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Publisher:

European Audiovisual Observatory
76, allée de la Robertsau
F-67000 STRASBOURG

Tel. : +33 (0) 3 90 21 60 00
Fax : +33 (0) 3 90 21 60 19
E-mail: obs@obs.coe.int
www.obs.coe.int

Comments and Suggestions to: iris@obs.coe.int

Executive Director: Susanne Nikoltchev

Web Design:

Coordination: Cyril Chaboisseau, European Audiovisual Observatory
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EDITORIAL

One of the many things that the pandemic has changed is the way we communicate and network. In the pre-COVID world, we were used to meeting physically, shaking hands and talking to each other in person. Now that the coronavirus makes this very natural need for human contact less advisable, technology is jumping to the rescue, providing us with a useful surrogate in the form of videoconferencing. It is certainly not the same, but it is still far better than nothing!

As a recent example of this, the European Audiovisual Observatory organised a conference to present and discuss the findings of a Mapping report on the assessment and the labelling of the nationality of European audiovisual works, co-funded by the Creative Europe Programme of the European Union, with a view to exploring possible ways to simplify the often complicated work of both the stakeholders and the institutions involved in this exercise. The video of the conference is available here.

On the subject of online events, in our previous newsletter, we announced that on 24 September 2020 the European Audiovisual Observatory was organising an online Focus Session on the topic of "Regulation and Responsibility of Video-Sharing Platforms" as part of the "Pluralism and Responsibility. Media in the Digital Society" digital conference series, under the auspices of the German Presidency of the European Union. Now you can watch this interesting online event here.

In the meantime, many EU member states are working hard to transpose the revised AVMSD, and this newsletter bears witness to that, reporting on the most recent bills in France and Slovenia (see also our overview table here). Moreover, this newsletter reports on the bill amending the Dutch Media Act in order to strengthen the future of public broadcasting; the proposed legislation to modify the functions of the BBC and privatise Channel 4; the CSA contribution to the public consultation on the Digital Services Act package; and many other interesting issues!

Stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

COE: EURIMAGES

Eurimages updates its governance regulation

Julio Talavera
European Audiovisual Observatory

Eurimages, the Council of Europe's film co-production fund, has changed its governance rules in order to lighten the selection process for projects applying for funds and to be better prepared to adapt to the currently changing film and audiovisual industry. Therefore, its Board of Management will focus on strategic planning and procedural rules, delegating day-to-day management to an Executive Committee. Moreover, external experts will be in charge of assessing the applications.

Since its creation in 1988, the fund has significantly increased its membership - from the original dozen countries to its current 41 members (39 European countries and two associate members: Argentina and Canada). This growth reflects the success of the fund, but at the same time it has become detrimental to agile decision-making. On 9 September, the Committee of Ministers of the Council of Europe adopted Resolution CM/Res(2020)8 amending the fund's regulations. According to Article 2.5, the Executive Committee "shall be composed of one third of the representatives using a system of rotation amongst all the member States of the Fund (including associate members). Rotation will ensure, wherever possible, a geographical and gender balance amongst the representatives." The Executive Committee will be in charge of day-to-day managerial decisions and the adoption of recommendations on working groups, allowing the Board of Management to devote more time to defining a long-term vision, as well as to its current tasks of adopting the budget and establishing the rules for support.

According to Article 2.2, the Board of Management "shall avail itself of independent experts from the cultural field, such as film and audiovisual professionals, […] subsequently hired by the Secretariat, based on public procurement principles." A pool of experts will be created from amongst those who respond to a call for expression of interest, yet to be launched; they will be selected by a computer algorithm based on their profile, country and gender. Each group of evaluating experts will be composed of five members, three of whom must be either a producer, director, scriptwriter, sales agent or distributor. The other two can be from other professions, for example DOPs or editors.

These changes stem from the results of the external assessment on the fund's performance and governance conducted by Ernst & Young in 2018, and are planned to be implemented in the course of 2021.

Resolution CM/Res(2020)8 amending Resolution Res(88)15 setting up a European Support Fund for the Co-production and Distribution of Creative Cinematographic and Audiovisual Works ("Eurimages")

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809f8736

Eurimages overhaul designed to bring quicker, fairer funding decisions, Screen Daily

https://www.screendaily.com/news/eurimages-overhaul-designed-to-bring-quicker-fairer-funding-decisions/5153078.article

CROATIA

ECtHR: N.Š. v. Croatia

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

Balancing the freedom to convey remarks in a television interview concerning a matter of public interest and the necessity of protecting a child's best interests and privacy rights, the European Court of Human Rights (ECtHR) found a violation of the right to freedom of expression as protected by Article 10 of the European Convention on Human Rights (ECHR). The ECtHR found that the domestic courts in Croatia had applied a too formalistic approach as to the confidentiality of information revealed in a television programme about a child's custody case.

The applicant in this case, N.Š., is the grandmother of a young child whose parents died in a car accident. Soon after the accident, a family dispute arose over the child's custody, and following administrative proceedings, custody was given to the child's uncle. The accident itself and the ensuing family dispute attracted significant media coverage. N.Š. was interviewed in a newspaper article, with a reaction by the director of the social welfare centre dealing with the child's custody procedure. The name of the child was explicitly mentioned by both N.Š. and the director. A few months later, a television show on a commercial television channel discussed the case in detail. The child's name was explicitly mentioned by the journalist, and the director of the social welfare centre talked in detail about the circumstances of the custody. A few days later, N.Š. took part in another television show, this time on the national public television channel. During the interview, a bundle of papers could be seen in front of N.Š. while she criticised the malfunctioning of the social welfare system, including the relevant court proceedings concerning the child's custody. Following the broadcast of this television show, the child's uncle lodged a criminal complaint against N.Š. for breach of confidentiality of the administrative proceedings concerning the child's custody, and in particular for disclosing the child's full identity. The Croatian courts found that by revealing information about the custody proceedings, N.Š. had committed a criminal offence under the Criminal Code, taken in conjunction with a provision of the Family Act. N.Š. was sentenced to four months' imprisonment, suspended for two years, and she was ordered to pay 1000 Croatian kunas (HRK) (EUR 130) for costs and expenses incurred in the proceedings. N.Š. lodged an application before the Strasbourg Court, complaining that her criminal conviction for breaching the confidentiality of administrative custody proceedings had been contrary to Article 10 ECHR.

First, the ECtHR referred to its established case law, reiterating that there is a high level of protection of freedom of expression in relation to discussions or debate on matters of public interest, including on issues related to the functioning of a system for deciding on the custody rights and fate of children. Moreover,

when a particular expression constitutes criticism directed at state bodies acting in an official capacity, those bodies must accept wider limits of acceptable criticism than private individuals. However, as children are particularly vulnerable, the domestic authorities have a duty to ensure that their right to privacy is adequately protected, including in proceedings related to adoption, child abuse, custody or residency. Indeed, the protection of the confidentiality of such proceedings is essential not only to ensure that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment, but to protect the child's personal data for the sake of protecting his or her identity, well-being and dignity, personality development, psychological integrity and relations with other human beings, in particular between family members.

The ECtHR observed that the case had caught the attention of the media, putting the child's privacy at serious risk. But it also noted that by participating in the disputed television show and by pointing to various deficiencies in the processing of the custody case, N.Š. had engaged in a debate capable of contributing to matters of public interest, particularly as regards the proper functioning of the system of child care proceedings. In this context, the domestic authorities must carefully strike a balance between the freedom to convey remarks concerning a matter of public interest and the necessity of protecting the child's best interests and privacy rights. In so doing, they must examine the particular circumstances of the case, while bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have a high priority and are not just one of several considerations. Therefore, a significant weight must be attached to what serves the child's best interest, especially when an action has an undeniable impact on the child concerned. The ECtHR found that the domestic courts had not taken into account the above-mentioned considerations, chiefly owing to a purely formalistic approach to the notion of the confidentiality of the proceedings and solely focusing on the disclosure of confidential information as a criminal offence. The formalistic approach taken by the domestic courts is contrary to the requirements developed in the case law of the ECtHR, as it lacks a proper review as to whether the interference with the rights protected by Article 10 ECHR was justified. The ECtHR referred to the fact that the disputed television report in which N.Š. participated did not provide any information that was not already known to the public. In particular, the child's name and the names of other persons involved were already well known from previous media reports, as were details about the course and stage of the proceedings in the custody case. Furthermore, N.Š.'s participation in the disputed television report could not be considered in isolation, but had to be seen in the wider context of the media coverage of the case. The domestic courts had also failed to clarify the role of the journalists in the disclosure of the confidential information, and they had not take into account the fact that N.Š.'s participation in the disputed television show was not aimed at satisfying the curiosity of a particular audience regarding details of a person's private life, but had sought to protect the child's interests by raising issues relating to the malfunctioning of the social welfare services. The ECtHR placed particular emphasis on the domestic courts' failure to examine all these relevant

circumstances and their omission to engage in a balancing exercise as required by the Court's case law in situations of conflict between the rights under Article 10 and Article 8 ECHR. Therefore it found, unanimously, a violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, First Section, case of N.Š. v. Croatia, Application no. 36908/13, 10 September 2020.

https://hudoc.echr.coe.int/eng?i=001-204320

RUSSIAN FEDERATION

ECtHR: *OOO Regnum v. Russia*

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

Again, the European Court of Human Rights (ECtHR) has found a violation of the right to freedom of expression on the Internet in Russia (see also *Vladimir Kharitonov v. Russia, OOO Flavus and Others v. Russia, Bulgakov v. Russia* and *Engels v. Russia* reported in Iris 2020:8). In a defamation case, the domestic judicial authorities have failed to establish convincingly and in conformity with the principles embodied in Article 10 of the European Convention on Human Rights (ECHR) that there had been a pressing social need to impose a high amount of damages to be paid by an online news platform for its reporting on a commercial company in relation to the discovery of a potential health hazard.

The applicant in this case is OOO Regnum, an electronic news outlet based in Moscow. In several news items on its website, it reported on a case of mercury poisoning following the consumption of a branded soft drink. The news platform had based its report on information released by the local police and the state consumer protection agency that a woman had been hospitalised with mercury poisoning after drinking a *Lyubimyy Sad* juice.

One of the legal entities, Ramenskiy Molochnyy Kombinat (JSC RMK), that produced soft drinks under the *Lyubimyy Sad* brand brought a defamation claim against OOO Regnum. The lower commercial courts dismissed the claims, but the Federal Commercial Court of the Moscow Circuit (the Circuit Court), found against the media platform and ordered it to pay JSC RMK an award of 1 000 000 Russian rubles (RUB) (EUR 28 428) in compensation for non-pecuniary damage. The Circuit Court found that the news items contained untruthful statements which had tarnished JSC RMK's business reputation. It considered that the information that mercury had been found in a carton of the branded drink had not been confirmed by evidence, as no criminal proceedings had been opened against JSC RMK.

Relying on Article 10 ECHR, OOO Regnum alleged that the ruling by the Moscow District Court had amounted to a disproportionate interference with its right to freedom of expression. It argued in particular that the courts had failed to balance JSC RMK's right to reputation against its right to report on and the public's right to be informed about a potential health hazard. Hence, the core question for the ECtHR to answer was whether the Moscow Circuit Court had struck a fair balance between an electronic media outlet's right to freedom of expression and a commercial company's right to reputation.

After reiterating the basic principles regarding freedom of expression and electronic media, and the balancing of the rights under Articles 8 and 10 ECHR, the ECtHR emphasised that there **was** a difference between the reputational interests of a legal entity and the reputation of an individual as a member of society: an individual deserves a higher level of protection, as defamatory allegations about an individual may have repercussions on their dignity, while the reputation of a commercial company is devoid of that moral dimension. Another important factor was that the impugned news items reported on a case of mercury poisoning following the consumption of a shop-bought branded soft drink. As this clearly pertained to an important aspect of human health and raised a serious issue in terms of consumer protection, OOO Regnum had reported on information of considerable public interest. The ECtHR found that the judgment of the Moscow Circuit Court had omitted to consider this aspect of the general interest in receiving reports on the discovery of a potential health hazard.

Furthermore, the news platform had relied on information gathered from official sources, and media and journalists should be entitled to do so without having to undertake independent research. The ECtHR could not accept the argument that the news items lacked a factual basis because it was later decided not to open criminal proceedings against JSC RMK: such reasoning defies temporal logic, as at the time of the publication of the news items, OOO Regnum had no means of envisaging the events that would occur almost a month later. The ECtHR clarified that the extent to which a media outlet or journalist can reasonably regard a source of information as reliable is to be determined in the light of the situation as it presented itself to the media at the material time, rather than with the benefit of hindsight. The ECtHR also found that, when publishing the news items on its website, OOO Regnum had acted in discharge of its duty as a purveyor of accurate and reliable information and in full compliance with the tenets of responsible journalism.

Finally, the ECtHR emphasised that the most careful scrutiny is called for when measures taken or sanctions imposed by a national authority risk having a chilling effect, capable of discouraging the participation of the media in debates over matters of legitimate public concern. The Moscow Circuit Court did not advance any arguments as to why it had accorded more weight to the reputational interests of a commercial company than to the interest of the general public in being informed of a matter as serious as an instance of mercury poisoning through commercially distributed foods. Nor did the Circuit Court make any assessment, however perfunctory, of the proportionality of the sizeable amount claimed by the commercial company in respect of non-pecuniary damage to the alleged damage to its business reputation. This omission disregarded the requirement that an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered. Therefore, the ECtHR considered that the Circuit Court had not provided “relevant and sufficient reasons” to justify the award of one million rubles in compensation for the alleged damage to the reputation of a commercial company.

The conclusion is that the Moscow Circuit Court failed to establish convincingly and in conformity with the principles embodied in Article 10 ECHR that there had

been a pressing social need for the interference complained of by OOO Regnum. The interference with the news platform's right to freedom of expression was disproportionate and not necessary in a democratic society within the meaning of Article 10, section 2 ECHR. Accordingly, the ECtHR found, unanimously, that the Russian judicial authorities **had** violated Article 10 ECHR.

Judgment by the European Court of Human Rights, Third Section, case of OOO Regnum v. Russia, Application no. 22649/08, 8 September 2020.

https://hudoc.echr.coe.int/eng?i=001-204319

EUROPEAN UNION

GERMANY

CJEU: Opinion on copyright infringements through framing

Jan Henrich
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 10 September 2020, Advocate General Maciej Szpunar published his opinion in the case between *VG Bild-Kunst* and *Stiftung Preußischer Kulturbesitz* (C-392/19) concerning copyright infringements resulting from the embedding of third-party content on websites. He concluded that embedding works using automatic links (so-called inline linking) requires the authorisation of the copyright holder, whereas embedding them using clickable links using the framing technique does not. The same would apply if the works were embedded by circumventing technical measures taken or instigated by the copyright holder to prevent framing. Framing is the division of a webpage into different parts, in each of which the content of a different webpage can be displayed.

The case, referred by a German court, involved the Stiftung Preußischer Kulturbesitz, a foundation under German law that operates the Deutsche Digitale Bibliothek, an online library devoted to culture and knowledge. The library website contains links to digitised content stored on the Internet portals of participating institutions. The library itself only stores thumbnails, that is, smaller versions of the original images.

The Verwertungsgesellschaft Bild-Kunst (VG Bild-Kunst) is a copyright collecting society for the visual arts in Germany. It makes the conclusion of a licence agreement for the use of its catalogue of works conditional on the licensee undertaking to apply effective technical measures against the framing by third parties of the thumbnails displayed on the Deutsche Digitale Bibliothek website. The Stiftung Preußischer Kulturbesitz had brought an action against this condition, which it considered unreasonable. The German Bundesgerichtshof (Federal Supreme Court) submitted to the Court of Justice of the European Union questions on the interpretation of Directive 2001/29/EC on the exclusive right of the copyright holder to authorise or prohibit the communication of its works to the public, including the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them.

In his opinion, Advocate General Szpunar suggested that the embedding of third-party works made freely accessible to the public on other websites with the copyright holder’s consent, using clickable links based on the framing technique did not require the authorisation of the copyright holder. It could be assumed that such permission had been given when the work had originally been made available. However, this did not apply to so-called inline links, in which works were

automatically displayed when a webpage was opened without the need for the user to take any action. This form of embedding, which was usually used in the context of graphics or audiovisual files, required the rightsholder's permission because it made the content appear to be an integral part of the webpage containing the link.

Schlussanträge vom 10. September 2020 in der Rechtssache C-392/19

http://curia.europa.eu/juris/liste.jsf?language=de&td=ALL&num=C-392/19

Opinion of 10 September 2020 in Case C-392/19

http://curia.europa.eu/juris/document/document.jsf?docid=230872&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=7383004

EU: EUROPEAN COMMISSION

Report and Study on the Memorandum of Understanding on online advertising and intellectual property rights

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 14 August 2020, the European Commission published a Report and Study on the functioning of the Memorandum of Understanding on online advertising and intellectual property rights (MoU). The MoU is a voluntary agreement facilitated by the European Commission designed to limit advertising on websites and mobile applications that infringe copyright or disseminate counterfeit goods, signed by 28 advertisers, advertising intermediaries and associations in 2018 (see IRIS 2018-2/7). The MoU contains commitments, for example, that signatories undertake reasonable measures to minimise the placement of their advertising on certain websites or mobile apps. These are websites and apps that, due to the information which is available on them, have been found by judicial, administrative or other enforcement authorities to infringe copyright or to disseminate counterfeit goods on a commercial scale. Signatories also commit to taking reasonable steps to ensure that when they become aware that their advertising appears on such websites or apps, the advertising will be removed.

The Report on the functioning of the MoU, and the Study on the impact of the MoU, contain a number of notable findings and conclusions. First, the Report notes that the signatories have assessed the overall effectiveness of the MoU in a positive light, and that most of them consider the MoU to be effective in reducing the placement of advertising on, and the financing of, intellectual property rights (IPR)-infringing websites and apps. Secondly, the Report finds that the MoU makes it possible for signatories to share good practices; to better assess the risks; to improve their bargaining position with other stakeholders; and to discuss the need for new studies on online advertising and IPR, as well as the use of technologies and tools available on the market. Thirdly, according to the monitoring Study on the impact of the MoU on the online advertising market, following the introduction of the MoU, the share of advertisements of European business on IPR-infringing websites has dropped by 12%. The most popular type of infringing content found on the monitored websites was TV/Film (72%), followed by music (28%) and sports (20%).

Furthermore, in terms of the future, signatories consider that there is no apparent need to amend the text of the MoU, as its provisions have been drafted in such a way as to incorporate new initiatives and take into account new trends within the framework of the MoU. Finally, the MoU process has its limits, such as the involvement of a limited group of stakeholders. Therefore, the Report concludes that signatories should encourage the further participation of companies and

trade associations involved in the digital advertising supply chain, as well as other categories of intermediaries, such as social media firms, payment industry and e-commerce platforms, and technology companies, in the MoU.

European Commission, Study on the impact of the Memorandum of Understanding on online advertising and intellectual property rights on the online advertising market

https://ec.europa.eu/growth/industry/policy/intellectual-property/enforcement/memorandum-of-understanding-online-advertising-ipr_en#monitoring%20study

European Commission, Report on the functioning of the Memorandum of Understanding on online advertising and intellectual property rights

https://ec.europa.eu/docsroom/documents/42702/attachments/1/translations/en/renditions/native

ITALY

CJEU rules that the provision of Italian law constitutes a restriction on freedom of establishment and is contrary to EU law

Francesco Di Giorgi & Luca Baccaro

On 3 September 2020, the Court of Justice of the European Union (CJEU) - Case C-719/18 - ruled that the provision of Article 43, paragraph 11 of the TUSMAR (Consolidated Law on Media Services) is contrary to EU law, constituting a restriction on freedom of establishment while not being suitable for achieving the objective of the protection of pluralism of information.

According to the said provision, adopted in 2005, it is forbidden for any company whose revenues in the electronic communications sector (including those obtained through subsidiary or affiliated companies) exceed 40% of the overall revenues generated in the sector, to earn revenues within the Integrated Communications System (the SIC) exceeding 10% of the total revenues generated in the SIC.

The rationale behind this provision is to avoid the creation of dominant positions in each of the markets which make up the integrated communications system, with the aim of safeguarding pluralism of information. The SIC is an economic basket that gathers various areas of activity that relate to audiovisual and radio media services; daily and periodical publishing (including press agencies); yearbook publishing; electronic publishing and online advertising; cinema; outdoor advertising; communication initiatives for products and services; and sponsorship. The issue originates from a complaint submitted to Agcom by Italian media company Mediaset for the alleged violation of the aforementioned provision. On 8 April 2016, Mediaset entered into a strategic partnership agreement with the French company Vivendi, through which Vivendi acquired 3.5% of Mediaset’s share capital and 100% of the Mediaset Premium SpA. Due to disputes relating to this agreement, in December 2016 Vivendi launched a hostile acquisition campaign to obtain Mediaset shares, which resulted in Vivendi obtaining 28.8% of Mediaset’s share capital.

By means of Resolution No. 178/17/CONS (see IRIS 2017-6/24 and IRIS 2017-9/24), Agcom established that Vivendi, by exerting control over its subsidiary Telecom Italia, held more than 40% of the electronic communications sector in Italy, meaning that its revenues may exceed 10% of the total SIC revenues. Therefore, Agcom ordered Vivendi to terminate the acquisition of shares in Mediaset or Telecom Italia within twelve months.

In April 2018, Vivendi, while complying with Agcom’s order and transferring 19.19% of Mediaset’s shares to a third company, challenged this decision before

the Regional Administrative Court of Lazio (TAR Lazio), who asked the CJEU whether the freedom of establishment enshrined in Article 49 of the Treaty on the Functioning of the European Union (TFEU) precludes legislation of a member state which prevents a company registered in another member state, whose revenues in the electronic communications sector at national level, including through subsidiaries or affiliates, exceed 40% of the total revenues generated in that sector, from earning, within the SIC, revenue exceeding 10% of the total revenues generated in this system.

The Court found that Article 49 of the TFEU precludes any national measure which is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the TFEU. The Court furthermore found that this is the case with the provision of Article 43 of the TUSMAR, in line with which a prohibition was imposed on Vivendi from retaining its shareholdings in Mediaset and Telecom Italia, that is, requiring it to put an end to this situation in one or other of those companies.

Furthermore, the judgment states that although a restriction on the freedom of establishment may, in principle, be justified by an objective in the general interest, such as the protection of pluralism of information and the media, the provision of Article 43 is not appropriate for achieving that objective.

With specific reference to electronic communications services, the judgement affirms a clear distinction between the production of content and the transmission of content, stating that the companies active in the electronic communications sector which control the transmission of content do not automatically have control over the production of that content. In addition, the Court notes that the provision in question defines the electronic communications sector too restrictively, since it excludes markets of increasing importance for the transmission of information, such as retail services for mobile phones and other electronic communications services connected to the Internet and satellite broadcasting services.

Finally, the judgement notes that the thresholds of 10% of the SIC revenues and 40% of the electronic communications sector revenues set by Italian law bear no relation to the risk to media pluralism, since these thresholds do not make it possible to determine whether and to what extent a company is actually able to influence the content of the media.

It is now up to the TAR Lazio to establish the modalities for the implementation of the CJEU judgement. The hearing is set for 13 December 2020. At the same time, it is also possible that the Italian Parliament modifies this provision, found to be contrary to EU law; the opportunity could come by the end of the year through the 2019 European Delegation Law, the legislative instrument that transposes European directives into the Italian legal system, including Directive 2018/1808 (AVMSD).

Judgment in Case C-719/18 Vivendi SA v Autorità per le Garanzie nelle Comunicazioni

http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrec=it&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-719%252F18&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=3966810

NATIONAL

AUSTRIA

[AT] ORF broke advertising rules

Gianna Iacino
Legal expert

On 30 June 2020, as part of its supervisory activities, the Austrian regulator for broadcasting and audiovisual media, *Kommunikationsbehörde Austria* (KommAustria), ruled that Austrian public service broadcaster ORF had committed several breaches of the ban on surreptitious advertising and two breaches of the requirement to distinguish between advertising and editorial content, enshrined in the *ORF-Gesetz* (ORF Act – ORF-G).

KommAustria is responsible for checking compliance with the ORF-G's provisions on commercial communication. It therefore regularly evaluates programmes that contain commercial communication and follows up possible infringements. During an assessment of the regional radio station Radio Steiermark, KommAustria found three breaches of the ban on surreptitious advertising contained in Article 13(1)(2) ORF-G in three different programmes, as well as two breaches of the requirement to distinguish between advertising and editorial content, enshrined in Article 14(1)(2) ORF-G.

In the programme *Radio Steiermark Marktbericht*, KommAustria was particularly critical of the following comments made by the presenter concerning products on sale at the Kaiser Josef market, especially at the stall of a farmer who was interviewed during the programme: "The tables at Styrian farmers' markets are now literally buckling", "tomatoes of all colours and sizes", "everything is here", "even freshly harvested pears are on offer", "and this aroma is best enjoyed fresh."

In the programme *Die Lange Tafel*, KommAustria criticised the following comments made by the presenter concerning the event: "With a wonderful view of the Schlossberg", "so it's really important to be there", "but next year, make sure in plenty of time that you perhaps come to the 11th Lange Tafel", "all these lucky people", "are you salivating enough, have we given you enough of a taste for the Lange Tafel?", "in fact, there are no places left this year".

In the programme *Steirische Weinwoche*, KommAustria also criticised several of the presenters' comments about the event: "You've just got to be there", "you can try all the different varieties of Styrian wine", "so there's loads going on, and we haven't even reached the end yet".

KommAustria decided that, in all three cases, evaluative statements had been made about the products and services concerned. Contrary to the ORF's claim, these numerous comments constituted more than just factual information. The ORF's argument that "the casual, flowery language was used as a journalistic device" was rejected because that device had been used to create commercial messages. In editorial programmes, the presenter in particular had a specific responsibility to avoid such commercial messages. The comments had been intended to directly promote sales and had been made for advertising purposes. Since these commercial messages had been embedded in an apparently editorial programme, they were likely to mislead listeners as to their commercial intent and therefore constituted surreptitious advertising under Article 13(1)(2) ORF-G.

Reference had also been made on Radio Steiermark to a live broadcast on Zweites Deutsches Fernsehen (ZDF). This was not a channel organised by ORF, so it had no public service remit in Austria. The reference therefore constituted advertising under Article 14(1)(2) ORF-G and should have been clearly distinguished from other programme elements by acoustic means. Since such a distinction had not been made either before or after the reference, the separation requirement of Article 14(1)(2) ORF-G had not been met. Furthermore, a commercial reference to a sponsor had not been identified as such by acoustic means.

Die Entscheidung der KommAustria vom 30. Juni 2020

https://www.rtr.at/de/m/KOA185019065/39619_KOA%201.850-19-065.pdf

KommAustria decision of 30 June 2020

BELGIUM

[BE] CSA contribution to the public consultation on the Digital Services Act package

Olivier Hermanns
Conseil Supérieur de l'Audiovisuel Belge

Like other national regulators, the Belgian Conseil supérieur de l'audiovisuel (regulatory authority for the audiovisual sector of the French-speaking Community of Belgium – CSA) participated in the public consultation on the Digital Services Act (DSA) package. The consultation was organised by the European Commission from 2 June to 8 September 2020 (see IRIS 2020-7/9).

The European Regulators Group for Audiovisual Media Services (ERGA) also contributed to the debate. ERGA is a consultative body set up by the European Commission which brings together the audiovisual regulatory bodies of the 27 EU member states, including the CSA.

On certain issues, the national contributions submitted by ERGA members may either supplement the contribution of ERGA itself or place additional emphasis on matters of particular importance from a national perspective. It was on this basis that the CSA prepared its own contribution.

In general, the points that the ERGA and CSA contributions had in common can be summarised as follows: first of all, both institutions support the country of origin principle as the basis of EU online content regulation; secondly, they want to see fundamental values protected online; thirdly, they also advocate the extension of the rules – already well established for the audiovisual sector – to include new forms of content and to urge online platforms to take greater responsibility. On this last point, both institutions call for the adoption of measures to prevent disinformation and illegal content. Algorithmic content recommendation systems therefore need to be transparent. Finally, ERGA and the CSA also support the extension of the competences of audiovisual regulators in this field, as well as strengthened cooperation at European level.

In the part of its contribution devoted to the governance of digital services, the CSA referred to its guidance note on the fight against certain forms of illegal Internet content, in particular hate speech, published on 6 February 2020 (see IRIS 2020-3/17). This note particularly highlighted the need for online platform operators to take greater responsibility and called for the development of co-regulatory mechanisms. To this end, operators should publish certain information and submit regular reports on illegal content to the regulator.

The CSA's contribution also states that: "The supervision of digital services will undoubtedly create the need for increased cooperation, not only with the sector-

specific authorities of other member states, but also with national competition, data protection, consumer protection, child protection, educational and judicial bodies, etc. Cooperation should be a means of both preventing potential conflicts and of resolving them." In particular, the CSA suggests setting up joint supervisory mechanisms shared by several neighbouring national authorities, whether they are part of specific geographical areas and share the same language, or meet only one of these two criteria.

In addition, the CSA believes that each national regulator should appoint experts to oversee this cooperation and co-regulation. These experts should have the know-how and means necessary to carry out their mission. The CSA does not share the view that a European Union body could replace the national regulators.

Finally, "the CSA calls for a national approach, but one that is coordinated at EU level, to the supervision of services established outside the EU." It considers that the risk of fragmented supervision can be limited by the use of cooperation and coordination mechanisms.

The contributions will be published on the European Commission website.

Contribution du CSA à la consultation publique sur le paquet relatif aux services numériques

https://www.csa.be/103283/lerga-apporte-sa-contribution-a-la-consultation-publique-du-plan-daction-pour-la-democratie-europeenne/

CSA contribution to the public consultation on the Digital Services Act package

GERMANY

[DE] German courts issue rulings on Instagram influencer labelling obligation

Jan Henrich
Institute of European Media Law (EMR), Saarbrücken/Brussels

In two recent judgments issued on 21 July and 9 September 2020, the *Landgericht Köln* (Cologne Regional Court, Case no. 33 O 138/19) and the *Oberlandesgericht Karlsruhe* (Karlsruhe Regional Court of Appeal, Case no. 6 U 38/19) ruled that Instagram influencers were obliged to label references to brand names as advertising.

The *Landgericht Köln* decided that such posts by Instagram influencers should be labelled as advertising even if no remuneration was involved. Product recommendations constituted a commercial practice even if no advertising contract had been agreed.

In this case, a fashion blogger had regularly published images and stories on her Instagram account in which she provided links to the manufacturers of the clothes she was wearing. If users clicked on the link, they would be taken to the company's page on the social network. The blogger's activities as an influencer earned her a high six-figure euro sum every year. An association for the promotion of commercial and independent professional interests, including fair competition, had applied for three injunctions after the influencer had published posts in the autumn of 2019 without explaining the commercial purpose of the posts. It thought that the defendant should have labelled the three posts as advertising and that the existence of commercial intent did not depend on whether she had received remuneration, free goods or similar, since it should be assumed that there had been a "commercial connection". The influencer considered the posts lawful because she had not signed any advertising contracts with the tagged companies, had provided the links for editorial reasons, and had bought and paid for the clothes herself.

The court upheld the association's claim for an injunction on the basis of Articles 8(1)(3)(2) and 5a(6) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG). According to Article 5a(6) UWG, unfairness is deemed to have occurred where the commercial intent of a commercial practice is not identified, unless this is directly apparent from the context, and where such failure to identify the commercial intent is likely to cause the consumer to take a transactional decision which he would not have taken otherwise. The court considered all the posts to have been a commercial practice. It was not necessary for the practice in question to have involved remuneration. The links to third-party companies in the posts promoted their sales, at least indirectly, by raising awareness of the companies concerned. The publication of the posts in question, including the company tags, also promoted the influencer's own company and

presented her as a potential advertising partner. Commercial intent did not need to be the only motive for a commercial practice. It was sufficient if, when viewed objectively, the practice was primarily aimed at promoting the sale of goods and services.

In a similar case, the Karlsruhe Regional Court of Appeal decided that so-called "tap-tags", that is, links activated by tapping on an object in an image, should be labelled as advertising. The influencer concerned had argued that she had merely been expressing personal opinions. The court believed that this threatened fair competition because of the conflict between the private image on the one hand and the elements of communication that were influenced by third-party interests on the other. This lack of transparency created an obligation to clarify where third-party products were being promoted, regardless of whether payments were made for the use of "tap-tags".

These decisions were contradicted by a ruling of the *Oberlandesgericht Hamburg* (Hamburg Regional Court of Appeal) of 2 July 2020 (Case no. 15 U 142/19), which, in a similar case, had decided that the commercial intent of the commercial practice depended on the circumstances and had been immediately apparent to the consumer. Since the post concerned therefore did not need to be labelled as advertising, it was not anti-competitive.

Urteil des LG Köln vom 21.07.2020 - 33 O 138/19

https://openjur.de/u/2269061.html

Cologne Regional Court decision of 21 July 2020 – 33 O 138/19

Fundstellen zum Urteil des OLG Karlsruhe vom 9. September 2020 - 6 U 38/19

https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG%20Karlsruhe&Datum=09.09.2020&Aktenzeichen=6%20U%2038%2F19

Karlsruhe Regional Court of Appeal decision of 9 September 2020 – 6 U 38/19

Urteil des OLG Hamburg vom 02.07.2020 - 15 U 142/19

https://openjur.de/u/2271476.html

Hamburg Regional Court of Appeal decision of 2 July 2020 – 15 U 142/19

[DE] Ruling on ex-chancellor Kohl's widow's claim to information about whereabouts of tape recordings

Mirjam Kaiser
Institute of European Media Law

In a ruling of 3 September 2020, the third civil chamber of the *Bundesgerichtshof* (Federal Supreme Court – BGH), Germany's highest civil court, decided that the widow of former German chancellor Helmut Kohl was entitled to information about the existence and whereabouts of copies of tape recordings with a view to filing a subsequent surrender claim against the defendant, a well-known journalist.

The dispute followed a claim for information about the existence and, in particular, the whereabouts of written, digital and other copies of tape recordings of interviews that the defendant had conducted with Dr Kohl. The interviews covered the whole of Kohl's life, with a particular focus on his period as chancellor. After the collaboration between the two broke down, a legal dispute was followed by the publication of the original tapes, which then became Kohl's property. The dispute that was the subject of the latest judgment was triggered by the defendant's publication of an unauthorised volume of the late ex-chancellor's memoirs under the title *Vermächtnis: Die Kohl-Protokolle* (*Legacy: the Kohl protocols*). The defendant claimed that copies of the tapes still existed, but that they were not in his possession and he could therefore not surrender them.

In order to prevent further publications, Kohl's widow demanded information about the existence and whereabouts of the copied tape recordings and other documents held by the defendant as a result of their collaboration on the writing of Kohl's memoirs so that she could then submit a surrender claim.

Overturning the appeal decision of the *Oberlandesgericht Köln* (Cologne Regional Court of Appeal – OLG) of 29 May 2018 (Case no. 15 U 66/17) and restoring the first-instance ruling of the *Landgericht Köln* (Cologne Regional Court – LG) of 27 April 2017 (Case no. 14 O 286/14), the BGH upheld the information claim, but decided that a further claim concerning other documents was time-barred. In the BGH's view, since a valid contract between the defendant and Kohl had been drawn up under contract law, Kohl's widow was entitled to ask for the recordings to be surrendered under German civil law. German contract law established the right to information about the status of transactions, as well as obligations to account for their completion. In principle, the defendant's statement that the copies were no longer in his possession met this information requirement. However, the defendant had gone on to say that the copies were scattered "in German lands and abroad", so it would be "difficult to find them quickly". According to the BGH, this showed that his previous statement about the tape recordings had been culpably false. Refuting this accusation, the defendant argued that his particular status as a journalist and historian gave him a degree of independence that entitled him to use the documents in question. The BGH countered that the premature end of their collaboration meant that Kohl had

withdrawn his consent for any further uses of the material. His widow was therefore entitled to the same compensation that would have been due to Kohl himself if the correct information had been provided. According to the BGH, harm had been caused by the fact that, on account of the false information, it had not been possible to file a surrender claim. However, the court ruled that the claim to information about other documents was already time-barred.

Pressemitteilung des BGH vom 3.9.2020.

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020116.html;jsessionid=6F9F82CE66459A0B6E94E66C9B3ED034.2_cid286?nn=10690868

Federal Supreme Court press release of 3 September 2020

[DE] Youth protection body publishes report on search engine filter mechanisms

Jan Henrich
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 21 August 2020, the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM) published a report entitled "Search engine filter mechanisms". The report, prepared by jugendschutz.net on behalf of the KJM, studied the security settings of Germany's two most popular search engines, Google and Bing. It concluded that, even when security settings were activated, children and young people using both platforms could easily come into contact with content that could harm their development, especially through search results relating to violence, self-harm and extremism.

As Germany's central supervisory body for the protection of minors in private broadcasting and telemedia, the KJM had commissioned the study in order to find out how seriously search engine providers were taking their responsibility to protect children and young people from harmful images and video content. Both of the search engines that were assessed offer a 'SafeSearch' function designed to filter out harmful content. A total of 28 concepts linked to Islam, right-wing extremism, violence, self-harm and pornography were compared and investigated. Both search engines performed well with pornographic content, which was generally filtered out when security settings were activated. However, search results linked to violence, self-harm and extremism were displayed without any modification. Furthermore, Bing also displayed URLs that had been classified by the *Bundesprüfstelle für jugendgefährdende Medien* (Federal Review Board for Media Harmful to Minors – BPjM), even though both search engines had agreed, as part of the regulated self-regulation system set up in Germany, not to display sites listed by the BPjM. However, these search results were removed when Bing was notified.

Measures to prevent the circumvention of youth protection systems were also inadequate, since children and young people could activate and deactivate safe search settings themselves in some situations. However, youth protection software automatically activated SafeSearch on various services.

The report concludes that both search engines must do more to protect users from harmful content. Automatic recognition and filtering must be enabled for content showing violence, extremism and self-harm in particular. In addition, search engines should provide references or links to help and information sites. Such references are already provided for abuse-related searches. The report also mentions the possibility of improving the ranking of educational websites.

Pressemitteilung der KJM vom 21.08.2020

https://www.kjm-online.de/service/pressemitteilungen/meldung/jugendschutz-

einstellungen-von-suchmaschinen-im-fokus-der-medienaufsicht

KJM press release of 21 August 2020

FRANCE

[FR] Fight against fake news: first CSA report published

Amélie Blocman
Légipresse

On 10 September, the European Commission presented its evaluation report on the Code of Practice on Disinformation, which was launched at the end of 2018. The report takes into account the annual self-evaluation reports of the platforms that have signed the code (Google, Facebook, Twitter, Microsoft, Mozilla and TikTok). These platforms have set up policies aimed in particular at reducing advertising opportunities and economic incentives for distributors of online disinformation and at creating functionalities that give prominence to reliable information. The report notes that the quality of the information provided by the platforms concerned remains inadequate, mainly because the code is based on self-regulation. Related measures are expected by the end of the year, in particular within the framework of the Digital Service Act (DSA), which is currently being drafted.

At the end of July, the *Conseil supérieur de l'audiovisuel* (the French audiovisual regulator – CSA) had published its first summary of the measures taken in 2019 by online platform operators to combat the dissemination of fake news. Under the law of 22 December 2018, the CSA was required to prepare a summary of the application of these measures, based on the annual declarations submitted by the main operators. Each operator reported on the measures it had taken in accordance with the CSA's recommendation of 15 May 2019 under its cooperation obligation. The 16 platforms concerned each have at least 5 million unique users per month and include search engines, social networks, video and audio sharing platforms, online forums and online encyclopaedias.

The CSA noted that, generally speaking, the operators had risen to the challenge of combating the dissemination of fake news. Nevertheless, the measures needed to be stepped up. All but one of the operators had set up a mechanism for reporting fake news likely to disturb public order or harm the integrity of a vote, as required by law. While most of the platforms used algorithms to organise their content, the CSA criticised a lack of transparency surrounding how these algorithms worked. It also encouraged the promotion of reliable content, in particular that published by press companies and agencies and audiovisual communication services. It also set out recommendations on combating accounts that spread fake news on a massive scale, and on media and information literacy.

Lutte contre la diffusion de fausses informations sur les plateformes en ligne : bilan de l'application et de l'effectivité des mesures mises en œuvre par les opérateurs en 2019

https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Lutte-contre-les-infox-

le-CSA-publie-son-premier-bilan

Fight against the online dissemination of fake news: summary of the application and effectiveness of the measures taken by operators in 2019

[FR] Minister of Culture presents measures to support recovery of cinema and audiovisual sectors

Amélie Blocman
Légipresse

The cultural sector continues to be hit hard by the health crisis. On 23 September, the French Minister of Culture, Roselyne Bachelot, presented a set of measures to support the audiovisual and film industries.

The measures include, on the one hand, a EUR 50 million emergency fund managed by the *Centre national du cinéma et de l'image animée* (National Centre of Cinematography and the Moving Image – CNC) to encourage cinema operators to resume their activities by offsetting the loss of box office revenues suffered by cinemas due to the drop in ticket sales from September to December 2020.

Under the *France Relance* plan, on the other hand, EUR 165 million out of a total of EUR 2 billion earmarked for the cultural sector will be allocated to the audiovisual and film industries: EUR 60 million will go to the CNC, fully offsetting its net tax revenue losses. This sum will make it possible to maintain the current level of support provided by all the CNC's creation and distribution aid schemes. The other EUR 105 million will finance new emergency measures. These measures are part of a global recovery and structured modernisation strategy which will see EUR 34 million paid directly to cinemas in need of cash and modernisation. Film distribution companies will receive EUR 17.7 million to encourage new film releases, while EUR 38.4 million will be allocated to support film and audiovisual production.

These announcements back up promises made by the French Prime Minister, Jean Castex, at the end of August. Castex pointed out that the French film industry had to face numerous challenges, in particular the need to strengthen its cultural sovereignty. Foreign platforms must, with the transposition of the AVMS Directive, be subject to the French funding system for audiovisual production, especially independent production. The prime minister added that the government would ensure that media chronology was discussed by stakeholders in the very near future because the current release windows were no longer appropriate for the platforms, which were subject to new obligations.

On 27 August, the government also announced a EUR 432 million support plan for live entertainment. This plan is based on three main objectives: to allow the resumption of activity by adapting current health measures; to support private companies, artists, authors and public or subsidised establishments; and to restore confidence and encourage the public to return to theatres. Under the plan, EUR 220 million will go to private live entertainment companies, EUR 200 million will go to public companies, and EUR 12 million will go towards directly supporting creation and employment.

Un plan de relance et de modernisation inédit pour le cinéma et l'audiovisuel, communiqué de presse du ministère de la Culture

https://www.culture.gouv.fr/Presse/Communiques-de-presse/Un-plan-de-relance-et-de-modernisation-inedit-pour-le-cinema-et-l-audiovisuel

An unprecedented recovery and modernisation plan for the cinema and audiovisual sector, Ministry of Culture press release

[FR] Timetable for transposition of AVMS Directive and revision of SMAD Decree becomes clearer

Amélie Blocman
Légipresse

Through an amendment of the *Projet de loi portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économique et financière* (Bill covering various provisions to adapt to European Union economic and financial law – DDADUE), examined by the Senate on 7 and 8 July, the government gave itself the power to legislate by ordinance in order to transpose the Audiovisual Media Services Directive 2018/1808 of 14 November 2018 (AVMS Directive). The bill will be examined by the National Assembly on 7 October. The Ministry of Culture announced that, once the enabling law is adopted, "ordinances will be quickly published after the opinions of the *Conseil supérieur de l'audiovisuel* (the French audiovisual regulator – CSA) and the *Conseil d'Etat* (Council of State) have been gathered". The head of state has promised that all the reforms will enter into force on 1 January.

In the meantime, however, in addition to the amendment of Articles 27, 33 and 33-2 of the Law of 30 September 1986 by way of ordinance, the transposition of the directive will require several regulatory measures to be adopted in the following fields: the contribution to the production of works by audiovisual media service providers established in another member state and targeting France (Article 13.2 of the directive); the procedure for settling disputes applicable to video-sharing platforms; means of blocking services from a member state; access for disabled people to on-demand audiovisual media services; and the exhibition of European works on on-demand audiovisual media services.

With this in mind, the *Direction générale des médias et des industries culturelles* (General Directorate of Media and Cultural Industries – DGMIC) and the *Centre national du cinéma et de l'image animée* (National Centre of Cinematography and the Moving Image – CNC) have, through a public consultation, collected the views of the stakeholders concerned on the amendment of Decree No. 2010-1379 of 12 November 2010 on on-demand audiovisual media services (SMAD Decree).

The Ministry of Culture has announced that another consultation, this time on the amendment of Decree No. 2010-416 of 27 April 2010 on non-terrestrial television services (Cable and Satellite Decree), will be held very soon.

"The transposition of the AVMS Directive and the revision of the SMAD Decree are the first stage in the overall rebalancing of our system for financing audiovisual creation, which is indispensable for guaranteeing not only sustainability but also fairness," said Roselyne Bachelot, Minister of Culture.

Consultation publique sur la révision du décret « SMAD »

https://www.culture.gouv.fr/Sites-thematiques/Audiovisuel/Actualites/Consultation-

publique-sur-la-revision-du-decret-SMAD

Public consultation on the revision of the SMAD Decree

UNITED KINGDOM

[GB] Ofcom approves the brand new Radio 1 Dance stream on BBC Sounds

Lorna Woods
School of Law, University of Essex

Ofcom is required under Article 46 of the BBC Charter to create and operate an Operating Framework for the BBC in order to reduce the risk of the impact that the BBC might have on fair and effective competition. Before the BBC changes its trading arrangements, under the BBC Agreement it must consider whether any of the changes it proposes are “material”; it may only carry out material changes with the approval of Ofcom. Material changes are, according to the BBC Agreement: the carrying out of a new type of activity as a commercial activity, or a significant change to the BBC’s commercial arm, where there is a significant risk that the change may, as a result of the relationship of the activity with the BBC Public Service, distort the market or create an unfair competitive advantage. Upon notification, Ofcom carries out an initial assessment (including whether enough information has been provided) and invites third party comments. It may decide that the change is not material at this stage.

The BBC carried out a materiality assessment on its proposal to bring together existing BBC dance genre content on BBC Sounds as the "Radio 1 Dance Stream" and determined that it was not material. Ofcom agreed with this conclusion on the basis that the impact of Radio 1 Dance Stream on the market would be likely to be small given that it would be online only and that it would contain no new or exclusive content.

However, Ofcom noted that there had been a number of changes to BBC Sounds overall and that there had also been complaints from commercial radio stations that the BBC is crowding out the commercial stations. Ofcom thus also stated that it would undertake an evaluation of BBC Sounds, including asking for evidence from affected parties, but did not plan to carry out a formal consultation.

Materiality assessment of BBC Radio 1’s Dance stream, Ofcom

https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/bbc-operating-framework/competition

[GB] ICO’s Age Appropriate Design Code comes into effect

Alexandros K. Antoniou
University of Essex

On 2 September 2020, the Information Commissioner’s Office (ICO), the United Kingdom's independent body established to uphold information rights, formally issued its Age Appropriate Design Code of Practice which should be followed by online services to protect children’s privacy.

The Age Appropriate Design Code of Practice is a statutory code required under section 123 of the Data Protection Act 2018 (DPA 2018) and aims to address the increasing “datafication” of children. The Code was first published on 12 August 2020 and, following completion of its parliamentary stages, it came into force on 2 September 2020. The Information Commissioner, Elizabeth Denham CBE, stated: “For all the benefits the digital economy can offer children, we are not currently creating a safe space for them to learn, explore and play. This statutory Code of Practice looks to change that, not by seeking to protect children from the digital world, but by protecting them within it.”

The Code’s primary focus is to set a benchmark for the appropriate protection of children’s personal data and provide default settings which ensure that children have the best possible access to online services whilst minimising data collection and use, by default. It sets out 15 standards on data collection and protection, and reflects a risk-based approach. Section 127(7) of the DPA 2018 defines “standards of age-appropriate design” as “such standards of age-appropriate design of such services as appear to the Commissioner to be desirable having regard to the best interests of children.” The 15 points of the Age Appropriate Design Code include a duty to conduct data protection impact assessments; transparency; policy and community standards; data sharing and minimisation; geolocation; parental controls; nudge techniques; and online tools, among others. For a brief overview of the standards laid out in the Code, see IRIS 2020-4/17. Due to the fact that different services will need to implement various technical solutions, the ICO acknowledges that these are not intended as technical standards, but as a bundle of technology-neutral design principles and practical privacy features.

These principles apply to any online products or services (including, for instance, educational websites, social media platforms, apps, online games, and connected toys with or without a screen) that process personal data and are likely to be used by children under 18 in the UK; therefore, they are not limited to services specifically aimed at children. The Code covers entities based in the UK as well as entities based outside of the UK if their services are provided to (or monitor) users based in the UK. Services provided on an indirect charging basis (for example, funded by advertising) also fall within its remit.

The ICO and the courts will take the Code into account in determining whether the GDPR and PECR requirements have been met for the purposes of enforcement

action. Although the Code is now in effect, the industry has been given a 12-month implementation period to get up to speed and introduce suitable changes. After a year in force, the ICO will undertake a review of the Code and its effectiveness.

Age-appropriate design: a code of practice for online services, ICO.

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

[GB] Proposed legislation to modify the functions of the BBC and privatise Channel 4

Julian Wilkins
Wordley Partnership and Q Chambers

Currently, there are before the UK Parliament three proposed items of legislation which, if enacted, will affect the BBC and, in one instance, another public sector broadcaster (PSB): Channel 4.

The BBC Licence Fee (Civil Penalty) Bill proposes to decriminalise the non-payment of the BBC licence fee. The prime source of annual revenue for the BBC is a fee that users of its terrestrial, streaming and downland TV services have to pay. There are a limited number of licence fee exemptions, otherwise users are liable to criminal prosecution if caught using the BBC services without a licence. The current maximum fine is GBP 1 000 plus court costs. The proposed bill would make using the services without a licence a civil matter and not a criminal offence. A non-payer would be sued for the fee plus costs.

A Department for Digital, Culture, Media and Sport (DCMS) consultation report of February 2020 invited comment on proposals to decriminalise for not having a TV licence. One of the arguments put forward for decriminalising the non-payment of the licence is that it would remove a considerable resource burden from the courts and prosecution services. Also, decriminalisation would protect the most vulnerable, who were more likely not to pay the licence fee. Responses to the consultation were to be submitted by April 2020. Various parties, including the BBC, have submitted their responses, but the DCMS has yet to publish its conclusions. Meanwhile, a private member bill (introduced by a member of parliament rather than the government) has been introduced.

Another proposed item of legislation which affects the BBC is the British Broadcasting Corporation (Oversight) Bill, which proposes to create an independent body to monitor broadcasting impartiality at the BBC. Under the current BBC Charter and Agreement, the broadcaster is regulated by the media regulator Ofcom in accordance with their general duties, as set out in section 3 of the Communications Act 2003.

The Public Services Broadcasters (Privatisation) Bill proposes privatising the BBC and Channel 4. The BBC, ITV, Channel 4 and Channel 5 have, pursuant to the Communications Act 2003, their own PSB remits. Ofcom has responsibilities to monitor and enforce each channel's public service broadcasting obligations. In the case of Channel 4, the broadcaster is owned by the public but its income is derived principally from advertising revenue.

In the case of Channel 4, the then government mooted in 2015 that the channel should be privatised, but this was withdrawn when the DCMS's Culture Secretary, Karen Bradley, said that the government regarded Channel 4 as a "precious

public service asset." However, some still consider that it could be privatised and still offer a PSB objective.

Under the prevailing Royal Charter for the continuance of the British Broadcasting Corporation 2016 (the Charter), the Corporation can form commercial partnerships through subsidiary companies, although the main corporation cannot enter into commercial activities. This is stipulated at section 23(4) of the 2016 framework Agreement between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation (the Agreement) which accompanies the Charter. Section 23(4) of the Agreement is supported by clause 13 of the Charter. Furthermore, Ofcom can undertake a competition review of the BBC, pursuant to section 12 of the Agreement.

The three bills are due to have their second reading on 13 November 2020. All three bills have yet to have their terms fully drafted. The second reading is normally the first opportunity for a bill to be discussed either in the House of Commons or the House of Lords. It is at this stage that the overall principles are discussed. If a bill passes the second reading stage, it then moves to a committee process where it is considered line by line. It is an opportunity for changes to be made to the wording or for new clauses to be added.

British Broadcasting (Oversight) Bill 2017-2019- UK Parliament

https://services.parliament.uk/Bills/2017-19/britishbroadcastingcorporationoversight.html Public Service Broadcasters(Privatisation) Bill 2017-2019- UK Parliament https://services.parliament.uk/Bills/2017-19/publicservicebroadcastersprivatisation/documents.html The BBC Licence Fee (Civil Penalty) Bill 2019-21- UK Parliament. https://services.parliament.uk/bills/2019-21/bbclicencefeecivilpenalty.html

Public Service Broadcasters (Privatisation) Bill 2017-2019- UK Parliament

https://services.parliament.uk/Bills/2017-19/publicservicebroadcastersprivatisation/documents.html

BBC Licence Fee (Civil Penalty) Bill 2019-21- UK Parliament

https://services.parliament.uk/bills/2019-21/bbclicencefeecivilpenalty.html

LITHUANIA

[LT] The Supreme Administrative Court confirms journalists' right to obtain recordings of Government meetings

Indre Barauskiene
TGS Baltic

The story began in Autumn 2018 when Lietuvos Vyriausybė (the Government of the Republic of Lithuania) decided to charge journalists for the provision of data and information from official state registers. Prior to that date, all the data was freely accessible without payment. Such a decision provoked enormous discontent amongst both journalists and the public.

Faced with public pressure, the government was forced to convene a meeting on 3 October 2018 and discuss this matter once again. Information that the meeting had been very heated and that the prime minister had expressed himself in a very rude and discourteous way towards journalists was leaked to the public. In reaction to this information, the next day the journalists requested that the recording of the government meeting be presented. Not surprisingly, the government refused to submit the recording, basing its decision on the fact that meetings are not public, that recordings are used only for the purpose of preparing the minutes of meetings and that the provision of recordings is not a public function of Vyriausybės kanceliarija (the Government Office). After a couple of days of pressure from various media outlets, the government announced that the recording had been deleted. The journalists were not convinced by the arguments and appealed the refusal to provide the recording, requesting that the court order the recording to be restored.

After almost two years of litigation, on 23 July 2020, the Supreme Administrative Court of Lithuania (SACL) concluded that the government had breached the Law on the Provision of Information to the Public by refusing to submit the recordings to journalists.

The SACL recounted its previous case law on the Media Law and freedom of expression. The court noted that the Media Law obliges journalists to provide correct, accurate and impartial information; to critically evaluate their sources of information; to carefully check the facts; and to rely on several sources. It is obvious that the work of a journalist is directly related to one of the fundamental rights of every person – the right to have beliefs and express them (freedom of information). A journalist, depending on his or her status, has the right to receive information promptly, therefore Article 42(1) of the Media Law establishes the obligation of state and municipal institutions to provide information which is necessary for the performance of the functions of producers and disseminators of public information. The state is constitutionally obliged not only to refrain from

impeding the free dissemination of information in society but also to take positive action so that its citizens are provided with the information they need to know to be able to participate in taking decisions relating to the conduct of public affairs, as well as decisions relating to the exercise of their rights and freedoms.

Considering the above, the SACL held that the government's deliberations in a meeting are an organisational form of the government's activities; therefore, the journalists, in the course of their professional activities, had a legitimate reason to apply to the government for information about the government's meeting and the decision taken in it (and the reasons for it), and that such a request was not excessive. The court further pronounced that the applicable law does not provide for any restrictions to the provision of information in the case at hand and that the government had failed to demonstrate that it had a legitimate reason to refuse the provision of information.

However, since the recording had been deleted, the SACL was convinced that the restoration of the recording was not technically possible, therefore it did not order the government to restore the recording.

Even though the ruling of the SCAL was only a formal victory for journalists, this high-profile case forced the government to change the applicable law. From 1 January 2019, all government meetings are broadcast via the Internet and their recordings are made publicly available.

Nuasmeninta nutartis byloje, eA-1639-520-2020.

http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=c7fe5868-2946-4c7c-aa2e-71a3bde7832b

Depersonalised case ruling, eA-1639-520-2020.

NETHERLANDS

[NL] Appeal Court judgment on politician's conviction over televised speech and interview

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 4 September 2020, The Hague Court of Appeal delivered an important judgment on the appeal made by controversial Dutch politician Geert Wilders over his conviction for comments made during a media interview and a televised speech (see IRIS 2017-2/25). Notably, the court of appeal upheld Wilders' conviction for group insult, but set aside his conviction for incitement to discrimination. Similar to the lower court ruling, the court of appeal also decided not to impose a sentence on Wilders. The judgment contains important principles on a politician's right to freedom of expression and its limits.

The case arose in 2014 in the run-up to the Dutch municipal elections. On 19 March 2014, during a public meeting, Wilders asked an audience whether they wanted more or fewer Moroccans. In response, the audience cheered "Fewer! Fewer! Fewer!" numerous times. Wilders then said, "Well, then we are going to take care of that." Both Wilders' statements and the cheering of the audience were recorded and broadcast by the Dutch public broadcaster NOS. Earlier, on 12 March 2014, Wilders had given an interview to a reporter while out in a market, where he stated that certain voters were voting for a "safer, and more social city, and in any case, a city with fewer problems and, if possible, fewer Moroccans." The Dutch Public Prosecution Service charged Wilders with incitement to hatred, incitement to discrimination, and group insult. In December 2016, The Hague District Court convicted Wilders of group insult and incitement to discrimination, but found him not guilty of incitement to hatred. According to the court, Wilders had generalised all Moroccans, making contemptuous and therefore insulting statements. Furthermore, Wilders had incited discrimination by distinguishing Moroccans from other people living in the Netherlands.

In its judgment of 4 September 2020, The Hague Court of Appeal first upheld the conviction for group insult. The court held that Wilders had aimed to discredit all those with a Moroccan background on the sole ground that they belonged to this population group, and that his statements, even if made in the context of a political debate, were "unnecessarily offensive". The court held that the statements had damaged the honor and dignity of those with a Moroccan background, and had contributed to (further) polarisation within Dutch society. Although offensive statements are protected to a certain extent by the right to freedom of expression, it was considered that Wilders had gone too far and was thus guilty of a criminal offence. However, in relation to incitement to hatred or discrimination, the court of appeal acquitted Wilders. The court stated that when assessing whether a statement incites hatred or discrimination against people on account of their race, "it is not the statement itself that is central, but its intended

effects on others." Essentially, the court found that there was insufficient proof that Wilders had intended to incite hatred or discrimination, but was rather "seeking political gain" with his statements. Furthermore, in relation to the interview with the reporter, the court held that Wilders had only been describing the voting behaviour of people to whom he had spoken in the market.

Finally, like the district court, the court of appeal decided not to impose a sanction on Wilders. The court held that it had to take account of the special circumstances of the politician, noting that he was a democratically elected representative, and that he had made the statement in that capacity. Crucially, the court of appeal took into account the fact that Wilders had been "threatened" for a long time for expressing his (party) political position, and, consequently, has to live under police protection. As such, Wilders has been "paying a high price for communicating his opinion for years."

Gerechtshof Den Haag, 4 september 2020, ECLI:NL:GHDHA:2020:1606

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2020:1606

The Hague Court of Appeal, 4 September 2020, ECLI:NL:GHDHA:2020:1606

[NL] New bill amending the Media Act

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 31 August 2020, the Minister for Primary and Secondary Education and Media introduced a new bill to the Lower House of Parliament (*Tweede Kamer*), which will amend the Media Act (*Mediawet*) 2008, in order to strengthen the future of public broadcasting. The publication of the bill follows the Minister's Letter to Parliament in June 2020 on the future of public broadcasting, which set out the Dutch Government's plans for public broadcasting. The Minister also reached agreement on the proposed amendments with the public broadcasting organisation NPO (*Nederlandse Publieke Omroep*) earlier this year. A number of important amendments are detailed below.

First, in relation to advertising, from 1 January 2021, the public broadcaster NPO will stop advertising on its video-on-demand service NPO Start, as well as on its other online channels. Furthermore, NPO will no longer include advertising around children's programmes on television. Notably, the number of advertising minutes will also be gradually reduced on NPO 1, 2 and 3 over the next five years, to half the current amount. Secondy, in relation to regional broadcasting, there will be more regional news and programming with NPO *Regio* on the NPO 2 channel, and a two-hour block of regional programming every weekday. The public broadcaster's main news programme, *NOS Journaal*, will be followed by a selection of news from different regions and programmes from national broadcasters with a regional character. Moreover, more programmes from regional broadcasters will also be available via NPO Start. Thirdly, in relation to independent production, the portion of their budget which broadcasters are currently required to spend on programmes made by independent producers (*buitenproducenten*) will be lowered from 25 per cent to 16.5 per cent. In addition, sports programmes will now also count in the calculation.

Crucially, under the bill, news and current affairs programmes, and in particular investigative journalism, are explicitly added by law as a task to be performed by the public broadcaster. Finally, because more and more people are watching TV on demand rather than linear TV, the public broadcaster will now be legally obliged to provide only two linear TV channels instead of three. However, TV package providers will still be required to carry all three public TV networks as long as they exist.

Wijziging van de Mediawet 2008 met het oog op de versterking van het toekomstperspectief van de publieke omroep, No. 35554

https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35554

Amendments to the Media Act 2008 with a view of strengthening the future of the public broadcaster, No. 35554

Kamerbrief over toekomst publieke omroep

https://www.rijksoverheid.nl/regering/bewindspersonen/arie-slob/documenten/kamerstukken/2019/06/14/kamerbrief-over-toekomst-publieke-omroep

Letter to Parliament on the future of public broadcasting

SLOVENIA

[SI] Slovenia's draft AVMS law introduces obligations to invest in European works

Deirdre Kevin
COMMSOL

In addition to the draft media laws published by the Slovenian Ministry of Culture in July (see IRIS 2020-8/21), the Ministry also published a draft proposal for amending the Law on Audiovisual Media Services on 6 July. A first consultation closed in August, and the Ministry of Culture has redrafted sections of the law and extended the consultation on the draft until 2 October 2020. The purpose of the draft amendments is to transpose the Audiovisual Media Services Directive. For the most part, the law directly reflects the AVMS Directive. During the first consultation period, several issues were raised regarding the proposal.

The draft law introduces obligations for audiovisual media service providers to invest in European audiovisual works. Under a new Article 16.a (1), providers of audiovisual media services are obliged to contribute at least 10% of their gross annual revenue generated in the Republic of Slovenia for the development, production or promotion of European audiovisual works. This obligation is also applicable to media service providers established in a different member state (16a (2)). The following criteria will be considered when determining which non-domestic media service providers are obliged to contribute: advertising intended for viewers in the Republic of Slovenia; the language of programmes and advertising services and other promotional activities, including subtitling and dubbing; and the number of subscribers to a service in the Republic of Slovenia.

The new draft indicates that the following qualify as development, production or promotion: direct investment in the development of scripts and in the recording of a European audiovisual work, as well as the purchase of licensing rights for the European audiovisual works.

According to the Ministry documentation, during the consultation, a broad range of stakeholders expressed concern that this new fee would represent a disproportionate burden on audiovisual media service providers. They also noted that it was not clear which audiovisual media service providers would fall under the scope of the obligation. In addition, they claimed that it was unclear how such fees would be collected.

The new draft published in August added the public service broadcaster RTV Slovenia to the list of audiovisual media services that will be exempt from the obligation (presumably as RTV Slovenia already has obligations under the Slovenian Film Centre Act to contribute at least 2% of the licence fee towards funding film production by independent producers, and also perhaps due to the new proposed obligations on RTV Slovenia to contribute 5% of the licence fee to

funding public interest media and a further 3% to financing the Slovenian Press Agency. See IRIS 2020-8/21 for more details).

Services of special importance or services whose programmes are intended for a local audience and are not included in a broadcast network that reaches more than 50% of the population are also exempt, as are services intended exclusively for advertising, teleshopping or self-promotion. A general exemption clause is provided in Article 16a (5) providing that the obligations will not apply to audiovisual media services with low traffic or small audiences, in accordance with the European Commission guidelines.

Article 16a (6) outlines that the basis for the calculation of the contribution shall be revenues from advertising and revenues from subscriptions generated by the audiovisual media service provider in the Republic of Slovenia, excluding value added tax. The amount of tax on profits paid in the Republic of Slovenia will also be deducted from the 10% of total revenues.

Regarding the concerns of stakeholders as to how this scheme would be implemented, the latest draft proposal includes an additional Article (16b) which is intended to specify the procedure according to which the obligations from Article 16a will be determined. This introduces a significant role for the regulator – the Agency for Communication Networks and Services (AKOS) – who will be responsible for the implementation of this obligation. In the first instance, the AKOS will decide by September each year which services are within the scope of the obligation, with reference to the various exemptions and criteria outlined above.

Hence, the law will also require all audiovisual media service providers to submit reports every year to the agency; these reports shall include data on revenues from advertising and subscriptions, as well as on the fulfilment of the obligations for investment in the previous year.

Zakon o spremembah in dopolnitvah Zakona o avdiovizualnih medijskih storitvah

https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=11475

Draft Law Amending the Audiovisual Media Services under (second) consultation

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