IRIS newsletter

IRIS 2021-2

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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ISSN 2078-6158

EDITORIAL

The year 2020 ended with a vague promise of a return to normality. And while we have started to see some light at the end of the tunnel thanks to the vaccine distribution process, we are becoming painfully aware of the fact that certain things may never be the same again. Some of these changes may have been brought about by the various effects of the pandemic. Others, however, may be the result of pre-existing trends.

The European Commission seems to have been aware of the need for change, since in December 2020, it launched a series of far-reaching policy and legislative initiatives. At the beginning of the month, the European Commission presented a European Democracy Action Plan, which aims at empowering citizens and building more resilient democracies across the European Union, and a Media and Audiovisual Action Plan to support the recovery and transformation of the media and audiovisual sector. A couple of weeks later, it presented a comprehensive regulatory package, the so-called Digital Services Act package, that aims at modernising the current legal framework for digital services, including social media, online marketplaces, and other online platforms that operate in the European Union.

All these initiatives have raised their share of hopes, fears and, most of all, questions – lots of questions. That is why the European Audiovisual Observatory has decided to give the public a first look at the new Digital Services Act package through an online conference that will take place on Thursday, 11 February from 3 p.m. to 5 p.m. Brussels/Paris time. You can follow the conference free of charge by clicking here.

Having said that, one thing that remains unchanged in 2021 is our commitment to bringing these and many other important developments to your attention.

Stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

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COUNCIL OF EUROPE

Changes in Eurimages' regulations

Julio Talavera
European Audiovisual Observatory

In parallel to the newly approved governance regulation (see IRIS 2020-9/5), Eurimages' Board of Management has introduced several changes to its regulations for the support of co-productions, which came into force with the new year

The support granted under the Council of Europe's film fund scheme for Support for Co-Production will now take the form of non-refundable grants when the amount received by the recipient project is under EUR 150 000. In the case of higher amounts, the grants will continue to take the form of soft loans, repayable on the basis of the revenues generated by the supported project.

In addition, Eurimages has also updated the requirements for qualifying projects in order to bring them in line with the points system of the Revised Council of Europe Convention on Cinematographic Co-production. This point system, based on the nationality of key talent, cast and crew members, now gives more importance to the origin of the director, the heads of the main departments (cinematography, sound, production and editing), as well as to the location where visual effects (VFX) and computer-generated imagery (CGI) are carried out (Article 2.6).

On the administrative side, from now on the fund will only launch three calls for projects instead of the previous four. In 2021, the deadlines are 14 January, 20 April and 15 September. Lastly, the new regulations establish that grants will be disboursed in two installments - the first, with 70% of the grant payable on the first day of principle photography, and the second, with the remaining 30% payable upon theatrical realease, therefore eliminating the previous intermediate installment payable upon completion of the digital master.

Support for co-production feature-length fiction, animation and documentary films, Eurimages

https://rm.coe.int/coprodregulations-2021-en-new/1680a0c17d

SWITZERLAND

European Court of Human Rights: *Schweizerische Radio- und Fernsehgesellschaft and publisuisse SA v. Switzerland*

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

In a case about a TV commercial in support of animal protection, the European Court of Human Rights (ECtHR) accepted that broadcasters can be required to provide an outlet for critical opinions, even if the message is presented in a provocative manner. The ECtHR found that the obligation imposed on a nationwide public service broadcaster and on an advertising sales company to run a disputed commercial did not amount to a disproportionate interference with their right to freedom of expression as protected by Article 10 of the European Convention on Human Rights (ECHR).

The two applicants in this case are the Schweizerische Radio- und Fernsehgesellschaft (SSR), a private-law association which provides nationwide public service radio and television broadcasts, and publisuisse SA (now: Admeira SA), an advertising sales company in which SSR held a 99.8% stake. The dispute was about a TV commercial booked by the Verein gegen Tierfabriken (VgT), an association which is active in the areas of animal and consumer protection (see also IRIS 2001-7/2 and IRIS 2009-10/2). A first commercial with the text “What the other media do not mention” was broadcast, while the SSR refused to broadcast a modified version with the message: "What Swiss Television does not mention" (*Was das Schweizer Fernsehen totschweigt*). The SSR motivated the refusal on the grounds that it was damaging to its commercial interests and image. VgT filed a complaint with the Independent Complaints Authority for Radio and Television (ICA) against the SSR, alleging that the refusal to broadcast the amended version of the commercial amounted to a form of censorship. The AIEP rejected that complaint. The Federal Supreme Court, however, found in favour of VgT, holding that the refusal to broadcast the commercial amounted to a restriction on VgT’s right to freedom of information. Although the commercial was unusual as it attacked the SSR directly, the mere fear that it could damage the SSR’s reputation was not sufficient to justify a refusal to broadcast it. The Supreme Court argued that, as a privileged holder of a franchise concession from the Swiss Confederation, and as the recipient of public funding through the audiovisual licence fee, the SSR did not enjoy the same freedom as a private company, even though it was bound to advertisers through private-law contracts; and although the SSR was entitled to full autonomy with regard to editorial choices in its programming, this was not the case with regard to advertising. The Supreme Court also stated that criticism should be accepted, not only of public authorities, but also of individuals or private companies which were performing a task on behalf of the state (see also IRIS 2014-2/7).

Relying on Article 10 ECHR, the SSR and publisuisse SA complained about having been obliged to broadcast a commercial, which, in their view, was damaging to their reputation. The ECtHR referred to Article 35, section 2 of the Swiss Constitution, which states that any person who performs a task on behalf of the state is required to respect fundamental rights and to contribute to implementing them. It finds this obligation particularly applicable where a private company is granted a licence for a task falling within the public service field. The ECtHR is of the opinion that the interference with the applicants' rights had been intended to guarantee the pluralism that is necessary for the functioning of a democratic society and the protection of the rights of others. Most importantly, the ECtHR focusses on the question of whether the obligation to broadcast the disputed commercial was a proportionate interference with the rights of SSR and publisuisse SA. It notes that the advertisement at issue fell outside the regular commercial context of promoting the purchase of a particular product, as it was part of a multimedia campaign through which VgT was seeking to raise awareness of its website and of the information regarding animal protection to be found on it. VgT also wanted to make it clear that the media, and in particular the SSR, had shown no interest in the subject of animal protection. Hence VgT was allowed to draw attention to this issue in the exercise of its right to freedom of expression and its participation in a debate of public interest. The ECtHR also mentions the role of the audiovisual media in a democratic society; because of their power to convey messages through sound and images, the audiovisual media have a more immediate and powerful effect than the print-based media, while the function of television as a familiar source of entertainment in the intimacy of the viewer's home further reinforced its impact. Furthermore, the ECtHR finds that the mere fear that the advertisement could damage the SSR's reputation was not sufficient to justify a refusal to run it, since freedom of expression allows for the criticism not only of public authorities, but also of individuals or private companies which are performing a task on behalf of the state. Given its particular position in the Swiss media landscape, the SSR is required to accept critical opinions and to provide an outlet for them on its broadcasting channels, even if this involves information or ideas that offend, shock or disturb: such are the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society. Furthermore, although the commercial was presented in a very provocative manner, it was clearly unrelated to the programming schedules offered by the SSR. Having the VgT commercial broadcast via other private or foreign channels was not a valid alternative option for VgT, as these other channels could not reach the same audience in Switzerland as the SSR. Therefore, the ECtHR concluded that the obligation imposed on the SSR and publisuisse SA to run the disputed commercial had not amounted to a disproportionate interference with their right to freedom of expression, and that it had therefore been "necessary in a democratic society." Unanimously, the ECtHR found no violation of Article 10 ECHR.

Arrêt de la Cour européenne des droits de l'homme, troisième section, rendu le 22 décembre 2020 dans l'affaire Schweizerische Radio- und Fernsehgesellschaft et publisuisse SA c. Suisse, requête n° 41723/14

http://hudoc.echr.coe.int/eng?i=001-206713

Jusgment of the European Court of Human Rights (Third Section), of the 22nd December 2020, on the case Schweizerische Radio- Und Fernsehgesellschaft and Publisuisse Sa v. Switzerland, application no. 41723/14

CROATIA

European Court of Human Rights: *Tölle v. Croatia*

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

The European Court of Human Rights (ECtHR) delivered an interesting judgment in the case of *Tölle v. Croatia* regarding insulting allegations of domestic violence. In a newspaper article a father accused an association of being responsible for his child's abduction by its mother. The president of this association, which provides support for women who are victims of violence, replied in a radio interview that her organisation was not involved in his daughter's abduction and that the man had violently abused his wife - that was also the reason why mother and daughter had fled the country. The association's president was subsequently convicted for the criminal offence of insult. The ECtHR found that this criminal conviction amounted to a violation of the president of the association's freedom of expression under Article 10 of the European Convention on Human Rights (ECHR): the criminal conviction for insult was a sort of censorship which discouraged the promotion of support for victims of domestic violence.

The applicant in this case was Ms Neva Tölle, the president of the Zagreb Autonomous Women's House ("the Association"), an association that supports women who are victims of violence. The Association had intervened in a family dispute between a certain D.O. and his wife C.O. following a request for help from the latter. C.O. and the couple's underage daughter had stayed for several months at the Association's refuge for women, and afterwards C.O. had taken the child abroad. A daily newspaper published an interview with D.O. in which he alleged that the Association was responsible for the fact that his daughter had been kidnapped by her mother. On the same day, Ms Tölle explained the circumstances of the Association's actions in the case and denied its involvement in the kidnapping of the child. She also stated that D.O. had been abusing his wife and that the criticism by D.O. of her association was aimed at presenting the abuser as the victim and the victim as the abuser.

A few weeks later, D.O. brought a private criminal prosecution against Ms Tölle on charges of defamation relating to her allegations that he had abused his wife. Ms Tölle was found guilty of insult; it was held that she had tarnished D.O.'s honour and reputation by alleging that he had abused his wife. The domestic courts were of the opinion that the accusation at issue could not be qualified as defamation, but as insult. By referring to D.O. as an abuser, Ms Tölle had stated a negative opinion of him that was "objectively insulting". Ms Tölle was sanctioned with a judicial admonition and ordered to pay the costs and expenses of the proceedings, as well as the expenses incurred by D.O. and his lawyer. Both an appeal before a second instance court and before the Constitutional Court were dismissed. Ms Zölle complained before the ECtHR that her criminal conviction had

violated her right to freedom of expression as guaranteed in Article 10 ECHR.

The ECtHR focusses on the question of whether the interference with Ms Tölle's right to freedom of expression could be considered as "necessary in a democratic society" in conformity with Article 10, section 2 ECHR and the Court's case law. It noted that the case at hand concerns a conflict between concurrent rights, namely, on the one hand, D.O.'s right to reputation as part of his private life, and, on the other, MS Tölle's right to freedom of expression. Referring to *Axel Springer AG v. Germany* (IRIS 2012-3/1) and *Couderc and Hachette Filipacchi Associés v. France* (IRIS 2016-1/3), the ECtHR evaluates (1) whether the radio interview at issue was about a matter of public interest; (2) how well known D.O. was, and the subject and context of the interview; (3) the prior conduct of D.O.; (4) the content, form and consequences of the radio interview; and (5) the severity of the sanction imposed on Ms Tölle. The ECtHR considers that the central issue discussed in the radio interview was about violence against women and domestic violence, an issue of important public interest and the subject of a social debate, "both at the material time and today." As D.O. had given an interview in a national daily newspaper, he had entered the arena of public debate, and therefore he should have had a higher threshold of tolerance towards any criticism directed at him. Furthermore, D.O. had publicly accused the Association, managed by Ms Tölle, of a serious criminal act in the media. In such circumstances, and bearing in mind that the right of rectification or of reply falls within the scope of Article 10 ECHR, Ms Tölle could not have been expected to remain passive and not defend the Association's reputation in the same way. The ECtHR finds that, in assessing the nature of the impugned statements, the domestic courts had limited their analysis to the fact that D.O. had never been convicted of domestic violence. The ECtHR reiterates that although a final criminal conviction amounts to incontrovertible proof that a person has committed an offence, it is unreasonable to similarly circumscribe the manner in which allegations about that person's criminal conduct are proved in the context of a defamation or insult case.

The ECtHR also holds that the domestic courts had not embarked on an analysis of whether Ms Tölle had had reasonable grounds to believe that D.O. had actually abused his wife, despite the fact that her association had provided his wife with shelter for several months and that during the criminal proceedings several witnesses had testified that there had been some sort of police intervention and allegations of domestic violence in D.O.'s family. With regard to the nature of the interference with Ms Tölle's freedom of expression, the ECtHR is of the opinion that the penalty imposed on her was mild, but that it nonetheless consisted of a criminal conviction, and consequently, an entry in Ms Tölle's criminal record. The ECtHR recognises that the sanction itself did not prevent Ms Tölle from remaining involved in the Association's activity, but it finds that the criminal conviction nevertheless amounted to a sort of censorship which might have discouraged her from promoting the Association's statutory aims in the future (see also *GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland*, IRIS 2018-6/1). The ECtHR also finds that the criminal conviction strengthened D.O.'s chances of obtaining damages against Ms Tölle in civil proceedings.

The ECtHR concludes that the domestic courts had failed to take into account the fact that Ms Tölle had been exercising her right of reply in relation to a serious accusation made against an association of which she was the president. Nor had the domestic courts carried out an adequate proportionality analysis with a view to assessing the overall context in which the impugned expressions had been used and their factual basis. They had thus exceeded the margin of appreciation afforded to them and had failed to strike a reasonable balance of proportionality between the measures restricting Ms Tölle's right to freedom of expression and the legitimate aim pursued of protecting the reputation or the rights of others. There ha accordingly been a violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, First Section (sitting as a Committee), in the case of Tölle v. Croatia, Application No. 41987/13, 10 December 2020

http://hudoc.echr.coe.int/eng?i=001-206364

EUROPEAN UNION

European Democracy Action Plan

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 3 December 2020, the European Commission presented a European Democracy Action Plan (EDAP), which aims at empowering citizens and building more resilient democracies across the European Union. The EDAP is one of the major initiatives of the Commission's Work Programme for 2020, as announced in the Political Guidelines of President von der Leyen. The Commission expects that the EDAP, taken together with the new European rule of law mechanism, the new Strategy to strengthen the application of the Charter of Fundamental Rights, the Media and Audiovisual Action Plan as well as the package of measures taken to promote and protect equality across the EU, will be a key driver for the new push for European democracy to face the challenges of the digital age.

The Action Plan sets out measures around three main pillars:

1. Promote free and fair elections

The Commission will propose legislation on the transparency of sponsored political content ("political advertising"). The Commission will also revise the rules on the financing of European political parties. Through the European Cooperation Network on Elections, the Commission will enhance cooperation among member states and launch a new operational mechanism, which will support efficient and timely exchanges on issues related to the integrity of elections, such as the cyber-security of elections. The Commission will organise a high-level event bringing together various authorities to address the challenges related to electoral processes as well as to empower citizens to participate as voters and candidates in the democratic process. A healthy democracy relies on citizen engagement and an active civil society, and not only at election times. To that end, the Action Plan promotes the use of EU structural funds and the funding available under the new Creative Europe Programme, and it also highlights the importance of active participation among young people, a key element of the EU youth strategy. The European Union will also consolidate the capacity of EU elections observation missions in third countries.

2. Strengthen media freedom and pluralism

In recent years, the safety of journalists has continued to deteriorate – physical and online threats and attacks on journalists are on the rise in several member states. This is why in 2021 the Commission will propose a recommendation on the safety of journalists, drawing particular attention to threats against women journalists, and an initiative to curb the abusive use of lawsuits against public

participation (SLAPPs). The Commission will also work closely with member states through a structured dialogue and will provide sustainable funding for projects on legal and practical assistance to journalists in the European Union and elsewhere. Finally, the Commission will also put forward further measures to support media pluralism and to strengthen the transparency of media ownership and state advertising, through, among others, the new Media Ownership Monitor.

The European Democracy Action Plan goes hand in hand with the Media and Audiovisual Action Plan, which aims to help the sector recover and make the most of the digital transformation.

3. Counter disinformation

The Action Plan proposes to improve the existing EU's toolbox for countering foreign interference, including through new instruments that allow costs to be imposed on perpetrators. The Commission will steer efforts to overhaul the Code of Practice on Disinformation into a co-regulatory framework of obligations and accountability for online platforms, in line with the upcoming Digital Services Act. To that end, in the spring of 2021, the Commission will issue guidance to enhance the Code of Practice and will set up a more robust framework for monitoring its implementation. The Commission and the High Representative will also take further measures to strengthen the resilience of our societies and foster international partnerships.

The Commission will gradually implement the European Democracy Action Plan until 2023 - a year ahead of the elections to the European Parliament. The Commission will then also assess progress made and decide whether further steps are needed.

European Democracy Action Plan

https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan_en

European Media and Audiovisual Action Plan

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 3 December 2020, the Commission adopted an Action Plan to support the recovery and transformation of the media and audiovisual sector. The Action Plan focuses on three areas of activity and 10 concrete actions, with the overall aim of helping the media sector recover from the crisis by facilitating and broadening access to financial support, transforming by stimulating investments to embrace the twin digital and green transitions while ensuring the sector's future resilience, and empowering European citizens and companies.

The three areas of activity are the following:

Recover: under the Recovery and Resilience Facility, each National Recovery and Resilience Plan will earmark a minimum level of 20% of expenditure for the digital sector. Measures to boost the production and distribution of digital content, such as digital media, will count towards this target. In addition, the Action Plan aims to:

- Facilitate access to EU support via a dedicated tool for media companies to find all relevant EU funding opportunities available to them. This will offer guidance on how to apply for relevant EU support, not only in the context of the 2021-2027 Multiannual Financial Framework, but also through national recovery and resilience plans;

- Boost investment in the audiovisual industry via the new MEDIA INVEST initiative, whose target is to leverage investments of EUR 400 million over a 7-year period;

- Launch a “NEWS” initiative to bundle actions and support for the news media sector. The initiative includes a pilot NEWS invest project with foundations and other private partners, access to loans to be backed by the InvestEU guarantee, grants, and a European News Media Forum with the sector. Particular attention will be paid to local media.

Transform: the Action Plan aims to support the green and digital transformation of the sector by:

- Encouraging European media data spaces for data sharing and innovation;

- Fostering a European Virtual and Augmented Reality industrial coalition to help EU media benefit from these immersive technologies and launching a VR Media Lab on projects for new ways of storytelling and interacting;

- Facilitating discussions and actions for the industry to become climate neutral by 2050.

Enable and Empower citizens and companies: actions include:

- Launching a dialogue with the AV industry to improve access to and the availability of audiovisual content across the European Union; to help the industry scale up and reach new audiences; and to allow consumers to enjoy a wide diversity of content;

- Fostering European media talents, including by promoting diversity both in front of and behind the camera, and by scouting and supporting media startups;

- Empowering citizens, including by strengthening media literacy and supporting the creation of independent alternative news aggregation;

- Strengthening cooperation among regulators within the European Regulators Group for Audiovisual Media Services (ERGA) to ensure the proper functioning of the EU media market.

According to the Commission, this Media and Audiovisual Action Plan goes hand in hand with the European Democracy Action Plan, and it is also fully aligned with the Commission's proposals on the Digital Services Act and the Digital Markets Act. Most of the actions outlined in the Action Plan will already be launched in the first months of 2021, and consultations with stakeholders will be carried out on how best to implement the actions on the ground.

Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation, COM/2020/784 final

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0784

Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act)

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On 15 December 2020, the European Commission published the much-anticipated Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act, DSA). The proposed DSA introduces a harmonised set of new rules for digital services, including social media, online market places, and other online platforms that operate in the European Union. It builds on the Commission's 2018 Recommendation on measures to effectively tackle illegal content online (see IRIS 2018-4/9). As the Explanatory Memorandum states, the proposed DSA "seeks to ensure the best conditions for the provision of innovative digital services in the internal market", and "contribute to online safety and the protection of fundamental rights, and to set a robust and durable governance structure for the effective supervision of providers of intermediary services."

Some general remarks on the proposed DSA can be made. First, it is *lex generalis* to other sector-specific acts of EU law regulating online intermediary services, such as the Directive on Copyright in the Digital Single Market (IRIS 2019-4/5), and the Audiovisual Media Services Directive (IRIS 2019-1/3). In addition, it does not define "illegal content" – this is defined by the member state laws, or other acts of EU law. Importantly, it does not directly regulate "harmful content". Rather, there is an attempt to mitigate the societal risks that harmful content may cause through the obligations imposed on "very large platforms" on the management of systemic risks.

In setting out the duties and responsibilities of intermediaries, the proposed DSA adopts a differentiated approach. It introduces a new terminology of Internet intermediaries having regard to their role, size and impact in the online ecosystem. The overarching term is "intermediary services" that consist of "mere conduits", "caching" and "hosting" service providers. In addition to the legal framework on the liability of providers of intermediary services, the proposed DSA also lays down obligations applicable to all providers of intermediary services, such as the obligation to establish a single point of contact (Article 10) and, where necessary, a legal representative (Article 11); terms of service taking due account of fundamental rights, along with transparency reporting requirements (Articles 12 and 13); and cooperation with national authorities following orders. Hosting service providers are additionally obligated to put in place mechanisms to allow third parties to notify the presence of alleged illegal content (Article 14), and to provide information to users (Article 15).

Online platforms are introduced as a subcategory of hosting service providers to refer to providers of hosting services that not only store information provided by the recipients of the service at their request, but that also disseminate that

information to the public, again at their request. Online platforms' obligations, in addition to those mentioned above, include setting up internal complaint-handling systems in respect of decisions taken in relation to alleged illegal content or information incompatible with their terms and conditions (Article 17); setting up out-of-court dispute settlement systems; and treating notices submitted by trusted flaggers as a priority (Article 18). Furthermore, they are obligated to publish reports on their activities relating to the removal and the disabling of information considered to be illegal content or contrary to their terms and conditions (Article 23). Online platforms are also mandated to comply with transparency obligations in respect of online advertising (Article 24).

Within online platforms, "very large online platforms" are platforms reaching more than 10% of the 450 million consumers in Europe that are subject to specific obligations, having regard to the fact that their activities may cause societal risks. For example, they are obligated to conduct risk assessments on the systemic risks brought about by or relating to the functioning and the use of their services (Article 26); to take reasonable and effective measures aimed at mitigating those risks (Article 27); and to submit themselves to independent audits (Article 28). Certain duties are imposed on very large online platforms where they use recommender systems (Article 29) or display online advertising on their online interface (Article 30). Importantly, the proposed DSA establishes the conditions under which very large online platforms provide access to data to the Digital Services Coordinator of establishment or the Commission and vetted researchers (Article 31).

Furthermore, the proposed DSA contains provisions aimed at facilitating an innovative cooperation process among public authorities to ensure effective enforcement and implementation across the Single Market. Member states are obligated to designate competent authorities, one of which will function as the "Digital Services Coordinator", responsible for the application and enforcement of the Proposed Regulation (Article 38). Importantly, the Proposal establishes the European Board for Digital Services, an independent advisory group of Digital Services Coordinators (Article 47).

The European Parliament and member states are scheduled to discuss the Commission's proposal according to the ordinary legislative procedure. Once adopted, the new rules will be directly applicable across the European Union.

Proposal on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020

https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN

Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 15 December 2020, the European Commission published the eagerly-awaited Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act) (DMA). The DMA builds upon the Platform-to-Business Regulation 2019 (see IRIS 2019-4/7), and its purpose is to target very large online platforms which act as gatekeepers between business users and end users, and which have a major impact and substantial control on the access to certain digital markets. As such, the DMA is designed to lay down harmonised rules across the European Union to ensure contestable and fair markets in the digital sector where these large gatekeepers are present. The DMA functions by providing a mechanism to designate certain very large platforms as “gatekeepers”, and once designated, these platforms are then subject to an array of significant legal obligations under the DMA.

Crucially, Article 3 of the DMA provides that certain online platforms, including online marketplaces, search engines, social media networks, and video-sharing platforms, may be designated as a gatekeeper under the DMA if certain criteria are satisfied, namely: if the platform has (a) a significant impact on the internal market; (b) operates a platform service which serves as an important gateway for business users to reach end users; and (c) enjoys an “entrenched and durable position” in its operations. Importantly, a platform will be presumed to be a gatekeeper where it achieves an annual EEA turnover equal to EUR 6.5 billion in the previous three years, or where the average market capitalisation amounted to at least EUR 65 billion in the previous year, and where it provides a platform service that has more than 45 million monthly active end users in the European Union, and more than 10 000 yearly active business users established in the European Union.

The most important aspect of the DMA is that once a platform has been designated as a gatekeeper under the DMA, it will then have numerous legal obligations under Chapter III of the DMA. These include rules relating to (a) not combining personal data sourced from their platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services; (b) allowing business users to offer the products or services through other platforms at different prices or conditions; (c) providing transparency on the pricing of advertisements; (d) using, in competition with business users, any data not publicly available; (e) allowing end users to un-install any pre-installed software applications; (f) the interoperability of software; (g) not treating more favourably in ranking services and products offered by the gatekeeper itself; and (h) providing the effective portability of data generated

through the activity of a business user or end user. Finally, in terms of compliance with the DMA, fines of up to 10% of a gatekeeper's total worldwide annual turnover may be imposed for non-compliance with the DMA's obligations. Notably, in case of systematic infringements of DMA obligations by gatekeepers, additional remedies may be imposed, including "behavioural and structural" remedies, such as divestiture of a business, or parts of it.

The European Parliament and member states will now consider the Commission's proposal according to the ordinary legislative procedure; if adopted, the new rules under the DMA will be directly applicable across the European Union.

Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, 15 December 2020

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0842&from=en

NATIONAL

BULGARIA

[BG] Local media law harmonised with the Audiovisual Media Services Directive

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On 22 December 2020, a new Act for amendment and supplement to *Закон за радиото и телевизията* (the Radio and Television Act - RTA) was promulgated in *Държавен вестник* (State Gazette) and entered into force on the same day. By way of this Act, Bulgaria has transposed Directive (EU) 2018/1808 (AVMSD/Directive) shortly after the infringement procedure opened by the Commission against Bulgaria and other countries.

Video-sharing platform services

One of the main novelties concerns the regulation of video-sharing platform services and providers within the meaning of the AVMSD. From now on, video-sharing platform providers (platform providers) under the jurisdiction of Bulgaria will be obliged to notify *Съвет за електронни медии* (the Council for Electronic Media - CEM), which will maintain a public register.The notification shall include various information on the platform provider and the platform. What is noteworthy is that a draft of the platform providers' general terms and conditions (GTC) shall be attached to the notification and these shall be subject to an *ex-ante* approval by the CEM. Future amendments to the GTC shall be subject to the same approval procedure. In addition, the CEM will have the right to take the sole initiative to amend them to ensure the interests of the audience.

Apart from the notification procedure, providers shall take appropriate measures to protect the general audience and minors from different types of harmful content. These include discriminatory content; violence and hatred; content whose dissemination constitutes a criminal offence under *Наказателен кодекс* (the Penal Code); and any other types of content which impair the physical, mental or moral development of minors. In addition, video-sharing platform providers shall comply with some of the requirements for commercial communications and *Националните етични правила за реклама и търговска комуникация* (the National Ethical Rules for Advertising and Commercial Communication) developed by *Сдружение „Национален съвет за саморегулация“* (the National Council for Self-Regulation Association).

European works and on-demand media providers

Another important amendment concerns the promotion of European works by on-demand media providers. Under the new regulation, they will have to reserve at least 30% of their content for European works. The latter shall also be given “sufficient prominence”, for example, through various means such as a dedicated section for European works that is accessible from the service homepage; the possibility of searching for European works in the search tool available as part of that service; the use of European works in campaigns of that service; or a minimum percentage of European works promoted from that service's catalogue, for example by using banners or similar tools. The minimum share of 30% is calculated on an average annual basis and on the basis of the total number of works in the relevant catalogue.

Furthermore, the CEM shall adopt rules for determining the relative weight of individual types of titles in the catalogues of on-demand media services. The rules shall also clarify the process of measuring the audience share of the on-demand audiovisual media services (subject to the EC Communication (OJ C (2020) 4291 of 2 July 2020).

It is worth mentioning that the RTA waives the EU quota requirements: i) for microenterprises; ii) for on-demand providers with an audience of less than 1% of the total audience of all on-demand audiovisual media services offered on the territory of the country; iii) where it would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services.

Closing on the topic of EU quotas, Bulgaria has decided not to transpose Article 13, paragraph 2 of the AVMSD, respectively media providers will not have an obligation to contribute financially to the production of European works.

Accessibility of audiovisual media services for persons with disabilities

The RTA will better ensure the accessibility of audiovisual media services for persons with disabilities such as impaired vision or hearing. The means to achieve greater accessibility now include (non-exhaustively): sign language, subtitling for the deaf and hard of hearing, spoken subtitles, and audio description. The RTA indicates that the achievement of such accessibility shall be gradual and imposes obligations on media service providers to submit 3-year action plans for the continuous and gradual improvement of the accessibility of their services, as well as annual reports to the CEM. The first action plans shall be provided to the media regulator within 8 months.

An obligation long-awaited by people with disabilities has been introduced for: i) all national media service providers who broadcast terrestrial digital television channels with a polythematic or informational programme profile and an average daily audience share of over 20%, and ii) for all channels of the public service broadcaster - *Българска национална телевизия* (Bulgarian National Television – BNT). They are now obliged to ensure the translation into Bulgarian sign language of at least one of their news programmes between 7 p.m. and 11 p.m.

Commercial communications

Important amendments have also been introduced in the commercial communications section of the RTA. The RTA now provides that the proportion of television advertising and teleshopping spots within the period between 6 a.m. and 6 p.m. shall not exceed 20%. For the period between 6 p.m. and 12 a.m., the maximum proportion is also 20%. There is no limitation between 12 a.m. and 6 a.m. The new approach gives more freedom to broadcasters and allows them to schedule more advertising spots during primetime. To this effect, in comparison to Article 23, paragraphs 1 and 2 of the AVMSD, the RTA has a wider scope of exceptions which are not counted against the limitations for advertising. Namely, the RTA also stipulates that the promotion of European films and public service announcements and charity appeals shall not count against the advertising quotas. Some confusion is possible, however, as regards the criteria for defining European films, as no definition is given. The most reasonable interpretation is that a European film is a film which meets the criteria for a European work (as defined in the RTA), but there is no clarity at this point, especially as there is a definition of European films in the Film Industry Act.

As regards product placement, it is noteworthy that the RTA waives the requirement set out in Article 11, paragraph 3, letter “d” of the AVMSD, except for programmes produced or commissioned by a media service provider or by a company affiliated with that media service provider. At the same time, both the AVMSD and the RTA refer to “affiliated companies”, but both acts do not stipulate a definition of the term, which may lead to issues with the interpretation and application of the law.

Self-regulation and Code of Conduct (applicable to all media service providers)

The RTA provides several new provisions which essentially change the current regime for the protection of minors. The CEM together with media service providers must prepare *Кодекс за поведение* (a Code of Conduct), which shall include measures to assess, label and restrict access to programmes which are adverse to, or pose a risk of impairing minors’ physical, mental, moral and/ or social development. The Code of Conduct must be prepared within 8 months following the entry into force of the new legislation. Until then, providers shall continue to apply the acts concerning the protection of minors which are still in effect. Furthermore, a new uniform standard for the regulation of sound levels in advertising will have to be developed, and the existing self-regulatory instruments have been given the statue of Codes of Conduct as per Article 4a, paragraph 1 of the AVMSD.

Country of origin principle (COP)

A comment deserves to be made concerning the COP. A new provision in the RTA essentially states that the rules of the Bulgarian audiovisual media services legislation shall also be applicable to providers under the jurisdiction of other member state who wholly or mainly direct their media services to the territory of Bulgaria. According to documents from the public consultations concerning the transposition of the AVMSD, this text aims to implement Article 4, paragraph 6 of

the AVMSD, but it could be argued that this is not entirely compliant with the Directive. As a result, although it is too early to assess the implications of this text, the said local provision (Article 5b, paragraph 9 of the RTA) may potentially undermine to a certain extent the COP when applied in practice.

Final comments

Other amendments in the RTA also include: extending the competences of the CEM; providing possibilities for a derogation from the principle of freedom of retransmission in case of risk of prejudice to public health; providing for effective media literacy measures and tools and raising users' awareness of those measures and tools; and many others. What seems to be missing from the RTA is new provisions to ensure that the CEM has adequate financial and human resources to carry out its functions effectively. Nevertheless, apart from some exceptions, the RTA seems to be mostly in line with the AVMSD, and major deviations from the Directive cannot be identified at this stage.

The media sector now expects the upcoming secondary legislation, which will additionally impact media services and the content that can be broadcast, especially in light of the protection of minors.

Закон за изменение и допълнение на Закона за радиото и телевизията

https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=154572

Law for amendment and supplement of the Radio and Television Act

GERMANY

[DE] *Bundesländer* demand revision of youth protection bill

Christina Etteldorf
Institute of European Media Law

At its meeting on 27 November 2020, the Bundesrat (Federal Council), through which the German *Länder* participate in federal legislation and matters relating to the European Union, criticised the federal government's bill amending the *Jugendschutzgesetz* (Youth Protection Act) on the grounds that it had failed to achieve its purpose of creating a convergent and coherent system for protecting young people in the media. In its statement concerning the bill, it mainly addressed questions relating to legal competence and substantive issues, and called for a fundamental revision of the document.

The federal government bill amending the *Jugendschutzgesetz* is primarily designed to protect children from the dangers posed by interaction with others on the Internet, such as mobbing, sexual harassment or financial scams. It makes provision for standard age rating symbols to guide parents, professionals and young people. Amending the act should help ensure that its provisions can also be enforced in relation to foreign providers whose services are particularly popular with young people. Media legislation in Germany is the responsibility of the *Länder,* which, in the *Medienstaatsvertrag* (State Media Treaty) and *Jugendmedienschutz-Staatsvertrag* (State Treaty on the Protection of Minors in the Media – JMStV), have already created and recently reformed a regulatory framework that has been further extended to include more Internet-based services. The Bundesrat fears that the proposed new regulations at federal level will threaten the convergence of these rules at state level.

Regarding legal competence, the Bundesrat particularly points out that the plan to expand the scope of protection offered by the *Jugendschutzgesetz* at federal level to include telemedia goes against the key points that were agreed in the federal government's coalition agreement for the 19th legislative period. Under that agreement, a future-oriented, coherent legal framework for the protection of children and young people in the media was to be created, taking into account the legal jurisdiction of the *Länder*. In its statement, however, the Bundesrat claimed that the protection of young people in electronic media was already fully guaranteed by the JMStV and was regularly analysed to check whether any amendments were necessary. It did not think that regulation at state level resulted in inconsistent application of the law or put German providers at a disadvantage, as the federal government had suggested in its bill. Rather, the plan to expand the scope of federal provisions to include telemedia and the creation of new supervisory structures would lead to double regulation and, therefore, inconsistent application of the law. In particular, the Bundesrat pointed out that the definition of the scope of application of the proposed law and its relationship with obligations under the JMStV were unclear, and that the diversity

of media formats had not been taken into account, since broadcasting services in particular were excluded.

The Bundesrat added that the proposed Bundeszentrale für Kinder- und Jugendmedienschutz (Federal Office for the Protection of Children and Young People in the Media), which was to be set up under the bill, would also result in double regulation in relation to the supervisory structures established under the JMStV and other national laws (in particular the *Telemediengesetz* (Telemedia Act) and the *Netzwerkdurchsetzungsgesetz* (Network Enforcement Act), both of which regulate online providers) and would lead to fragmentation. There would also be constitutional and European law concerns if an independent federal body was to hold supervisory responsibilities in an area with strong links to media law. Both the AVMSD and fundamental rights required such supervision to be carried out by an independent, non-state authority.

Stellungnahme des Bundesrats zum Entwurf eines Zweiten Gesetzes zur Änderung des Jugendschutzgesetzes, Drucksache 618/20

https://www.bundesrat.de/SharedDocs/drucksachen/2020/0601-0700/618-20(B).pdf?__blob=publicationFile&v=1

Federal Council statement on the Second Bill amending the Youth Protection Act, doc. 618/20

[DE] Constitutional Court denies public service broadcasters emergency legal protection in dispute over licence fee increase

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Institute of European Media Law

In a decision issued on 22 December 2020 in the dispute over a proposed increase in the broadcasting licence fee used to fund public service broadcasting in Germany, the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) rejected urgent applications submitted by the broadcasters forming the ARD, ZDF and Deutschlandradio contesting the block that one of the German *Bundesländer* had placed on the proposed increase. The broadcasters therefore failed in their attempt to ensure that the increase took effect on 1 January 2021 despite opposition to it, which was partly political in nature.

German households and businesses are (with some exceptions) currently obliged to pay a monthly licence fee of EUR 17.50, which is used to fund public service broadcasters. The fee is set in accordance with the broadcasters' requirements. The process for establishing their financial requirements and adjusting the fee accordingly is clearly set out in the *Rundfunkfinanzierungstaatsvertrag* (State Treaty on the financing of broadcasting – RFinStV). The complex rules governing this process include the obligation for the broadcasters to present their requirements to the independent Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten (Commission for Determining the Financial Requirements of Broadcasters - KEF), which must examine them according to the principles of economy and efficiency. Every two years, the KEF submits a report on its evaluations to the governments of the German *Bundesländer*, who are responsible for media regulation, and includes a recommended licence fee in its report. This recommendation can only be disregarded under specific, strict conditions. In its most recent report, published in 2020, the KEF proposed that the fee should be increased by EUR 0.86 to EUR 18.36 from 1 January 2021. However, in order for an increase to take effect, all the parliaments of the German *Länder* must approve an amendment to the RFinStV. After the Saxony-Anhalt Parliament rejected the proposal, its Minister-President withdrew the bill on 8 December 2020, thereby blocking the licence fee increase.

The urgent proceedings initiated with the BVerfG by the broadcasters (along with a main procedure running in parallel) concerned (and still do concern) the question of whether the Saxony-Anhalt Parliament was actually allowed to reject the fee increase. According to the RFinStV, the state parliaments can only reject the KEF's proposal if the fee increase is likely to impede free access to information or if the cost to the licence-holder is no longer reasonable. In either scenario, verifiable justification must be presented. However, in the broadcasters' view, such justification had not been provided.

The BVerfG rejected the urgent application to impose the fee increase at least temporarily pending the outcome of the main procedure. However, it was not

required to decide whether the Saxony-Anhalt Parliament's refusal to approve the increase had been lawful, since the urgent proceedings only required it to weigh the consequences of not imposing an interim order and the main application being successful against the disadvantages that would result if the interim order was granted and the main application was later dismissed. In the court's view, the broadcasters had failed to provide sufficient evidence that infringing the constitution by delaying the fee increase would be irreversibly and seriously detrimental. They would have had to show that the funds generated from the existing licence fee were insufficient to provide the programme portfolio examined by the KEF and that the broadcasters' freedom of broadcasting would therefore have been irreparably infringed. However, the BVerfG did not believe that this had been plausibly substantiated because, under its own case law, retrospective financial compensation would become due if it was later found that the licence fee had been set in breach of the constitution. The ARD members should be able to continue providing their programmes for a limited period of time.

However, the BVerfG did not rule on the legality of the Saxony-Anhalt Parliament's rejection of the proposal or the fixing of the licence fee. These questions will be dealt with in the pending Constitutional Court proceedings. Nevertheless, in its decision, the BVerfG stressed that the Saxony-Anhalt Parliament's decision may well have infringed broadcasting freedoms.

BVerfG, Beschluss des Ersten Senats vom 22. Dezember 2020 (1 BvR 2756/20 - 1 BvR 2775/20 - 1 BvR 2777/20)

http://www.bverfg.de/e/rs20201222_1bvr275620.html

Federal Constitutional Court, ruling of the First Senate of 22 December 2020 (1 BvR 2756/20 - 1 BvR 2775/20 - 1 BvR 2777/20)

[DE] Federal Supreme Court determines user information to be provided by YouTube

Mirjam Kaiser
Institute of European Media Law

In a decision (I ZR 153/17) of 10 December 2020, the Bundesgerichtshof (Federal Supreme Court – BGH), Germany's highest ordinary court, ruled that the information that must be disclosed concerning a user who has illegally uploaded copyright-protected content to a video-sharing platform does not include their e-mail address, telephone number or IP address. The court therefore followed the preliminary ruling of the Court of Justice of the European Union (CJEU) of 9 July 2020 (C-264/19).

The dispute concerned an action brought by a film distributor against the YouTube Internet platform. The film distributor was demanding that YouTube, in accordance with Article 101(3)(1) of the German *Urheberrechtsgesetz* (Copyright Act – UrhG), provide the e-mail addresses, telephone numbers and IP addresses of users who had uploaded the copyright-protected films (see Article 2(1)(6)(2) UrhG) *Parker* and *Scary Movie 5* to the video portal in 2013 and 2014. The distributor held exclusive exploitation rights in respect of these films.

YouTube is a video portal whose users can watch, upload and review video clips, as well as make them accessible to other Internet users, free of charge. In order to upload videos, users must register with the platform and provide their e-mail address, name and date of birth. If they want to post a video lasting more than 15 minutes, they must also provide a telephone number for additional verification. Users must also consent to their IP address being logged.

According to the BGH and the lower-instance courts, the right to information under Article 101(3)(1) UrhG was derived from the fact that works had been made available to the public in the sense of Article 19a UrhG illegally through the uploading of copyright-protected works without the permission of the film distributor, who owned the associated exploitation rights (Article 101(2)(1) UrhG). The right to information from YouTube under Article 101(3)(1) concerned the users' names and addresses. However, the interpretation of the term "address" was disputed, in particular whether or not it included the user's e-mail address, IP address and telephone number. Article 101(2)(1) UrhG implements Article 8(2)(a) of Directive 2004/48/EC on the enforcement of intellectual property rights and should therefore be interpreted in accordance with the directive. The CJEU was therefore asked how the term "address" in Article 8(2)(a) of the directive should be interpreted. According to the CJEU, in everyday language and in other legal instruments, the term "address" does not refer to an e-mail address, telephone number or IP address, therefore, the same should apply when interpreting the term "address" in Article 101(3)(1) UrhG. In line with the CJEU's reply, the BGH therefore rejected the claim for information based on the UrhG. It also decided that a general claim to information under the rules of good faith should be dismissed.

BGH, Urteil vom 10.12.2020 (I ZR 153/17)

https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=113487&pos=8&anz=544

Federal Supreme Court judgment of 10 December 2020 (I ZR 153/17)

[DE] German regulators responsible for Amazon Prime Video post-Brexit

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Institute of European Media Law

After the end of the Brexit transition period, Amazon's Prime Video on-demand service within the European Union will fall under the jurisdiction of German regulators, and more specifically the Munich-based Bayerische Landeszentrale für neue Medien (Bavarian new media authority – BLM). The BLM and Amazon recently announced that, following joint discussions, Amazon had met the necessary conditions for its service to come under German jurisdiction, in accordance with the relevant provisions of the Audiovisual Media Services Directive (AVMSD).

Under Article 2 of the AVMSD, which applies to on-demand audiovisual media services such as the Amazon Prime on-demand service, legal jurisdiction within the European Union depends on the state in which the service provider is established, which in turn is largely determined by where editorial decisions on the service are taken or, if necessary, where a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates. Since, under those criteria, the service had previously been operated in the European Union by the UK-based company Amazon Digital UK Ltd, the British regulator Ofcom had been responsible for its supervision. However, in cooperation with the Munich-based subsidiary Amazon Digital Germany GmbH, Amazon Digital UK Ltd has now ensured that editorial decisions regarding Prime Video in the European Union are mainly taken in Bavaria. As a result, once the United Kingdom has finally left the European Union, Ofcom will only regulate the Prime Video on-demand service in the United Kingdom.

The AVMSD contains a series of obligations for providers of on-demand audiovisual media services regarding matters such as advertising, protection from certain types of harmful content and the promotion of European works, compliance with which will in future be monitored by the BLM. The BLM will also therefore be the point of contact for regulatory bodies in other EU member states as regards the popular on-demand service. By ensuring that jurisdiction over its service lies in an EU member state, Amazon also benefits from the country-of-origin principle, which is enshrined in the AVMSD. Under this principle, the EU member states guarantee freedom of reception and must not impede the distribution of audiovisual media services from other member states in their territory on grounds related to matters coordinated by the AVMSD. By complying with the German rules implementing the AVMSD, Amazon can therefore continue to distribute its service to other member states without any restrictions. After Brexit, this provision of the AVMSD will no longer apply to audiovisual media service providers under the United Kingdom's jurisdiction, who will instead be subject to international agreements and conventions that, in many cases, at least for the time being, have a narrower scope of application. For example, the Council of Europe's Convention on Transfrontier Television, which still applies to the

relationship between the European Union and the United Kingdom, does not cover video-on-demand services. Similarly, not all audiovisual services are governed by the EU-UK Trade and Cooperation Agreement.

Pressemitteilung der BLM

https://www.blm.de/infothek/aktuell/aktuell.cfm?object_ID=14987

Bavarian new media authority press release

[DE] KJM approves *auXenticate* age verification system

Mirjam Kaiser
Institute of European Media Law

At the end of 2020, the Kommission für Jugendmedienschutz (Commission for the Protection of Minors in the Media – KJM) approved the *auXenticate* age verification system in accordance with the provisions of the *Jugendmedienschutz-Staatsvertrag* (State Treaty on the Protection of Minors in the Media - JMStV) of the German *Länder*.

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.

auXenticate is a concept within the meaning of Article 4(2)(2) JMStV and provides a comprehensive age verification system for closed user groups of adults. It is designed to ensure that Internet content that is clearly harmful to minors can only be accessed by adults. Proof of age is checked through the identification of personal data. According to the KJM, the *auXenticate* app offers a reliable age verification system.

Users of the system are required to identify themselves as adults by entering personal data into the *auXenticate* app. A so-called AppID is then created and associated with the user's smartphone. In other words, the ID is inextricably linked to the installation of the app on the smartphone, so it cannot be moved to or duplicated on different phones. This means the system cannot be used on children's smartphones. An authentication procedure also checks personal data using processes that have already been approved. Finally, the app associated with the AppID and smartphone is used to scan a QR code. This registration code is sent by e-mail for further verification. In order to confirm the registration code, a PIN sent by SMS must be entered.

In the KJM's opinion, this three-step verification system meets the necessary identification and authentication requirements.

Pressemitteilung der KJM

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

Commission for the Protection of Minors in the Media press release

[DE] State media authority initiates proceedings against Google for possible breach of new anti-discrimination rules in state media treaty

Christina Etteldorf
Institute of European Media Law

On 17 December 2020, the Medienanstalt Hamburg/Schleswig-Holstein (Hamburg/Schleswig-Holstein media authority – MA HSH) – one of Germany's 14 media regulators – initiated media law proceedings against Google Ireland Ltd. (Dublin) regarding its compliance with the new anti-discrimination rules that apply to media intermediaries under the *Medienstaatsvertrag* (State Media Treaty – MStV), which recently entered into force. The proceedings will examine cooperation between Google and the German Federal Ministry of Health which led to content from the ministry's Internet portal being given special prominence in Google search results when certain keywords were entered by users. It is claimed that this could unreasonably discriminate against other journalistic and editorial providers in the health sector.

The new MStV, which replaced the *Rundfunkstaatsvertrag* (State Broadcasting Treaty) and entered into force in Germany on 7 November 2020, contains rules for media intermediaries (defined as "any telemedia service which also aggregates, selects and presents journalistic and editorial offers of third parties in a generally accessible way without combining them into an overall offer"), such as Google in its function as a search engine operator. It applies to media intermediaries even if they are not based in Germany, as long as they are intended for use in Germany (Article 1(8) MStV). In order to safeguard diversity of opinion, Article 94 MStV prohibits media intermediaries from discriminating against journalistic and editorial content on whose perceptibility they have a particularly high influence. Discrimination occurs, for example, if the media intermediary systematically deviates from its usual aggregation, selection or presentation criteria for no objectively justifiable reason, either to the advantage or to the detriment of specific content.

The MA HSH claims that, under the recently disclosed cooperation between the Federal Ministry of Health and Google, the content of the ministry's website is presented differently from other content in Google search results: when 160 selected keywords for illnesses are entered in the search box, journalistic and editorial content from the ministry website is presented in the form of edited texts about the illnesses concerned and highlighted either next to or above (on mobile devices) other search results (in a so-called "Knowledge Panel"). Meanwhile, the content of other providers, including providers of health-related journalistic and editorial content, continues to be shown in the search results in the usual manner, provided it is relevant to the search terms entered.

The MA HSH will now examine whether this practice infringes Article 94 MStV or whether it is objectively justifiable. If the Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision – ZAK) of all the state media

authorities, acting on behalf of the MA HSH in supervisory proceedings against media intermediaries, decides that an infringement has been committed, the MA HSH will be obliged to take necessary measures, which can include a formal objection, a prohibition order or the blocking of content. This is the first time proceedings have been initiated under the new provisions of the MStV, and, with Google, it affects one of the most influential media intermediaries in the online environment.

Pressemitteilung der MA HSH

https://www.ma-hsh.de/infothek/pressemitteilung/kooperation-google-mit-bundesministerium-fur-gesundheitma-hsh-leitet-medienrechtliches-verfahren-ein.html

Hamburg/Schleswig-Holstein media authority press release

FRANCE

[FR] Adoption of ordinance transposing AVMS Directive

Amélie Blocman
Légipresse

Law No. 2020-1508 of 3 December 2020 authorised the French Government to adopt an ordinance transposing Directive (EU) 2018/1808, known as the Audiovisual Media Services Directive (AVMSD), after the wide-ranging bill on audiovisual communication and cultural sovereignty in the digital age was abandoned because of the health crisis.

Without further ado, the ordinance of 21 December 2020 was adopted, amending the Freedom of Communication Act of 30 September 1986, the Cinema and Animated Images Code and the system of film release windows. The new legislation has two objectives: to protect the sustainability of the film production funding system, in particular for independent productions, and to guarantee fairness between French distributors and global platforms. To this end, Article 19 of the ordinance describes how foreign television and audiovisual media services aimed at French audiences will be required to contribute to the production of films and audiovisual works under the system that currently only applies to French service providers. The service providers in question will be able to sign an agreement with the French audiovisual regulator (Conseil supérieur de l'audiovisuel – CSA) setting out their obligations. The ordinance also creates a new chapter IV in the Act of 30 September 1986, which explains the new scheme applicable to video-sharing platforms, the directive's definition of which is replicated in Article 2 of the Act. Under the AVMSD, these platforms are now also subject to audiovisual regulation. Those that are established on French soil will be regulated by the CSA in accordance with the country-of-origin principle.

The ordinance also transposes several other provisions of the AVMSD. It prohibits incitement to commit acts of terrorism in programmes and strengthens the rules on the protection of minors by prohibiting service providers from processing the personal data of minors for commercial purposes. The CSA will also be tasked with encouraging service providers to adopt codes of conduct in relation to food advertising and promoting general-interest audiovisual services on new interfaces used to access audiovisual content.

Finally, the ordinance authorises the government to adopt a decree setting a deadline for the renegotiation of the professional agreement of 6 September 2018 on media chronology. If this deadline passes without an agreement being reached, the government will be able to temporarily determine the length and terms of release windows that are not established in law.

In line with these new provisions, the government, backed by the CNC (*Centre national du cinéma et de l'image animée* - National Centre for Cinema and the Moving Image), has finalised the new version of the so-called AVMS decree, which

sets out the obligations of foreign platforms that target French audiences in terms of their contribution to the financing of French and European audiovisual production. The draft decree, which provides for fixed contributions of between 20% and 25% of the turnover generated in France, was notified on 18 December to the European Commission, which, along with the member states, has until 19 March to submit its observations. The government's intention is that the decree should enter into force on 1 July 2021. Meanwhile, talks recently opened between television channels and production company representatives concerning the revision of the so-called DTT decree (Decree No. 2010-747 of 2 July 2010), which lays down the production obligations of television channels.

Ordonnance no 2020-1642 du 21 décembre 2020

https://www.legifrance.gouv.fr/download/pdf?id=wqq5CCA5s0SfYJEGgvYNTvK88INSC-q-NZWqUPb-UFY=

Ordinance No. 2020-1642 of 21 December 2020

[FR] Conseil d'Etat rules that cinema closures did not constitute a manifestly illegal infringement of the freedom of expression due to the high virus transmission rate

Amélie Blocman
Légipresse

Several dozen artists, theatres and representatives of the live entertainment and cinema industries asked the Conseil d'État judge responsible for urgent applications on matters concerning fundamental freedoms to suspend the closure of cinemas, theatres and performance venues ordered by the French Government since 29 October 2020 on account of the COVID-19 pandemic. On 10 December 2020, the Prime Minister announced that these venues, as well as museums, would remain closed for at least three weeks after the end of the lockdown, which was set for 15 December 2020.

As the plaintiffs had pointed out in their application, the urgent applications judge held, firstly, that the closure of cinemas, theatres and performance venues to the public represented a serious breach of basic freedoms, in particular freedom of expression, freedom to communicate ideas, freedom of artistic creation, freedom of access to cultural works, freedom to do business, freedom of trade and industry, and freedom to carry out a profession. The fact that some of the activities concerned could continue to be made available to the public through other media or electronically was not sufficient to address this breach.

In order to justify the continued closure of these venues, the administration had noted that they were enclosed spaces occupied by a high density of people, characteristics that it said were associated with a high risk of contamination. However, between May and October 2020, the operators of the establishments concerned had designed and implemented particularly stringent health protocols that were, at least in some cases, likely to reduce the risk. As the COVID-19 scientific council had stated in a report of 26 October 2020, the risk of the virus being transmitted in live performance venues and cinemas was lower than for other indoor public events, provided such protocols were applied in practice.

In view of these circumstances, and with no prospect of the virus disappearing in the near future, the judge noted that keeping cinemas, theatres and performance venues closed to the public would be clearly unlawful if it were only justified on the grounds of a continuing risk of infection to the audience. Keeping them closed, whether throughout the country or on a regional basis, could therefore only be considered necessary, appropriate and proportionate to the aim of protecting public health while the spread of the virus remained at a particularly high level in the population, likely to compromise the treatment, and in particular the hospital admission, of infected patients and those suffering from other illnesses in the short term.

With the latest data on the day of the hearing (22 December 2020) showing a "worsening" of the health situation "that could be even more concerning at the beginning of January," and the discovery of a new, more contagious variant of the virus, given the fast-changing nature of the situation and the risk of the epidemic deteriorating in the short term, and since a decision to reopen cinemas, theatres and performance venues generally involved a period of at least two weeks prior to restarting, the judge held that the Prime Minister's decision, on the day the ordinance had been published, did not represent a clearly unlawful breach of the fundamental freedoms mentioned by the applicants.

The *Fédération Nationale des Cinémas Français* (French National Cinema Federation) said it would be "extremely careful to ensure that cinemas reopen as soon as the conditions laid down by the Conseil d'Etat are met." Unfortunately, however, whereas 20 January had been earmarked as the date for reopening, in view of the epidemic's recent resurgence, the Ministry of Culture has decided not to set any further target dates for the reopening of cinemas, museums and entertainment venues. The minister has promised to "extend the economic and financial support" for the sectors that have been shut down since 30 October 2020 "until the COVID crisis is over."

Conseil d'État (ord. réf.), 23 décembre 2020, n° 447698 et suiv., Fédération nationale des cinémas français et autres

https://www.conseil-etat.fr/Media/actualites/documents/2020/12-decembre/447698-et-suivants-salles-de-spectacles.pdf

Conseil d'Etat (urgent applications judge), 23 December 2020, No. 447698 et seq., French national cinema federation et al.

[FR] Court of Cassation confirms rejection of request to delay release of film *Grâce à Dieu*

Amélie Blocman
Légipresse

A judgment issued on 6 January 2021 by the 1st civil chamber of the Court of Cassation put an end to the dispute between the production company responsible for the film *Grâce à Dieu* (*By the Grace of God*) and the main character portrayed in the film, Father Preynat, who was indicted in 2016 on suspicion of sexually abusing minors between 1986 and 1991 while he was a priest in the diocese of Lyons. The film tells the story, in a fictional format, of three of the priest's alleged victims. In January 2019, the priest lodged an application for emergency proceedings, demanding that the film's release the following month be delayed pending a final court decision on his guilt. He based his request on alleged violations of his privacy and of the presumption of innocence. The first court and then the appeal court both rejected his demands.

In its ruling, the appeal court weighed up the right to be presumed innocent and the right to freedom of expression. It noted that this balancing process should take particular account of the content of the disputed work, its contribution to a debate of public interest, its potential influence on the criminal proceedings and the proportionality of the requested measure, as the European Court of Human Rights had stated in its judgment in *Bédat v. Switzerland*. It also held that the film *Grâce à Dieu* was an intellectual work rather than a documentary on the priest's forthcoming trial and concerned the freedom of speech of victims of child abuse in the Catholic church, which was an issue of public interest.

Finally, the court pointed out that the film started with a written message stating that "This film is fictional, based on real facts", informing the public that it was an intellectual work, and concluded with another, stating that "Father X... should be presumed innocent". All viewers would therefore be informed that the priest should be presumed innocent when the film was released. Furthermore, the story told in the film was already in the public domain. Finally, delaying the release of the film until the conclusion of the priest's trial could result in it not being released for several years. This would cause a serious and disproportionate violation of the freedom of expression. The priest lodged an appeal against the appeal court's ruling with the Court of Cassation.

The Court of Cassation ruled that the appeal court had correctly weighed up the interests involved and assessed the impact that the film and the warnings issued to its viewers might have on the criminal proceedings, and did not think the priest would have been presumed guilty before his trial. The appeal court had therefore been right to rule that delaying the film's release until the conclusion of the trial would be disproportionate to the interests at stake.

Cour de cassation, 1re chambre civile, 6 janvier 2021, n° 19-21718

https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/26_6_46230.html

Court of Cassation, 1st civil chamber, 6 January 2021, No. 19-21718

[FR] Fight against online hate speech addressed again in bill “strengthening respect for the principles of the Republic”

Amélie Blocman
Légipresse

The torrent of anti-Semitic tweets targeting the Miss France runner-up on the evening of the beauty pageant on 20 December 2020 once again brought into sharp focus the need to strengthen the tools available to combat online hate speech in France. The law to combat hate speech on the Internet, known as the “Avia law”, of 24 June 2020, which required social networks to remove manifestly illegal hate speech within 24 hours (or one hour in some cases), was almost entirely rejected by the Constitutional Council. One of the few provisions to escape criticism concerned the creation of a “parquet numérique” (digital public prosecution authority) to act as a specialist body in order to centralise and simplify the reporting procedure so that online hate speech could be dealt with effectively by the courts.

Enacted pursuant to Article 15-3-3 of the Code of Criminal Procedure, as amended by Article 10 of the Avia law, the decree of 24 November 2020 gives the Tribunal Judiciaire de Paris (Paris judicial court) jurisdiction to deal with Internet-based psychological and sexual harassment of a discriminatory nature that is committed on French soil and reported online. This national jurisdiction is concurrent with that of other courts with local jurisdiction. On 24 November, in order to deal with all online threats and hate speech “in real time”, the Minister of Justice, Eric Dupond-Moretti, sent a circular letter to French public prosecutors explaining the specialist body’s powers and the criteria under which cases could be referred to it. It can examine acts of direct provocation committed on the Internet that are not actually followed by the commission of a crime or offence (Article 24(1) and (2) of the 1881 press law); incitement to discrimination, hatred or violence (Article 24(7) and (8)); public insults and defamation based on origin, race, religion, gender or sexual orientation; and psychological harassment through messages containing aggravating elements (for example, mentioning the victim’s background, race or religion). Whether a case can be referred to the Paris-based authority depends on its complexity, which is based on the technicality of the investigation, the public disorder that results from it, in particular the media attention created, and the sensitivity of the case. The specialist body will work in close cooperation with the Pharos reporting platform.

Chapter 4 of the bill strengthening respect for the principles of the Republic, which was presented to the Council of Ministers on 9 December and which will be debated in parliament from 1 February, contains a series of provisions aimed at combatting online hate speech and illicit content. It introduces a new offence of “endangering the lives of others” by distributing information about their private life “in order to knowingly expose them or members of their family to a direct risk of an attack on their person or possessions.” Presented as a means of responding to the hate campaign waged against Samuel Paty, the teacher who was murdered

last October, this offence will be punishable with a three-year prison sentence and a fine of EUR 45 000. The bill also contains a measure to combat mirror sites that replicate illegal content that has been removed or blocked by the courts.

In anticipation of the implementation of the Digital Services Act, the bill also contains a provision designed to regulate the moderation of illicit content on social networks and search engines, under the responsibility of the CSA (the French audiovisual regulator).

Décret n° 2020-1444 du 24 novembre 2020 pris pour l'application de l'article 15-3-3 du Code de procédure pénale Projet de loi confortant le respect des principes de la République

https://www.assemblee-nationale.fr/dyn/15/dossiers/respects_principes_republique?etape=15-AN1-DEPOT

Decree No. 2020-1444 of 24 November 2020 pursuant to Article 15-3-3 of the Code of Criminal Procedure Bill strengthening respect for the principles of the Republic

[FR] Creation of fund to compensate for interruption, delay or abandonment of filming due to COVID-19 pandemic

Amélie Blocman
Légipresse

As the COVID-19 pandemic enters a new phase, with vaccinations becoming available and new mutations of the virus being discovered, the French Government has continued to support the audiovisual sector, which has suffered long-term harm because of the health crisis. In a decree published on 30 December 2020, a special support fund was created for certain audiovisual production companies whose filming on French soil was interrupted, delayed or abandoned when one or more indispensable individuals, such as production team members, were unable to work due to the COVID-19 virus. This one-off fund is designed to enable the production companies concerned to pay the additional costs not covered by their insurance and to encourage them to resume filming. The decree sets out the conditions of eligibility for the funding and how it will be managed. The support is available to programmes in any of the following three genres: game shows and magazine programmes; entertainment; documentaries and real-life programmes. The programme must also: be the subject of a pre-purchase or co-production agreement with a television or on-demand audiovisual media service provider established in France; be covered by an insurance policy that includes a guarantee concerning the unavailability of individuals; have involved filming that started, resumed or was delayed on or after 1 June 2020; and be produced on French soil. Finally, the programme must not be eligible for the financial support granted by the *Centre national du cinéma et de l'image animée* (National Centre of Cinematography and the Moving Image) under its general regulations. In order to receive funding, which takes the form of a subsidy, production companies must apply to the Minister of Communication by 31 May 2021.

On 16 January, the Prime Minister announced that the state’s financial support programme would be extended (solidarity fund, social charge exemptions and wage subsidies). In addition to the cross-sector measures, specific arrangements aimed at each part of the cultural sector, whether providing support to companies or individuals (rescue fund, emergency fund, compensation), will also be extended and adapted if necessary. The Minister of Culture announced that a particular effort would be made to protect jobs in the artistic and cultural sector, for both artists and authors.

Décret n° 2020-1794 du 30 décembre 2020 portant création d'un fonds d'indemnisation pour interruption, report ou abandon des tournages de programmes de flux liés à l'épidémie de covid-19

https://www.legifrance.gouv.fr/download/pdf?id=3EW2asQgntsWrcVjAJncs1RQQdy3PjpVTTL0upeEjrY=

Decree No. 2020-1794 of 30 December 2020 creating a fund to compensate for the interruption, delay or abandonment of TV filming linked to the COVID-19 epidemic

UNITED KINGDOM

[GB] A new change is introduced to the Code of Practice for British newspapers, magazines and news websites

Alexandros K. Antoniou
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The Editors' Code of Practice, under which the majority of Britain's newspaper, magazine and news website journalists operate, was reviewed in 2020 and changes to it became effective from 1 January 2021.

The Code is described by the Editors' Code of Practice Committee (which draws up the Code's provisions) as the 'cornerstone' of the UK press self-regulatory system. Its rules set standards that the industry members who voluntarily subscribe to it have agreed to maintain. Editors and publishers can be held to account via the Independent Press Standards Organisation (IPSO), which became the new regulatory body for the industry on 8 September 2014. IPSO has not yet sought formal approval from the Press Recognition Panel, which was established following the Leveson Report recommendations in the aftermath of the phone-hacking scandal to ensure that any future press regulator meets certain standards.

The Code covers various aspects of journalistic activity, such as accuracy, harassment, crime reporting, confidential sources and financial journalism. Since its first publication in 1991, it has been amended several times to adapt to developments in the industry, technology and public attitudes. Changes were introduced in late 2020 following a public consultation that attracted over 1 000 submissions on that occasion. The Code had last been revised in 2018.

Following consideration of representations made by charities campaigning on the issue of mental health, Clause 2 of the Code on privacy (which is subject to public interest exceptions) was amended to make specific reference to mental health. The text of Clause 2(i) now reads: "Everyone is entitled to respect for their private and family life, home, *physical and mental health*, and correspondence, including digital communications."

Mental health was already covered implicitly by Clause 2, but the Code expressly recognises now that mental health is one of the issues that raise ethical considerations around privacy. The amendment also reflects changing societal attitudes. As the Editors' Code of Practice Review Report noted, "mental health is now openly acknowledged, and the press can take some credit for driving that welcome transformation."

Finally, it is hoped that the change will improve understanding of the protection that Clause 2 provides for individuals. For more details on the contents of its remaining sub-clauses, see the earlier report in IRIS 2018-3/19.

The Editors' Code of Practice (incorporating changes taking effect from 1 Jan. 2021)

https://www.editorscode.org.uk/the_code_2021_no_links.php

Editors' Code of Practice Review Report 2020

https://www.editorscode.org.uk/downloads/reports/Editors-Code-of-Practice-Review-2020-Report.pdf

[GB] Facebook provides Undertakings to the Competition and Markets Authority to improve transparency of incentivised content on Instagram

Julian Wilkins
Wordley Partnership and Q Chambers

On 16 October 2020, the Competition and Markets Authority (CMA) published undertakings dated 1 October 2020 given by Facebook Ireland Ltd, which operates Instagram in the United Kingdom, committing to tackling hidden advertising on the photo- and video-sharing platform. The undertakings were issued pursuant to section 219 (4) of the Enterprise Act 2002. The CMA had been investigating hidden advertising on Instagram concerning too many social media influencers posting content about businesses without clarifying whether they had been paid or incentivised to do so, and whether Facebook was adequately addressing the problem.

Incentivised endorsements are defined by the CMA guidelines as any situation where a user, such as an influencer, posting content has received any payment or gift directly or indirectly from the brand in the past year (irrespective of whether this was “in exchange for” the post). This includes any type of financial or non-financial benefit, as this could influence their opinion of the product.

The undertakings will make it harder for an advert to be posted on Instagram without labelling it as such. Such clear labelling brings incentivised posts into line with consumer protection law, particularly the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), to guard against people being misled.

The CPR bans the practice of falsely claiming or creating the impression that a trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

Instagram undertakes to prompt users to confirm if they have been incentivised in any way to promote a product or service and, if so, requires them to disclose this fact clearly.

It also undertakes to further extend its "paid partnership" tool to all users so they can easily display a clear label at the top of a post.

Furthermore, it undertakes to use technology and algorithms designed to identify when users might not have disclosed clearly that posts are adverts, and to report those users to the businesses being promoted. One undertaking by Facebook is to investigate the effectiveness and feasibility of developing a reporting tool to allow users to report suspected inadequately labelled or unlabelled incentivised endorsements, and, if feasible, to provide that tool to users.

Instagram is also required to involve businesses in the changes by creating a tool to help them monitor how their products are being promoted. This will ensure that businesses comply with consumer protection law and take action where

appropriate, including asking the platform to remove posts if necessary. Instagram will report its progress against all commitments to the CMA regularly.

The undertakings apply to all users in the United Kingdom as well as to anyone globally who directs their posts towards Instagram users in the United Kingdom. It is part of a wider investigation into misleading online endorsements; in 2019, sixteen celebrities pledged to reform how they promoted themselves on social media following CMA action.

Andrea Coscelli, Chief Executive of the CMA, said: “For too long, major platforms have shied away from taking responsibility for hidden advertising on their site. So, this commitment to tackle hidden adverts and overhaul the way people post on Instagram – making it difficult for users to ignore the law – is a welcome step forward”.

The CMA has not made a finding on whether Instagram’s practices have breached consumer protection law. The provision of undertakings is neither an admission of a breach of the law nor an admission that any person has committed any criminal offence or otherwise infringed the law. The CMA is subject to Part 8 of the Enterprise Act 2002, whereby they can enforce the law through the courts; however, only a court can decide whether a particular practice infringes the law.

Some of the undertakings given by Facebook take effect from 31 December 2020, with full effect from 30 June 2021.

Undertakings to the Competition and Markets Authority (pursuant to Section 219 of the Enterprise Act 2002 (EA02)) relating to the Consumer Protection from Unfair Trading Regulations 2008, CMA

https://assets.publishing.service.gov.uk/media/5f882329e90e07415e7f36cb/Facebook_Undertakings___-.pdf

[GB] Parliament investigates the economics of music streaming

Kelsey Farish
Dac Beachcroft

Lockdowns and strict social distancing measures implemented to curb the spread of coronavirus (COVID-19) meant that 2020 was a difficult year for Europe's live music and events industry. Thankfully, many artists were able to create studio-quality recordings from their residences and upload them to the ever-growing number of online music and audiovisual platforms. As such, some singers, composers and other musicians were able to be as productive as ever. Venues may be closed, and tours may be cancelled, but - and perhaps accordingly - the music streaming industry enjoyed a phenomenal year of growth.

As this dynamic sector continues to expand, it is increasingly important for media and entertainment lawyers, as well as those specialising in technology agreements, to be mindful of the myriad of contractual and regulatory issues related to music streaming. To put this into an economic context, in 2020 the music streaming industry was worth over EUR 5 billion. Analysts project that the industry will be worth closer to EUR 5.6 billion by the end of 2021, notwithstanding a gradual return to "normal" after populations receive the COVID-19 vaccine.

Members of Parliament (MPs) in the United Kingdom are now examining the current business models, and considering how existing contracts and laws impact artists, record labels, streaming platforms, and consumers. Announced in October 2020, the inquiry is entitled the *Economics of music streaming* and is led by MPs on the Digital, Culture, Media and Sport (DCMS) Committee. Using Spotify's publicly available figures as a typical example, a music streaming platform will generally take a certain percentage of the subscription fees it receives as profit, before delivering the remaining fees to rightsholders, which are split according to the number of streams. In Spotify's case, the company retains 30% before delivering up the other 70% to the rightsholders.

The rightsholders are typically the record labels, publishers, and distributors, who then pay the artist based on their individual contracts. However, as the DCMS Committee explained, artists may receive as little as 13% of such income, with the rest remaining with the rightsholder. In the press statement announcing the inquiry, Committee Chair Julian Knight MP said: “while streaming is a growing and important part of the music industry contributing billions to global wealth, its success cannot come at the expense of talented and lesser-known artists.”

In November, the inquiry heard from Radiohead guitarist Ed O'Brein, Elbow frontman Guy Garvey, and soloists Nile Rodgers, Fiona Bevan and Soweto Kinch, amongst others. Tom Gray, a musician and founder of the #BrokenRecord campaign, also spoke. #BrokenRecord advocates for better streaming royalties for artists, and recently published the results of a survey in which it found 77% of

respondents believe artists are not paid enough.

There are many stakeholders in this ecosystem, each with their own views as to how revenue should be collected and distributed. It remains to be seen just how performers could receive more royalties in practice, and whether or not the solution will be found by way of private contractual negotiations, or whether a more robust regulatory regime is appropriate. Interestingly, the DCMS will look to its European neighbours for inspiration, and has cited in a report that it would examine “a model operated by the Spanish Government to implement a form of 'equitable remuneration' for streaming that protects artists' income.”

In addition to exploring the relative merits of various business models, the inquiry will also consider whether the government should introduce new laws on intellectual property rights. For example, those which could seek to protect the industry from piracy in the wake of steps taken by the European Union on copyright. During oral hearings, MP Alexandra Davies-Jones questioned the extent to which social media platforms have had an impact on artists' revenue streams. She noted the argument that sharing an artist's music for free via social media gives artists exposure, which could potentially outweigh the negative effects of safe harbor rules on copyright.

Several artists who spoke to the Committee were not so sure of this argument. Singer-songwriter Fiona Bevan remarked that musicians “cannot pay the rent with exposure.” Jazz alto saxophonist and rapper Soweto Kinch also pointed out that the algorithms employed by certain platforms such as Instagram may hinder lesser-known artists from obtaining good levels of exposure in the first place.

Following its review of written and oral evidence, the Committee will make recommendations to parliament. Although the specifics of the recommendations are yet unknown, the hearings and public reports published to date contain several interesting suggestions. One such idea being considered is imposing a legal obligation upon streaming services to be more transparent with artists. For example, the platforms may be obliged to post verified statistics and income trackers onto “artist dashboards”, which could show musicians exactly how much they are owed. At present, a majority of data used to calculate royalties payable are unauditable, due, in part, to the confidentiality arrangements in place between streaming platforms and the publishers and labels.

In light of the legal and practical complexities, it appears that MPs are starting to appreciate how the lack of transparency and information in this dynamic sector impacts the creative economy more generally. Obviously, the task before the DCMS Committee is a considerable one indeed, with a multitude of diverse stakeholders: consumers, artists, performers, record labels, social media companies, and music technology platforms each have an important role to play.

United Kingdom Parliamentary Committees, Digital, Culture, Media and Sport Committee, Economics of music streaming

https://committees.parliament.uk/work/646/economics-of-music-streaming/

[GB] UK radio station sanctioned by Ofcom over coronavirus conspiracy theories

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On 7 December 2020, Ofcom, the UK's communications regulator, found that *The Family Programme*, a live radio broadcast, featured potentially harmful statements about the COVID-19 pandemic without adequate protection for listeners.

The regulator currently prioritises cases linked to the coronavirus where programmes may have helped spread misinformation or included misleading material about the illness and public policy in relation to it. *The Family Programme* is broadcast every Sunday on New Style Radio 98.7 FM, which is a community radio station providing a service for Afro-Caribbean communities in Birmingham. The licensee for this service is the Afro-Caribbean Millennium Centre (ACMC).

During the programme, a number of "highly contentious, unevidenced conspiracy theories about the coronavirus" were set out. In its ruling, Ofcom highlighted controversial allegations that wearing face masks can "cause serious neurological and respiratory damage", as well as suggestions that Bill Gates intended to reduce the world population, and mark and control 7 billion humans through vaccination. At the time of the broadcast, human and clinical trials were ongoing around the world to develop and deploy an effective vaccine, which is recognised by the scientific and medical community (and endorsed by the World Health Organisation) as the key to controlling and potentially defeating the COVID-19 pandemic. Ofcom was particularly concerned that such unsubstantiated claims would cause harm to listeners by undermining confidence in any future roll-out of a vaccination programme.

The presenter, Simon Solomon, referred to the crisis as an orchestrated "plan-demic" linked to the roll-out of 5G, and repeated without challenge throughout the programme the suggestion that "government and WHO policies are deliberately aimed at killing people." Much of the discussion centred around a document written and a video presented by conspiracy theorist Claire Edwards, both of which have been discredited by fact-checking initiatives or trustworthy media organisations. Ofcom expressed serious concerns that such allegations could lead listeners to disregard public authorities' advice and the social distancing measures intended to protect public health (especially at a time when coronavirus cases were rising and the government had just announced a second national lockdown in England).

The regulator rejected the presenter's arguments that he had not endorsed Claire Edwards' claims. In its view, the presenter had increased the potential for harm by lending the contents of those claims further credibility and adding greater

weight: “listeners would have been left in no doubt that the presenter supported the contents of Ms. Edwards’ documents.” ACMC accepted the regulator’s findings and mentioned in its response that, as Mr. Solomon was a “very experienced” presenter, they “could not have possibly envisaged” that he would present a programme containing potentially harmful material. The licensee also stated that *The Family Programme* broadcast at issue could be seen as an “aberration” and believed that it constituted an “exception” to their normal high standards of professionalism.

In considering whether ACMC had provided listeners with “adequate protection” from this potentially harmful material (as Rule 2.1 of the Ofcom Broadcasting Code requires), Ofcom ruled that the disclaimer given by the presenter at the beginning of the programme had the potential to compound the potential harm to members of the public: “Rather than provide a warning about the unsubstantiated and controversial nature of the conspiracy theories put forward in the programme, in our view [the disclaimer] denigrated listeners who did not subscribe to them and cast doubt on the veracity of mainstream and credible sources of information about the coronavirus pandemic.” Moreover, according to Ofcom, Mr. Solomon had presented highly contentious claims as unequivocal facts and uncritically guided listeners to use the programme as the basis for their research.

Ofcom considered the steps ACMC had taken to mitigate the potential for harm following the broadcast of the programme; these were the suspension of the programme and its presenter, as well as the broadcast of “a special programme” about the coronavirus, which was aired on 15 November 2020 at the same time as the original programme and which “comprehensively refuted all the conspiracy theories” included in the initial broadcast.

The regulator emphasised that broadcasting views which question official authorities on public health information is not in principle prohibited and acknowledged the presenter’s right to discuss contentious viewpoints. However, in doing so, broadcasters must ensure compliance with the Code. Despite the actions taken by the licensee, the regulator was of the opinion that there were not sufficient measures in place to ensure that listeners were protected from the inclusion of “potentially extremely harmful material” in this programme, which was broadcast for two hours “without sufficient warnings, context or challenge during a public health crisis.”

As a result, Ofcom found that New Style Radio had committed a serious breach of the Broadcasting Code and directed the station to broadcast a summary of its ruling. The regulator has yet to give a final verdict regarding a suitable sanction, which could determine whether Solomon shall continue on the station as a presenter.

Ofcom Broadcast and On Demand Bulletin (Issue 416, 7 December 2020)

https://www.ofcom.org.uk/__data/assets/pdf_file/0029/208865/The-Family-Programme,-New-Style-Radio-98.7-FM,-1-November-2020,-1800.pdf

ITALY

[IT] Lazio Regional Administrative Court implements the Court of Justice judgment in the Vivendi case

Ernesto Apa& Marco Bassini
Portolano Cavallo

On 16 December 2020, the Lazio Regional Administrative Court (*TAR Lazio - Roma*) delivered Judgment No. 13958, which followed up on the landmark decision of the Court of Justice of the European Union dated 3 September 2020 in Case C-719/18.

The case originated from the disputed legal status of Vivendi, a French company holding at the same time a 23.9% stake in Telecom Italia (the leading Italian telecommunications company) and 28.8% of the share capital, as well as 29.94% of the voting rights in shareholders' meetings of Mediaset (the leading Italian private broadcaster). Through Resolution No. 178/17/CONS of 18 April 2017, the Italian Communications Authority (AGCOM) found that Vivendi had violated the relevant threshold in the context of the acquisition of some shares in Mediaset.

Specifically, Article 43, paragraph 11 of the AVMS Code (*Testo Unico dei Servizi di Media Audiovisivi e Radiofonici*, also known as TUSMAR) prevents companies collecting revenues in the electronic communications sector (including those secured through controlled or affiliated companies) greater than 40% of the overall amount generated in that sector from earning, in the context of the so-called integrated communications system (*Sistema Integrato delle Comunicazioni*, SIC), revenues exceeding 10% of the total revenues generated in Italy within the SIC (including those secured through controlled or affiliated companies). Moreover, in the view of AGCOM, the relevant Telecom Italia revenues exceeded 40% of the revenues generated in the electronic communications sector, while the share of Mediaset was larger than 10% of the integrated communications system.

As a consequence of the AGCOM stance, Vivendi had to choose between its stake in Mediaset and the capital share in Telecom. It then challenged the resolution before the Lazio Regional Administrative Court, which decided to stay the proceedings and make a preliminary reference to the Court of Justice on the compatibility of the aforesaid provision and EU law.

By way of the judgment rendered in Case C-719/18 (*Vivendi SA v. Autorità per le Garanzie nelle Comunicazioni*), the Court of Justice ruled that the relevant provisions of Italian law governing the protection of media pluralism, namely Article 43, paragraph 11 of the AVMS Code, disproportionately interfered with the freedom of establishment enshrined in Article 49 of the Treaty of the European Union.

The judgment of the Lazio Regional Administrative Court has thus brought to an end this saga by implementing the decision of the Court of Justice in the national legal system. In the view of the administrative court, no alternative interpretation of the national provisions at stake which is likewise compatible with EU law is possible, in accordance with the judgment of the Court of Justice; therefore, national courts have to disapply Article 43, paragraph 11 of the AVMS Code. As a result of this, the Italian administrative court has invalidated AGCOM Resolution No. 178/17/CONS, based on the ascertained incompatibility of the legal grounds of the same with EU law.

TAR Lazio, sez. III, sentenza 16 dicembre 2020, n. 13958

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm&nrg=201705880&nomeFile=202013958_01.html&subDir=Provvedimenti

TAR Lazio, section III, Judgment No. 13958 of 16 December 2020

LITHUANIA

[LT] New law regulating the national broadcaster enters into force

Indre Barauskiene
TGS Baltic

On 1 January 2021, a new version of the Republic of Lithuania Law on the National Radio and Television (*Lietuvos Respublikos Lietuvos nacionalinio radijo ir televizijos įstatymas*) that regulates the status, rights, obligations and activities of the Lithuanian public broadcaster – *VšĮ Lietuvos nacionalinis radijas ir televizija* (LRT) – came into force.

One of the novelties introduced by the amendments is that the law establishes not only the requirements for LRT programmes, but also the requirements for the contents of the LRT website. According to the amended law, people with different beliefs shall have the right to participate in and express their opinions on LRT programmes and on the LRT website. Human dignity and rights, as well as moral and ethical principles, must be respected on the LRT website and in its programmes.

Furthermore, a variety of topics and genres must be ensured in LRT programmes and on the LRT website; the content of the programmes broadcast by LRT and its website must demonstrate the diversity of the history and present-day reality of the nations of Europe; audiovisual works broadcast in a language other than Lithuanian must be translated into Lithuanian, or shown with Lithuanian subtitles; etc.

However, a major “reform” was introduced in respect of the property rights of LRT. Prior to 1 January 2021, the law had established that all LRT assets were property of the state and could be privatised. The new version of the law changes the regime and ownership of LRT assets by providing that: “LRT also manages, uses and disposes of the assets owned by it.” The assets that LRT manages, uses and disposes of as the legal owner are: (i) property invested by the state; (ii) incomes received from the commercial and economic activities of LRT; (iii) funds and other assets received as support; (iv) other monetary funds, except for state budget funds; (v) assets acquired from the state budget funds and from the other aforementioned funds; (vi) donated property; (vii) inherited property; (viii) property rights arising from the results of the intellectual activity of LRT; (ix) incomes, assets or other benefits received from the management, use and disposal of the funds or other assets specified above.

Thus, from the beginning of this year, all assets, rights and other benefits that LRT acquires from its activities (including, for instance, intellectual property rights), will be owned by LRT itself, and not the state. This means that LRT will now be

able to join the content creation process and will be able to further market itself, something that was very problematic before the introduction of the amendments.

Change also affects the management of LRT. The Council and the General Director of LRT will remain the main bodies of LRT. The formation of the Council will not change substantially (as before, the highest collegial body, which performs the management and supervision functions and represents the interests of the society, consists of 12 persons – public, scientific and cultural figures, appointed for a term of six years). However, the functions and responsibilities of the Council were supplemented and/or specified.

The law also introduces two new positions in the management of LRT: Ethics Controller and Internal Audit Service Manager. It is the position of Ethics Controller that is generating the biggest debate now, because the new amendments to the main media legislation – the Law on Provision of Information to the Public of the Republic of Lithuania (*Lietuvos Respublikos visuomenės informavimo įstatymas*) –, which are currently being debated in parliament (Lietuvos Respublikos Seimas), propose to exempt LRT from the Office of the Inspector of Journalist Ethics (*Žurnalistų etikos inspektoriaus tarnyba*). Therefore, there might be further changes, depending on how the legislation process related to the Law on Provision of Information to the Public of the Republic of Lithuania will be finalised.

2020 m. gegužės 20 d. Lietuvos Respublikos Lietuvos nacionalinio radijo ir televizijos įstatymo Nr. I-1571 pakeitimo įstatymas

https://www.e-tar.lt/portal/legalAct.html?documentId=1fd390409beb11ea9515f752ff221ec9

The Law amending the Republic of Lithuania Law on the National Radio and Television No. I-1571, dated 20 May 2020

MALTA

[MT] Legal challenge on the existence of broadcasting stations owned by political parties

Pierre Cassar
University of Malta

An independent media house in Malta is calling on the Constitutional Court to decree that a provision in the Broadcasting Act relating to impartiality is incongruent with the Constitution.

LovinMalta, a news portal which has become very popular in Malta, particularly with the younger generation, is challenging a long-established practice that allows political parties to own broadcasting stations.

This legal challenge could change the Maltese media landscape, which has for the last 30 years been dominated by the two main political parties, as they each own and operate a radio and television station. In Malta, it is possible for political parties to own a broadcasting station, provided they set up a commercial company duly registered under the Companies Act.

The Broadcasting Authority, which was set up in 1961, and which is celebrating its 60th anniversary this year, is a Constitutional entity, as reflected in Articles 118 and 119 of the Constitution of Malta.

Article 119 (1) of the Constitution states that "[i]t shall be the function of the Broadcasting Authority to ensure that, so far as possible, in such sound and television broadcasting services as may be provided in Malta, due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties."

Following a crowdfunding campaign through which LovinMalta generated the funds to mount this legal challenge, the Constitutional Court will be called upon to determine whether the existence of two television stations - ONE, owned by the Partit Laburista, which is currently the party in government, and NET TV, which is owned by the opposition party (Nationalist Party) - go against the principle of impartiality as dictated by the Constitution.

LovinMalta is objecting to a clause in the Broadcasting Act which states that the Broadcasting Authority shall be able to consider the general output of the programmes provided by the various broadcasting licensees and contractors together as a whole for due impartiality in respect of matters of political or industrial controversy or relating to current public policy.

In practice, this means that the principle of impartiality is achieved given that these two particular stations tend to broadcast opposing agendas that reflect the principle of their respective political parties.

Meanwhile, the two stations have already declared that they will mount a strong legal defence against this claim.

Broadcasting Act

https://legislation.mt/eli/cap/350/eng/pdf

NETHERLANDS

[NL] Court fines journalist for criminal offence during newsgathering activities

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 31 December 2020, the District Court of Gelderland delivered a notable judgment on the controversial issue of the criminal liability of journalists who commit (minor) offences as part of their newsgathering activities, and on which the European Court of Human Rights has delivered a series of judgments (see, for example, IRIS 2016-8/1 and IRIS 2016-9/1). In its judgment, the district court convicted a Dutch journalist of purchasing illegal fireworks as part of a news report, and ruled that the right to newsgathering by the media does not mean that journalists do not have to comply with the provisions of criminal law.

The case arose in December 2019, when a journalist with *De Gelderlander* sought to demonstrate how easy it was to purchase illegal fireworks as a private person via social media. The journalist secured an appointment with an illegal fireworks' seller via the Telegram messaging app and purchased six fireworks which fall under the highest category of fireworks. The journalist took the fireworks to the police two days later, and an article was published in the newspaper on the easy availability of such fireworks.

The public prosecutor initiated proceedings against the journalist for the offence of possession of illegal fireworks. The District Court of Gelderland first held that the article by the journalist had contributed to public debate. Importantly, the court stated that the right to newsgathering by the media does not mean that journalists do not have to comply with the provisions of criminal law. However, the court added an important caveat: it may be different if a journalist commits an offence to "expose an abuse", and there was "no other way to expose the abuse."

First, the court found that "actually receiving the illegal fireworks was not necessary for the article", and that the journalist had kept the fireworks for an "unnecessarily long" period after their delivery. Secondly, the court held that the journalist could have prepared the article in a less far-reaching way, and without committing a crime. Thirdly, the court criticised the journalist for not returning the fireworks to the police immediately after the purchase, and for taking the fireworks in a car to the *De Gelderlander* editorial office.

The fireworks were stored there for two days and only then taken to the police. As such, the journalist acted dangerously, as these were explosive material. Fourthly, the court took into account the fact that the purchase of the illegal fireworks had been discussed at an editorial meeting, and that legal advice had also been obtained in advance. On the basis of this - what turned out to be - incorrect advice, the journalist made the wrong decision.

In determining the sanctions, the court noted the seriousness of the crime, and the danger the journalist has caused. The court stated that it could have imposed a heavy community service order for possession of illegal fireworks. However, it decided to only impose a fine. The court took into account the fact that the journalist had acted from a journalistic point of view, and therefore considered that a fine was sufficient. In addition to the unconditional fine, the public prosecutor had also demanded a conditional fine, but the court saw no reason to impose such a fine.

Rechtbank Gelderland, De Gelderlander, 31 december 2020

https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Gelderland/Nieuws/Paginas/Geldboete-voor-journalist-na-kopen-illegaal-vuurwerk.aspx

District Court of Gelderland, De Gelderlander, 31 December 2020

[NL] Ministry ordered to reassess large parts of freedom of information request from broadcaster

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 30 December 2020, an important judgment on freedom of information (FOI) requests by the media, under the Public Access to Government Information Act (*Wet openbaarheid van bestuur*), was delivered by the District Court of Midden-Nederland (Rechtbank Midden-Nederland). In allowing a broadcaster's appeal over a ministry's refusal to release certain documents relating to a tragic train accident which was subject to widespread public debate, the court held that a large number of documents were "incorrectly refused", "improperly redacted", and that the decision was taken "carelessly and insufficiently motivated."

The case arose in October 2018, following the Oss train accident, when a passenger train collided with an electric-powered cart which was carrying a number of children, resulting in the death of four children. Following the accident, there was a public debate over the safety of the small electric-powered carts, called Stint carts, that can transport small groups of children, and the news programme *RTL Nieuws* submitted an FOI request to the Ministry of Infrastructure and Water Management (Ministerie van Infrastructuur en Waterstaat). The broadcaster sought access to internal documents, memorandum and emails relating to the accident, including internal documentation on the safety of Stint carts. After carrying out a search, the Ministry identified 781 documents that related to the broadcaster's request. While the Ministry partially granted the access request, it refused to release documents that included "personal policy views". Furthermore, the Ministry refused to release documents from the Ministry's Inspectorate for Transport (Inspectie Leefomgeving en Transport, ILT), because, in it's view, the Inspectorate's interest in supervision and inspection outweighed the interest in disclosing the documents.

RTL Nieuws appealed the Ministry's decision to the district court, arguing that access to the documentation should be granted under the Public Access to Government Information Act. First, in relation to the Ministry's refusal to release the Inspectorate's internal documents, the court held that the Ministry had wrongly refused to release the documents. The court considered that there was nothing in the documents that could harm the Inspectorate's interest in conducting supervision and investigation. Secondly, in relation to documents refused because they contained personal policy views, the court reiterated that Article 11 of the Act, which permits the non-disclosure of documents with personal policy views drawn up for internal consultation, was intended to ensure that civil servants should be free to contribute unimpeded to policy preparation or implementation, and to study, brainstorm, consult, and write notes. However, the court stated that factual data are not personal policy views, and cannot be refused on the basis of Article 11. Notably, it held that 135 documents had been wrongly refused under Article 11, and in its opinion, these documents did not

contain any personal policy views at all. Furthermore, the court held that 75 other documents should not have been refused in their entirety based on Article 11, and should have been disclosed in redacted form, as they also contained factual information that did not represent personal policy views.

The court issued an interim measure for the Ministry to release the documents, or, where the reasons given were inadequate, to make the documents public or provide further reasons for refusal to release. The court concluded by holding that the Ministry had incorrectly refused and improperly redacted a "large number of the documents" and that the decision had been taken "carelessly and insufficiently motivated."

Rechtbank Midden-Nederland, ECLI:NL:RBMNE:2020:5668, 30 december 2020

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2020:5668

District Court of Midden-Nederland, 30 December 2020

NORWAY

[NO] More independence and predictability in media support cases

Gudbrand Guthus
Norwegian Media Authority

On 1 January 2021, the act relating to financial support for the media, *mediestøtteloven* (Media Support Act), entered into force. Until the entry into force of this act, the legal basis for grant schemes was decisions made by the *Storting* (Norwegian Parliament) pursuant to the Fiscal Budget.

The overall purpose of the act is to promote the diversity of editor-controlled journalistic media throughout Norway. The act stipulates the purpose behind five grant schemes for direct media support.

The act will contribute to establishing predictable financial frameworks for media activity. A new political instrument comes in the form of a four-year governing plan for media support. In the year following elections to the *Storting*, the government will propose a governing plan to the *Storting*. Elections to the *Storting* take place every four years; the next elections are due to be held in September 2021. A fixed, long-term financial framework for NRK, the publicly owned public service broadcaster, as well as fixed, long-term frameworks for direct grant schemes for media support will be included in the four-year governing plan.

The new act will provide increased independence in managing media support.

According to the act, Medietilsynet (Norwegian Media Authority - NMA) processes applications, makes decisions on the allocation of grants, disburses grants and audits the use of granted funds in accordance with the grant schemes for direct media support. The NMA disburses grants to NRK in accordance with the *Storting* ’s budgetary decisions and manages the funds for commercial public service broadcasting in accordance with both the *Storting*’s budgetary decisions and the agreement on commercial public service broadcasting in effect at the time.

Individual decisions on grants made by the NMA can be appealed to the Medieklagenemnda (Media Appeals Board).

The act states that the government cannot instruct the NMA or the Media Appeals Board regarding decisions in individual cases. Furthermore, the government cannot change decisions made by the NMA or the Appeals Board or make decisions in such cases.

Mediestøtteloven

https://lovdata.no/dokument/NL/lov/2020-12-18-153?q=mediest%C3%B8tte

Media Support Act

https://www.medietilsynet.no/globalassets/engelsk/200106-the-media-support-act---unofficial-translation.pdf

ROMANIA

[RO] Instructions for the vaccination campaign coverage

Eugen Cojocariu
Radio Romania International

The Consiliul Naţional al Audiovizualului (National Audiovisual Council, CNA) adopted Instruction No. 5 of 22 December 2020 on the progress of the information and communication campaign on the vaccination against COVID-19 in Romania in the audiovisual media (see IRIS 2020-4/6, IRIS 2020-5/30, IRIS 2020-6/11, IRIS 2020-7/22, IRIS 2020-7/12, and IRIS 2020-8/20).

According to Article 1 (1), during the information and communication campaign regarding the vaccination against COVID-19, audiovisual media service providers have the obligation to ensure that information and debate programmes addressing the topic of the vaccination against COVID-19 comply with the legal obligations regarding the provision of correct information to the public, respectively:

a) rigour and accuracy in the presenting of and debating on the subject of the vaccination against COVID-19, including clear communication of the benefits, risks and importance of the vaccination campaign;

b) the dissemination of information taken from official and reliable sources, both national and international, so that the audiovisual media services can contribute to combating the contamination of the public with fake news published on social media networks; the verification of any information directly or indirectly related to the subject of the vaccination against COVID-19;

c) the observance of deontological rules, paying special attention to each message disseminated so as not to stimulate strong emotional reactions, panic and insecurity among citizens.

For the purpose of implementing the provisions of paragraph (1), audiovisual media service providers have the obligation to take any necessary editorial measures to ensure the fulfilment of the obligations provided for in CNA Decision No. 220/2011 on the Code of regulation of audiovisual content, with subsequent amendments and completions.

According to Article 2 (1), the National Audiovisual Council requests that broadcasters, in the interests of the general public, air the audio-video spots related to the information and communication campaign on the vaccination against COVID-19, which was elaborated by the public authorities involved in the strategy, at their request, based on the provisions of Chapter IX - Communication Strategy of the Vaccination Strategy against COVID-19 in Romania, approved by

Government Decision No. 1031/2020.

The audio-video spots are broadcast within each advertising slot, as part of a public interest campaign; for each audio-video spot, the broadcasting periods and the coverage area, respectively the broadcasting of the spot within the national, regional and/or local radio and television programme services, shall be established by the authorities responsible for the communication strategy, taking into account the different stages of the vaccination process.

According to Article 6, paragraph (2) of Audiovisual Law No. 504/2002, with subsequent amendments and completions, the editorial decision with regard to broadcasting belongs exclusively to the broadcaster.

The National Audiovisual Council stated that it would quickly monitor the way in which the vaccination campaign against COVID-19 in Romania is reflected in the audiovisual space. In another development, on 7 January 2021, the Council approved the submission to the Strategic Communication Group (GCS), which is responsible for public communication in connection with the COVID-19 pandemic, of a request for the public interest spots related to the information campaign on the vaccination against COVID-19 in Romania to be subtitled in the languages of national minorities and in the sign language. The languages of the national minorities invoked by the members of the CNA were Hungarian, Russian and Romani, for the Roma communities.

CNA Instruction No. 5 of 22 December 2020, regarding the audiovisual development of the information and communication campaign regarding the vaccination against COVID-19 in Romania

Press release regarding the vaccination campaign against COVID-19

RUSSIAN FEDERATION

[RU] Fines for Internet companies significantly increased

Andrei Richter
Comenius University (Bratislava)

A new Article 13.41 was added to the Code of the Russian Federation on Administrative Offences by the Federal Statute adopted by the State Duma on 23 December and signed by the President on 30 December 2020.

Under the new law, inaction by hosting providers and website owners (including foreign ones) with regard to the requirements to block access to information banned in Russia or to remove information recognised as illegal in Russia under the Federal Statute "On Information, Information Technologies and on the Protection of Information" (see Iris Extra 2015) shall lead to significant monetary fines. The illegal information in question includes "information with calls to extremist activities"; child pornography; drug use; "information disrespectful to state authorities" (see IRIS 2019-5:1/25); "unfaithful information" (see IRIS 2016-8:1/32); and "untruthful socially significant information" (see IRIS 2019-5:1/24); as well as a new set of content types introduced to the Federal Statute "On Information, Information Technologies and on the Protection of Information" on the same day.

Offenders shall now face high fines ranging from several hundred thousand to eight million Russian rubles (about EUR 75 000). The penalties for repeated violations by a legal entity shall amount to between 5% and 20% of the company's year-end revenue. It remains unclear as to whether the company's head office or its representative office (if any) in Russia shall be responsible for paying the fines proportionate to its revenue.

The only exception made to the norm shall be copyright violations, punished otherwise by law.

This amendment should be understood in the context of the recent demands by Roskomnadzor, the Russian Government's authority responsible for supervising the media, communications and information technology, that Google LLC remove information which is illegal in Russia from its search algorithms, advertisements and YouTube videos. According to Roskomnadzor, Google does not remove up to 30% of content recognised as illegal in Russia from its search engines.

О внесении изменений в Кодекс Российской Федерации об административных правонарушениях

http://publication.pravo.gov.ru/Document/View/0001202012300050

Federal Statute "On amendments to the Code of the Russian Federation on Administrative Offences"

Пресс-релиз Роскомнадзора

http://rkn.gov.ru/news/rsoc/news73202.htm

Press release by Roskomnadzor

[RU] Increased penalties for the dissemination of information online

Andrei Richter
Comenius University (Bratislava)

A new edition of Article 128-1 of the Russian Federation's Criminal Code was adopted by the State Duma on 23 December and signed by the President on 30 December 2020. It introduces harsher penalties for slander, or the dissemination of intentionally false information that defames a person, "or a number of persons that are not individually defined". It specifies that slander disseminated online or in the mass media shall now be punished with a fine of up to one million Russian rubles (RUB) - about EUR 11 000 - or up to two years' imprisonment; slander by those holding a management position shall be punished with a fine of up to RUB 2 million or with up to three years' imprisonment; slander claiming somebody has an infectious disease shall be punished with a fine of up to RUB 3 million or with up to four years' imprisonment; and slander that accuses someone of committing grave crimes, with a fine of up to RUB 5 million or with up to five years' imprisonment. Thus, imprisonment for slander has been reintroduced in Russia after it being abolished in July 2012.

A set of amendments to the Code of the Russian Federation on Administrative Offences, adopted by the State Duma on 16 December and signed by the President on 30 December 2020, introduces several new norms. A new norm to its Article 6.13 introduces a ban on the online "propaganda" of drugs and related substances. In the case of legal entities, the fine shall be between RUB 1 million and RUB 1.5 million, or the suspension of activities for up to 90 days. If committed by a foreigner, the offender may now be expelled from Russia. Article 13.34 has been amended to significantly increase the fines for communication operators who disobey Roskomnadzor's orders to restrict access to online resources; fines of up to RUB 500 000 can be issued, increasing to RUB 800 000 for those who repeatedly violate the Code within a 12-month period.

Another set of amendments to protect the personal data of a number of categories of public officials was adopted by the State Duma on 23 December and signed by the President on 30 December 2020. In particular, they amend the Federal Statute "On the state protection of judges, officials of law enforcement and oversight bodies" (N 45-FZ of 20 April 1995). They prescribe a ban on providing data on those who work in the judiciary, in prosecution, in investigation, in the military police, or in special units of the Armed Forces and other law enforcement authorities, as well as in various regulatory and oversight agencies, irrespective of whether their life, health or property is at risk. In practice, it will allow the state to withhold information about the "protected persons", "persons close to them", and their property, from all existing public records, such as real estate deeds and state registers of legal entities and individual entrepreneurs.

О внесении изменения в статью 128-1 Уголовного кодекса Российской Федерации),

http://publication.pravo.gov.ru/Document/View/0001202012300058

Federal Statute "On amendment to Article 128-1 of the Criminal Code of the Russian Federation"

О внесении изменений в Кодекс Российской Федерации об административных правонарушениях

http://publication.pravo.gov.ru/Document/View/0001202012300056

Federal Statute "On amendments to the Code of the Russian Federation on Administrative Offences"

О внесении изменений в отдельные законодательные акты Российской Федерации в части обеспечения конфиденциальности сведений о защищаемых лицах и об осуществлении оперативно-розыскной деятельности

http://publication.pravo.gov.ru/Document/View/0001202012300041

Federal Statute "On amendments to certain legal acts of the Russian Federation with regard to providing confidentiality of data on protected persons and on investigation activities"

[RU] New rules on social networks: Blocking permitted

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A new set of amendments that expands the scope of the Russian Federation's Federal Statute "On Information, Information Technologies and on the Protection of Information" (see Iris Extra 2015) to include social networks was adopted by the State Duma on 23 December and signed by the President on 30 December 2020. It entered into force on 1 February 2021.

The amendments largely present a new 16-page Article 10-6 to the Federal Statute "On Information, Information Technologies and on the Protection of Information" that regulates several important aspects of activities for the owners of social networks, both Russian and foreign, that have 500 000 users accessing them daily from the territory of the Russian Federation. This category includes owners of a website, and/or of a page of the website, and/or owners of an information system, and/or of a computer programme, if these resources are designed to allow users to create and disseminate their personal webpages in Russian and/or in other languages of the Russian Federation. The regulation is also applicable to web resources that allow for the dissemination of advertising aimed at consumers in Russia.

The owners of such social networks shall be required to abide by Russian law, in particular the rules on the dissemination of certain types of information, as provided for in the above Federal Statute, including a ban on the dissemination of calls for extremist and terrorist activity and other extremist materials; materials with protected secrets; the propaganda of pornography; the propaganda of the cult of violence and cruelty; and the dissemination of information containing swear words. The Article also includes a ban on disseminating defamatory materials, and, in particular, the defamation of a person or a category of persons because of their political views, as well as the requirement to observe election campaigning rules. The owners shall independently organise the monitoring of the social networks in order to detect and take down materials with information that is considered illegal in Russia, particularly that related to suicide methods, the use and production of drugs, the distant retail sale of alcohol, and to the indecent disrespect for human dignity, as well as for Russia's Constitution and public authorities.

The Rules of Service of social networks shall, in particular, be made available in Russian and shall not contravene Russian law governing content dissemination. Their owners shall, as prescribed by the new Article, establish an electronic form and email address for complaints; provide annual reports on the results of their monitoring and on the following up of the complaints; and incorporate one of the software programmes recommended by Roskomnadzor - the Russian Government's authority responsible for supervising the media, communications and information technology - for counting the number of users. Complaints from users regarding the access to their materials being restricted shall receive replies

from the owner within three days. In cases where the user is not satisfied with the owner's response, he/she may redirect the complaint to Roskomnadzor. The latter may instruct the owner of the social network to unblock the content in question.

In case of doubt as to whether the dissemination of the content that it monitors violates Russian law, the owner is required to consult Roskomnadzor and, while it awaits its response, temporarily restrict access to the content in question.

Roskomnadzor shall establish a Register of Social Networks (those that fall under the regulation of this Article), as well as organise its own monitoring of the networks' content, communicate with their hosting providers in Russian and in English, and demand the information necessary for keeping the Register. This information shall be provided by the providers within three days.

There is a grace period of two months for the owners of social networks that are entered in the Register to comply with Russian law.

Moreover, a new set of amendments that further expands the scope of the Russian Federation’s Federal Statute of 2012 entitled “On measures to influence persons involved in violations of fundamental human rights and freedoms, the rights and freedoms of citizens of the Russian Federation” (see IRIS Extra 2020) was adopted by the State Duma on 23 December and signed by the President on 30 December 2020. It entered into force on the same day.

It allows access to the online resources owned by companies that were officially recognised as being involved in such violations to be restricted. Such recognition comes from the Prosecutor General (or his deputies) upon consent from the Ministry of Foreign Affairs of the Russian Federation. The violations recognised by the adopted amendments include “limitations” to the dissemination of information online in Russian or in other languages of the Russian Federation which is "essential for the public", including materials of the Russian mass media, if such limitations discriminate on the basis of, for example, property status, or are the result of sanctions imposed by foreign governments upon the Russian Federation, Russian citizens or Russian companies.

Once the entity is recognised as having violated the freedom of information of Russian citizens, Roskomnadzor enters it into a special new Register that will be available on its official website. Thereafter, Roskomnadzor sends a warning to the owner of the online resource demanding that a stop be put to these limitations. If this does not happen, Roskomnadzor blocks “in full or partially” access to the online resource. The Russian authorities' decisions may be retracted once the violations cease to exist.

Foreigners that are involved in the introduction of the above limitations of information from Russian sources shall be banned from entering the country and their assets in Russia shall be arrested.

These amendments should be understood in the context of the recent demands by Roskomnadzor that Facebook LLC stop, “in the shortest time possible”, limiting access to and blocking both the Instagram accounts of the regional state broadcasting companies Stavropolye and Lotos and the Facebook account of

Baltnews (an affiliate of the Rossija Segodnya state news agency), as well as its demands on Google LLC in relation to the latter's downgrading of the *Solovyov Live* YouTube channel, the blocking of the ANNA News YouTube channels, the "limitations" on documentaries by RT and Ukraina.ru, the marking of a programme by Rossija-1 state TV as "unsuitable and offensive for certain audiences", etc. On 13 November 2020, Roskomnadzor also called on Russian broadcasters and online resources to migrate from YouTube to Russian Internet platforms for the distribution of video materials.

О внесении изменений в Федеральный закон 'О мерах воздействия на лиц, причастных к нарушениям основополагающих прав и свобод человека, прав и свобод граждан Российской Федерации'

http://publication.pravo.gov.ru/Document/View/0001202012300002

Federal Statute "On amendments to the Federal Statute 'On measures to influence persons involved in violations of fundamental human rights and freedoms, the rights and freedoms of citizens of the Russian Federation'"

Федеральный закон "Об информации, информационных технологиях и о защите информации"

http://publication.pravo.gov.ru/Document/View/0001202012300062

Federal Statute "On amendments to the Federal Statute 'On Information, Information Technologies and on the Protection of Information'

Пресс-релиз Роскомнадзора

http://rkn.gov.ru/news/rsoc/news73130.htm

Press release by Roskomnadzor

[RU] Rules established for journalists at public protests

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A set of amendments that regulates, in particular, the behaviour of journalists covering public protests was entered in the Russian Federation's Federal Statute "On Meetings, Rallies, Marches and Pickets" (No. 54-FZ of 19 June 2004) by the State Duma on 23 December and signed by the President on 30 December 2020.

The amendments to Article 6 of the Federal Statute expand on the requirement for journalists covering mass events to put on markings that distinguish them as members of the press by saying that such markings shall be designed and approved by Roskomnadzor, the Russian Government's authority responsible for supervising the media, communications and information technology, upon consent of the Ministry of the Interior, the National Guard of the Russian Federation, and the Russian Union of Journalists.

The focus of the amendments is, however, to prohibit journalists covering public events from exercising the following activities: canvassing during such events, including through wearing related symbols (such as T-shirts); collecting signatures for petitions or citizens' demands, or donations; taking part in the administration of the event; participating in the discussions or the adoption of the decisions related to the aims of the public event; or hiding their markings as members of the press. Violations of the provision shall apparently exclude the journalists from privileges provided to them by the Statute "On the Mass Media."

О внесении изменений в Федеральный закон "О собраниях, митингах, демонстрациях, шествиях и пикетированиях

http://publication.pravo.gov.ru/Document/View/0001202012300027

On amendments to the Federal Statute "On Meetings, Rallies, Marches and Pickets"

[RU] Scope of “Foreign Agents” Law expanded as first journalists labelled as “foreign agents”

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A new set of amendments further expanding the scope of the Russian Federation’s Federal Statute of 2012 entitled “On amendments to certain legislative acts of the Russian Federation with regard to regulating the activities of non-commercial organisations acting as foreign agents”, commonly known as the “Foreign Agents” Statute (see IRIS Extra 2020), was adopted by the State Duma on 23 December and signed by the President on 30 December 2020. It entered into force on the same day.

It now allows for this label to be applied to ordinary citizens, as well as to public associations (movements) that need no registration as legal entities, who are involved in politics (broadly defined) in Russia and who receive, or intend to receive, material and/or financial means that originate from other countries. From now on, they fall under the regulation of the “Foreign Agents” Statute, including its requirements on establishing a legal entity and frequent reporting on its activity.

Such associations are to be included by the Ministry of Justice in the Register of unregistered non-commercial organisations that perform the functions of a foreign agent, while citizens shall be entered in the List of citizens that perform these functions. The exceptions to the registration of citizens as foreign agents include foreign diplomats and “foreign journalists, accredited in the Russian Federation, including those already recognised as individuals – media outlets that perform the functions of a foreign agent in accordance with the legislation of the Russian Federation on the mass media.”

In particular, the amendments to Article 4 (“Inadmissibility of abuse of freedom of the media”) of the 1991 Statute “On the Mass Media” introduce a norm that bans the dissemination in the mass media and online of information about such associations and citizens, as well as their materials, without relevant markings.

Article 330(1) of the Criminal Code of the Russian Federation on malicious evasion of submitting necessary papers to be registered as a “foreign agent” was amended on 23 December 2020 by a separate Federal Statute to take account of the changes made and to increase the maximum punishment for this criminal offence from two to five years’ imprisonment. This amendment enters into force on 1 March 2021.

Moreover, on 25 December 2020, the State Duma adopted, at first reading, several additions to the Code of the Russian Federation on Administrative Offences that provide for fines, on average of up to RUB 50 000 (about EUR 550) for citizens, and up to RUB 500 000 for associations, with or without confiscation of the material objects used, for violations of the established procedures.

Soon before its entry into force, on 28 December 2020, the Ministry of Justice (MoJ) of the Russian Federation published a press release wherein it announced five new entries to the "register of foreign mass media that perform the functions of a foreign agent" and it also published their names on its official website. They are all Russian citizens, including two journalists from Radio Liberty and the editor of *Pskovskaya guberniya online* (Псковская губерния online), a web resource from the town of Pskov. Their activity shall now be regulated by the "Foreign Agents" Law (see IRIS Extra 2020).

Earlier, on 21 December 2020, the MoJ entered in the Register a Czech News Agency, Medium-Orient, that publishes news from the Caucasus and is financed by the Open Society Institute.

Federal Statute "On amendments to certain legal acts of the Russian Federation as to establishing additional measures of counteraction of threats to national security"

О внесении изменения в статью 330-1 Уголовного кодекса Российской Федерации

http://publication.pravo.gov.ru/Document/View/0001202012300043?index=0&rangeSize=1

Federal Statute "On amendments to Article 330(1) of the Criminal Code of the Russian Federation"

Реестр иностранных средств массовой информации, выполняющих функции иностранного агента

https://minjust.gov.ru/ru/documents/7755/

The Register of foreign mass media that perform the functions of a foreign agent as amended on 28 December 2020

Пресс-релизы Министерства юстиции от 21 декабря 2020 года

Press releases of the Ministry of Justice of 21 December 2020

https://minjust.gov.ru/ru/events/48278/

Пресс-релизы Министерства юстиции от 28 декабря 2020 года

https://minjust.gov.ru/ru/events/48291/

Press releases of the Ministry of Justice of 28 December 2020

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

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