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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

Editorial Board:

Maja Cappello, Editor • Francisco Javier Cabrera Blázquez, Sophie Valais, Julio Talavera Milla, Deputy Editors (European Audiovisual Observatory)

Artemiza-Tatiana Chisca, Media Division of the Directorate of Human Rights of the Council of Europe, Strasbourg (France) • Mark D. Cole, Institute of European Media Law (EMR), Saarbrücken (Germany) • Bernhard Hofstötter, DG Connect of the European Commission, Brussels (Belgium) • Tarlach McGonagle, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) • Andrei Richter, Central European University (Hungary)

Council to the Editorial Board: Amélie Blocman, *Legipresse*

Documentation/Press Contact: Alison Hindhaugh

Tel.: +33 (0)3 90 21 60 10

E-mail: alison.hindhaugh@coe.int

Translations:

Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Paul Green • Marco Polo Sarl • Nathalie Sturlèse • Brigitte Auel • Erwin Rohwer • Sonja Schmidt • Ulrike Welsch

Corrections:

Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Sophie Valais, Francisco Javier Cabrera Blázquez and Julio Talavera Milla • Aurélie Courtinat • Barbara Grokenberger • Jackie McLelland

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EDITORIAL

According to Mark Twain, “History doesn’t repeat itself - but it often rhymes.”

Whenever I think about the dreadful year that has just left the stage, I like to look back a hundred years. In 1920, the world was still suffering from a deadly pandemic, the so-called Spanish Flu. Not only was it a much more dangerous virus than SARS-CoV-2, but the world was also far less prepared to confront it. And yet, humanity got through it.

But look what happened next.

The decade that followed earned the nickname of "the Roaring Twenties" because it was a period of extraordinary economic and cultural development. It was not only the beginning of both the Hollywood Golden Age and the Jazz Age, but also the period when a second Industrial Revolution brought spectacular technical innovations and scientific advances.

Let’s hope that "history rhymes" indeed.

On behalf of the entire team of the European Audiovisual Observatory, I wish you a healthy and successful 2021!!

Maja Cappello, editor

European Audiovisual Observatory

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Table of content

COUNCIL OF EUROPE

European Court of Human Rights: Şık v. Turkey (No. 2) and Sabuncu and others v. Turkey

EUROPEAN UNION

European Commission opens infringement procedures against 23 member states for failing to transpose the revised AVMSD 2018

CJEU Advocate General finds regional advertising ban compatible with EU law

Council of the EU: EU-UK Trade and Cooperation Agreement enters into foce

NATIONAL

[AM] Audiovisual Statute introduced

CSA study on audiovisual consumption in French-speaking Belgium

[BG] Legislative proposals for promoting the local film industry, including 25% cash rebates for eligible costs for production aid

[DE] Berlin regional court rules on film revenue information rights

[DE] Online gaming platform’s youth protection system approved

[DE] Bill on strengthening consumer protection in competition and trade law

[DE] New German State Media Treaty enters into force

[DE] Draft copyright reform bill for Germany

[ES] First Draft Law on Audiovisual Communication

[FR] CSA publishes extensive study on the distribution of fake news on Twitter

[FR] Court rejects former Numéro 23 owner’s CSA compensation claim

[FR] Media chronology: health crisis prompts new film release window derogation

[GB] BBC Introduces Guidance on Individual Use of Social Media

[HR] New Law on Electronic Media (proposal no. 62) sent to Parliament

[IE] Broadcasting Authority announces details of Sponsorship Scheme 2021

[IE] Broadcasting Authority launches online Media Ownership database

[IT] New proposal to reform the governance of the Italian public service broadcaster

[IT] First green light for the transposition of the AVMSD in Italy

[LT] Supreme Court finds that using filmed footage of an offence in a television show was not sufficient to justify the restriction of a person’s right to privacy and protection of image

[LT] Constitutional Court confirms that funding the national broadcaster through a fixed percentage from the state budget is in line with the Constitution

[LV] The Public Electronic Media and their Management Law adopted

[LV] Amendments to the Electronic Mass Media Law adopted for the transposition of the AVMSD

[NL] Media Act amended to incorporate the revised AVSM Directive 2018

[NL] Dutch Court annuls GDPR fine imposed on streaming platform VoetbalTV for distributing sports content to large audiences

[PT] Portugal transposes the Audiovisual Media Services Directive

[RO] State aid scheme for the cultural sector

[RO] Rules for the 2020 parliamentary elections campaign coverage

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[RU] Rules on labelling “foreign media agents” enforced
[SI] Update on the third draft AVMS law and the establishment of a European Audiovisual Production Fund
[US] Sheet Music v. Sounds: Led Zeppelin case reminds us of copyright technicalities

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INTERNATIONAL

COUNCIL OF EUROPE

REPUBLIC OF TÜRKIYE

European Court of Human Rights: *Şık v. Turkey* (No. 2) and *Sabuncu and others v. Turkey*

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

In one of the numerous cases brought against Turkey in relation to the right to freedom of expression and the rights of journalists, the European Court of Human Rights (ECtHR) found that the arbitrary pre-trial detention of an investigative journalist had violated the European Convention on Human Rights (ECHR). In *Şık v. Turkey*, the ECtHR found that a series of articles published on the website of *Cumhuriyet*, in the newspaper's print edition, and in items posted on social media from the journalist's Twitter account, had produced no sufficient basis for a reasonable suspicion that the journalist had disseminated terrorist propaganda. The judgment in *Şık v. Turkey* of 24 November 2020 is analogous to the reasoning and outcome of the judgment in *Sabuncu and others v. Turkey* of 10 November 2020, another case where the ECtHR found that the Turkish authorities had violated the rights of journalists and the managers of the newspaper *Cumhuriyet*.

The applicant, Ahmet Şık, is an investigative journalist working for the national daily newspaper *Cumhuriyet* (*The Republic*). The newspaper is known for its critical stance towards the current Turkish Government under the presidency of Recep Tayyip Erdogan. On 29 December 2016, Şık was arrested and taken into police custody by the Istanbul police. He was held in pre-trial detention by court order, based, according to the Istanbul Magistrate's Court, on "strong suspicions" that the journalist had committed the offence of disseminating propaganda in favour of terrorist organisations such as the PKK (the Kurdistan Workers' Party), the FETÖ/PDY (Fethullahist Terror Organisation/Parallel State Structure), and the DHKP/C (People's Revolutionary Liberation Party/Front). The pre-trial detention was extended on several occasions; it ended in March 2018, when the Istanbul Assize Court ordered Şık's release pending trial. In a judgment of 25 April 2018, the Istanbul Assize Court found the journalist guilty of assisting the terrorist organisations PKK, DHKP/C and FETÖ. The Assize Court concluded that Şık's articles and Twitter posts constituted acts seeking to legitimise violent actions and amounted to assisting terrorist organisations by arguing that it was the state that was a mafia and a murderer. Furthermore, rather than informing the public or pursuing the public interest, the articles and posts were seen to portray terrorist organisations as legitimate and innocent. Şık was sentenced to seven years and six months' imprisonment. After a judgment by the Court of Cassation, the Assize

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Court confirmed Şık's conviction, and again the case was referred to the Court of Cassation. In the meantime, Şık's application before the Constitutional Court claiming a breach of his right to liberty and security and his right to freedom of expression and freedom of the press, failed.

Şık complained before the ECtHR that his initial and continued pre-trial detention had been arbitrary and devoid of any concrete evidence grounding a reasonable suspicion that he had committed a criminal offence. According to Şık, his right to liberty and security under Article 5, section 1 ECHR had been violated. He also argued that the facts on which the suspicions against him had been based related solely to acts falling within the scope of his activity as a journalist and, hence, of his right to freedom of expression under Article 10 ECHR. Şık's application was supported by third-party interventions from the Council of Europe Commissioner for Human Rights, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and a range of NGOs, such as ARTICLE 19, the Committee to Protect Journalists, the European Centre for Press and Media Freedom, Human Rights Watch, Index on Censorship, the International Federation of Journalists, the International Press Institute, PEN International and Reporters Without Borders.

The ECtHR found unanimously that there had been a violation of Article 5, section 1 ECHR on account of the lack of a reasonable suspicion that Şık had committed a criminal offence. The ECtHR observed that the articles and posts in question constituted contributions by Şık, in his capacity as an investigative journalist, to various public debates on matters of general interest; they contained his analysis and criticism of various actions taken by government bodies, and his point of view on the legality and compatibility with the rule of law of the administrative and judicial measures taken against the alleged members or sympathisers of the illegal organisations. The topics addressed in these articles and Twitter posts had already been the subject of wide-ranging public debate in Turkey and beyond, involving political parties, the press, non-governmental organisations, groups representing civil society and public international organisations. The ECtHR also noted that the articles and posts at issue did not contain any incitement to commit terrorist offences, did not condone the use of violence and did not encourage insurrection against the legitimate authorities. While some of the published material may have reported the points of view voiced by members of prohibited organisations, it remained within the bounds of freedom of expression, which stipulates that the public has the right to be informed of the different ways of viewing a situation of conflict or tension, including hearing the point of view of illegal organisations. Hence, the posts and articles were the result of the legitimate activities of an investigative journalist or a political opponent, and fell within the exercise of Şık's freedom of expression and freedom of the press, as guaranteed by the Turkish law and the ECHR.

The lack of a reasonable suspicion that Şık had committed a criminal offence coupled with the finding of a violation of Article 5, section 1 ECHR, formed the basis for the finding of a violation of Sik's right to freedom of expression under Article 10 ECHR. First, the ECtHR considered that Sik's pre-trial detention in the

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context of the criminal proceedings brought against him for offences carrying a heavy penalty and directly linked to his work as a journalist, amounted to an actual and effective constraint, and thus constituted "interference" with the exercise of his right to freedom of expression. On that basis, the ECtHR dismissed the Turkish Government's objection as regards the journalist's lack of victim status. The ECtHR further observed that the requirements of lawfulness under Articles 5 and 10 ECHR are aimed in both cases at protecting the individual from arbitrariness, and that the detention measure, which was not lawful, could not be regarded as a restriction prescribed by national law. Accordingly, the interference with Şık's rights and freedoms under Article 10, section 1 ECHR could not be justified under Article 10, section 2, since it was not prescribed by law. Since the violation of the journalist's rights had indisputably caused him substantial damage, the Turkish State was ordered to pay Şık EUR 16 000.

However, Şık's complaint under Article 18 ECHR (limitation on use of restrictions on rights) was dismissed by the ECtHR, as it had not been established beyond reasonable doubt that the journalist's pre-trial detention was ordered for a purpose not prescribed by the ECHR within the meaning of Article 18. The ECtHR did not reach unanimity on this point however, as one of the judges strongly dissented, arguing that there was massive evidence that the detention and prosecution of the journalists and managers of *Cumhuriyet* was part of the Turkish authorities' political persecution of their opponents, and part of the government's general strategy to silence dissenting voices after the attempted military coup in 2016.

Judgment by the European Court of Human Rights, Second Section, in the case of Şık v. Turkey (No. 2), Application No. 36493/17 of 24 November 2020

https://hudoc.echr.coe.int/eng?i=001-206411

Judgment by the European Court of Human Rights, Second Section, in the case of Sabuncu and others v. Turkey, Application No. 23199/17 of 10 November 2020

https://hudoc.echr.coe.int/eng?i=001-206212

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EUROPEAN UNION

CJEU Advocate General finds regional advertising ban compatible with EU law

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

In his opinion of 15 October 2020 in Case C-555/19 (Fussl Modestraße Mayr), Maciej Szpunar, Advocate General at the Court of Justice of the European Union (CJEU), discussed whether the German law prohibiting the regional transmission of advertising on television programmes authorised for the entire country was compatible with EU law. He concluded that, although European law did not prevent such a restriction in principle, it was necessary to examine, in view of the freedom to provide services, whether there were any less restrictive measures that the German legislator could introduce in order to protect diversity of opinion at regional and local level.

The case, referred by the Landgericht Stuttgart (Stuttgart regional court), concerned the Austrian firm Fussl Modestraße Mayr GmbH, which operates a chain of fashion stores in Austria and Bavaria.

In May 2018, Fussl signed a contract with the German company SevenOne Media GmbH, the marketing company for the German ProSiebenSat.1 group, concerning the broadcasting of television advertising via the Bavarian cable network of Vodafone Kabel Deutschland GmbH, which only served the state of Bavaria, as part of ProSieben's national television programme.

SevenOne Media refused to honour this contract on the grounds that it was prohibited from broadcasting regional television advertising as part of a national programme under Article 7(11) of the *Rundfunkstaatsvertrag* (state broadcasting treaty – RStV), which has now been replaced by the identical Article 8(11) of the *Medienstaatsvertrag* (state media treaty – MStV). According to the treaty, the *Bundesländer* can authorise regional advertising on national television channels, although the state of Bavaria has never made use of this possibility. Fussl lodged a complaint with the Landgericht Stuttgart and demanded that SevenOne Media be required to meet its contractual obligations. The regional court then submitted questions to the CJEU regarding the compatibility of the provision with EU law.

In his opinion, Advocate General Szpunar pointed out that the provision in question was designed to ensure that the regional advertising market was reserved for regional and local TV broadcasters and that it guaranteed them a source of income. He thought the division of the advertising market between national and regional broadcasters and, therefore, the law concerned here did not fall under the scope of the AVMSD. Furthermore, the equal treatment principle did not prevent a ban on regional advertising on national television channels.

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However, although such a ban restricted the freedom to provide services, this could be justified by overriding cultural policy interests.

The German legislator should therefore have been allowed to assume that the entry of national television broadcasters into the regional advertising market could jeopardise the financing of regional and local television companies and thereby threaten diversity of opinion at regional and local level. The disputed national law provision therefore seemed an appropriate means of protecting such diversity. However, the referring court needed to decide whether the rule was proportionate and, in particular, whether media pluralism could be protected through less restrictive measures.

Schlussanträge des Generalanwalts in der Rechtssache C-555/19

http://curia.europa.eu/juris/document/document.jsf;jsessionid=820EC51083E167448BE04FC5501B8A36?text=&docid=232472&pageIndex=0&doclang=de&mode=lst&dir=&occ=first&part=1&cid=15535754

Advocate General's opinion in Case C-555/19

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European Commission opens infringement procedures against 23 member states for failing to transpose the revised AVMSD 2018

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 23 November 2020, the European Commission announced that it had launched infringement procedures against 23 EU member states and the United Kingdom for failing to transpose the revised Audiovisual Media Services Directive 2018 (AVMS Directive) (see IRIS 2019-1/3) into national law. The revised AVMS Directive was enacted in November 2018, and under Article 2, EU member states were required to incorporate the Directive into national law by 21 September 2020, and to notify the Commission of the text of the main provisions of national law which was adopted. However, the Commission stated that as of 23 November 2020, only Denmark, Hungary, the Netherlands and Sweden had notified transposition measures and declared their notification complete.

The revised AVMS Directive contains a range of new rules, including more flexibility in television advertising; a strengthened country-of-origin principle; increased obligations to promote European works for on-demand services (such as Netflix), including at least a 30% share of European content in their catalogues and the requirement to ensure the prominence of this content; certain audiovisual rules being extended to what are termed video-sharing platforms (such as YouTube); extending the obligation to protect minors also to video-sharing platforms, which must put in place appropriate protective measures; reinforced protection on television and video-on-demand against incitement to violence or hatred and public provocation to commit terrorist offences; and video-sharing platforms also being required to take appropriate measures to protect people from incitement to violence or hatred and content constituting criminal offences.

The Commission stated that member states had 21 months to transpose the revised AVMS Directive into national legislation, and has also published guidelines on European works and video-sharing platforms (see IRIS 2020-8/3). As such, the Commission sent letters of formal notice to Belgium, Bulgaria, Czechia, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, and the United Kingdom, requesting them to provide further information within two months. Under the EU treaties, the Commission may take legal action – an infringement procedure – against an EU member state that fails to implement EU law. This legal action involves a number of stages, including: first, sending a letter of formal notice requesting further information to the member state concerned, who must send a detailed reply; (b) second, sending a reasoned opinion: a formal request to comply with EU law; and (c) the Commission deciding to refer the matter to the EU Court of Justice.

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European Commission, Commission opens infringement procedures against 23 member states for failing to transpose the Directive on audiovisual content

https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2165

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UNITED KINGDOM

Council of the EU: EU-UK Trade and Cooperation Agreement enters into foce

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 1 May 2021, the EU-UK Trade and Cooperation Agreement (TCA) entered into force.

On 31 January 2020, the United Kingdom left the European Union and entered a transition period while it negotiated its future relationship with the European Union. Almost a year later, on 24 December 2020, the European Commission and the United Kingdom reached a deal on the TCA, which defines the terms of their future cooperation. On 29 December 2020 the Council of the European Union adopted by written procedure the decision on the signing of the agreement and its provisional application, pending the consent of the European Parliament and conclusion by the Council decision. On 30 December 2020, the President of the European Council and the President of the European Commission signed the TCA on behalf of the European Union, and the Agreement was brought to the United Kingdom for its signature. The European Parliament gave its consent on 27 April 2021 by 660 votes for, five against and 32 abstentions. The accompanying resolution, setting out Parliament's evaluation of and expectations from the deal, passed by 578 votes, with 51 against and 68 abstentions. Finally, the Council of the EU concluded the adoption process on 29 April 2021.

The draft Trade and Cooperation Agreement consists of three main pillars:

- a Free Trade Agreement,

- a partnership for security,

- a horizontal agreement on Governance.

Foreign policy, external security and defence cooperation are not covered by the Agreement.

Brexit will have significant effects on the audiovisual sector in both the UK and the EU, among them the following:

- The UK will no longer be bound by the EU State aid regime, save for specific exceptions concerning Northern Ireland (see below). According to the TCA, its chapter on subsidy control "does not apply to subsidies related to the audio-visual sector."

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- The UK's Creative Sector Tax Reliefs will not be affected by Brexit. However, UK personnel will no longer have EEA status – and are thus not able to qualify for other member states' cultural tests or qualify for tax relief under incentive schemes in some member states. The BFI continues to be able to issue European Certificates of Nationality.

- The UK will no longer have direct access to Creative Europe funding. To offset the loss of funding opportunities, the UK Government has confirmed that it will fund the delivery of a Global Screen Fund, worth GBP 7 million in 2021/22, that will support independent British screen content, in particular film, to compete across international markets. Under the TCA, the UK will participate in the EU's Horizon Europe programme, the EU's research and innovation framework programme (2021-2027).

- Brexit will have no impact on co-production agreements including the UK's bi-lateral treaties signed with Australia, Brazil, Canada, China, France, India, Israel, Jamaica, Morocco, New Zealand, Occupied Palestinian Territories and South Africa. Moreover, the UK will continue to be party to the Council of Europe's European Convention on Cinematographic Co-Production.

- UK audiovisual media services received or retransmitted in the European Union will no longer benefit from the freedom of reception and retransmission laid down in Article 3 AVMSD. Therefore, EU27 member states will, based on their own national law and, where applicable, within the limits of the European Convention on Transfrontier Television, be entitled to restrict reception and retransmission of audiovisual media services originating from the UK. UK broadcasting services available in the EU may need two types of licences:

a) an Ofcom licence for services receivable in the UK and in other ECTT countries (this includes the 20 EU countries that have signed and ratified the ECTT);

b) licences covering services receivable in EU countries that have not signed up to the ECTT.

- Concerning EU audiovisual services available in the UK, only services from one of the seven EU countries that have not ratified the ECTT will need a licence from Ofcom to be received in the UK. The UK is committed to continuing licence-free reception for TG4, RTÉ1 and RTÉ2 to reflect the commitments in the Good Friday Agreement.

- Concerning video on-demand services, the ECTT does not provide for freedom of reception for these types of services, therefore UK providers will need to comply with AVMSD jurisdiction rules if they provide VOD services in a EU country.

- Works which originate in the UK would still be considered European works since the definition laid down in Article 1(n) AVMSD includes works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe, to which the UK is a party.

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- The EU rules in the field of copyright do not apply to the UK anymore. This means that the main international copyright treaties, to which both the UK and EU are contracting parties, will apply to the EU-UK relationship in the field of copyright.

- Copyright duration in the UK for works from the UK, EEA, or other countries will not change. EEA works are given the same copyright duration in the UK as UK works. For works from outside the EEA, copyright lasts for the term granted in the country-of-origin or the term granted to UK works, whichever is less.

- The EU orphan works exception no longer applies to UK-based institutions.

EU exit, the end of the transition period and the UK-EU Trade and Cooperation Agreement: Answering questions from the screen sectors

https://www.bfi.org.uk/strategy-policy/policy-statements/eu-exit-end-transition-period-uk-eu-trade-cooperation-agreement-answering-questions-from-screen-sectors

European Commission: The EU-UK Trade and Cooperation Agreement

https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en

Press release of the Council of the EU, "EU-UK trade and cooperation agreement: Council adopts decision on conclusion", 29 April 2021

https://www.consilium.europa.eu/en/press/press-releases/2021/04/29/eu-uk-trade-and-cooperation-agreement-council-adopts-decision-on-conclusion/

Press release of the European Parliament, "Parliament formally approves EU-UK trade and cooperation agreement", 28 April 2021

https://www.europarl.europa.eu/news/en/press-room/20210423IPR02772/parliament-formally-approves-eu-uk-trade-and-cooperation-agreement

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NATIONAL

ARMENIA

[AM] Audiovisual Statute introduced

Andrei Richter
Comenius University (Bratislava)

On 5 August 2020, the President of the Republic of Armenia signed into law the statute “On Audiovisual media”, adopted on 16 July 2020 by the National Assembly (the parliament). The new statute invalidates the Law on Television and Radio of 9 October 2000 (IRIS 2001-2:1/9). It takes as a model the AVMSD of the European Union.

The new statute regulates the governance, financing and remit of the national public broadcaster; the formation and powers of the independent audiovisual media regulator (Commission on Television and Radio); the notification procedures for the “authorisation” of broadcasters; the procedures for tenders and the licensing of slots in the existing public digital multiplex, as well as for licensing network operators (such as cable companies); and the notification procedures for the distribution of audiovisual programmes by the relevant distributors.

Article 4 of the statute bans the censorship of audiovisual information. The statute defines the public multiplex as “the digital broadcasting network being the property of the company, with 100 percent property of the Republic of Armenia” (Article 3), and defines its pivotal role in the country's audiovisual sector. Private multiplexes shall be licensed and established when relevant frequencies are available.

Article 7 of the statute provides for measures that broadcasters must adopt to ensure the reliability of the information in their audiovisual programmes. They shall ensure the right of reply, as well as appropriate notices when news and other information originates from anonymous sources or when the authenticity has not been sufficiently verified from other sources. Broadcasters are mandated to use the notices "Live", "Repetition", and "Archive" in relevant cases.

The new statute entered into force on 7 August 2020.

A number of national media NGOs criticised the new statute in its draft form, as it does not solve the problem of 10 local TV stations that were left out of the digital switchover, and it does not establish grounds for a reform of the public broadcaster.

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https://www.arlis.am/documentview.aspx?docid=145079

On Audiovisual Media. Statute of the Republic of Armenia, N ZR-395

ԱՅՏԱՐԱՐՈՒԹՅՈՒՆ: Առաջին ընթերցմամբ ընդունված «Տեսալսողական մեդիայի մասին» օրենքի նախագծի շուրջ մտահոգությունների կապակցությամբ

https://ypc.am/hy/statements/հուլիսի-8-2020/

Statement: Concerns over the first reading of the Law on Audiovisual Media

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BELGIUM

CSA study on audiovisual consumption in French-speaking Belgium

Olivier Hermanns, Joëlle Desterbecq & Samy Carrere
Conseil Supérieur de l'Audiovisuel Belge

On 15 December 2020, the Belgian Conseil supérieur de l'audiovisuel (regulatory authority for the audiovisual sector of the French-speaking Community of Belgium – CSA) published a new study entitled *Médias: Attitudes et Perceptions* (*Media: Attitudes and Perceptions* – MAP). The study analyses the different ways in which audiovisual media services are used in French-speaking Belgium. More specifically, it aims to discover how the emergence of new forms of audiovisual consumption is changing television usage. It is the first study of this magnitude to be conducted in the French-speaking part of the country.

The authors of the MAP study adopted a highly rigorous approach to their research methods and analysis. Their methodology is based on two complementary components: the first is a standardised questionnaire completed by a representative sample of 2 200 people aged over 15 from Belgium's French-speaking population, which aims to gather data about the participants' behaviours and attitudes; the second element is based on the results of semi-structured interviews with 16 women and 14 men aged between 15 and 76, chosen with the help of a selection matrix. This part of the study is designed to identify the reasons behind the participants' consumption choices and the values and representations attached to them.

Each of the two components covers three main themes. Firstly, the study aims to determine the number of different devices in each household: 93.5% of the respondents said they had at least one television set in their household, while 93.3% had at least one mobile telephone. Desktop computers have largely been replaced by laptops. The most common household combination was one TV set, one computer and one mobile phone. It was found that 88.5% of households in French-speaking Belgium have an Internet connection. The interviews showed that linear television services are mainly used on television sets, paid video on demand is watched on a multitude of devices and free video on demand is primarily consumed on television sets and computers.

The second theme is audiovisual consumption. Linear television remains very popular and is watched by 72.3% of the respondents (some in combination with video on demand), 81.6% of whom said they watched television at home every day. This figure is much higher than for paid video on demand, which is only used by 35.8% of respondents on a daily basis, and free video on demand (37.7%). Only 5% of the respondents watch television while travelling (either exclusively or in combination with viewing at home or elsewhere). However, 21.9% watch paid

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video on demand while travelling (20.3% watch free video on demand). The study also examines in detail the simultaneous use of multiple devices to watch audiovisual media services. Simultaneous use is more common with television (34.7%) than either free (22.3%) or paid (13.1%) video-on-demand services. Meanwhile, the individual interviews show that the entertainment and recreational functions of television and video on demand (paid or free) are highly appreciated. On the other hand, video on demand is not generally used for information or educational purposes, whereas this is a popular function of television. Those questioned were also asked about the pros and cons of the different forms of consumption. Regarding television, they liked the diversity of content, the ease of choice and the family focus, but they also noted the pervasiveness of advertising. They thought that paid video on demand provided access to interesting content and was characterised by the absence of advertising and the ability to control viewing times, but they also considered that it could be addictive. Free video on demand offered alternative sources of information, with viewer recommendations playing a prominent role, but omnipresent advertising was considered a major drawback.

Finally, the third theme concerns the complementarity and substitutability of the different types of audiovisual consumption. The questionnaire results show that the different types of audiovisual consumption are complementary rather than substitutable: 86.3% of the respondents do not intend to stop watching television (71.5% for paid video on demand). The interview-based part of the study, meanwhile, suggests that people for whom television is the primary means of regular consumption believe it is irreplaceable in its linear form or as a video-on-demand service provided by traditional television channels. However, people whose primary means of regular consumption is a form of video-on-demand (paid or free) are prepared to switch to the other type of video-on-demand service.

The study also focuses in detail on the factors affecting changes to consumption patterns and viewing equipment. It looks at the impact of the health crisis linked to the COVID-19 pandemic. It also suggests standard user profiles and concludes by listing some of the major topics for public debate raised by the research carried out, including the affirmation of local platforms vis-à-vis large international platforms, the regulation of social networks, and the fight against discrimination and illegal services.

Étude « Médias : Attitudes et Perceptions 2020 »

https://www.csa.be/map/

Study on Media: Attitudes and Perceptions 2020

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BULGARIA

[BG] Legislative proposals for promoting the local film industry, including 25% cash rebates for eligible costs for production aid

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

On 18 November 2020, *Министерски съвет* (the Bulgarian Council of Ministers, also referred to as the Government) adopted a decision concerning the approval of *Законопроект за изменение и допълнение на Закона за филмовата индустрия* (Bill to amend and supplement the Film Industry Act – FIA). The Bill envisages various incentives for the promotion of the local film industry, including a new cash rebate aid scheme for the production of audiovisual works, in accordance with Regulation (EU) No. 651/2014. The Government is also expected to propose secondary legislation following the final adoption of the Bill.

The Government's reasoning behind the amendments is that the current provisions of the FIA were adopted way back in 2003, and since then, the audiovisual sector and landscape have changed significantly. The Government has acknowledged that many processes have been digitalised, production volume has increased, and a whole new set of business and cultural models has been introduced within the film industry (for example, some of the largest platforms and producers of films and series have since emerged, such as Disney+, Amazon Prime, HBO GO, and Netflix). Furthermore, trends in the European film industry over the past few years have marked a substantially higher level of public funding for film production and the distribution of audiovisual works, as well as significant progress in terms of accessibility and increased audiences. At the same time, the existing legal framework has not reflected these developments, and the Government is seeking to adapt the Bulgarian film industry to the current state of the market.

Among other things, the proposed changes provide for an increase in the budget for national film production, film distribution, festivals, cultural events, promotion and display: BGN 10 million per year over a three-year period. The proposed increase in the subsidy for national film production is to be implemented through three components: 1) an increase in the number of films; 2) the implementation of a new methodology for calculating the average budget; and 3) the provision of additional funding of 15% required for distribution, display, promotion, festivals and cultural events.

In order to eliminate the discrepancies established in the past in the process for determining the subsidy, it is proposed that the subsidy be formed as a sum of the funds necessary for the production of Bulgarian films, calculated on the basis of the previous year's average budget for the production of 12 feature films, 24

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documentaries and 250 minutes of cartoons. An additional 15% is added to cover the costs of distribution, display, promotion, festivals and cultural events; these funds are to be included in a separate budget item. Separate state aid schemes are envisioned for the latter activities.

Another proposal in the Bill envisions a new state aid scheme for cash rebates of up to 25% of all eligible costs incurred for the production of audiovisual works (as per Article 54 (5), point (a) of Regulation (EU) No. 651/2014) in relation to the delivery of goods and services provided in the Republic of Bulgaria (additional conditions are stipulated in the Bill). The eligible costs should not exceed 80% of the overall production budget, and only works that meet a “culture test” would be able to qualify for cash rebates. Other requirements are also envisaged in the draft text – works should be established in whole or in part on the territory of the Republic of Bulgaria and should be intended for public display and/or broadcasting.

In addition, works that qualify for cash rebates include:

(a) feature-length films lasting more than 70 minutes;

(b) documentary films of more than 70 minutes in length or a documentary series of more than 40 minutes in each episode;

(c) animated films or animated series (that is, cartoons) of a total duration exceeding 24 minutes;

(d) television films of more than 70 minutes in length or a television series of more than 40 minutes in each episode.

Cash rebates are specifically excluded for some categories of audiovisual works (non-exhaustive): sports events; talk shows; reality shows; live events; television series such as sitcoms; audiovisual works of an advertising/promotional nature; projects which include pornography; political or religious propaganda; works that may undermine the authority of the Republic of Bulgaria or the Bulgarian nation; works directed against the rule of law or constitutional principles; works that incite war, racism, manifestations of nationalism, religious hatred and national separatism, etc.

In relation to the above-mentioned categories, for the first time in Bulgaria, special definitions have been proposed for some specific terms. These include definitions for “feature-length film”, “difficult film”, “sitcom”, “daily drama”, “talk show”, “short film”, “television series”, “television film”, “platform for the distribution of audiovisual works” (it should be noted here that the latter does not seem to be coordinated with the definition of video-sharing platform services as per the AVMSD), and many others.

The Bill was submitted to parliament on 27 November 2020, where it shall be put to the vote in two hearings and then promulgated in the State Gazzete, before entering into force. In any case, the Bill seems to have the support of the Government and all stakeholders in the media sector, so it is expected to be

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adopted soon.

Решение на Министерски съвет за одобряване на Законопроект за изменение и допълнение на Закона за филмовата индустрия

https://www.gov.bg/bg/prestsentar/zasedaniya-na-ms/dneven-red-na-zasedanie-na-ministerskiya-savet-na-18-11-2020-g

Decision of the Council of Ministers on the approval of the Bill amending the Film Industry Act

Законопроект за изменение и допълнение на Закона за филмовата индустрия

https://www.parliament.bg/bg/bills/ID/163441

Bill amending and supplementing the Film Industry Act

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GERMANY

[DE] Berlin regional court rules on film revenue information rights

Mirjam Kaiser
Institute of European Media Law

In a judgment of 27 October 2020 (Case no. 15 O 296/18), the *Landgericht Berlin* (Berlin regional court – LG) decided that a screenplay writer was entitled to information about the revenue generated from the exploitation of film productions so she could demand an adjustment to her remuneration for use of her screenplays.

The dispute between the screenplay writer on the one hand and the production company that owned the rights to two well-known German films and a film and media group on the other concerned the right to further equitable remuneration as enshrined in Article 32a of the German *Urheberrechtsgesetz* (Copyright Act – UrhG). The author had written the screenplays for the films *Keinohrhasen* (2007) and *Zweiohrküken* (2009), which had been very successful in Germany, and had granted associated exploitation rights to the producers in return for remuneration in accordance with a flat-rate agreement. However, in so-called "best-seller" cases, German copyright law provides for contractually agreed remuneration to be subsequently amended (Article 32a UrhG). This can occur if a work is unexpectedly successful to the extent that the originally agreed remuneration is disproportionately low compared to the revenue derived from the exploitation of the production. Article 20 of Directive 2019/790 (DSM Directive) contains a similar contract adjustment mechanism at EU level.

In order to find out whether she was entitled to a higher level of remuneration than under the existing agreement, the author initially requested from both defendants, that is, the production company and the film and media group, in multistage proceedings, information about the revenue they had generated by exploiting the films.

The Berlin regional court granted this information claim. It ruled that it did not matter whether the claimant was the sole author or a co-author, she was entitled to the information because both films had achieved a level of success that could justify amending the level of remuneration under German law. The defendants had argued that, since the conditions for adjusting the remuneration had not been met, the applicant was not entitled to the information. They claimed, firstly, that the remuneration originally agreed was not conspicuously disproportionate (as the law required) to the proceeds derived from the exploitation of the films because the author had received adequate remuneration. Regarding the conspicuous disproportion, the LG Berlin reiterated that the films had been very successful. Secondly, the defendants claimed that the right to information being claimed by the author had become time-barred. On this matter, the court referred

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to the case law of the *Bundesgerichtshof* (Federal Supreme Court – BGH), Germany's highest ordinary court. The BGH considered that information about revenue generated should be disclosed for remuneration adjustment purposes even after the limitation period. The argument that the right to the information required to determine remuneration rights was time-barred was therefore not valid.

The regional court's initial decision only concerned the right to information. A decision on whether additional remuneration should be paid has yet to be taken. An appeal against the ruling may be lodged within one month of the grounds being notified in writing.

Pressemitteilung des Landgerichts Berlin

https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2020/pressemitteilung.1009617.php

Press release of the Berlin regional court

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[DE] Bill on strengthening consumer protection in competition and trade law

Dr. Jörg Ukrow
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 4 November 2020, the German Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry of Justice and Consumer Protection – BMJV) published a bill on strengthening consumer protection in competition and trade law. The *Entwurf einer Novelle des Gesetzes gegen den unlauteren Wettbewerb* (Bill amending the Unfair Competition Act – UWG-E) is particularly designed to implement Directive (EU) 2019/2161 as regards the better enforcement and modernisation of Union consumer protection rules. It should improve consumer protection against unfair business practices, in particular in the context of digital business models, and provide for more effective enforcement of consumer law.

The bill aims to improve consumer information in the form of rankings and customer reviews. It requires operators of online market places to indicate whether suppliers who use their platforms to sell goods and services are businesses (Article 5b(1)(6) UWG-E). If comparison sites and other intermediary platforms allow users to search for the goods or services of different suppliers, they must disclose the main parameters of their rankings and how they are weighted (Article 5b(2)(1) UWG-E). Platforms, online shops and other companies that publish customer reviews must indicate whether and how they ensure that such reviews are actually written by customers (Article 5b(3) UWG-E). These new transparency obligations are supplemented with special provisions designed to protect customers from covert advertising in search results and forged customer reviews by extending the annex to Article 3(3) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG).

Under Article 9(2) UWG-E, consumers are also entitled to compensation if companies culpably infringe the consumer protection provisions of the UWG. In the case of widespread breaches in several EU member states of regulations designed to transpose Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, the relevant authorities are authorised, as part of joint enforcement measures, to impose fines of up to 4% of a company's annual turnover. For this reason, the bill provides for the inclusion of a prohibition clause (Article 5c UWG-E) and a fine (Article 19 UWG-E) in the UWG.

Irrespective of these developments at European level, a series of recent conflicting court decisions in Germany has highlighted the need for greater legislative clarity with regard to the conditions under which online content is deemed to serve a commercial purpose that needs to be labelled. This primarily concerns newer forms of commercial communication and online marketing, such as influencer marketing. In this context, the bill aims to increase legal certainty in relation to the scope of application of the UWG, in particular in terms of the distinction between the expression of personal opinions and commercial

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communication on the Internet. It explains the circumstances in which content must be labelled as commercial communication. The bill also states that a business activity carried out exclusively for the benefit of a third-party company should only be considered to have a commercial purpose if the third-party company pays a fee or similar consideration in return (Article 5a(4)(2) UWG). This means that recommendations posted by influencers exclusively for third parties without any payment being made in return do not need to be labelled as commercial communications.

Interested parties had until 2 December 2020 to respond to the draft. Their opinions will be published on the BMJV website.

Entwurf eines Gesetzes zur Stärkung des Verbraucherschutzes im Wettbewerbs- und Gewerberecht

https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Staerkung_Verbraucherschutz_Wettbewerbs-_und_Gewerberecht.pdf?__blob=publicationFile&v=2

Bill on strengthening consumer protection in competition and trade law

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[DE] Draft copyright reform bill for Germany

Christina Etteldorf
Institute of European Media Law

On 13 October 2020, the German *Bundesministerium der Justiz und für Verbraucherschutz* (Federal Ministry of Justice and Consumer Protection – BMJV) published a bill to adapt copyright law to the requirements of the digital single market. The bill mainly contains proposals for the implementation of Directive (EU) 2019/790 on Copyright in the Digital Single Market (DSM Directive) and Directive (EU) 2019/789 (the Satellite and Cable Directive, or SatCab Directive).

In particular, the bill contains a proposal for a *Urheberrechts-Diensteanbieter-Gesetz* (Copyright Service Provider Act – UrhDaG-E), which is designed to implement Article 17 of the DSM Directive and which regulates the platforms' copyright liability for content uploaded by their users, from which they can only be released if they meet specific due diligence obligations. These include the obligation to apply for certain licences to communicate protected works to the public. If protected content is not licensed and its use is prohibited, the service provider must remove or block access to it at the rightsholder's request. However, in the interests of users, the bill permits the use of protected works for the purposes of caricature, parody and pastiche, while limited minor uses for non-commercial purposes are also allowed if reasonable remuneration is paid by the platform. Video-sharing platforms must enable their users to label uploads as authorised uses in order to protect them from being immediately removed or blocked. Creators can claim remuneration directly from the platforms.

In relation to other provisions that were fiercely debated when the DSM Directive was adopted, the bill also contains proposals on the rights of press publishers. Such rules already existed in Germany, although they had been deemed inapplicable by the Court of Justice of the European Union (CJEU) (Case C-299/17) for procedural reasons after Germany had failed to meet its notification obligation. The bill again makes provision for remuneration to be paid to publishers by amending the German *Urheberrechtsgesetz* (Copyright Act – UrhG) and *Verwertungsgesellschaftengesetz* (Collecting Societies Act – VGG), with rules closely based on Article 15 of the DSM Directive.

Other amendments proposed in the bill concern the authorisation for text and data mining and cross-border education; extended collective licensing; amendments to copyright contract law; publisher remuneration; reproductions of works of visual arts in the public domain; and improvements to cross-border access to broadcast content for European civil society (the implementation of the SatCab Directive).

In addition to the provisions designed to implement EU secondary legislation, the bill introduces new rules in other areas: the CJEU's Pelham decision (*Metall auf Metall*) requires the amendment of domestic law (Germany's provision on "free use" in Article 24 UrhG is annulled), while the time limitation in the

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Urheberwissenschaftsgesetz (Act on copyright in education and research) has been removed.

The bill has not yet been approved by the other German governmental departments.

Entwurf eines Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes (Stand 2.September 2020)

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

Bill to adapt copyright law to the requirements of the digital single market (as at 2 September 2020)

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[DE] New German State Media Treaty enters into force

Christina Etteldorf
Institute of European Media Law

On 7 November 2020, the new *Medienstaatsvertrag* (State Media Treaty – MStV) entered into force in Germany, replacing the previous *Rundfunkstaatsvertrag* (State Broadcasting Treaty). The treaty not only transposes the revised Audiovisual Media Services Directive (AVMSD), amended under Directive (EU) 2018/1808, into national legislation, but also addresses other elements of the German media system in the context of a changing media landscape. In particular, it contains provisions on the findability and prominence of digital channels that are applicable to media platforms, user interfaces and media intermediaries.

The introduction of the *Medienstaatsvertrag* has been a lengthy process. Following the publication of the final report of the *Bund-Länder-Kommission zur Medienkonvergenz* (Joint Committee of the Federal Government and the *Länder* on Media Convergence) in June 2016, an initial draft treaty was published in June 2018. Two public online consultation procedures followed in relation to the first draft (in the summer of 2018) and a revised version (in the summer of 2019), in which interested members of the public were invited to give their views on the proposed regulations. On 5 December 2019, a resolution was adopted by the heads of government of the 16 German *Bundesländer*, which are responsible for enacting media legislation within Germany's federal structure in the form of a state treaty in which they agree common rules in specific fields of national relevance which they then transpose into their respective state laws. In January 2020, the *Entwurf eines Staatsvertrages zur Modernisierung der Medienordnung in Deutschland* (draft State Treaty on the modernisation of media legislation in Germany) was notified to the European Commission (notification number 2020/26/D). Although the Commission agreed to the adoption of the new rules, it raised a number of concerns, especially with regard to the new rules on platform regulation, their impact on the free movement of services and their compatibility with existing and emerging EU secondary legislation. All 16 state parliaments then had to agree to the adoption of the MStV before its entry into force in November.

In relation to the implementation of the AVMSD, the MStV, partly in connection with amendments to the *Jugendmedienschutzstaatsvertrag* (State Treaty on the protection of minors in the media), contains provisions to protect minors and human dignity on video-sharing platforms, to strengthen barrier-free services and to relax advertising restrictions for private broadcasters. As regards the so-called "new media providers", it also establishes general principles in the form of technology-neutral rules, transparency obligations and non-discrimination requirements. It contains specific regulations for media platforms (provisions on signal integrity, must-carry/accessibility and findability rules) and media intermediaries (obligations to label "social bots" and to nominate an authorised agent in the host country).

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The European Commission is currently examining whether the *Medienstaatsvertrag* implements the provisions of the revised AVMSD. On 23 November 2020, it launched infringement procedures against Germany, 22 other EU member states and the United Kingdom.

Pressemitteilung der Rundfunkkommission

https://www.rlp.de/de/regierung/staatskanzlei/medienpolitik/rundfunkkommission/

Press release of the Broadcasting Commission

Press release of the European Commission

https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2165

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[DE] Online gaming platform’s youth protection system approved

Mirjam Kaiser
Institute of European Media Law

In October 2020, the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM) confirmed the decision of the *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V.* (voluntary self-monitoring body for multimedia service providers – FSM) that the MagentaGaming gaming platform’s youth protection system meets the requirements of the *Jugendmedienschutz-Staatsvertrag* (state treaty on the protection of minors in the media - JMStV) of the German *Länder*. The KJM concluded that the FSM had not exceeded its discretionary power by approving the system at the request of the platform’s operator, Telekom Deutschland GmbH.

The KJM, as an organ of Germany’s *Landesmedienanstalten* (state media authorities), is responsible for monitoring compliance with the provisions of the JMStV applicable to broadcasters and telemedia providers. This is necessary to ensure a common level of youth protection across the country.

MagentaGaming is a cloud-based gaming service that can be used on any device. The suitability of the platform’s youth protection system was assessed by the FSM on the basis of the regulated self-regulation mechanisms established under the JMStV. The FSM is a non-profit organisation recognised by the KJM as a self-regulatory body for the telemedia sector. One of its tasks is to assess the suitability of youth protection systems in order to ensure the effective protection of minors on the Internet. According to Article 11 JMStV, such systems are suitable if they permit age group-differentiated access to telemedia and provide for state-of-the-art identification. They must also be user-friendly and allow for autonomous use by consumers.

In the case at hand, the FSM particularly examined whether the youth protection system used by MagentaGaming was capable of detecting age-restricted games on the platform and preventing unauthorised users from accessing them. It considered that the platform’s settings, including an age rating system for games and a PIN for adult content, were suitable and expedient. It also looked at whether the youth protection system was able to recognise services that might be harmful to the development of children and young people. The system used by Telekom Deutschland GmbH enabled every profile to have its own individual age setting and PIN, so access for every user could be limited to games that had been checked and were suitable for their age. The FSM concluded that children and young people could therefore be protected from content that might harm their development and that, overall, the youth protection system met the requirements of the JMStV.

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Following receipt of the FSM's evaluation, the KJM – as required by law – checked the FSM's decisions, ensuring that it had not exceeded its discretionary power in assessing the youth protection system's suitability.

The KJM concluded that the FSM had acted within its powers, therefore its decision should be considered lawful. The youth protection system of the MagentaGaming online gaming platform operated by Telekom Deutschland GmbH therefore met the requirements of the JMStV.

Pressemitteilung der KJM

https://www.kjm-online.de/service/pressemitteilungen/meldung/geeignetes-jugendschutzprogramm-fuer-gaming-plattform-magentagaming

KJM press release

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SPAIN

[ES] First Draft Law on Audiovisual Communication

María T. García Leiva
Audiovisual Diversity/ University Carlos III of Madrid

On 6 November, the Ministry of Economic Affairs and Digital Transformation made public a Draft Law on Audiovisual Communication (*Anteproyecto de Ley General de la Comunicación Audiovisual*) with the aim of transposing the European Union's amended Audiovisual Media Services Directive and updating the regulation of the sector so that there is a level playing field for all competing agents.

The draft is open to public information and consultation until 3 December and, once approved, will substitute the current Law 7/2010 on Audiovisual Communication. The main changes proposed in relation to the latter are:

- Protection of minors: The co-regulation of the description and rating of content by age is promoted; contents and advertising relating to gaming, esoterism or parascience should be aired from 1 a.m. to 5 a.m. on linear free-to-air and pay television services; and all providers would have a duty to facilitate parental control systems.

- Accessibility: The existing obligations are extended to all providers, including therefore, for the first time, pay television and on-demand services.

- Advertising: Greater flexibility is allowed for commercial communications in linear television services: the limit of 12 minutes per hour is extended to a maximum of 144 minutes between 6 a.m. and 6 p.m., and to a maximum of 72 minutes between 6 p.m. and midnight. The existing prohibitions on alcohol and tobacco are extended to all providers of audiovisual communication services.

- Promotion of European works: quotas and prefunding obligations: Quotas would apply to providers of both linear and non-linear services legally based in Spain. Linear services would continue to reserve at least 51% of their annual broadcasting time for European audiovisual works, of which 50% should be reserved for works in Spanish or in any of Spain's co-official languages. In any case, 10% of the total broadcasting time is to be reserved for independent producers. Providers of on-demand services will have to offer a 30% share of European works in their catalogues, of which 50% should be reserved for works in Spanish or in any of Spain's co-official languages. The prominence of these works shall be ensured. Pre-funding obligations would apply to providers of both linear and non-linear services legally based in or targeting Spain (as long as their previous fiscal year's income in the country reached a minimum of 10 million euros). Such obligations could be fulfilled via direct contributions to the production of works, the acquisition of their exploitation rights, or through a contribution to a national fund dedicated to the protection of cinema (Fondo de

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Protección de la Cinematografía). Obligations are stipulated differently depending on the type of provider: public service broadcasters would invest 6% of their income from the previous year, whilst commercial players would contribute 5%.

Anteproyecto de Ley General de la Comunicación Audiovisual

https://avancedigital.gob.es/es-es/Participacion/Paginas/DetalleParticipacionPublica.aspx?k=355

Draft Law on Audiovisual Communication

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FRANCE

[FR] CSA publishes extensive study on the distribution of fake news on Twitter

Amélie Blocman
Légipresse

Under the Act on the fight against the manipulation of information of 22 December 2018, the French national audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisue*l - CSA) was given new powers in this area. The CSA therefore wished to learn more about the mechanisms used to spread fake news, a problem exacerbated by the COVID-19 pandemic, by commissioning a specific study of the Twitter social network. The data required for the study was collected using Twitter's open API (interface), which can be used to collect the Tweets posted from an account, statistics specific to each Tweet (the number of ReTweets, likes, etc.) and the identity of accounts that follow or are followed by a given account.

Twitter provided all the information that it considered relevant for the report, especially concerning the efforts it was making in this area. For the purposes of the study, news is considered fake if it has been designated as such by journalists specialising in fact-checking. In the same way, Twitter accounts are categorised as reliable or likely to spread fake news, as determined by certain fact-checkers (in particular the *Décodeurs du Monde*, as part of the Décodex initiative).

The first part of the study is devoted to the analysis of the least reliable news accounts, which have a much smaller number of Twitter followers than most of the reliable news accounts. Nevertheless, accounts known to spread fake news generate the same number of ReTweets as reliable accounts; this is because followers of unreliable accounts are much more likely to help spread the information posted on these accounts than followers of reliable accounts (posting 10 to 20 times the number of ReTweets per follower). In order to better understand the impact of the virality of these accounts, the study contains a qualitative analysis of their most shared Tweets. This shows that the accounts identified as unreliable mainly focus on topical themes linked to controversial issues (policies on immigration, health, religion, terrorism, etc.).

The first section concludes by analysing the Twitter accounts of fact-checkers affiliated to traditional media. The accounts of journalistic organisations specialising in fact-checking have, on average, more followers than accounts categorised as unreliable, but they generate less interaction than the latter. In terms of the themes most commonly dealt with, only politics and religion are covered by both types of account. Fact-checkers are more interested in topics linked to their profession, such as media-related news or content connected to media and information literacy.

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The next part of the study analyses in greater detail certain pre-selected Tweets relating to fake news that was either spread or refuted by the Tweets concerned. All the fake news studied is contained in a heavy concentration of Tweets posted over a very short space of time. This observation underlines the difficulty facing fact-checkers, who have to react very quickly in order to have an impact on the spread of fake news. The analysis of their distribution chronology shows that, contrary to what might be expected or hoped, "real" news does not drive out the fake news. Furthermore, fake news is primarily used to fuel criticism of authorities or to express a form of panic, for example in relation to sensitive health issues. It relies on information that has not been cross-checked or identified as false by journalists who, for their part, post corrections in accordance with codes specific to the social networks. However, these corrections do not trigger such a high level of engagement (ReTweets, comments) as accounts that are used to spread fake news.

La propagation des fausses informations sur les réseaux sociaux - Étude du service Twitter

https://fr.calameo.com/read/00453987593232e1ffcc6?page=1

The spread of fake news on social networks – study of the Twitter service

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[FR] Court rejects former Numéro 23 owner's CSA compensation claim

Amélie Blocman
Légipresse

In a ruling of 12 November 2020, the Paris administrative court rejected a request from the former owner of the channel Numéro 23, who was claiming EUR 20.2 million in compensation from the French national audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel - CS*A). The DTT channel, now owned by the NextRadioTV group and renamed RMC Story, had been sanctioned by the CSA in 2015, when its broadcasting licence had been withdrawn and its sale to NextRadioTV blocked on the grounds of fraudulent speculation. This sanction had been overturned by the Conseil d'Etat on 30 March 2016. The channel's owner had then claimed more than EUR 20 million in compensation from the CSA in 2019 "for reparation of the damage" caused. He also demanded a symbolic payment of EUR 1 for "moral and reputational damage". Following the CSA's implicit refusal, he took his claim to the administrative court, arguing in particular that he had suffered losses as a result of the decline in value of his shares between the initially aborted sale of the channel to NextRadioTV and the subsequent completion of the sale.

The administrative court held that "the investigation shows that the company was in financial difficulty before the CSA began the sanction proceedings" and that "fluctuations in audience share between 2015 and 2016" were not "directly linked to the sanction".

Furthermore, whereas the claimant argued that Numéro 23's loss of audience share was a direct result of the CSA's decisions, the investigation had failed to prove that the fluctuations in audience share between 2015 and 2016 were directly linked to the sanction. In addition, although the investigation had shown that the sanction imposed by the CSA had exacerbated the channel's problems in selling advertising slots, these difficulties had already existed before the sanction was issued. Therefore, the court decided that, in view of its pre-existing structural and financial difficulties, the company's drop in value – which had led to a fall in the value of the claimant's shares – and the lower sale price, which had been freely negotiated in an agreement dated 1 April 2016, were not directly and necessarily attributable to the CSA's decisions.

The court therefore concluded that, since the loss of earnings cited by the claimant had not been directly caused by the CSA's sanction and subsequent decisions, he had no right to compensation. Moreover, regarding the request for a symbolic payment of EUR 1, the claimant had failed to provide any evidence to show that he had suffered any personal moral or reputational damage. Instead, he was ordered to pay legal expenses of EUR 1 500 to the CSA.

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Tribunal administratif de Paris, 5e sect. 2e ch., 12 novembre 2020, N° 1906300/5-2, M. H. P.

Paris administrative court, 5th section, 2nd chamber, 12 November 2020, No. 1906300/5-2, M.H.P.

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[FR] Media chronology: health crisis prompts new film release window derogation

Amélie Blocman
Légipresse

The decision taken to close cinemas on 30 October on public health grounds brought a halt to film screenings in cinemas. In order to protect producers and distributors, and to enable the public to continue watching the films available at the time, a decree was issued on 27 November 2020 shortening by up to four weeks the four-month period before works can be released on VOD or DVD/Blu-Ray under Article 231-1 of the Cinema and Animated Images Code.

A similar measure had been taken under the emergency law passed on 23 March 2020 in response to the COVID-19 epidemic, after cinemas had been ordered to close on 14 March.

At the start of November, the S*yndicat de l'Edition Vidéo Numérique* (Digital Video Production Union – SEVN) asked the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC) for a new derogation to media chronology rules to help the sector, which had been severely impacted by the health crisis.

Derogation requests must be sent to the CNC president by the holder of the video publishing rights, together with the following information and documents:

- the film's title, licence number and date of cinema release;

- the date on which the film is due to be released on video.

The CNC can also be asked to grant a video derogation for eligible works, that is, films with fewer than 100 000 cinema viewings within the first four weeks following release. This derogation shortens all the relevant release windows.

Décret n° 2020-1462 du 27 novembre 2020 portant dérogation exceptionnelle au délai d'exploitation des œuvres cinématographiques sous forme de vidéogrammes

https://www.legifrance.gouv.fr/download/pdf?id=qQZvjpD5KEWkBEm4pRiZiivZj44jEoKbW5FqgNLxO1g=

Decree no. 2020-1462 of 27 November 2020 concerning a one-off derogation to the video film exploitation window

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UNITED KINGDOM

[GB] BBC Introduces Guidance on Individual Use of Social Media

Julian Wilkins
Wordley Partnership

The BBC has introduced guidance on how BBC representatives should use social media, whether for their work or in a personal capacity. The Social Media Guidance (Guidance) is to be read in conjunction with the BBC's Editorial Guidance on impartiality.

The Guidance is to help preserve the BBC's reputation for impartiality, as well as to promote compliance with both its own and Ofcom's editorial guidelines. The BBC and its representatives have an obligation to ensure that the BBC's editorial decisions are not perceived to be influenced by any personal interest or bias.

The Guidance list of dos and don'ts is not definitive. The overriding principle of the Guidance is that anyone working for the BBC is a representative of the organisation, both on- and offline, including on social media; the same standards apply to the behaviour and conduct of staff in both circumstances.

The Guidance emphasises that individuals working in news and current affairs and factual journalism production, along with all senior leaders, have a particular responsibility to uphold the BBC's impartiality through their actions on social media, and so must abide by the specific rules set out in this Guidance.

Nevertheless, there will be some non-journalists or persons not involved in factual programming, who will have an additional responsibility because of their profile on the BBC. Such individuals are to avoid taking sides on party political issues or political controversies, including those concerning public policy matters.

The Guidance rules apply even if the person does not identify themselves on social media as a representative of the BBC.

The rules and expectations of social media use include being courteous and professional, as well as not bringing the BBC into disrepute. Furthermore, if the person's work for the BBC requires impartiality, then they must avoid giving their personal opinion unless it is an issue in which they have a personal interest and that interest is flagged, for instance a planning decision near where they live; moreover, representatives must not express criticism of colleagues in public and must ensure the confidentiality of meetings.

Even if the representative is expressing an opinion to a private group on social media, it must be assumed at all times that their comment is open to scrutiny and is considered in the light of their BBC role.

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Representatives of news and current affairs and factual journalism production and all senior leaders need to be careful not to show express and inadvertent bias or prejudice, for instance sharing a like, retweeting, or using a certain hashtag or emoji. In the case of “live tweeting”, representatives need to indicate that it is a developing story and that posts are not a final or settled view. Representatives expressing a personal judgment must ensure it is about their specialism and is fact-based. BBC representatives must not reveal personal voting tendencies or support any political party

News and current affairs staff should not rush to break a story at the expense of accuracy, nor should they do this through a personal social media account.

BBC representatives, without exception, must not be lured into ill-tempered exchanges, or exchanges that will reflect badly on them, or the BBC; also, they should not post when their judgement may be impaired. Likewise, they should not use their BBC status to seek personal gain or pursue personal campaigns.

The impartiality requirements begin when you start working for the BBC: they are not retrospective.

A BBC representative using a disclaimer such as "my view" or "my opinion", such as in a personal biography, will not be sufficient to circumvent the Guidance rules.

Any breach of the Guidance could include disciplinary action, even dismissal, and in the case of self-employed contracted representatives of the BBC, the termination of their contract. Independent production companies that produce social media content which is directly or indirectly associated with the BBC should ensure that the Guidance is followed.

Actors, dramatists, comedians, musicians and pundits who work for the BBC are not subject to the requirements of impartiality on social media.

The extent to which a non-staff member, whether a contributor or a presenter, is required to comply with the Guidelines will be set out in the BBC’s contractual relationship with them.

BBC Guidance: individual Use of Social Media

https://www.bbc.com/editorialguidelines/guidance/individual-use-of-social-media

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CROATIA

[HR] New Law on Electronic Media (proposal no. 62) sent to Parliament

Zrinjka Perusko
University of Zagreb

The new Law on Electronic Media was officially presented before the Croatian Parliament in November 2020 and is scheduled to be discussed in a first reading before the end of this year. This will be the seventh change in the law; it was first adopted in 2003 and amended in 2007, 2008, 2009 (twice), 2011, and 2013. Prior to 2003, the audiovisual sector was included in the Law on Telecommunications (first adopted in 1994, amended twice in 1999 and twice in 2001, with subsequent changes ceasing to encompass the content-producing media industry). The 2003 law created the Agency for Electronic Media as a financially independent arms-length regulator in the audiovisual sector. The 2009 amendment to the law introduced a non-linear audiovisual service in the law, ahead of the adoption of the 2010/13 EU Audiovisual Media Services Directive (AVMS).

The Ministry of Culture of Croatia first put forward the present legislative proposal for public consultation with the interested public via its online platform on 4 February 2020 (REF 2). While the proposal first appeared just before the start of the COVID-19 pandemic, with public attention being focussed soon afterwards on pandemic-related issues, some controversial issues regarding the proposal were publicly challenged and debated at that time. As the proposal was unveiled amid the discussions in Europe and globally about how to tackle fake news, it was presented by the Ministry of Culture as the solution to the problem of fake news on social media and online platforms. Especially troublesome was the idea in this original proposal that the (theoretically) arms-length regulatory body in the audiovisual and electronic media sector (the Agency for Electronic Media) would decide on which news and information and current affairs content did not represent reality accurately or in a way which would enable the free formation of opinion (Article 16), leading to fines of up to HRK 1 million (EUR 133 000). Many critics insisted that the only institution that should have the power to decide if media content is contrary to law are the courts, and even then, not in relation to issues of this kind, which are, and should remain, part of professional journalistic standards and ethical journalistic conduct in reporting news and current affairs. The proposal of February 2020 has since been amended, and the law before parliament no longer includes fines for news misrepresentation.

Proposal No. 62 aims to include the adopted changes in the new Audiovisual Media Services Directive (2018/1808), especially those concerning video-sharing platforms and social media; the flexibility of regulatory constraints regarding television; the increased promotion of European content and the protection of children; more effective prevention of hate speech; and the strengthening of the

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independence of national regulatory bodies (paragraph 2). The debates surrounding the proposal and the final solutions adopted will be presented in the next article.

Zakon o elektroničkim medijima (pze 62)

https://www.sabor.hr/sites/default/files/uploads/sabor/2020-11-12/164712/PZE_62.pdf

Law on Electronic Media (PZE 62)

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IRELAND

[IE] Broadcasting Authority announces details of Sponsorship Scheme 2021

Ingrid Cunningham
School of Law, National University of Ireland, Galway

On 19 November 2020, the Broadcasting Authority of Ireland (BAI) announced details of its Sponsorship Scheme 2021, with funding of up to EUR 150 000 available for applicants to support a range of activities during 2021.

The BAI's annual Sponsorship Scheme "makes funding available for media-related activities and events that support the BAI's strategic objectives and help to raise awareness of its work." The Authority considers and agrees the events and activities to be funded each year. Under the Sponsorship Scheme, applicants are invited to submit a proposal for one-off events/activities; a programme element, or elements within a larger event, or a series of connected events/activities taking place in 2021. By offering the sponsorship support to such events/activities, "the BAI contributes to the growth and continued development of the audiovisual industry in Ireland" and is also "an important tool that enables the BAI to communicate to, and engage with, a range of stakeholder groups."

The BAI states that applications for its Sponsorship Scheme 2021, "should support one or more of the objectives set out in the BAI's Strategy Statement, and in the context of the COVID-19 pandemic, must clearly outline how the proposed event/activity will be conducted in line with Government health guidelines and related restrictions." Moreover, "applications must also outline any contingencies being considered in this regard."

The BAI's Chief Executive, Mr Michael O'Keefe, commended the organisers, who, in these challenging times, "have shown great innovation to ensure that the 2020 events and activities went ahead." Mr O' Keefe stated that the Sponsorship Scheme for 2021 "is focused on events and activities that help to promote diversity and plurality and to enhance innovation and sectoral sustainability."

The BAI has published a Sponsorship Scheme guide for applicants. The closing date for receipt of applications to the BAI's Sponsorship Scheme 2021 was 17 December 2020.

Broadcasting Authority of Ireland, Funding of up to EUR 150 000 available under BAI's Sponsorship Scheme 2021

https://www.bai.ie/en/funding-of-up-to-e150000-available-under-bais-sponsorship-scheme-2021/

Broadcasting Authority of Ireland, Strategy Statement

https://www.bai.ie/en/about-us/our-strategic-goals/

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Broadcasting Authority of Ireland, 2021 BAI Sponsorship Scheme Guide For Applicants

http://www.bai.ie/en/download/135325/

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[IE] Broadcasting Authority launches online Media Ownership database

Ingrid Cunningham
School of Law, National University of Ireland, Galway

On 11 November 2020, the Broadcasting Authority of Ireland (BAI) launched a new website that provides information about the ownership and shareholdings of Irish media companies. The website provides “a structured and searchable reference database of media businesses that serve Irish audiences.” The project forms part of the BAI’s commitment to promoting media plurality, in line with the provisions in the Broadcasting Act 2009 and the Competition and Consumer Protection Act 2014. The media outlets included in the database “comprise national and local newspapers, radio stations, television channels and media websites.” Members of the public can search the database by outlets, owners and shareholders in order to improve their understanding of the Irish media landscape.

The Chief Executive of the BAI, Mr Michael O’Keefe, stated on the launch of the database that “the BAI is committed to promoting media plurality in Ireland and also to empowering audiences.” Mr O’Keefe further highlighted the role the BAI has in advising the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media on proposed media mergers in the context of protecting the plurality of media, adding that "the information in this database will also act as an important resource when examining the impact any proposed media merger may have." The website currently provides information on media ownership in Ireland up to the end of 2019, and the database will be updated in 2021 to reflect the position at the end of 2020. The School of Communications at Dublin City University has been commissioned by the BAI to design and maintain the media ownership website, which can be accessed at www.mediaownership.ie.

Broadcasting Authority of Ireland (BAI) launches online Media Ownership database

https://www.bai.ie/en/bai-launches-online-media-ownership-database/

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ITALY

[IT] First green light for the transposition of the AVMSD in Italy

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

On 29 October 2020, the Senate of the Italian Republic approved the text of the 2019 European Delegation Law, a legislative instrument by which the parliament delegates powers to the government to transpose EU directives into the Italian legal system.

Following its approval by the other parliamentary chamber (the Camera), which is expected by the end of 2020, the text will become binding, leading the way for the long-awaited process of transposing the previous year's EU legislation. The 2019 European Delegation Law refers to 38 European directives, including Directive 2018/1808 (AVMSD). Article 3 of the law thus sets down principles and guiding criteria for the implementation of the AVMSD which will need to be taken into account in the forthcoming process of revising the relevant audiovisual legislation.

The principles and criteria were initially proposed by the Council of Ministers on 23 January 2020. Following the process of public consultations and internal discussions by the relevant parliamentary committees, the guiding criteria adopted by the Senate to transpose the AVMSD refer to the following lines of action (those added during the parliamentary process are indicated in italics):

- Undertaking the revision of the Consolidated Law on Radio and Audiovisual Media Services (Legislative Decree No. 177), *that is*, the adoption of a new text on digital media services which would include new provisions and definitions relating to audiovisual, radio and video-sharing platform services.

- Ensuring the adequate protection of human dignity and minors in audiovisual content, including user-generated videos and commercial communications on video-sharing platforms.

- *Simplifying and rationalising the current measures for the promotion of European works*. In relation to this point, it should be recalled that the Italian legislation has already transposed the AVMSD's provisions on European works and European works by independent producers. The legislation regarding the promotion of European and Italian works (the so-called Franceschini Decree) has been amended several times since it was first adopted in 2017 (see IRIS 2019-10/20 and IRIS 2019-3/21). It has also received much criticism for being overly restrictive and contrary to European law.

- Adapting the rules on commercial communications to video-sharing platform services.

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- Revising advertising limits according to the principles of flexibility, proportionality and competition.

- Limiting the sound levels of commercial communications and messages.

- Ensuring that media service providers (including social platforms) provide users with sufficient information regarding the content that may harm the physical, mental or moral development of minors, including advertising and the prohibition of advertising related to gambling.

- Obliging audiovisual media service providers to provide adequate information on content that may harm the physical, mental or moral development of minors; they should provide an acoustic warning if the content is used on mobile devices.

- Protecting minors from inappropriate content, including advertising, that accompanies or is included in programmes for children and that relates to food or beverages, including alcoholic ones, which contain nutrients and substances with a nutritional or physiological effect, the excessive intake of which is not recommended in a general diet, as well as provide for suitable measures, including the promotion of self-regulatory and co-regulatory procedures, aimed at effectively reducing children's exposure to audiovisual commercial communications for such drinks and food products.

- Promoting digital literacy.

- Regulating as well as promoting self- and co-regulatory procedures, a task which is entrusted to AGCOM as the national regulatory authority for the sector. This also refers to the regulation of consumer protection measures, including out-of-court dispute resolution procedures and compensation mechanisms. AGCOM’s duties shall therefore be expanded and its prerogatives of independence further strengthened.

- Amending the administrative sanctioning system already provided for in the Consolidated Law on Audiovisual and Radio Media Services with respect to the new obligations established by the AVMSD.

- Establishing that the implementation of new measures shall not result in new or increased costs for public finances.

Legge di delegazione europea 2019

http://www.politicheeuropee.gov.it/it/normativa/legge-di-delegazione-europea/legge-delegazione-ue-2019/

European Delegation Law 2019

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[IT] New proposal to reform the governance of the Italian public service broadcaster

Ernesto Apa& Marco Bassini
Portolano Cavallo

On 15 October 2020, Andrea Orlando, a member of the Chamber of Deputies and former Minister of Justice, introduced to Parliament a new bill (No. 2723) which aims to amend the parts of the Audiovisual Media Services Code (Legislative Decree No. 177 of 31 July 2005) which regulate Italian public service broadcasting (namely RAI).

The proposed measures are intended to reform specifically the governance of the public service broadcaster. The most important aspect of the reform lies with the introduction of an ad-hoc foundation: the Ministry of the Economy and Finance shall transfer to the newly-established foundation the shares it owns in the company Rai-Radiotelevisione italiana Spa.

The board of directors of the foundation shall be competent to determine its general aims and the means to pursue them. According to Article 2 of the bill, it shall be in charge of a variety of tasks, including but not limited to: managing the foundation in accordance with the applicable principles governing public service broadcasting; drafting and implementing the public service contract; appointing the members of the board of directors of RAI-Radiotelevisione italiana Spa; approving the bylaws of RAI-Radiotelevisione italiana Spa and any modification thereof; and enforcing any liability action vis-à-vis the members of the board of directors of RAI-Radiotelevisione italiana Spa.

The board of directors shall comprise eleven members, including: five members appointed by the speakers of the Chamber of Deputies and the Senate of the Republic; two members appointed by a permanent council for the relationship between the central government and the regions; two members appointed by the Conference of Italian University Rectors (CRUI); one member appointed by the Lincean Academy; and one member appointed by the employees of RAI-Radiotelevisione italiana Spa and of the companies that the latter controls. The members of the board of directors of the foundation shall serve for a six-year non-renewable term. They shall be chosen among individuals who have well-established professional expertise, who are renowned for their independence, and who are distinguished in the relevant market sector (communications, audiovisual media, cinema, etc.). Those persons who held governmental offices or elective political offices, or who have acted as representatives of political parties in the previous two years shall not be eligible to serve as members of the board of directors of the foundation. Furthermore, the appointed experts shall be prevented from exercising any direct or indirect professional activity or from serving as directors or employees of public or private entities.

By way of its Article 3, the bill also aims to introduce a new version of Article 49 of the AVMS Code to replace the current one. This provision establishes that RAI-

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Radiotelevisione Italian Spa shall carry out the activities falling within the mandate of public service broadcasting in accordance with the AVMS Code and with the priorities and goals set by the board of directors of the foundation. RAI-Radiotelevisione italiana Spa shall implement the strategies and programmes developed by the foundation, implement the public service contract and appoint the members of the boards of the operational entities. The same eligibility requirements as those set for the members of the board of directors of the foundation shall apply. The chief executive officer of RAI-Radiotelevisione italiana Spa shall be nominated by the board of directors of the foundation and be voted by the board of the company. The CEO will serve for three years and can be re-elected; he/she shall act as the legal representative of RAI-Radiotelevisione italiana Spa. In this capacity, the CEO can also delegate powers to specific members of the board, after having consulted the board of directors of the foundation.

Camera dei Deputati, Proposta di legge d'iniziativa del deputato Orlando - Modifiche al testo unico dei servizi di media audiovisivi e radiofonici, di cui al decreto legislativo 31 luglio 2005, n. 177, in materia di disciplina e organizzazione del servizio pubblico radiofonico, televisivo e multimediale

https://documenti.camera.it/leg18/pdl/pdf/leg.18.pdl.camera.2723.18PDL0118080.pdf

Chamber of Deputies, Bill on the initiative of deputy Orlando - Amendments to the consolidated text of audiovisual and radio media services, pursuant to Legislative Decree No. 177 of 31 July 2005 concerning the regulation and organisation of public radio, television and multimedia services

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LITHUANIA

[LT] Constitutional Court confirms that funding the national broadcaster through a fixed percentage from the state budget is in line with the Constitution

Indre Barauskiene
TGS Baltic

The case was initiated by Lietuvos Vyriausybė (the Government of the Republic of Lithuania) when it applied to Konstitucinis Teismas (the Constitutional Court of the Republic of Lithuania - the Court) requesting a constitutional investigation into whether certain provisions of the laws regulating the financing of certain programmes, funds or institutions are in conformity with the Constitution of the Republic of Lithuanian (the Constitution).

Among other laws, the Law on the National Radio and Television *(Lietuvos Respublikos Lietuvos nacionalinio radijo ir televizijos įstatymas*) was questioned in this case. The law lays down that the amount of funds allocated to the national public broadcaster VšĮ Lietuvos nacionalinis radijas ir televizija (LRT) from the state budget each year shall be fixed at 1.5% of personal income tax revenues and 1.3% of the excise revenues actually received in the previous year. The law also prohibits the national public broadcaster from receiving funds for advertising and does not provide any other significant sources of financing.

The government questioned this principle on the basis that it limited its constitutional right to prepare a draft state budget and the parliament’s right to approve the state budget, as it already provides for the amounts to be allocated to LRT and does not allow the government and the parliament any freedom to adjust the budget. The government argued that the amount of funds to be allocated to the national public broadcaster should be negotiated each year together with the state budget.

The Court issued a ruling on 3 November 2020 which dismissed all of the government's doubts in respect of the funding of the national public broadcaster.

In the ruling, the Court recounted its previous constitutional doctrine, where the Court states that LRT is entrusted with the national public broadcaster's mission to ensure the public interest: to disseminate information about Lithuania and the world, and to prepare and publish programmes fostering constitutional, shared human and national cultural values, based on the principles of objectivity; democracy; impartiality; respect for human dignity and rights; freedom of expression and creativity; pluralism of opinion; morality; and ethics. This legal regulation established in the Constitution presupposes the independence of LRT, as the national public broadcaster, from state institutions, officials and other persons. Aspects of the independence of the national public broadcaster – its independence in terms of freedom of information (editorial independence) and its

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institutional independence – are inextricably linked. The national public broadcaster was not established to occupy the market. LRT's mission is different from that of a market participant: a public service broadcaster, without representing any interest group, must provide public radio and television broadcasting services to the general public and not to its founder, the state. Thus, to carry out its constitutional mission, the national public broadcaster must be financed properly to ensure its independence.

Taking into account such a constitutional doctrine, the Court in this case found that the legislator, having established a financing model according to which the main source of financing is the state budget (and at the same time prohibiting advertising), must ensure that LRT is not subject to political pressure when the state budget is being planned and approved. Otherwise, if the government had a wide measure of discretion in deciding on the amount of the state budget to be allocated to LRT each year when preparing a draft state budget, the institutional and editorial independence of LRT and the public interest enshrined in the Constitution would be compromised.

Therefore, the Court concluded that the funding of the national public broadcaster, whereby certain funding is already set out in the law, does not infringe the Constitution.

2020 m. lapkričio 3 d. Konstitucinio teismo nutarimas Nr. KT187-N15/2020

https://www.lrkt.lt/lt/teismo-aktai/paieska/135/ta2254/content

Ruling of the Constitutional Court of Lithuania in Case no. eA-1639-520/2020, dated 3 November 2020

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[LT] Supreme Court finds that using filmed footage of an offence in a television show was not sufficient to justify the restriction of a person's right to privacy and protection of image

Indre Barauskiene
TGS Baltic

The right to privacy is one of the fundamental human rights. As a general rule, a person cannot be filmed, recorded or photographed without their consent. However, these prohibitions do not apply to the recording of violations of the law, and private information and images may be published without a person's consent in cases where it helps to reveal violations of the law or criminal offences.

Taking into account this legal framework, the national broadcaster had a popular weekly show that was produced together with *Lietuvos Policija* (the Police), whereby a cameraman followed and recorded on-duty police officers responding to emergency calls.

In the present case, the claimant was filmed as a potential offender during an alleged violation of public order that had occurred near a casino. The claimant sought damages from the defendant (the producer of the show) on the ground that his right to an image had been infringed: the claimant had not only been filmed without his consent, but the footage had been shown twice on national television. According to the claimant, the publicly displayed video material had not only violated his image rights, but also his honour and dignity, and his health had also deteriorated due to the defendant's illegal actions. Therefore, the claimant requested compensation of EUR 500 000 for moral damages.

Both the court of first instance and the appellate court rejected the claim. The courts found that the claimant had been filmed on the scene through the making of a video of the police officers' work and that he had not objected to the filming or broadcasting of the filmed material, thus, in the courts' view, the claimant had agreed to be filmed and, consequently, had agreed to make the video public. In addition, the courts ruled that the claimant had been filmed and his image shown on the show on a legal basis – the claimant's own unlawful conduct in a public place.

The case reached Lietuvos Aukščiausiasis Teismas (the Supreme Court of Lithuania, hereinafter the Court), which adopted a final ruling on 28 October 2020 annulling both judgments of the lower courts. In the ruling, the Court ruled on two important aspects of the case – a person's consent and exemptions to the right to privacy and an image.

With respect to the principle of consent, the Court noted that a person's consent may be given in any form (orally, in writing or by implicit actions). However, consent to be filmed does not in itself mean consent to be shown on national

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television. The Court noted that if the person, seeing and perceiving that he is being filmed, does not express any objections to being filmed or to the filmed material being used on a television show, this does not constitute grounds for considering that consent has been given to broadcast the filmed material, especially as the person filmed does not know which content will be shown and how it will be used in the television show.

The Court once again pronounced that the burden of proof to demonstrate both consents (to being filmed and to the material being used in the TV show) lay with the producer. Taking into account the fact that no evidence had been presented to show that consent had been given, the Court found that the element restricting one's right to an image had not been established in the case at hand.

As regards the second question, the Court clarified that the conditions for restricting both the right to privacy and the right to freedom of expression are essentially the same: first, the possibility of restricting the right in question (ground) must be established by law; secondly, such a restriction must pursue a legitimate aim; thirdly, such a restriction must be necessary in a democratic society. In each case, it is necessary to strike a reasonable and fair balance between the two values protected by law, considering the facts of the individual case. And again, the burden of proof lies with the defendant.

In this case, the claimant had been filmed in a public place. However, this fact alone did not justify the finding that there were grounds for restricting the claimant's image rights. Moreover, in this case, the cause of the claimant's damages derives not from the fact of being filmed, but from the way he was portrayed on the TV show. Therefore, the courts had to assess whether these acts, and not the filming, had been performed without degrading the claimant's personal honour, dignity and reputation. It should be noted that filming may be objective and objectively reflect the reality of events (for example, the actual offence), but filmed material may be shown in a way that may not only degrade a person's honour and dignity, but also completely distort the overall context of the video.

Although the lower courts had emphasised the claimant's unlawful conduct, the Court noted that this was not sufficient to justify showing the footage with the recorded infringement in public. The lower courts had to determine whether there was a legitimate and reasonable public need to know the circumstances of the violation and/or other relevant information (personal data, factual details, etc.); this should be determined by taking into account the nature of the violation, the interests involved, the consequences, and any other aspects that would presuppose the conclusion that the case raised important issues. The courts did not assess or rule out the need for the public to know, nor did they analyse the main purpose of communication that was merely for economic gain or public curiosity.

Therefore, the Supreme Court concluded that the essence of the case had not been revealed by the lower courts. Consequently, both judgments of the lower courts were annulled, and the case was remitted to the court of first instance for

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re-examination. However, the court of first instance is bound to follow the rules set forth by the Court.

2020 m. spalio 28 d. Lietuvos aukščiausiojo teismo nutartis civilinėje byloje Nr. e3K-3-278-403/2020

http://liteko.teismai.lt/viesasprendimupaieska/paieska.aspx?card_id=B6C8684F-1240-45AB-B5D3-FFFFFDA20941

Ruling of the Supreme Court of Lithuania in civil Case no. e3K-3-278-403/2020 of 28 October 2020

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LATVIA

[LV] Amendments to the Electronic Mass Media Law adopted for the transposition of the AVMSD

Ieva Andersone
Sorainen, Latvia

On 17 November 2020, new amendments to the Latvian Electronic Mass Media Law (EMML) implementing the amended Audiovisual Media Services Directive (AVMSD) were announced.

The amendments to the EMML have been developed to transpose the AVMSD and to adapt the regulatory framework to the audiovisual and media environment, which has changed rapidly and significantly over the last decade due to digitalisation and globalisation.

Firstly, the EMML has been supplemented by the clarification of existing definitions or the addition of new definitions for services or service providers. The definition of "audio and audiovisual media service" has been fully transposed from the AVMSD, imposing editorial responsibility on service providers who offer a service with audiovisual content and form, even though the service is not related to and is separate from the service provider's main activity. Such services also include separate parts for online newspapers featuring audiovisual programmes or user-generated videos. Furthermore, the definition of "audio or audiovisual media service", besides television or radio broadcasting and on-demand audiovisual services, also includes the provision of commercial communications, as previously defined in Directive 2010/13/EU and kept in force by the AVMSD.

Amendments have extended the definition of "audio and audiovisual commercial communication" to include user-generated videos; the restrictions applicable to commercial communications will now also apply to user-generated videos, as provided for by the AVMSD. The definition has been supplemented due to the emergence of new types of unregulated service providers who are inherently comparable to audiovisual media. Accordingly, user-generated videos have been included in the EMML definition of product placement as a form of commercial communication.

Secondly, the EMML has been supplemented with an additional chapter that directly transposes the AVMSD regulations for video-sharing platforms, including the audiovisual commercial communications on those platforms. The EMML sets an obligation for the National Electronic Media Council (NEPLP) to assess whether the service provided is substantially compliant with the video-sharing platform service. In the case of compliance, and if the service provider is under Latvian jurisdiction, the NEPLP adds the video-sharing platform provider to the register. The register provides transparent information on service providers who are subject to the requirements and rules of the EMML, including the restrictions on

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commercial communications.

The provisions of the AVMSD which are applicable to commercial communications and product placement have been fully implemented in Articles 35, 41, 42, 44 and 45 of the EMML, providing a wider scope for self-promotion than previously; this also includes self-promotion where it is placed within the same electronic media group, broadcasts and services.

Given that new video-sharing platform providers may quickly appear on the market, the EMML also provides a legal framework for potential infringements with immediate and serious consequences. Section 232 of the EMML stipulates the obligation for video-sharing platform providers to develop a publicly available code of conduct, which is also required of electronic mass media.

Moreover, as the AVMSD pays special attention to the needs of persons with disabilities, the EMML has been supplemented with Article 24.1 setting obligations regarding access to electronic media. Electronic media must ensure that its services are continuously and gradually made more accessible to persons with disabilities, and it must annually report to the NEPLP.

The amendments to the EMML entered into force on 1 December 2020.

Amendments to the Electronic Mass Media Law, published in Latvijas Vēstnesis, No. 223

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[LV] The Public Electronic Media and their Management Law adopted

Ieva Andersone
Sorainen, Latvia

On 19 November 2020, the Public Electronic Media and their Management Law (PEMML) was adopted; for the first time in Latvian media regulation, the supervision of public and commercial electronic media will be dealt with separately. The PEMML is a product of lengthy discussions among various stakeholders. Among other things, it provides for a new procedure to appoint the public media board and editor-in-chief, as well as establishing an ombudsman.

The PEMML aims to ensure the efficient and transparent management, independence and accountability of public media; it also sets out the strategic purpose and the legal status of the public electronic media, as well as the principles of their operation, financing, governance and supervision.

The PEMML stipulates that public electronic media are capital companies in which all capital shares belong to the state (as is the status quo). Furthermore, the PEMML has engendered a new institution, the Public Electronic Media Council (SEPLP). The SEPLP will be the holder of state capital shares in public media. At present, the National Electronic Media Council (NEPLP) simultaneously performs the functions of a regulator, namely managing and monitoring the overall development of the Latvian electronic media industry and Latvia's public electronic media capital shareholder functions, as well as determining their public procurement. The current model makes it difficult to effectively manage and control public electronic media or to promote the development of private electronic media. The PEMML aims to solve this problem by separating the supervision of public and private media.

The SEPLP will comprise three members; the President of Latvia, the parliament (Saeima) and the Council for the Implementation of the Memorandum of Co-operation between Non-governmental Organisations and the Cabinet will nominate one member each. All members are approved by the Saeima. The law sets the requirements a person must meet in order to hold the relevant position. *Inter alia*, members of a political party or of a decision-making or executive body established by a political party or party association are not allowed to hold the position.

The SEPLP elects the members of the board of the public electronic media. The board comprises a maximum of three members. Board members will not be entitled to use their powers to directly or indirectly influence editorial decisions taken by the public media. The editor-in-chief of the public media will be responsible for the development and implementation of editorial policy. The candidate for the position of editor will be nominated by the board but elected by the SEPLP for a term of five years.

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The PEMML also provides for the establishment of a public electronic media ombudsman. The ombudsman will monitor the compliance of public electronic media services with the purpose and basic principles set out in the PEMML, as well as with the codes of ethics and editorial guidelines of the public media. Furthermore, the ombudsman will be entitled to apply to the Saeima urging for the removal of a SEPLP member or the entire council in cases where the council member's actions or omissions pose a threat to the editorial independence of the public media. The ombudsman will be elected by the SEPLP for a five-year term, subject to prior coordination with the Public Media Ethics Councils.

There is also a ban on all forms of commercial communication in public media programmes and services, including the Internet. An exception to this ban is, *inter alia*, announcements regarding sponsorship, which is a source of finance for the programme or film, and information announcements concerning cultural events.

The PEMML has been adopted by the Saeima, but it has not been announced by the President. It is scheduled to enter into force on 1 January 2021.

Draft law of the Public Electronic Media and Their Management Law. Available here

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NETHERLANDS

[NL] Dutch Court annuls GDPR fine imposed on streaming platform VoetbalTV for distributing sports content to large audiences

Jurriaan van Mil
Institute for Information Law (IViR)

On 23 November 2020, the District Court of Midden-Nederland (*Rechtbank Midden-Nederland* - the Court) annulled the decision of the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens* - DDPA) to impose a EUR 575 000 administrative fine on VoetbalTV, a streaming platform for amateur football. Most importantly, the Court found that the DDPA had erred, ruling that the commercial processing of personal data does not categorically exclude a legitimate interest in that processing under the General Data Protection Regulation (*Algemene Verordening Gegevensbescherming* - GDPR).

Following a regulatory investigation, the dispute materialised on 16 July 2020, when the DDPA decided to impose a EUR 575 000 administrative fine on VoetbalTV for the unlawful processing of personal data. According to the DDPA, VoetbalTV had no legal basis to record a large number of amateur football matches and distribute those recordings to a large audience (Article 6(1) GDPR). The DDPA substantiated the conclusion by holding that the commercial processing of personal data categorically excludes a legitimate interest in that processing (Article 6(1)(f) GDPR). More generally, the DDPA accused VoetbalTV of infringing the principle of lawfulness (Article 5(1)(a) GDPR).

As a preliminary matter, the Court considered whether VoetbalTV could successfully invoke the journalistic exception (Article 85 GDPR; Article 43 *Uitvoeringswet Algemene Verordening Gegevensbescherming*), rendering most of the GDPR inapplicable. Even though commercial purposes can coincide with journalistic purposes, the Court rejected the appeal, ruling that recordings of amateur football matches are not newsworthy enough.

As the crux of the matter, the Court considered whether a commercial interest in the processing of personal data could be considered a legitimate interest (Article 6(1)(f) GDPR). While the DDPA argued that a legitimate interest has to be specified as a legal interest in legal rules or legal principles, VoetbalTV argued that a legitimate interest must not be contrary to the law. Following an overview of European case law and supervision, the Court sided with VoetbalTV, ruling that the commercial processing of personal data does not categorically exclude a legitimate interest in that processing.

However, the Court added that two other conditions had to be satisfied as well. The processing of personal data needed to be necessary to attain the interests of VoetbalTV, and a balance needed to be struck between the interests of VoetbalTV

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and the people who were recorded by the streaming platform. According to the Court, the DDPA had not considered these conditions sufficiently, meaning that the fine had to be annulled.

In conclusion, the judgment sets an important precedent, namely that commercial interests can be considered legitimate interests under the GDPR; it contains notable principles for the application of the GDPR to audiovisual recordings and to the online distribution of sports content.

Rechtbank Midden-Nederland, ECLI:NL:RBMNE:2020:5111, 23 november 2020

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2020:5111

District Court of Midden-Nederland, ECLI:NL:RBMNE:2020:5111, 23 November 2020

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[NL] Media Act amended to incorporate the revised AVSM Directive 2018

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 1 November 2020, new legislation amending the Media Act 2008 (*Mediawet 2008*) came into effect, transposing the European Union's revised Audiovisual Media Services Directive 2018 (AVMS Directive) (see IRIS 2019-1/3) into Dutch law. The revised AVMS Directive was enacted in November 2018, and under Article 2, EU member states were required to incorporate the Directive into national law by 21 September 2020. The revised AVMS Directive contained a range of new rules, including more flexibility in television advertising, increased obligations to promote European works for on-demand services (such as Netflix), and certain audiovisual rules being extended to what are termed video-sharing platforms (such as YouTube). As such, the Dutch amending legislation contains a number of notable provisions implementing the revised AVMS Directive.

First, in relation to the promotion of European works, under a new Article 3:29c of the Media Act, providers of on-demand audiovisual media services must now offer at least a 30% share of European works in their catalogues, and European works must be given prominence. However, this obligation does not apply if the media service has a low turnover or a small audience. The Dutch Media Authority (*Commissariaat voor de Media*) can also grant an exemption from this obligation if the obligation would be impracticable or unjustified in view of the nature or subject of the media service.

Secondly, in relation to television advertising, under an amendment to Article 2.95 of the Media Act, the maximum percentage of 20% advertising is no longer calculated per clock hour. Instead, a maximum of 20% of advertising may now be broadcast between 6 a.m. and 6 p.m., and a maximum of 20% between 6 p.m. and midnight, providing more flexibility to broadcasters.

Thirdly, under a new Article 3a of the Media Act, new rules are applicable to video-platform services (*videoplatformdienst*), which are defined as services (a) whose principal purpose or essential functionality is providing audiovisual programmes or user-generated videos, or both, to the general public for information, entertainment, or education; (b) for which the video-platform provider does not have editorial responsibility; (c) the organisation of which is determined by the video-platform provider by automatic means or algorithms, and (d) is offered by means of public electronic communications networks. The new rules include the requirement for video platforms to ensure that audiovisual commercial communication is recognisable as such, that no subliminal techniques are used in audiovisual commercial communication, that audiovisual commercial communication is not offered in the form of surreptitious advertising, and that if user-generated videos contain audiovisual commercial communication and the provider of a video platform is aware of this, the provider of a video platform must inform the user about this in a way that is clear to the user. Importantly, video-

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platform providers must also take appropriate measures to protect minors from content that could be harmful to them, and they are also required to take appropriate measures to protect viewers against content that incites violence or the distribution of which is a criminal offence. Finally, the new rules for video-platform serivces under the amended Media Act are only applicable to video-platform services established in the Netherlands.

Wet van 30 september 2020, houdende wijzing van de Mediawet 2008 in verband met de implementatie van Richtlijn 2018/1808 van het Europees Parlement en de Raad van 14 november 2018 tot wijziging van Richtlijn 2010/13/EU betreffende de coördinatie van bepaalde wettelijke en bestuursrechtelijke bepalingen in de lidstaten inzake het aanbieden van audiovisuele mediadiensten (richtlijn audiovisuele mediadiensten) in het licht van een veranderende marktsituatie, 30 September 2020

https://zoek.officielebekendmakingen.nl/stb-2020-391.html

Law of 30 September 2020 amending the Media Act 2008 in connection with the implementation of Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13 / EU on the coordination of certain legal and administrative provisions in the Member States on the provision of audiovisual media services (Audiovisual Media Services Directive) in the light of a changing market situation, 30 September 2020

Commissariaat voor de Media, Gewijzigde Mediawet van kracht, 2 november 2020

https://www.cvdm.nl/actueel/gewijzigde-mediawet-van-kracht

Dutch Media Authority, Amended Media Act comes into effect, 2 November 2020

https://www.cvdm.nl/actueel/gewijzigde-mediawet-van-kracht

Mediawet 2008

https://wetten.overheid.nl/BWBR0025028/2020-11-01

Media Act 2008

https://wetten.overheid.nl/BWBR0025028/2020-11-01

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PORTUGAL

[PT] Portugal transposes the Audiovisual Media Services Directive

Helena Sousa
Communication and Society Research Centre, University of Minho

On 19 November 2020, Law No. 74/2020 was published in the *Diário da República* (Official Gazette); this new law transposes the Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 to the internal legal order, amending Law Nº 27/2007 of 30 July, which approves the Law on Television and Audiovisual Services on Demand, and Law 55/2012 of 6 September on the promotion, development and protection of cinema and cinematographic and audiovisual activities and works.

In line with European Directive 2018/1808, the Portuguese Parliament has approved Law No. 74/2020, which focuses on the following topics: the introduction of rules for video-sharing platforms; the reinforcement of accessibility criteria for people with special needs; the reinforcement of media literacy; the flexibility of advertising rules; promoting the protection of minors and combating hate speech; the promotion of the production and distribution of European audiovisual works; the specification of the country of origin and freedom of reception and retransmission; the integrity of programmes and services; and guaranteeing the independence of national regulators in the audiovisual field, among others.

On 9 July 2020, the media regulator agency Entidade Reguladora para a Comunicação Social (ERC) was asked by parliament to prepare a statement about Law Proposal 44/XIV/1ª, which transposes Directive 2018/1808. In its statement *Deliberação ERC/2020/143 (Parecer Leg)* of 29 July 2020, the ERC is critical of the legislative process, arguing in point 9 of the statement that a deep and participative debate would be recommended, considering that there were two years to do that.

The ERC qualifies the transposition of the Directive into national legislation as "minimalist" (point 17), and recommends its evaluation and potential revision within a year (point 24).

Despite the ERC’s appreciation, the law proposal was received with scepticism by the cinema and audiovisual sector. The most controversial issue was the option of not taxing large platforms, linking them solely to the obligation to invest in national production

The Secretary of State for Cinema, Audiovisual and Media, Nuno Artur Silva, publicly argued on 21 of November 2020 that the transposition of the EU Directive represented an opportunity to improve the sector and sectorial public policies.

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Lei n.º 74/2020

https://dre.pt/web/guest/pesquisa/-/search/148963298/details/maximized

Law n.º 74/2020

Deliberação ERC/2020/143 (Parecer Leg)

https://www.erc.pt/download/YToyOntzOjg6ImZpY2hlaXJvIjtzOjM5OiJtZWRpYS9kZWNpc29lcy9vYmplY3RvX29mZmxpbmUvNzg5OC5wZGYiO3M6NjoidGl0dWxvIjtzOjM0OiJkZWxpYmVyYWNhby1lcmMyMDIwMTQzLXBhcmVjZXItbGVnIjt9/deliberacao-erc2020143-parecer-leg

Deliberation ERC/2020/143 (Legal Statement)

Cinema e audiovisual: notas para o futuro próximo, Nuno Artur Silva, Diario Público

https://www.publico.pt/2020/11/21/culturaipsilon/opiniao/cinema-audiovisual-notas-futuro-proximo-1939995

Film and audiovisual: notes for a near future, Nuno Artur Silva, Diario Público

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ROMANIA

[RO] Rules for the 2020 parliamentary elections campaign coverage

Eugen Cojocariu
Radio Romania International

On 21 October 2020, the Consiliul Naţional al Audiovizualului (National Audiovisual Council) adopted the Decision on the rules for the audiovisual campaign for the election of the Senate and the Chamber of Deputies in 2020, which is scheduled for 6 December 2020 (see, *inter alia*, 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, IRIS 2019-9/22, and IRIS 2020-8/20).

According to Article 3 (1), the campaign must serve the following general interests: a) of the electorate, to receive correct information, so that they can vote knowingly; b) of the electoral candidates, to make themselves known and to present their platforms, political manifestos and electoral offers. Article 3 (2) obliges public and private broadcasters to ensure that a fair and balanced campaign is conducted for all electoral candidates by observing the following principles: a) equity - all candidates must have the opportunity to make themselves known to the electorate; b) balance in the presentation of the campaign activities of the electoral candidates; c) fairness - all electoral candidates are to benefit from an objective and equidistant treatment.

Article 5 (1) stipulates that in order to cover the election campaign, broadcasters may produce and broadcast only the following types of electoral programmes: a) informative programmes, in which information on the electoral system, voting methods 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 and election news programmes can be broadcast from Monday to Sunday; b) electoral programmes, in which the electoral candidates can present their political manifestos 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 electoral candidate. In the case of radio broadcasts, the programmes will be identified as such at the beginning of the programme, and in the case of televised broadcasts, this will be indicated by the caption “election show”, which will be visibly displayed throughout the broadcast; election shows can be broadcast from Monday to Friday; c) electoral debates, in which the broadcasters discuss the election manifestos and the topics of public interest related to the election campaign, with the participation of at least two candidates or their representatives; in the case of the non-participation of a candidate/representative thereof, this fact should be mentioned; election debate shows can be broadcast from Monday to Sunday.

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Article 6 (1) states that during the election campaign, the candidates and their representatives shall only have access to the programmes provided for in Article 5 (1) b) and c), which are aired by the public and private television and radio stations involved in the election campaign. Article 6 (2) specifies that during the election campaign, broadcasters may not broadcast programmes produced, performed or moderated by candidates or their declared representatives.

According to Article 7 (1), informative broadcasts are subject to the obligation of objectivity, equity and fair information to the public. Article 7 (2) stipulates that in the informative programmes, the presentation of campaign activities will be made exclusively by broadcasters. It is forbidden to broadcast contents related to campaign activities performed or made available to broadcasters by electoral candidates, including the broadcasting of interviews given by electoral candidates or their representatives. Article 7 (3) goes on to say that candidates holding public office may appear in news programmes only in connection with problems related to the exercise of their function; in these situations, broadcasters have the obligation to ensure the equidistance and pluralism of opinions. Finally, Article 7 (4) forbids the dissemination of information on the electoral system and voting methods that does not correspond to reality.

Article 8 (1) provisions that broadcasters must ensure fair conditions for all electoral candidates as far as freedom of expression, the pluralism of opinions and the principle of equidistance is concerned. In Article 8 (4), broadcasters are obliged to specify the capacity in which the persons invited on the programme express themselves, that is, whether they are candidates or representatives of candidates; in the case of television, the name and function of the guests will be visible on the screen at the time of their intervention.

Article 9 provisions as follows: the producers and moderators of electoral programmes and debates have the following obligations: a) to be impartial; b) to ensure the necessary balance for the development of the show, offering each candidate participating in discussions the possibility to present his/her opinions; c) to formulate the questions clearly, without being biased; d) to maintain the debate in the sphere of interest of the election campaign and of the established topics; e) to intervene when guests, through their behaviour or expressions, violate the provisions of the electoral law; if the guests do not behave as required, the moderator may decide to discontinue their microphones or to stop the show, as appropriate.

Article 11 stipulates that: (1) Private broadcasters may broadcast party election broadcasts only within electoral programmes and electoral debates; (2) The party election broadcasts shall be broadcast in separate blocks and marked as such. During the electoral show, election broadcasts by electoral candidates may not be inserted in the space allocated to their electoral opponents; (3) The content of party election broadcasts must comply with the following requirements: a) it does not endanger the constitutional order, the public order or the safety of persons or goods; b) it does not make statements that may harm human dignity or public morality; c) it does not incite hatred or discrimination on the grounds of race, religion, nationality, sex, sexual orientation or ethnicity; (4) in the case of

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electoral programmes and electoral debates broadcast by the public television and radio services, party election broadcasts can also be broadcast within the airtime allotted to the electoral candidates; (5) At the end of the blocks of party election broadcasts, public informaton announcements will be inserted; these will concern the electoral legislation made available by the Ministry of Internal Affairs and the Permanent Electoral Authority, in agreement with the National Audiovisual Council.

Finally, Article 13 provisions that broadcasters must ensure the exercise of the right to rectification or, where appropriate, the right to reply under the conditions of Law No. 208/2015, with amendments and subsequent completions.

Decizie nr. 603 din 21 octombrie 2020 privind regulile de desfăşurare în audiovizual a campaniei electorale pentru alegerea Senatului şi a Camerei Deputaţilor din anul 2020

https://cna.ro/IMG/pdf/Decizie_C.N.A._nr._603_din_21.10.2020-ALEGERI_PARLAMENTARE.pdf

Decision No. 603 of 21 October 2020 on the rules for the audiovisual campaign for the election of the Senate and the Chamber of Deputies in 2020

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[RO] State aid scheme for the cultural sector

Eugen Cojocariu
Radio Romania International

On 18 November 2020, the Government of Romania approved a Memorandum for the elaboration of a state aid scheme to support the cultural sector by allocating grants to cultural operators affected by the COVID-19 pandemic in order to help them resume their activity (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, IRIS 2020-7/12, and IRIS 2020-8/19).

The state aid scheme has a ceiling of EUR 100 million. Following a new series of discussions with representatives of Romanian artists, the Romanian Deputy Prime Minister, Raluca Turcan, said that the state aid scheme for culture would be finalised with the support of artists. The period during which potential beneficiaries can register in the Register of the Cultural Sector has been extended until 9 December 2020.

The state aid scheme covers five measures, and the eligible beneficiaries are private law entities: non-governmental organisations and companies (both SMEs and large enterprises) who, according to the activity report kept by the applicant's legal representative, have carried out activities in the last two years in one of the following cultural fields: performing arts (theatre, music, dance), visual arts (painting, sculpture, film, photography), heritage, literature, audiovisual production and cultural education. On the date of submission of the project, they must be registered in the Register of the Cultural Sector managed by the National Institute for Cultural Research and Training, an institution under the authority of the Ministry of Culture.

The scheme takes the form of two types of grants: micro-grants with a fixed value of EUR 4 000, and variable grants related either to the sale of books in 2019 or to the number of tickets sold in 2019, with a maximum ceiling of EUR 800 000 for each beneficiary.

The Ministry of Culture announced that the legal act for approving the state aid scheme for the cultural field would be discussed with potential beneficiaries in order to improve it. This announcement was made after representatives of the government and the Ministry of Culture had a series of meetings with members of the cultural and creative sector and artists, prompted notably by certain ambiguities in the public sphere regarding the way in which the state aid scheme would be implemented, as well as the categories of cultural operators to which it would be addressed. More than 90 well-known Romanian artists wrote an open letter to Prime Minister Ludovic Orban requesting the inclusion of artists in the state aid scheme in order to support the cultural sector.

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Memorandumul privind elaborarea unei scheme de ajutor de stat pentru sectorul cultural, aprobat de Guvern, Agerpress

https://www.agerpres.ro/politica/2020/11/18/memorandumul-privind-elaborarea-unei-scheme-de-ajutor-de-stat-pentru-sectorul-cultural-aprobat-de-guvern--612401

Memorandum on the development of a state aid scheme for the cultural sector, approved by the Government, Agerpress

Ministerul culturii actul normativ privind schema de ajutor de stat va fi discutat cu potenţialii beneficiari pentru a fi îmbunătăţit, Agerpress

https://www.agerpres.ro/cultura/2020/11/24/ministerul-culturii-actul-normativ-privind-schema-de-ajutor-de-stat-va-fi-discutat-cu-potentialii-beneficiari-pentru-a-fi-imbunatatit--615684

Ministry of Culture: The normative act regarding the state aid scheme will be discussed with the potential beneficiaries in order to improve it - Agerpres

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RUSSIAN FEDERATION

[RU] Rules on labelling “foreign media agents” enforced

Andrei Richter
Comenius University (Bratislava)

On 23 September 2020, Roskomnadzor, the Russian governmental supervisory authority in media and communications (see IRIS 2012-8/36), issued a decree that approved the standard text and procedure for publishing the imprint of a registered media outlet founded with the participation of a Russian legal entity that performs the functions of a “foreign agent” (see IRIS 2020-1:1/6). This was a requirement of Article 27 of the Statute of the Russian Federation “On the Mass Media” (*О средствах массовой информации*), as amended on 2 December 2019. The decree was duly registered by the Ministry of Justice on 19 October 2020 (N60449) and entered into force on 30 October 2020.

The standard imprint says: “The following story (material) is produced and/or distributed by the foreign mass media outlet that performs the functions of a foreign agent, and/or by the Russian legal entity that performs the functions of a foreign agent.”

The decree prescribes that the imprint with the standard statement on the “foreign agent” origin of a media story or material should be in audio form in the audiovisual media, last no less than 15 seconds at a normal speed, be at the same volume as the audiovisual material itself, and have no background noise or music.

In the online media, it should be in text form. The size of the font used for the imprint should be twice the size of the font used for the story (material) itself and the imprint should immediately follow the headline of the story, or – if there is no headline – should be placed before the story. Such a warning should precede each and every story by the media outlet that performs the functions of a “foreign agent”.

Приказ Федеральной службы по надзору в сфере связи, информационных технологий и массовых коммуникаций от 23.09.2020 г. № 124 "Об утверждении формы указания на то, что сообщения и материалы иностранного средства массовой информации, выполняющего функции иностранного агента, и (или) российского юридического лица, выполняющего функции иностранного агента, распространяемые на территории Российской Федерации, созданы и (или) распространены указанными лицами, а также требований и порядка размещения такого указания"

https://rg.ru/2020/10/20/roskomnadzor-prikaz124-site-dok.html

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Order of the Federal Service for Supervision in the Sphere of Communications, Information Technologies and Mass Communications of September 23, 2020 No. 124 "On approval of the form indicating that messages and materials of a foreign mass media performing the functions of a foreign agent, and (or) a Russian legal entity performing the functions of a foreign agent, distributed on the territory of the Russian Federation, created and (or) distributed by the specified persons, as well as the requirements and procedure for placing such instructions "". Rossiyskaya gazeta

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SLOVENIA

[SI] Update on the third draft AVMS law and the establishment of a European Audiovisual Production Fund

Deirdre Kevin
COMMSOL

On 6 July 2020, the Slovenian Ministry of Culture (*Ministrstvo za kulturo*) published a draft proposal for amending the Law on Audiovisual Media Services (see IRIS 2020-9/12). A first consultation closed in August, and the Ministry of Culture re-drafted sections of the law and extended the consultation on the draft until 2 October 2020. The second version of the law was withdrawn on 25 October and a third version sent on 27 October for inter-ministerial consultation, which was due to end on 9 November. Since then, there has been no news about the procedure.

An important aspect of the law was the introduction of 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 (see IRIS 2020-9:1/12).

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.

Article 16b introduced a role for the regulator – the Agency for Communication Networks and Services (AKOS) – who will be responsible for the implementation of this obligation.

According to the procedure prescribed by the law, AKOS will calculate the extent to which the media service providers have met their obligations with regard to investment. Outstanding contributions will then be paid, and in the second draft, it was established that these funds would be given to the Ministry for Culture, which manages various funds for production.

The third draft of the law (from 27 October 2020) introduced an additional article (16c) designating a different agency to be responsible for the management of these funds instead of the Ministry for Culture. The article establishes a European Audiovisual Production Fund, to be financed by the payments made by the media service providers (paragraph 3). The fund shall be managed by the Slovenian Film Centre, a public agency, on the basis of an annual work programme and a

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financial plan (paragraph 5).

Zakon o spremembah in dopolnitvah Zakona o avdiovizualnih medijskih storitvah, Ministrstvo za kulturo

https://e-uprava.gov.si/.download/edemokracija/datotekaVsebina/447961?disposition=inline

Third version of the Draft Law Amending the Audiovisual Media Services in inter-ministerial co-ordination, Ministry of Culture

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UNITED STATES OF AMERICA

[US] *Sheet Music v. Sounds*: Led Zeppelin case reminds us of copyright technicalities

Kelsey Farish
Dac Beachcroft

The copyright infringement case brought against Led Zeppelin reached its final conclusion in October 2020, as the United States Supreme Court declined the opportunity to hear an appeal of the Ninth District Federal Appeals Court in California. Accordingly, the ruling in favour of Led Zeppelin in *Michael Skidmore v. Led Zeppelin et al., Case no. 16-56057 (9th Cir., March 9, 2020)* holds as good law, likely much to the relief of record labels and well-known artists alike.

In the *Skidmore v. Led Zeppelin* litigation, the question before the court was whether the opening notes of Led Zeppelin's 1973 anthem *Stairway to Heaven* infringed a song written by Randy Wolfe. Wolfe, known professionally as Randy California, wrote *Taurus* in 1967 and regularly performed the piece with his psychedelic rock band Spirit. In 2014, Michael Skidmore, the co-trustee of Randy California's estate, brought a copyright infringement claim on the trust's behalf against the band Led Zeppelin, its individual members, Warner Music, and others.

After Led Zeppelin successfully defended the case before a jury in 2016, Skidmore had the judgment overturned in 2018. In that decision, the appeals panel invalidated the original ruling owing to errors of due process and poor jury instructions. The matter was re-litigated and, in March 2020, the appellate court reinstated the original victory for Led Zeppelin. In her judgment, Judge M. Margaret McKeown covers several key points, including the decision not to play recordings of the songs at trial, and questions of originality and similarity.

Given the pervasiveness of music streaming platforms today, it is easy to forget that in the United States, prior to the sweeping reforms of The Copyright Act of 1976, it was only the printed form (sheet music) of a composition that was protected under copyright law. Thus, when Randy California wrote *Taurus* in 1967, his work fell under the scope of The Copyright Act of 1909. The 1909 Act required that a copy of the sheet music be submitted to the Copyright Office and, importantly for our purposes, the copyright protection did not extend to the sound recording itself.

For this reason, it was only the one-page deposit copy of *Taurus* which ultimately defined the scope of the copyright. On appeal, Skidmore argued that the original jury should have been permitted to listen to the two songs in order to compare their substantial similarity (discussed below). However, Judge McKeown disagreed, and ruled that it had been proper to limit the similarity analysis to the sheet music.

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For a work to be protected by copyright, it must be independently created by the author and involve at least some minimal creativity. In proving copyright infringement, the claimant must establish that the defendant actually "copied" the work in question, in a manner which amounts to "unlawful appropriation". This can be further broken down into two limbs: "access" and "striking similarity" to the original content. The fact that Led Zeppelin had access to *Taurus* was not at issue. Indeed, Led Zeppelin performed with Spirit at least once, and Led Zeppelin's guitarist Jimmy Page testified that he owned Spirit's albums. The substantial similarity question, however, pitted expert musicologists against each other.

Absent the ability to play the songs for the jury, the legal teams needed to rely on the expert analysis of the musical compositions. Skidmore's lawyer set out five similarities, including the descending chromatic scales and the repetition of three two-note sequences (AB, BC, and CF#). Unsurprisingly, Led Zeppelin's expert explained that the compositions were completely different. Furthermore, it was argued that the alleged infringement concerned aspects which were either "unprotectable common musical elements" or simply "random" creative choices.

The court agreed that "copyright only protects the author's original expression in a work and does not protect ideas, themes or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes." Furthermore, the court observed that once Randy California had settled on using a descending chromatic scale in A minor, there were only a "limited number of chord progressions that could reasonably accompany that bass line (while still sounding pleasant to the ear)." Thus, given the relatively "narrow range of creative choices available" to Led Zeppelin, Skidmore could only assert "a 'thin' copyright, which protects against only virtually identical copying."

Stairway to Heaven is a radio classic and is estimated to have generated more than USD 500 million (EUR 412 million) in revenue over the decades. Randy California once told a journalist, "If you listen to the two songs, you can make your own judgment … I'd say it was a rip-off. And [Led Zeppelin] made millions of bucks on it and never said 'Thank you', never said, 'Can we pay you some money for it?' It's kind of a sore point with me."

One might wonder if the outcome would have been different had the 1976 Copyright Act applied, thereby permitting the jury to listen to the songs themselves. Although the lawsuit's analysis revolves around technical points of both musical arrangement and intellectual property legislation, it is also a prime example of the ways in which technology can outpace the law in the creative sector more generally.

Michael Skidmore v. Led Zeppelin et al., Case no. 16-56057 (9th Cir., March 9, 2020)

https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/09/16-56057.pdf

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