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Publisher:

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

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

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

Executive Director: Susanne Nikoltchev

Editorial Board:

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

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

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

Documentation/Press Contact: Alison Hindhaugh

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

E-mail: alison.hindhaugh@coe.int

Translations:

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

Corrections:

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

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EDITORIAL

From 1 January 2021, the relations between the United Kingdom and the European Union are governed by a Trade and Cooperation Agreement (TCA), as a result of a deal that was reached in the very last days of 2020. Putting in place this overarching structure has required extensive legislative modification on the UK side. As the most recent example of this, in late January 2021, the UK Government published its draft Audiovisual Media Services (Amendment) Regulations 2021, which, when enacted, will update certain technical elements of the existing framework established by the European Union's Audiovisual Media Services Directive (EU) 2018/1808 and subsequent laws. Needless to say, the implications of the TCA for the audiovisual sector cannot be addressed in one or even many newsletter articles. That is why the European Audiovisual Observatory has produced a note that aims to present an initial overview of the main legal changes that the new relationship between the United Kingdom and the European Union will introduce to their respective audiovisual sectors. You can download it here.

Beyond Brexit, the European Audiovisual Observatory has recently embarked on a tour of the proposed Digital Services Act Package. We started with an online conference that took place on 11 February 2021 (you can watch it here), and we announced on that occasion a series of webinars focusing on specific topics related to this regulatory initiative. The first of them will deal with content moderation in social media and will take place on Thursday, 18 March from 16.00 to 17.15 CET. You can register here.

With regard to the most recent legal developments in other areas, this newsletter comes loaded with a plethora of interesting issues: the transposition of the AVMSD in Lithuania, including the Lithuanian Radio and Television Commission's new guidelines for the qualification of video-on-demand services; the German Government's launch of its new '"Kino I" project to support cinemas during the pandemic; the European Commission's extension of the COVID-19 Disinformation Monitoring Programme, together with the publication of a set of reports on measures taken by the Code of Practice signatories to tackle COVID-19 disinformation; a very interesting judgment of the European Court of Human Rights concerning the rights and duties and responsibilities of journalists and online media when publishing illegal recordings containing private and intimate information; and... much more!

Stay safe and enjoy your read!

Maja Cappello, editor

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INTERNATIONAL

COUNCIL OF EUROPE

FRANCE

European Court of Human Rights: *Société Éditrice de Mediapart and others v. France*

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

The European Court of Human Rights (ECtHR) has delivered a judgment on the rights and duties and responsibilities of journalists and online media when publishing illegal recordings containing private and intimate information. The case concerns the judicial orders requiring the news website Mediapart to remove transcripts and tapes of conversations that had been illegally recorded at the home of Ms Bettencourt, the principal shareholder of the L'Oréal group. The ECtHR found the exposure of the illegal recordings to be of such a serious nature that the judicial orders to remove them from the news website did not breach the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).

The judgment deals with two applications concerning two separate judicial orders issued against Mediapart, a news website, and its publishing editor, Edwy Plénel, and a journalist, Fabrice Arfi, to remove audio extracts and transcripts of illegal recordings made at the home of Bettencourt from the news company's website. The recordings where secretly made by Bettencourt's butler over a period of more then a year during some of her meetings and conversations with other persons. Bettencourt's daughter had transmitted CD-ROMs with those recordings to the national financial police brigade. The recordings formed part of the evidence in what became a major criminal case regarding the abuse of Bettencourt's weakness and the mismanagement of her fortune, also involving some public figures. When the case was widely reported in the press, in June 2010, Mediapart decided to publish extracts from these recordings online on its news website. First P.D.M. – Bettencourt's wealth manager – and later Bettencourt herself brought urgent proceedings seeking to obtain an order for all extracts of the illegal recordings made at Bettencourt's home to be removed from Mediapart's Internet site because of breach of privacy. After several years of proceedings, including a series of judgments by the Court of Cassation, Mediapart was ordered to remove all extracts from its news site, as the disclosure of the recordings could not be justified on the grounds of freedom of the press or the alleged contribution to a debate of public interest. The orders to remove the illegal recordings were considered proportionate to the offence committed, in spite of the fact that the content of the recordings had also been disseminated by other news media.

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Mediapart and its publishing editor were also ordered to pay damages in compensation for non-pecuniary damages. In the meantime, criminal proceedings were brought against Plenel and Arfi and other journalists who had been involved in publishing the illegal recordings. All journalists were acquitted on the grounds that, in publishing the contested extracts and the accompanying commentary which placed them in context, it had not been the journalists' intention to infringe Bettencourt's privacy.

In 2014, Mediapart, Plenel and Arfi lodged an application with the ECtHR, alleging that the court orders obliging them to remove the written and audio extracts of the illegal recordings made in Bettencourt's home from Mediapart's news site had breached their right to freedom of expression under Article 10 ECHR. The Court reiterates that Article 10 does not guarantee a wholly unrestricted freedom of expression, even with respect to media coverage of matters of serious public concern. Exercise of this freedom carries with it duties and responsibilities which also apply to the press. A journalist cannot claim exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising their right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions. Furthermore, breaches of privacy resulting from the intrusion into the private life of individuals through the use of technical devices for illegal tapping, video recording or photography are to be subject to particularly attentive protection. Mediapart had been aware that the disclosure of recordings made without Bettencourt's knowledge was an offence, which ought to have led them to show prudence and precaution, irrespective of the fact that their actions were intended, *inter alia*, to denounce the exploitation of Bettencourt's weakness. The ECtHR also refers to the French courts' findings that the public could have been informed about these matters by means other than providing access to the illegal recordings, and that Mediapart's decision to publish the recordings had an unnecessary spectacular dimension. The Court reiterates that, in certain circumstances, even when a person was known to the general public, he or she could rely on the legitimate expectation that his or her private life would be protected and respected. The fact that an individual belongs to the category of public figures does not authorise the media to violate the professional and ethical principles which had to govern their actions, or legitimise intrusions into a person's private life, especially in the case of persons who, like Bettencourt, did not exercise official functions.

Having regard to the scope of the publications on Mediapart's site, the domestic courts legitimately concluded in the circumstances of the case that the public interest had to yield to Bettencourt's and P.D.M.'s right to respect for their private life. Although access to the site had not been free of charge, the transcribed statements had been visible to a large number of people and had remained online for a considerable period of time. Internet sites are an information and communication tool particularly distinct from the printed media, especially with regard to their capacity to store and transmit information, and the risk of harm to the exercise and enjoyment of human rights and freedoms posed by content and communications on the Internet, particularly the right to respect for private life, is certainly higher than that posed by the press. The ECtHR refers to the domestic courts' arguments to end the disturbance caused to a woman who, albeit being a

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public figure, had never consented to the disclosure of the published extracts. They also referred to the fact that Bettencourt was vulnerable and had a legitimate expectation of having the illegal publications, containing sensitive intimate information, removed from the news site. Although the content of the recordings had been largely disseminated by the time the court order was imposed, their verbatim publication had been unlawful from the outset and remained prohibited for the press as a whole. The Court also notes that the applicants, who had been acquitted in the criminal proceedings, have not been deprived of the possibility of fulfilling their task of providing information about the public aspect of the Bettencourt case. In this regard, the applicants had not shown, in the circumstances of this case, that the removal of the contents of the recordings and the ban on their further publication had indeed had a chilling effect on the way in which they exercised and continued to exercise their right to freedom of expression. Furthermore, the order to remove the illegal recordings from Mediapart's website was the only effective measure to stop the intrusion into Bettencourt's and P.D.M.'s private life. Finally, the ECtHR discerns no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing exercise conducted by them. It is satisfied that the reasons relied upon were both relevant and sufficient to show that the interference complained of was "necessary in a democratic society" and that the orders in question had not gone beyond what was necessary to protect Bettencourt and P.D.M. from the interference with their right to respect for private life. Unanimously, the ECtHR comes to the conclusion that there has been no violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, Fifth Section, in the case of Société Éditrice de Mediapart and others v. France, Application Nos. 281/15 et 34445/15, 14 January 2021

https://hudoc.echr.coe.int/eng?i=001-207357

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REPUBLIC OF TÜRKIYE

European Court of Human Rights: *Dickinson v. Turkey*

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

In a case about a satirical collage insulting the Turkish Prime Minister, the European Court of Human Rights (ECtHR) found that the criminal proceedings against the author of the collage had violated his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).

The applicant in this case was Michael Dickinson, a British national who had been living in Turkey for a long time; he was teaching in two universities in Istanbul and was also active as a collage artist. On two occasions in 2006 Dickinson took part in events during which he exhibited a collage featuring the then Prime Minister Recep Tayyip Erdoğan. The collage criticised Erdogan's political support for the military occupation of Iraq, portraying the Prime Minister's head glued to the body of a dog which was held on a leash with the colours of the American flag. The collage displayed the following phrase pinned on the dog's torso: "We Will not be Bush's Dog". Dickinson was placed in police custody and pre-trial detention for a few days, and criminal proceedings were brought against him for insulting the Prime Minister, in application of Article 125 of the Turkish Criminal Code. In 2010, Dickinson was ordered to pay a judicial fine of around EUR 3 043 for having displayed his collage in public. The court considered that Dickinson's work was such as to humiliate and insult the Prime Minister and that it represented an attack on his honour and reputation. However, the court decided to suspend delivery of its judgment for five years. In 2015, the court set aside the judgment in respect of which sentencing had been deferred and ordered that the criminal proceedings against Dickinson be discontinued. The court noted that Dickinson had not committed any new intentional offences during the five-year period of suspension and that he had complied with the conditions attached to the supervision order.

Dickinson lodged an application with the ECtHR complaining about the criminal proceedings brought against him for his artistic work as part of a political protest. The ECtHR agrees that the criminal proceedings against Dickinson for a period of nearly four years, and subsequently the five-year period of suspension of delivery of the judgment, amounted to an interference with his right to freedom of expression under Article 10 ECHR, emphasising the chilling effect as a result of such a criminal prosecution. As there was no disputing that the interference at issue was prescribed by law and aimed at the protection of the reputation and rights of others, the crucial question before the ECtHR was whether the criminal prosecution against Dickinson could be justified as being necessary in a democratic society.

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The ECtHR refers to its established case law and criteria when balancing the right to privacy and reputation as protected under Article 8 ECHR with the right to freedom of expression under Article 10 ECHR (see also *Von Hannover (no. 2) v. Germany* and *Axel Springer AG v. Germany* (IRIS 2012- 3/1)). The Court is of the opinion that the collage contained a political statement which criticised the Turkish Prime Minister for his policy on the international scene with regard to the military actions by the United States of America, and in particular those in Iraq. The cartoonish collage clearly expressed a value judgment about an issue of general public interest related to a country's foreign policy. The criticism was directed against the public functioning of the Prime Minister, and had a sufficient factual basis (see also *Tuşalp v. Turkey*, IRIS 2012-4/1). Although the depiction of the Prime Minister as a dog in a collage was likely to be perceived as degrading and humiliating by a part of the population in Turkey and might have created some unease among citizens, in the context at issue, a cartoonist is permitted to resort to a certain amount of exaggeration and even immoderate provocation. The ECtHR recalls that those who create, interpret, distribute or exhibit a work of art contribute to the exchange of ideas and opinions essential to a democratic society. Forms of artistic expression and social commentary such as satire, by the exaggeration and distortion of reality which characterise them, and by the use of an ironic and sarcastic tone, naturally aim to provoke and agitate. Having regard to the subject matter of the collage, the context of its public exposure and its factual basis, as well as its provocative style and content, the ECtHR finds that the collage at issue cannot be regarded as gratuitously insulting. In any case, a politician must show a greater tolerance towards criticism, especially when the latter takes the form of satire.

Finally, the ECtHR recalls that the dominant position that state institutions occupy requires them to exercise restraint in the use of criminal proceedings, such as in cases to protect the reputation of the Prime Minister as a representive of the state. It reiterates that the assessment of the proportionality of an interference with the rights protected by Article 10 would, in many cases, depend on whether the authorities could have used means other than a criminal sanction, such as civil measures. The ECtHR recalls the chilling effect of criminal prosecution and criminal sanctions, also in cases of suspended delivery of judgment or being sentenced to pay only a moderate fine. Although the delivery of the judgment convicting Dickinson was suspended and this judgment was finally set aside, the ECtHR is of the opinion that the duration for a considerable period of time of the criminal proceedings against Dickinson on the basis of a serious criminal offence, with the risk of being sentenced to imprisonment, had a chilling effect on Dickinson's willingness to express himself on matters of public interest. The ECtHR points at the domestic court's lack of analysis of the proportionality of the penal sanction imposed on Dickinson, and the lack of examination of the chilling effect that this sanction could have on his freedom of expression. In the light of all of the foregoing considerations, the ECtHR comes to the conclusion that the national authorities have not carried out an adequate balancing of interests in compliance with the criteria established by its case law dealing with the right to freedom of expression and the right to privacy and reputation. The ECtHR finds that there was no reasonable relationship of proportionality between the interference with the exercise of Dickinson's right to freedom of expression and

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the legitimate aim of protecting the reputation of the Prime Minister. Therefore, the ECtHR unanimously finds that the Turkish authorities have violated Article 10 ECHR.

Judgment by the European Court of Human Rights, Second Section, in the case of Dickinson v. Turkey, Application No. 25200/11, 2 February 2021.

https://hudoc.echr.coe.int/eng?i=001-207646

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EUROPEAN UNION

Commission extends COVID-19 Disinformation Monitoring Programme and publishes Code of Practice on Disinformation reports

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 28 January 2021, the European Commission announced an important extension of the COVID-19 Disinformation Monitoring Programme, which is a transparency mechanism designed to ensure public accountability for the measures taken by signatories to the EU Code of Practice on Disinformation in specifically tackling COVID-19 disinformation (see IRIS 2020-6/9; IRIS 2019-6/4, and IRIS 2019-1/7). The Commission stated that the Programme would be extended to June 2021, with a "special focus" on vaccine disinformation and vaccine-related misinformation.

Notably, the Commission also published a set of reports on measures taken by the Code of Practice signatories to tackle COVID-19 disinformation, including Facebook, Google, Microsoft, TikTok and Twitter. The Commission stated that platforms had (a) blocked "hundreds of thousands" of accounts, offers and advertiser submissions related to coronavirus and vaccine-related misinformation; (b) enhanced the visibility of "authoritative content", with "millions of users" directed to dedicated informative resources, and (c) "stepped up their work" with fact-checkers to make fact-checked content on vaccination more prominent. However, the Commission has asked platforms to provide more data on the evolution of the spread of disinformation during the COVID-19 crisis, and on the "granular impact of their actions at the level of EU countries."

Crucially, the platform reports include a number of notable measures undertaken, including the following: first, Google updated its YouTube policy in October 2020 to include vaccine disinformation, which "led to the removal of more than 700 000 videos related to dangerous or misleading COVID-19 medical information" and it also suspended the accounts of more than 1 800 EU-based advertisers for trying to circumvent its systems, including for COVID-19-related ads and offers; secondly, Twitter expanded its COVID-19 "misleading information policy" to cover misleading information about vaccines, so that tweets advancing harmful false or misleading narratives about COVID-19 vaccinations will be removed; thirdly, Facebook stated that it had removed false claims about vaccines that had been "debunked by public health experts" on Facebook and Instagram, and had re-launched a pop-up on Facebook's News Feed to direct users to the "Facts about COVID-19" section of its COVID-19 Information Centre; fourthly, Microsoft blocked over 323 000 advertiser submissions in the European Union directly related to

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COVID-19 and vaccine-related misinformation; and fifthly, TikTok reported that from 21 December 2020, it has been rolling out a new vaccine tag for all videos with words or hashtags related to COVID-19 vaccines. Finally, other measures taken by platforms include providing grants and free ad space to governmental and international organisations to promote campaigns and information on the pandemic, and increasing the visibility of content that is fact-checked.

The Commission stated that it would assess the situation further in June 2021, and has asked platforms to "address shortcomings " previously highlighted, including providing more data on the impact of the measures taken.

"Coronavirus disinformation: extended platforms' monitoring programme with focus on vaccines", 28 January 2021

https://ec.europa.eu/digital-single-market/en/news/coronavirus-disinformation-extended-platforms-monitoring-programme-focus-vaccines

European Commission, "Latest set of reports and the way forward: Fighting COVID-19 Disinformation Monitoring Programme", 28 January 2021

https://ec.europa.eu/digital-single-market/en/news/latest-set-reports-and-way-forward-fighting-covid-19-disinformation-monitoring-programme

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GERMANY

CJEU rules on regional advertising ban on national television in Germany

Christina Etteldorf
Institute of European Media Law

On 3 February 2021, the Court of Justice of the European Union (CJEU) ruled, in Case C-555/19 (Fussl Modestraße Mayr), that the provisions of the German *Rundfunkstaatsvertrag* (State Broadcasting Treaty – RStV), which was recently replaced by the *Medienstaatsvertrag* (State Media Treaty – MStV), prohibiting television broadcasters from showing advertising at regional level in programmes broadcast throughout the country could be contrary to EU law, in particular the freedom to provide services. The court cast particular doubt on the proportionality of Article 7(11) RStV (now Article 8(11) MStV), which prohibits regional advertising but allows certain exceptions at individual Bundesland level, although it noted that none of the German Bundesländer had so far used this option. The rule was introduced by the Land legislators mainly to protect media pluralism, on the grounds that income from regional advertising should be reserved for regional and local broadcasters. According to the CJEU, the blanket ban could go beyond what was necessary to preserve the pluralistic character of the offer of television programmes and could lead to unlawful unequal treatment between national television broadcasters and providers of advertising services on the Internet.

The proceedings before the CJEU concern a case heard by the Landgericht Stuttgart (Stuttgart regional court). The Austrian company Fussl Modestraße Mayr GmbH (Fussl) operates a network of fashion shops in Austria and the Land of Bavaria. In May 2018, Fussl concluded a contract with the German company SevenOne Media GmbH, the marketing company of the German ProSiebenSat.1 Group, to broadcast television advertising solely in the Land of Bavaria in the national programmes of ProSieben using the Bavarian cable networks of Vodafone Kabel Deutschland GmbH. SevenOne Media refused to perform the contract on the grounds that it was prohibited under Article 7(11) RStV from inserting regional television advertising in programmes broadcast throughout Germany. Fussl then referred the matter to the Landgericht Stuttgart with the request that SevenOne Media be ordered to comply with its obligations under the contract. The regional court then submitted a series of questions to the CJEU concerning the rule’s compatibility with Union law.

In its legal assessment, the CJEU emphasised four key points in particular. Firstly, it noted that the German ban on regional advertising was not more detailed or stricter within the meaning of Article 4(1) of the Audiovisual Media Services Directive (AVMSD), since although the rule fell within the field covered by the Directive, it did not concern a specific matter governed by it because the advertising rules of the AVMSD were mainly intended to protect viewers rather than deal with other aspects such as financing or plurality. In the absence of

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relevant secondary law provisions, the CJEU therefore examined the rule from the perspective of the freedom to provide services guaranteed by Article 56 of the Treaty on the Functioning of the European Union (TFEU) and found that it restricted this fundamental freedom to the detriment of both providers of advertising services (television broadcasters) and the recipients of those services (advertisers). With regard to whether such a restriction could be justified by an overriding reason in the public interest, it was true that the preservation of the pluralistic character of the offer of television programmes could be a suitable objective and the member states were free to legislate further in this area. However, the CJEU doubted whether the rule was suitable to attain its objective and whether it was proportionate. It thought there could be an inconsistency, in particular in the fact – which should be verified by the national court – that the prohibition only applied to advertising services provided by television broadcasters and not to advertising services, in particular linear advertising services, provided on the Internet. It should be remembered that advertising services provided on Internet platforms could constitute competition for traditional (including local and regional) media. Less restrictive measures for national broadcasters could be introduced by the Bundesländer through an exemption clause. However, according to the CJEU, the national court would need to verify whether, in practice, this was suitable for securing the attainment of the objective. Nevertheless, the court did not believe that the freedom of expression and information guaranteed by Article 11 of the EU Charter of Fundamental Rights or the principle of equal treatment enshrined in Article 20 of the Charter had been violated, provided, in relation to Article 20, that the legislation did not give rise to unequal treatment between television broadcasters and the aforementioned Internet advertising providers.

EuGH, Urteil vom 3.2.21, C-555/19, Fussl Modestraße Mayr

http://curia.europa.eu/juris/document/document.jsf?text=&docid=237285&pageIndex=0&doclang=de&mode=lst&dir=&occ=first&part=1&cid=3242242

CJEU, judgment of 3 February 2021, C-555/19, Fussl Modestraße Mayr

http://curia.europa.eu/juris/document/document.jsf?text=&docid=237285&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3242242/

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CJEU: Cash payments for licence fee not ruled out

Mirjam Kaiser
Institute of European Media Law

In a judgment (Case nos. C-422/19 and C-423/19) of 26 January 2021, the Court of Justice of the European Union (CJEU) ruled that payment in cash for the German radio and television licence fee could be refused on the grounds that the administrative cost of accepting cash payments was disproportionate.

The case concerned two German citizens from Hessen who had offered to pay Hessischer Rundfunk (HR) for their radio and television licences in cash. HR had refused their offer with reference to a rule that it had adopted preventing cash payments for the licence. The two German citizens had then received payment notices from HR, which they had disputed. The case ended up before the *Bundesverwaltungsgericht* (Federal Administrative Court – BVerwG). The BVerwG noted, firstly, that the rule infringed a higher-ranking provision of the *Gesetz über die Deutsche Bundesbank* (German Central Bank Act) and was therefore invalid under Article 31 of the German *Grundgesetz* (Basic Law). Cash payments could therefore not be prohibited. According to Article 14(1) of the Act, the euro was the only unrestricted legal tender for the settlement of monetary debts. The BVerwG doubted whether this application of the law was compatible with the requirements of the Monetary Union. It also wanted clarity over whether the unrestricted status of the euro as legal tender meant that cash payments could not be prohibited. It referred two related questions to the CJEU in a request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU).

In concrete terms, the CJEU ruled that the concept of "monetary policy" entailed a “regulatory dimension”. This was reflected in the fact that the euro served as a standard means of payment and could therefore, in principle, not be refused. With regard to the Union’s exclusive competence to determine the status of euro banknotes, the CJEU noted that, as a rule, payments could be made in cash. There was therefore a basic obligation to accept payments in euros. However, an exception could be made in cases where cash payments could be limited for reasons of public interest, as long as such a restriction was proportionate to the objective. Cash payments were therefore disproportionate if a more appropriate payment method was available. Such an exception was also in the public interest if the possibility of paying in cash were to result in unreasonable costs for the administration on account of the high number of licence fee payers. With this ruling, the CJEU referred the matter back to the BVerwG.

It is therefore now up to the BVerwG to decide whether or not the licence fee can be paid in cash, that is, whether limiting cash payments is in the public interest and proportionate.

Urteil des EuGH

http://curia.europa.eu/juris/document/document.jsf?text=&docid=236962&pageInd

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CJEU judgment

http://curia.europa.eu/juris/document/document.jsf?text=&docid=236962&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1739273

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NATIONAL

AZERBAIJAN

[AZ] Media reforms promoted

Andrei Richter
Comenius University (Bratislava)

On 12 January 2021, the President of the Republic of Azerbaijan signed a decree “On deepening media reform in the Republic of Azerbaijan”.

It lists the record of the country in “removing artificial obstacles to freedom of expression and freedom of information” and abolishing censorship since the 1990s. Modern technologies, though, call for reforms to be promoted in the country for “professional services on informing the public."

The decree establishes the Media Development Agency of the President of the Republic of Azerbaijan to replace the Fund of State Support for the Development of Mass Media. Its Chair, CEO and the board are appointed by the President of the Republic of Azerbaijan. The Agency’s founding capital will be AZN 285 405 (about EUR 14 000). Within two months, the Administration of the President of the Republic of Azerbaijan is to draft and submit to the President a new statute “On Media” to replace the 1999 statute “On the Mass Media” (see IRIS 2000-2:1/25) which is presently in force.

Azərbaycan Respublikasında media sahəsində islahatların dərinləşdirilməsi haqqında Azərbaycan Respublikası Prezidentinin Fərmanı

https://azertag.az/xeber/Azerbaycan_Respublikasinda_media_sahesinde_islahatlarin_derinlesdirilmesi_haqqinda__Azerbaycan_Respublikasi_Prezidentinin_Fermani-168630

Decree of the President of the Republic of Azerbaijan “On deepening media reform in the Republic of Azerbaijan”

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BULGARIA

[BG] Bulgarian competition watchdog approves major acquisitions in the local media, telecom and newspaper market

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

By adopting Decision No. АКТ-37-14.01.2021 of Комисия за защита на конкуренцията (the Commission for Protection of Competition, CPC), the local competition regulator has unconditionally approved the acquisition of the Bulgarian media company Нова Броудкастинг Груп (Nova Broadcasting Group) and its subsidiaries by the Dutch-based telecommunications and media company United Group.

Nova Broadcasting Group is one of the leading media service providers on the market. It owns 10 TV channels, including one of the national TV channels – Нова телевизия (Nova TV) –, as well as four radio stations, one of the major local online platforms (including the most popular video-sharing platform and mail service provider, and several news websites) and other information society service providers.

On analysing the facts of the case, the CPC ultimately found that the transaction would not lead to the establishment or strengthening of a dominant position on any of the relevant horizontal or vertically-related markets. The CPC found that there was no horizontal overlap between the activities of the parties to the concentration, thus concluding that there could be no anti-competitive effects at horizontal level.

Going into more detail, the CPC was of the opinion that the parties involved in the transaction operate at different levels of the audiovisual services chain and in certain telecommunications markets. Thus, the CPC established that some vertically-related markets in Bulgaria may be affected by the transaction. These include (i) the wholesale and retail markets for the distribution of TV and radio channels; (ii) the TV, Internet and radio advertising markets (due to Nova's activities with regard to the reselling of advertising time – both its own and that of other broadcasters), and (iii) the retail markets for mobile telecommunications services and Internet access services (stemming from the activities of Vivacom, another recent local acquisition of United Group – see below).

After making a detailed analysis of the possible outcome for all vertically-related markets, the CPC concluded that the new group would have neither the ability nor the incentive to engage in a foreclosure strategy in the vertically-related markets concerned. In short, the competition regulator states that: i) there are alternative TV and platform operators (some of whom are also vertically integrated) who are

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able to exercise effective competitive pressure over the merged entity; ii) the group would lose content, as well as income, from ad sales and the distribution of channels; iii) the industry is undergoing a process of modernisation, that is to say, moving from linear to non-linear providers, meaning that there is sufficient competition.

It is also worth briefly mentioning Decision No. AKT-39-14.01.2021 of the CPC, where the local watchdog also unconditionally approved the acquisition of two local newspaper publishers by United Group on the same day. The regulator found that the transaction would not impact the print media market. Thus, United Group has added two more companies to its portfolio of magazines (that is, adding to the magazines part of the Nova group).

These deals are the latest steps (probably not final) in United Group's strategy to consolidate the telecommunications and media market in the country following the acquisition of the incumbent telecom operator Българска телекомуникационна компания (the Bulgarian Telecommunications Company, BTC) earlier in 2020. Now United Group will be operating both Nova TV and Виваком (Vivacom), which is the telecom brand of BTC.

The acquisition of Nova Broadcasting Group is not the only acquisition of a similar nature in the local media and telecom industry. Another big deal which changed the Bulgarian media landscape occurred at the end of 2020. Би Ти Ви Медия Груп (the BTV Media Group), which owns the national channel Би Ти Ви (BTV), was sold to PPF Group NV (PPF) as part of the cross-border acquisition of Central European Media Enterprises (CME). In contrast to the Nova deal, the acquisition of CME by PPF was approved (also unconditionally) by the European Commission under the EU Merger Regulation.

Prior to the transaction for the acquisition of BTV, PPF also acquired Теленор България (Telenor Bulgaria) as part of the acquisition of Telenor's subsidiaries in Central and Eastern Europe, which is one of the three active mobile operators in the country.

The telecom and media market is consolidating and changing rapidly. It will be really interesting to see what the new players will bring to the local market and how they will be able to compete with the competition of OTT streaming services in the audiovisual services sector.

Решение № АКТ-37-14.01.2021 на КЗК

http://reg.cpc.bg/Decision.aspx?DecID=300059170

Decision No. AKT-37-14.01.2021 of the CPC

Решение № АКТ-39-14.01.2021 на КЗК

http://reg.cpc.bg/Decision.aspx?DecID=300059172

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Decision No. AKT-39-14.01.2021 of the CPC

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GERMANY

[DE] Advertising breaches by national broadcasters

Mirjam Kaiser
Institute of European Media Law

In a press release issued on 21 January 2021, the *Direktorenkonferenz der Medienanstalten* (Conference of Regional Media Authority Directors – DLM) announced that, in 2020, the Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision – ZAK) had investigated a total of 22 infringements of the programming rules contained in the *Rundfunkstaatsvertrag* (State Broadcasting Treaty – RStV), which has now been replaced by the *Medienstaatsvertrag* (State Media Treaty – MStV), by various national television channels.

The ZAK is responsible for supervising national commercial broadcasters insofar as the Kommission zur Ermittlung der Konzentration im Medienbereich (KEK) is not competent (see Article 36(2)(7) RStV, now Article 105(1)(1)(1) MStV).

The individual infringements involved, firstly, breaches of the journalistic principles enshrined in Article 10(1) RStV (now Article 6(1) MStV). In two cases, for example, the ZAK found that national TV programmes had reported on criminal cases in such a way that the victims and perpetrators could be identified. In one of these cases, the rule requiring restraint to be exercised when investigating children as vulnerable persons had also been breached. Furthermore, as part of its analysis of key advertising provisions and programme monitoring activities, the ZAK identified 16 violations of the advertising rules enshrined in Articles 7 *et seq.* RStV (now Articles 8 *et seq*. MStV). As well as the inadequate separation of advertising and programme content, the ZAK found breaches relating to the labelling of so-called split-screen advertising, infomercials and surreptitious advertising. It also criticised excessive product placement. Most of the advertising violations were committed in the run-up to Christmas 2019. The channels concerned were RTL, Sat.1, RTL 2, kabel eins, Tele 5, DMAX, n-tv, Channel21 and 1-2-3 TV.

Under the new MStV, which entered into force on 7 November 2020, the ZAK is now also responsible for telemedia supervision. Article 105(1)(1)(1) MStV requires it to monitor advertising in national telemedia services. The MStV also contains new provisions on the permitted duration of advertising (see Article 39 MStV). The regional media authorities have drawn up a new set of advertising regulations in order to clarify the advertising requirements of the MStV. These are likely to come into force on 15 April 2021 once they have been approved by the boards of the 14 regional media authorities.

Pressemitteilung der DLM

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https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/aufsicht-2020-werbeverstoesse-im-bundesweiten-rundfunk

DLM press release

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[DE] Federal Supreme Court rules on use of celebrity images as clickbait

Mirjam Kaiser
Institute of European Media Law

In judgments issued on 21 January 2021, the first civil chamber of the *Bundesgerichtshof* (Federal Supreme Court – BGH) ruled on two cases (nos. I ZR 120/19 and I ZR 207/19) concerning the use of images of celebrities for commercial purposes and the related intrusion on image rights.

In the first case (no. I ZR 120/19), the image of a celebrity had been used in an editorial article that had no connection with the person depicted. The dispute had arisen after a press company published a Facebook post containing a link to an article about cancer and four images of famous television presenters, one of whom took the case to court. By clicking on the post, readers were taken to the press company's website, which contained an accurate report about the illness of one of the other three TV presenters. The plaintiff demanded that the press company pay a fictitious licence fee for use of his image, referring to the enrichment provisions of Articles 812(1) and 818(2) of the *Bürgerliches Gesetzbuch* (Civil Code – BGB) and image rights protected under Article 22 of the *Kunsturhebergesetz* (Art Copyright Act – KUG) as a special form of personality right. Since the defendant had used the plaintiff's image without his permission, thereby intruding on his image rights, its actions should have been justified under Article 23 KUG. Exemptions from the requirement to obtain the permission of public figures under Article 23(1)(1) KUG must be granted after weighing up the opposing interests (see Article 23(2) KUG). The Federal Supreme Court held that, in this case, the celebrity's personality right took precedence because the image had been used without any editorial justification. It had only been used to draw readers' attention to the press publication. Known as "clickbait", this practice was similar to deliberate misreporting. The fictitious licence fee of EUR 20 000 granted to the plaintiff by the lower-instance courts was deemed appropriate by the BGH because it needed to take into account the plaintiff's exceptionally high market and advertising value.

The second case (no. I 207/19) concerned the use of the image and name of a famous actor from the ZDF series *Das Traumschiff* in an article about "Urlaubslotto", a competition featuring holidays and cash as prizes. A picture of the actor in his role as a ship's captain in the aforementioned series had appeared beneath the headline. The lower-instance courts had upheld the plaintiff's subsequent multi-stage claim for an injunction, information and the reimbursement of dunning costs. The Federal Supreme Court also ruled that the plaintiff's image rights had been breached. He had not given permission under Article 22(1) KUG. Regarding the exemption permitted under Article 23(1)(1) KUG, the court weighed the plaintiff's privacy rights against the public's interest in information. It found that the defendant's interest in information was supported by the link between a competition in which the prizes included holidays and the symbolic nature of an image from the series *Das Traumschiff*. However, this was

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outweighed by the absence of any noteworthy contribution to the formation of opinion and the primarily commercial purpose of the image's use. The plaintiff's personality rights were therefore predominant.

Pressemitteilung vom BGH zur Rechtssache Az. I ZR 120/19

https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=4c8bb952a01afb45571b564f8d41662c&anz=1&pos=0&nr=113838&linked=pm&Blank=1

Federal Supreme Court press release on case I ZR 120/19

Pressemitteilung des BGH zur Rechtssache Az. I ZR 207/19

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021014.html

Federal Supreme Court press release on case I ZR 207/19

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[DE] Federal government adopts new draft Film Support Act and launches "Kino I" initiative

Mirjam Kaiser
Institute of European Media Law

On 7 January 2021, the federal government announced the launch of its new "Kino I" project as part of the "Neustart Kultur" financial aid programme for 2021, which is designed to further stabilise the economic situation of cinemas during the pandemic.

The "Kino I" campaign forms part of the federal government's "Neustart Kultur" programme that was launched in 2020. "Neustart Kultur" is a government-led financial aid programme designed to safeguard the film industry as a cultural asset, which is in particular need of support following the closure of cinemas during the pandemic. The "Kino I" project aims to support investment in the long-term viability of cinemas, especially those in rural areas. The funding is particularly aimed at modernising aspects such as barrier-free access, sustainability, technical equipment, and energy efficiency. The campaign will provide up to EUR 25 million of funding, a EUR 3 million increase compared with last year.

Meanwhile, in a press release published on 13 January 2021, the federal government announced the adoption of a draft amendment to the *Filmförderungsgesetz* (Film Support Act – FFG).

The draft FFG is designed to provide financial support to the film industry through a film levy that is to be used to provide financial assistance through the *Filmförderanstalt* (Film Support Agency – FFA). Charged to pay-TV providers and programme distributors, the levy is designed to protect the structure of the German film industry, strengthen filmmaking as an economic and cultural asset, and uphold the quality and diversity of the German film landscape. The proposed amendments to the FFG concern pandemic-related adjustments to the eligibility requirements for receiving support, blackout periods and the general use of funding. The FFA will now be able to use a special "force majeure" clause to relax the requirements for receiving support, for example. Other key changes concern film production, which should be accompanied by measures to support ecological sustainability and reduce the carbon footprint; gender equality within the FFA board of directors and executive committee; fair working conditions in the film sector; and anti-discrimination measures to support disabled people and diversity. It will also be possible to adapt the levy requirement for pay-TV providers and programme distributors in line with current market developments. These proposals, which are designed to meet the need for flexibility during a pandemic, also take into account the current socio-political agenda regarding employee friendliness and climate protection within the film industry. The FFG is amended at least every five years in order to adjust the size of the levy. The latest amendment, which will come into force on 1 January 2022, will only be valid for

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two years because the consequences of the pandemic are hard to predict. It will now be examined by the German Bundestag (federal parliament) and Bundesrat (federal council).

Pressemitteilung der Bundesregierung zur "Kino I"-Aktion

https://www.bundesregierung.de/breg-de/bundesregierung/staatsministerin-fuer-kultur-und-medien/aktuelles/bund-verstaerkt-erneut-kinofoerderung-kulturstaatsministerin-gruetters-gemeinschaftserlebnis-im-kino-ist-durch-nichts-zu-ersetzen--1835014

Federal government press release on the 'Kino I' campaign

Pressemitteilung der Bundesregierung zum Gesetzesentwurf des FFG

https://www.bundesregierung.de/breg-de/bundesregierung/staatsministerin-fuer-kultur-und-medien/aktuelles/bundeskabinett-verabschiedet-neues-filmfoerderungsgesetz-kulturstaatsministerin-gruetters-filmfoerderung-in-zeiten-der-pandemie-flexibler-machen--1836268

Federal government press release on the draft FFG

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SPAIN

[ES] National Commission for Markets and Competition sanctions Atresmedia and Mediaset

Maria J. Roman Gallardo
MRG Abogados

The national regulator CNMC (National Commission for Markets and Competition) sanctioned the companies Atresmedia and Mediaset for violations of the General Act on Audiovisual Communication (*Ley General de Comunicación Audiovisual*, LGCA). The former has been sanctioned for covert advertising and the latter for non-anticipated changes in its scheduled programming.

With regard to the Atresmedia sanction, the applicable legislation defines covert advertising in Article 2.32 of LGCA as “the verbal or visual, direct or indirect, presentation of goods, services, name, brand, or activities of a merchandise manufacturer or of a service provider on TV shows, different from the location of the product, in which the presentation has, intentionally by the service provider of the audiovisual communication, an advertising interest and may induce the public to a mistake regarding the nature of said presentation.”

The facts: on 2 January 2020, five Atresmedia programmes included several covert commercial communications for the "Three Wise Men’s" cakes commercialised by *El Corte Inglés*. The said cakes are popular in Spain since they contain figurines that are said to bring good luck to whoever finds them in their portion. The covert advertising consisted in stating that, instead of the figurines, these cakes could contain annual subscriptions to Atresplayer Premium (Atresmedia) and that the said cakes were sold at *El Corte Inglés* stores.

The ruling: the CNMC considered that (i) the advertising purpose was clear and that there was a continuous infringement that obeyed a pre-established plan to advertise the cakes and the company *El Corte Inglés*; (ii) this may be considered as a direct inducement to buy the said cakes in *El Corte Inglés*; (iii) it may not be considered as self promotion by Atresplayer Premium, since it advertised the brand *El Corte Inglés*; (iv) the term “TV Commercial” was not displayed on the TV screen; and (v) it misled audiences since the advertising was masqueraded under the guise of informative content.

The sanction: having regard to these factors, to the duration of the covert advertising (199 seconds in total) and to the average audience of the programmes, the CNMC considered this a serious offence, and sanctioned Atresmedia to pay EUR 183 220.

As to the sanction for Mediaset, the applicable legislation states that according to the terms of Article 6.2 of the LGCA, the service provider shall announce its

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programming at least 3 days in advance and it must be made available to the public by way of a electronic programme guide with free content which can be found on the Internet, on one of the service provider's web pages. Changes are only permitted if they are the result of events beyond the service provider's control, or due to unexpected events of an informative interest or of live programming.

The facts: on 10 May 2020, Mediaset published its programming grid for 13 May 2020. According to this grid, the reality show *Supervivientes: Última Hora* was scheduled for 10 p.m. on 13 May 2020.

On 12 May 2020, in one of television network Cuatro's programmes, Mediaset changed the programming on 13 May 2020, substituting the programme *Supervivientes: Última Hora* for the programme *Supervivientes: Especial Última Hora*, which was 50 minutes longer than the substituted programme. Moreover, the announcement did not follow the last-minute modifications warning mechanisms on the Internet.

Mediaset stated that the change was due to unexpected events of informative interest related to one of the participants of the reality show who had been accused of fraud. Mediaset decided to inform him of these facts in order to allow him to challenge the facts or to abandon the reality show and return to Spain.

The ruling: despite this, the CNMC understood that: (i) the change in the programming did not respect the three days' prior notice obligation; (ii) the event causing the change in the programming was not beyond the service provider’s control and could not be considered as an unexpected event of informative interest either; (iii) the participant’s defence against the alleged fraud may not be at the expense of the audience’s right to transparent audiovisual communication; (iv) the new programme was longer than initially scheduled; (v) the broadcasting of the special programme coincided with the premiere of the Atresmedia show *Pasapalabra*, which could suggest that the real intention was to schedule the special programme in order to counteract interest for the premiere of the competing channel.

The sanction: for these reasons, the CNMC considered this a minor offence and sanctioned Mediaset to pay EUR 49 000.

Both rulings by the CNMC are subject to appeal before the Audiencia Nacional (High National Court), and it remains to be seen whether Atresmedia and/or Mediaset appeal the rulings.

Resolución de la CNMC SNC/DTSA/016/20/ATRESMEDIA

https://www.cnmc.es/sites/default/files/3316072_6.pdf

CNMC Decision SNC/DTSA/016/20/ATRESMEDIA

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Resolución del CNMC SNC/DTSA/049/20

https://www.cnmc.es/sites/default/files/3316089_2.pdf

CNMC Decision SNC/DTSA/049/20

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FRANCE

[FR] Amendment to France TV terms of reference to include Culturebox, a free temporary cultural channel

Amélie Blocman
Légipresse

With the COVID-19 pandemic raging and theatres still a long way from reopening, Culturebox, a temporary channel created by France Télévisions, was launched on DTT channel 19, france.tv, set-top boxes and apps on 1 February. The decree of 30 January 2021 amended the terms of reference of the national broadcaster France Télévisions in accordance with Article 48 of Act No. 86-1067 of 30 September 1986.

The channel's purpose is "to offer cultural programming, especially live entertainment, while theatres are closed following the cancellation of numerous cultural events due to the health crisis resulting from the COVID-19 epidemic."

The channel broadcasts all types of live entertainment (theatre productions, dance, opera, ballet, concerts, festivals, etc.), cultural programmes, artist profiles and other cultural events. The programmes are not subject to the provisions of Article 6 of the terms of reference, which specifies how shows should be broadcast on the public service broadcaster's other channels. Finally, Culturebox "does not broadcast any advertising."

Décret no 2021-96 du 30 janvier 2021 portant modification du cahier des charges de la société nationale de programme France Télévisions

https://www.legifrance.gouv.fr/download/pdf?id=z9Xex3BhyHCobGlKyQ5apkhid0FGM7a5PiSeodjDl1c=

Decree No. 2021-96 of 30 January 2021 amending the terms of reference of the national broadcaster France Télévisions

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[FR] CSPLA, Hadopi and CNC recommendations on the transposition of Article 17 of the Copyright Directive

Amélie Blocman
Légipresse

As stated in the law of 3 December 2020, the French Government is preparing to adopt an ordinance transposing Copyright Directive 2019/790 into French law by the summer. In particular, the new rules applicable to online platforms under the controversial Article 17 of the directive will need to be transposed. This article stipulates that, in future, content-sharing platforms will be liable for the unauthorised communication of copyright-protected content unless they conclude remuneration agreements with the rightsholder or make best efforts to block access to such content or remove it from their websites.

With this in mind, the Ministry of Culture's *Conseil supérieur de la propriété littéraire et artistique* (Higher Council for Literary and Artistic Property – CSPLA), the *Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet* (High Authority for the Dissemination of Works and the Protection of Rights on the Internet – Hadopi) and the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC) published their second joint report on content recognition tools for digital content-sharing platforms. The report was presented in the context of the forthcoming publication of the European Commission's guidance on the subject. The three institutions had published their first report on the matter in January 2020. They had concluded that these automatic recognition tools were effective and identified ways of ensuring that they could play their full role within the framework of Article 17. As a follow-up to this publication, the CSPLA president wanted to look at the proposed recommendations in more detail, in particular by clarifying the notion of the "best efforts" – mentioned in Article 17 of the Directive – that content-sharing platforms were required to make in order to ensure that unauthorised content could not be accessed. The question of what information rightsholders should provide in this context also needed addressing. The report's authors consider that technological content recognition tools are crucial and provide the only realistic way of regulating the enormous quantities of online content. Such tools are already in widespread use for video and audio content (Facebook, YouTube, Twitch, etc.).

The report goes on to describe the conditions of the balance that needs to be struck with regard to exceptions to intellectual property rights and to freedom of expression in order to ensure that these tools are not simply seen as filtering measures. It proposes amending France's draft implementing legislation in order to formally enshrine a guarantee as regards copyright exceptions. This would ensure that such exceptions, especially those for quotation and parody, could be invoked by users *ex post*. The regulator will also play an important role in keeping the mechanism in balance. It will provide out-of-court redress for users wishing to benefit from the intervention of a trusted third party if content is blocked without justification, and will be able to clarify best practices. The transparency of the

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management rules applicable to content access rights could also be improved. The report recommends broadening the range of licensed content, especially in certain sectors, such as still images. Finally, Article 17 should also make it possible to consolidate the shared responsibility of all players, including rightsholders.

Les outils de reconnaissance des contenus sur les plateformes numériques de partage : propositions pour la mise en œuvre de l'article 17 de la directive européenne sur le droit d'auteur, Rapport de mission du CPLA, de l'Hadopi et du CNC

https://www.culture.gouv.fr/Sites-thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-contenus-et-des-oeuvres-sur-les-plateformes-de-partage-en-ligne-II

Content recognition tools for digital content-sharing platforms: proposals for the implementation of Article 17 of the EU Copyright Directive, report by the CSPLA, Hadopi and CNC

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[FR] Google signs agreement on remuneration of neighbouring rights for publications containing "political and general information"

Amélie Blocman
Légipresse

In April 2020, the French competition authority ordered Google to negotiate licences with publishers "in good faith", allowing it to post publications or excerpts in accordance with the Act of 24 July 2019. This was confirmed by the Paris appeal court on 8 October 2020. On 21 January 2021, following the signature of an initial series of individual agreements between Google and various publishers (including *Le Monde*, *L'Obs*, *Le Figaro*, *Libération* and *L'Express*) in November, the *Alliance de la presse d'information générale* (French general press alliance – APIG) and the American giant announced an agreement on the remuneration of neighbouring rights under the Act of 24 July 2019. Several months of negotiations within the framework set out by the competition authority has culminated in an agreement which lays down the principles under which Google will negotiate individual licensing agreements with APIG members (which include national daily newspapers and regional daily and weekly publications) whose publications are recognised as containing political and general information, while reflecting the principles of the law, according to Google's blog. These individual licensing agreements will cover neighbouring rights and will allow for participation in News Showcase, a new licensing programme for press publications recently launched by Google to provide readers with access to enriched content. The remuneration provided for in the licensing agreements between each publisher and Google is based on criteria such as the publisher's contribution to political and general information, the daily volume of publications and its monthly Internet audience.

The Minister of Culture stressed that the agreement between Google and the APIG was only the first stage, with others to follow. Firstly, the agreement did not cover all rightsholders, even though neighbouring rights were owned by all press publishers (and not only those that published political and general information) and press agencies. Secondly, as Google was not the only company that should be paying for neighbouring rights, she called on the other platforms concerned to comply with French and European law. Finally, the minister announced that she would ensure that the remuneration received by publishers and press agencies for neighbouring rights was shared appropriately and fairly with journalists and other authors of works that were included in press publications, as the directive and the Act required. This is therefore not the end of the story...

L'Alliance de la Presse d'Information Générale et Google France signent un accord relatif à l'utilisation des publications de presse en ligne

https://france.googleblog.com/2021/01/APIG-Google.html

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The Alliance de la Presse d'Information Générale and Google France announce an agreement relating to the use of online press publications

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UNITED KINGDOM

[GB] An overview of the current inquiries being undertaken by the UK Parliament's Digital, Culture, Media and Sport Committee

Julian Wilkins
Wordley Partnership

The UK Parliament's Digital, Culture, Media and Sport Committee (DCMS) is undertaking five enquiries. One enquiry concerns the economic impact music streaming is having on artists, record labels and the sustainability of the wider music industry, as previously reported in IRIS 2021-2/22.

DCMS is also enquiring into Broadband, including the introduction of 5G; it is examining how realistic the government's pledge to ensure that every home and business in the United Kingdom has gigabit-capable broadband by 2025 is, and what is needed to achieve it. The DCMS Committee will consider the role of 5G technology, and what initiatives such as the Shared Rural Network mean for improving mobile connectivity across the United Kingdom. Another function of the inquiry is to evaluate the impact of COVID-19 on the introduction of full-fibre and 5G infrastructure.

A third DCMS enquiry is considering the future of public service broadcasting (PSB).The inquiry will look at the future of public service broadcasting within the wider media and digital industry, including funding, content and the regulation of PSBs. This also includes comparing PSBs with alternative subscription, streaming services and Freeview services.

The inquiry follows several developments that concern the BBC, including the government's consultation on decriminalising licence fee evasion and the cost of funding free TV licences for those aged over 75. The financial impact on the BBC, including cuts to some parts of its services, will form part of a broader examination of funding models.

Currently, regulations and obligations are placed on PSBs in return for benefits such as prominence and public funding. DCMS will consider whether SVODs and other streaming services should be subject to additional regulation.

Furthermore, DCMS will assess whether there is sufficient accessibility to different demographics and how a wholly Internet-based service would compare to the current terrestrial PSB model. DCMS will consider the role of PSBs in terms of services provided, accountability and whether public sector broadcasting is relevant - and what the suitable alternatives are. Other than the BBC, there are a number of other broadcasters across the United Kingdom with PSB responsibilities: ITV (Channel 3), Channel 4 and Channel 5 operate nationally, and STV (Scotland), S4C (Wales) and UTV (Northern Ireland) operate in the devolved

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nations.

A fourth DCMS inquiry concerns sport in our communities. The financial viability of community sports clubs is in doubt, with the future of many at risk even before the COVID-19 pandemic. The DCMS Committee wants to identify specific actions the government can take to guarantee the future survival of the community sports sector. The Committee is looking into sports governance, funding and the case for elite professional sports to support the lower leagues and grassroots.

The fifth future enquiry concerns the viability of UK music festivals, especially the support needed to see the return of events during 2021; in doing so, the inquiry will take account of the economic and cultural impact of festivals. DCMS will consider how to secure festivals in the face of the immediate pressures arising from COVID-19 and other long-term challenges

Finally, DCMS has a Sub-Committee on Online Harms and Disinformation. The DCMS Sub-Committee was set up in March 2020 to consider a broad range of issues in this area, including forthcoming legislation on Online Harms. This is a function arising from the consultative Online Harms White Paper launched in 2019 (see IRIS 2019-6/16).

Broadband and the road to 5G, UK Parliament

https://committees.parliament.uk/work/89/broadband-and-the-road-to-5g/

The future of public service broadcasting, UK Parliament

https://committees.parliament.uk/work/90/the-future-of-public-service-broadcasting/

The economics of music streaming, UK Parliament

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

Sport in our communities, UK Parliament

https://committees.parliament.uk/work/647/sport-in-our-communities/

The future of UK music festivals, UK Parliament

https://committees.parliament.uk/committee/378/digital-culture-media-and-sport-committee/news/123465/dcms-committee-to-examine-the-future-of-uk-music-festivals/

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[GB] Government publishes draft of post-Brexit Audiovisual Media Services (Amendment) Regulations 2021

Kelsey Farish
Dac Beachcroft

In late January 2021, the Government of the United Kingdom (UK) published its draft Audiovisual Media Services (Amendment) Regulations 2021 (referred to as the "2021 AV Regulations" for ease in this note). The objective of these new 2021 AV Regulations is to address the deficiencies that were not earlier addressed during the run-up to the UK's full withdrawal from the European Union.

When enacted, the UK's 2021 AV Regulations will update certain technical elements of the existing framework established by the European Union's Audiovisual Media Services Directive (the AVMSD) and subsequent laws. Some background to this regulatory landscape is set out below, together with a comment on the practical implications.

By way of background, the European Union's AVMSD was amended in 2018 to modernise and harmonise national legislation pertaining to audiovisual media across the Union's member states. Amongst other things, the AVMSD seeks to ensure a level playing field between the traditional TV broadcasting and new media services such as on-demand programme services (ODPS) like Netflix, and video-sharing platforms (VSPs) like YouTube.

In addition to harmonisation, the AVMSD also implements certain public policies to address the potential risks associated with media content. For example, it requires VSPs to put in place systems and policies to protect their users from harmful content, and to implement "the strictest measures such as encryption and effective parental controls" to protect children from content which may harm their physical, mental or moral development.

The implementation deadline for member states to bring the AVMSD into domestic legislation was in the autumn of 2020. Of course, the United Kingdom formally left the European Union in January 2020, although for one year (January 2020 through December 2020 inclusive) the UK benefited from a regulatory transition period during which time EU laws still applied (the "Transition Period").

Accordingly, the UK transposed the AVMSD into its national legislation in September 2020, by way of the Audiovisual Media Services Regulations 2020 (the "transposing Regulations"). That said, with the end of the Transition Period looming, the UK Government was obliged to prepare for the eventuality of the UK no longer being a member state from January 2021. The challenge for UK legislators was therefore to ensure that new laws worked for a post-Brexit landscape, whilst still meeting the practical demands of continued business with its European neighbours.

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To that end, the UK's Audiovisual Media Services (EU Exit) (Amendment) Regulations 2020 (SI 2020/1536) were laid down on 15 October 2020 to address several substantive problems with the transposing Regulations. Nevertheless, some deficiencies and inoperabilities regarding the operation of the transposing Regulations remained. This is where the 2021 AV Regulations enter the scene to amend the law in two key ways. Firstly, they update the responsibilities of Ofcom, which is the UK's communications regulator. Secondly, they ensure some degree of continuity for European works under the AVMSD regime.

With respect to Ofcom, under the 2021 AV Regulations, the regulator is still obliged to maintain lists of linear TV, ODPS and VSP services, but it is no longer required to notify the Commission of the same. Instead, Ofcom will just publish lists of the service providers that they regulate on their website. The new law also amends Ofcom's duty to cooperate with other regulators. Under the transposing Regulations, Ofcom was required to take all necessary steps to assist European Union member states and the Commission in complying with the AVMSD as it applies in relation to providers of ODPS and VSPs. Since the end of the Transition Period, these duties are no longer in effect. The new law therefore ensures that there are powers for Ofcom to cooperate and share information with EU and EEA regulators as appropriate, for example in relation to investigations.

The UK Government has noted in its explanatory memorandum to the 2021 AV Regulations (Explanatory Memorandum) that the sharing of information between Ofcom and its EU counterparts is "vital to ensure that UK users remain protected by supporting effective AVMSD regulatory regimes", and demonstrates that the UK "is abiding by its commitment to protecting minors from damaging content online." Interestingly, the Explanatory Memorandum also notes that it believes this spirit of open communication will also "incentivise other national regulators to cooperate if Ofcom engage with them."

The second issue concerns European works, and will be of interest to content creators and producers. As many in the sector will be aware, the AVMSD contains specific rules for the promotion of the distribution and production of European works, including reserving a minimum quota for European works. Despite Brexit, the UK will continue to participate in the European works regime, as eligibility is based on either EU membership, or being a signatory to the European Convention on Transfrontier Television (ECTT). Although the UK has left the European Union, it remains a signatory to the ECTT, which guarantees freedom of reception between parties and prohibits any restriction on the retransmission of compliant programmes within their jurisdictions. Likewise, any guidance issued by the European Commission with respect to audiovisual regulations will continue to have relevance in the UK as updated from time to time. In the Explanatory Memorandum, the UK notes that "eligibility is strongly in the UK's interests and reference to the relevant Commission guidance is evidence of the UK's commitment to the European works regime."

In conclusion, the UK Government maintains that there is currently a "high degree of similarity of the regulatory regimes for both the UK and the EU". As such, only a "low impact" on businesses is expected as a result of these new 2021 AV Regulations. However, although the outcome of the UK's new audiovisual

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regulations are indeed similar to those before Brexit, stakeholders would be prudent to note the context and consequences in any event.

Proposed Audiovisual Media Services (Amendment) Regulations 2021

https://assets.publishing.service.gov.uk/media/601965568fa8f53fbe1a0795/_Proposed_Negative_SI__-_Audiovisual_Media_Services__Amendment__Regulations_2021_SI.pdf

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[GB] Ofcom Revocation of Star China Media Limited Broadcasting Licence

Lorna Woods
School of Law, University of Essex

The Broadcasting and Communications Acts provide that entities responsible for broadcasting should have the appropriate licence; failure to have such a licence when required is a criminal offence (s 13(1) Broadcasting Act 1990). Conversely, only the persons who have "general control over which programmes and other services are comprised in the service" are the persons deemed to be providing the service for the purposes of the Act. A licensee cannot sub-let its licence, nor can it be the puppet of another body. Ofcom has provided guidance as to what this means in practice.

There are also limitations on the persons who may hold broadcasting licences; s 5(1)(a) Broadcasting Act 1990 disqualifies certain persons from holding licences (as listed in Part II of Schedule 2). Specifically, this provision excludes a body whose objects are wholly or mainly of a political nature and/or who is controlled by a body whose objects are wholly or mainly of a political nature.

Ofcom received a complaint (which was also published as a blog by the complainant) in early 2020 to the effect that Star China Media Limited (SCML) was ultimately controlled by the Chinese Communist Party. Ofcom started an investigation which led to another entity, China Global Television Network Corporation (CGTNC) accepting that SCML should no longer hold the licence. It subsequently submitted an application to transfer the licence from SCML to CGTNC. Ofcom rejected the application on two grounds: it did not contain all the information Ofcom had requested; and it was predicated on a corporate re-organisation which has still not been completed. Ofcom subsequently advised that it was minded to revoke the licence, and its recent decision implements the revocation.

Ofcom based its revocation notice on the fact that the wrong entity, CGTNC, is providing the licensed service, a fact which was not disputed. While Ofcom acknowledged that revocation of a licence was a significant interference with the applicants' freedom of expression as well as that of their audience, in Ofcom's view, this was a proportionate response. It is the responsibility of the broadcaster to ensure it is appropriately licensed. Moreover, Ofcom had engaged with both entities for the better part of a year to help them bring matters into line (detailed at Annex A). While it is possible for the licence to be transferred to another person, Ofcom had expressed concern in its provisional revocation notice that the current corporate structure meant that CGTNC would be under the control of and an associate of a disqualified person (part of the China Media Group controlled by the Chinese Communist Party). CGTNC provided no evidence to rebut this, and indeed the information provided to Ofcom as to the corporate structure was limited and inconsistent.

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In addition to the facts leading to revocation, Ofcom had found CGTNC in violation of impartiality rules and of fairness and privacy rules, in respect of which Ofcom was considering imposing sanctions. Three other fairness and privacy obligations are ongoing. The revocation decision was not affected by these content cases.

Ofcom, Notice of Revocation

https://www.ofcom.org.uk/__data/assets/pdf_file/0025/212884/revocation-notice-cgtn.pdf

Ofcom, Guidance on the licensing position of the 'provider of a service' and the 'sub-letting of capacity', 21 May 2010

https://www.ofcom.org.uk/__data/assets/pdf_file/0019/8326/service-provider.pdf

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[GB] Ryanair “jab and go” TV ad banned for encouraging irresponsible behaviour

Alexandros K. Antoniou
University of Essex

On 3 February 2021, the Advertising Standards Authority (ASA), the United Kingdom’s regulator of advertising across all media, banned Ryanair’s “jab and go” TV campaign on the grounds that it encouraged the public to act irresponsibly once they had received a coronavirus vaccination shot. The ban came just days after the Ryanair chief executive, Michael O’Leary, stated in a BBC Radio 4 interview that he expected a revival of European beach holidays in the summer of 2021.

The two controversial television advertisements were launched on Boxing Day and were seen between 26 December 2020 and 4 January 2021. The first ad featured a medical syringe and a small bottle labelled “vaccine” along with on-screen text stating “vaccines are coming”. The voice-over encouraged consumers to snap up Easter and Summer bargain deals to sunny European countries like Italy and Greece because “you could jab and go”. Footage also showed people in their 20s and 30s at holiday destinations. During the last few seconds of the ad, further on-screen text reinforced the same message with large lettering stating: “Jab & Go!” The second ad was similar, except that it included a different price offer.

The advertisements attracted 2 370 complaints and were challenged on three grounds: first, that the ads, and particularly the “Jab & Go” claim, were misleading because they gave the impression that large parts of the UK population would be vaccinated against COVID-19 by the summer of 2021 and would be unaffected by travel restrictions related to the pandemic; secondly, that the promotional statements in the ads were offensive because they trivialised the effects of the pandemic on society; and finally, that the ads encouraged people to behave irresponsibly once they had received a coronavirus vaccination shot.

In the opinion of the budget airline, the ads in question were first broadcast at a time during which the government continued to give “optimistic briefings” implying that a significant proportion of the population would be vaccinated midway through the year. In addition to the timing of the ads’ broadcast, the general public’s familiarity with information about the vaccines, the rollout schedule, the continuously changing international travel restrictions and inherent uncertainty in the travel industry, as well as the use of conditional language in the voice-over (“could”), were all important contextual factors which would enable the average viewer to understand that the ads envisaged “a hypothetical Easter or summer holiday.”

However, it was exactly this context, overshadowed by uncertainty and complexity, that placed an additional level of responsibility on advertisers to act

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cautiously when linking developments in response to the coronavirus pandemic with buyers' decision-making processes, especially at a time when consumers were likely to feel apprehensive about booking holidays.

The ASA found that both ads breached Rule 3.1 of the UK Code of Broadcast Advertising (BCAP Code) by materially misleading consumers about the impact that COVID-19 vaccines would have on their ability to travel abroad during Easter and summer 2021. The regulator considered that the information available at the time the ads were broadcast left no doubt that it was "highly unlikely" that societal groups falling outside the priority list for "phase one" of the planned vaccination rollout schedule (that is, the most vulnerable individuals in society) would be maximally protected in time to go on holiday either in summer or Easter 2021.

Moreover, while the vaccines are proved to provide some protection against developing serious illness, much is unknown about how the vaccine may prevent its spread from one person to another. Hence, vaccinated individuals are advised to continue adhering to social distancing and wearing face coverings, and such measures are likely to remain in place for both vaccinated and non-vaccinated people "in at least the short- to medium-term." However, the links to the planned vaccination rollout in the ad, coupled with the accompanying footage (which portrayed a group of young people jumping together into a pool and a couple being served by a waiter without a mask) conveyed a misleading message, namely, that most people who wished to go on holiday would be vaccinated in time to be in a position to do so and could go on holiday without restrictions as a direct result of being vaccinated against COVID-19.

The ads were also found to have breached Rule 1.2 of the BCAP Code, which requires marketers to prepare advertisements with a sense of responsibility to the wider society. The emphasis on the vaccines from the very outset, as well as the suggestion of immediacy and speed of access through the claim "Jab & Go", encouraged people to behave irresponsibly by prompting those not yet eligible to be vaccinated to arrange vaccination at a time when health services were coming under intense strain. Moreover, the featured imagery of people enjoying typical holiday activities without observing social distancing would lead some viewers to believe that it was possible for anyone to get vaccinated by Easter or summer 2021 and go on holiday once vaccinated without necessarily adhering to restrictions, posing risks for their own and others' health.

The ASA ruled, however, that the ads were not in breach of the harm and offensiveness rules under Section Four of the BCAP Code. Although their "celebratory" tone was "distasteful" to some viewers, it was not nevertheless found to be insensitive to the wider impact of the ongoing pandemic and was unlikely to cause serious or widespread offence against generally accepted societal standards.

The regulator directed Ryanair not to re-broadcast the ads in the form complained of. Interestingly, the evaluation made by Clearcast, the non-governmental

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organisation which pre-approves ads for broadcast on the United Kingdom's main commercial channels, was out of step with the regulator's assessment. Clearcast did not consider the language used in the ads to be insensitive. Instead, it took the view that the marketing communication in this case contained "a hopeful message" that holidaying in summer 2021 without social distancing was a real possibility, and at the time the ads were approved (when England was coming out of its second lockdown) "it looked like better times were coming."

The ASA is conscious of its regulatory role during the global health crisis. It has previously relied on its rules on social responsibility and material misleadingness when targeting ads that seek to profit from the ongoing public health emergency or otherwise exploit the current circumstances to sell products or services. In December 2020, following complaints by Stella Creasy, Labour/Co-operative Member of Parliament of the United Kingdom, the ASA banned four Instagram posts made by influencers in association with Klarna Bank for promoting the use of the company's deferred payment service in an "irresponsible manner", in breach of the advertising code. The controversial ads encouraged the use of credit to purchase beauty and clothing products in order to help with lifting or boosting people's moods during the challenging circumstances faced by many consumers in the national COVID-19 lockdown period.

ASA Ruling on Ryanair DAC

https://www.asa.org.uk/rulings/ryanair-dac-g20-1089921-ryanair-dac.html

ASA Ruling on Klarna Bank AB

https://www.asa.org.uk/rulings/klarna-bank-ab-a20-1081031-klarna-bank-ab.html

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ITALY

[IT] Court of Rome tackles the first case of online disinformation related to the COVID-19 emergency

Ernesto Apa& Marco Bassini
Portolano Cavallo

By way of an order issued on 27 November 2020 in the context of proceedings brought as a matter of urgency, the Court of Rome had the chance to tackle the first leading case in Italy concerning online disinformation, a very well-debated subject, most notably in the age of the pandemic.

The decision of the court arose out of the claim made by the founder of a web channel named InfOrmalTV, allegedly created to disseminate independent information, who complained that YouTube had removed from his portal some COVID-19-related videos because of multiple violations of the terms and conditions of the service.

According to the Court of Rome, in its capacity as a hosting provider, YouTube is subject to a contractual (and legal) obligation to remove unlawful content. In the view of the plaintiff, however, the pieces of content specifically removed by YouTube from his channel did not amount to unlawful information and therefore did not constitute violations of the relevant terms of service.

The content of the videos in question was in fact related to the COVID-19 emergency; in particular, the videos supported the use of ozone for treating the COVID-19-related disease, as opposed to what was established by the Ministry of Health in the guidelines against misinformation published on its website. The Ministry of Health's website marked as false the following statement: "Ozone sterilizes air and environments and prevents infection by Covid 19"; on the contrary, the video published on the YouTube channel managed by InfOrmalTV aimed at challenging this point of the guidelines.

In the view of the Court of Rome, there is no scientific evidence that ozone has such properties and can be used as a therapy in case of COVID-19 infection. Based on this, the Court of Rome acknowledged the lack of the requirement known as *fumus boni iuris* (that is, the likelihood of success on the merits), and therefore rejected the claim made by the plaintiff.

Tribunale di Roma, sezione diritti della persona e immigrazione civile, ord. 41450, 27 novembre 2020

Court of Rome, section on human rights and civil immigration, ord. 41450, November 27, 2020

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[IT] The Court of Rome sentences Dailymotion and Veoh to refund Mediaset for copyright infringement

Francesco Di Giorgi & Luca Baccaro

On 21 January 2021, in the wake of the consolidated national and EU jurisprudence, the Civil Court of Rome adopted two important judgments aimed at protecting publishers from several forms of online piracy.

The first statement concerns the French portal Dailymotion (controlled by Vivendi), which was ordered to pay Mediaset over EUR 22 million because of the illegal publishing of approximately 15 000 videos, amounting to a total of 30 000 minutes of viewing, taken from Mediaset contents. In addition, it was sentenced to pay a penalty of EUR 1 000 per day for any further illegal dissemination of the passages subject to the judgment, and to publish the sentence in two of the main Italian national newspapers, *Corriere della Sera* and *Sole 24 Ore*. The ruling confirmed all the legal principles which had already been expressed in a previous ruling of July 2019 by the same Court of Rome regarding Dailymotion's liability.

On the same day, the Court of Rome also condemned the American platform Veoh (at the time of the facts managed by Qlipso Inc.) for the same violation, ordering it to pay Mediaset over EUR 3.3 million. Also in this case, a penalty of EUR 1 000 was imposed for each violation, in addition to the obligation to publish the sentence in the newspapers *Corriere della Sera* and *Sole 24 Ore*.

Tutela del diritto d'autore anche sul digitale: Due nuove vittorie legali di Mediaset contro la pirateria online, Mediaset

https://www.mediaset.it/gruppomediaset/bin/90.$plit/Comunicato_Stampa_10399.pdf

Protection of copyright also on digital: Two new legal victories for Mediaset against online piracy, Mediaset

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LITHUANIA

[LT] Lithuania transposes new Audiovisual Media Services Directive

Indre Barauskiene
TGS Baltic

With a few months' delay, on 14 January 2021, the Lithuanian Parliament (Seimas) transposed Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities into the Law on Provision of Information to the Public of the Republic of Lithuania (*Lietuvos Respublikos visuomenės informavimo įstatymas* - Media Law).

The principle of state of origin and the new regulation of video-sharing platform services:

The principle of the state of origin was reinforced following the rules provided in the Audiovisual Media Services Directive, and its application was expanded not only to audiovisual media services but also to newly regulated video-sharing platform services, which were regulated by including a new section in the Media Law.

In particular, the amended law provides that the operators of such platforms will be required to notify the Radio and Television Commission (Lietuvos radijo ir televizijos komisija) of the planned video-sharing platform services before commencing these activities. This means that any platform operator who falls under Lithuanian jurisdiction will be subject to a prior notification requirement, without which the Radio and Television Commission will be able to apply to the court for suspension of the activities of such entities for an indefinite period.

The amended law also sets out requirements for platform operators, which include the following responsibilities:

- implement all measures provided for in the Media Law for the protection of minors from the negative impact of public information;

- prevent the dissemination of prohibited information (such as war propaganda, incitement of hatred, etc.);

- ensure compliance with advertising requirements;

- clearly inform consumers about audiovisual commercial communications in videos;

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- comply with a code of conduct (ethics) adopted on an individual basis or with other video-sharing platform providers regarding inappropriate audiovisual commercial communications that are included in children's programmes in respect of food and beverages that contain nutrients or substances with a physiological effect, in particular fats, trans-fatty acids, salt or sodium, and sugar, which are recommended in moderation.

What does this mean in practice? Now every platform operator that has not been regulated to date will have to:

- notify the Radio and Television Commission of its activities following a procedure that will be detailed in secondary law;

- pay fees to the Radio and Television Commission, which will amount to 0.8% of the revenue received from audiovisual commercial communications, advertising, subscription fees and other activities related to the video-sharing platform services; and

- ensure compliance with the above requirements.

Although the law provides for specific measures to be chosen by the platform operator, the Radio and Television Commission will be able to oblige the implementation of specific measures or indicate how to implement them if it finds that the wrong measures have been selected.

Creation of the information system of producers and disseminators of public information:

Certain amendments to the Media Law also provide for the creation of a new information system where all information about producers and disseminators of public information will be published, including basic information such as the company name, address, registration code, contact details, information about management, shareholders' details, issued licences, breaches of the law or ethic codes, financial statements, etc.

All this information will be published and available to everyone free of charge, except for information relating to the person's date of birth or personal telephone number.

Other amendments that derive from the Audiovisual Media Services Directive:

The amendments to the Media Law further harmonise the definitions used in the new directive (such as audiovisual media service); detail the rules on the establishment of jurisdiction; provide for the prohibition of overlaying audiovisual media services with advertising without the express consent of those service providers; further detail the rules and obligations with regard to European works, etc.

It should be noted that the Lithuanian legislator did not provide a lot of time to prepare for the changes: the amending law was adopted on 14 January, promulgated on 26 January, and entered into force on 1 February, leaving a lot of

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questions to be detailed in secondary law, which is yet to be prepared and enacted.

2021 m. sausio 20 d. Lietuvos Respublikos visuomėns informavimo įstatymo Nr. I-1418 2, 19, 20, 22, 24, 25, 31, 33, 34, 34-1, 37, 38, 39, 40, 40-1, 40-3, 40-4, 43, 45, 47, 48, 51, 52 straipsnių pakeitimo, Įstatymo papildymo 32-1, 40-5 straipsniais, 34-2 straipsnio pripažinimo netekusiu galios ir Įstatymo trečiojo skirsnio pavadinimo pakeitimo įstatymas.

https://www.e-tar.lt/portal/lt/legalAct/56ceb2d05fdd11eb9dc7b575f08e8bea

Law on Public Information of the Republic of Lithuania No. I-1418 amending Articles 2, 19, 20, 22, 24, 25, 31, 33, 34, 34-1, 37, 38, 39, 40, 40-1, 40-3, 40-4, 43, 45, 47 , 48, 51, 52, Supplementing the Law with Articles 32-1, 40-5, Repealing Article 34-2 and Changing the Title of the Third Section of the Law No. I-1418 dated 14 January 2021.

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[LT] Lithuanian Radio and Television Commission adopts new guidelines for the qualification of video-on-demand services

Indre Barauskiene
TGS Baltic

On implementing the provisions of the Law on Provision of Information to the Public of the Republic of Lithuania (*Lietuvos Respublikos visuomenės informavimo įstatymas* - Media Law), which transposes the 2018/1808 Audiovisual Media Services Directive into the Law on Provision of Information to the Public of the Republic of Lithuania, on 1 February 2021, the Radio and Television Commission (*Lietuvos radijo ir televizijos komisija*) announced Guidelines for the qualification of on-demand audiovisual media services (the Guidelines).

First, the Radio and Television Commission notes that the Guidelines are not legally binding, but provide general indications, which, if applied to a specific situation, would make it possible to determine whether an audiovisual media service is to be considered as on-demand. However, at the same time, the Commission emphasises that it is also important not to apply these features directly, but also to apply the criterion of reasonableness, as this is the only way to achieve the best result.

The essential criteria identified by the Radio and Television Commission to define on-demand audiovisual media services are:
An on-demand service is a non-linear audiovisual media service, that is to say, there are no live broadcasts because the user him/herself chooses when to watch. Programmes can be watched at a chosen time and individual requests selected by the user. Programmes are ordered from the catalogue offered by the on-demand service provider; if the content is selected, grouped and submitted by the service provider, it is an on-demand service. If the content is uploaded by the user, it is not an on-demand service, as it could be qualified as a video-sharing platform service. In order to determine whether an on-demand service provider is an audiovisual media service provider, the following elements are assessed: Is there editorial responsibility for a particular service provider? Is there an economic and commercial activity in the provision of this service (that is, is this activity registered, does it generate revenue, etc.)? Is there a charge for this service? Are services provided (programmes transmitted) via electronic communications networks? Are the programmes broadcast for information, entertainment or educational purposes? The main purpose of an on-demand service is to watch programmes. It is also important to determine whether the viewing/provision of such programmes to the consumer is the main purpose of the on-demand audiovisual media service. There may be situations where an entity offers programme viewing on its platform as one of many other services, in which case it is assessed whether this is the main purpose or only an element that complements other services.

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2021 m. vasario 1 d. Užsakomųjų audiovizualinės žiniasklaidos paslaugų reguliavimo gairės.

https://www.rtk.lt/lt/administracine-informacija/uzsakomuju-audiovizualines-ziniasklaidos-paslaugu-reguliavimas-ir-prieziura

Guidelines for the regulation of on-demand audiovisual media services, dated 1 February 2021.

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MOLDOVA

[MD] Audiovisual Code amended

Andrei Richter
Comenius University (Bratislava)

On 16 December 2020, the Parliament of the Republic of Moldova adopted at the final reading several amendments to the 2018 Code of the Republic of Moldova on Audiovisual Media Services. The amendments were introduced on 23 November 2020. They were signed by the outgoing President of Moldova Igor Dodon on 18 December and entered into force on 22 December 2020.

The amendments, in particular, rephrase paragraph 4 of the Code's Article 17 (see IRIS 2019-3:1/24). It now says: "In order to protect the national audiovisual space and ensure national security, providers and distributors of media services have the right to include in their service offerings the broadcast of television and radio broadcasting programmes of a military nature, domestic or purchased in third countries, which comply with the provisions of the Concept and the Strategy of Information Security of the Republic of Moldova." Law No. 299/2017 on the Concept was adopted by Parliament in 2017 and serves as the basis for strategies with five-year programmes, currently covering the period 2019-24.

The amendments abolished the minimum quota of 50% for audiovisual products from the EU member states and countries who ratified the European Convention on Transfronier Television of the Council of Europe, in respect of all programmes purchased by Moldovan broadcasters. In addition, the quotas of 50% for European audiovisual products and 10% for independent production for Moldovan linear broadcasters were abolished. The amendments also abolished the 30% quota for European products that existed for non-linear media (Articles 5 and 6 of the Code). Thus, the new law has removed the obstacles for the Russian TV news and public affairs programmes that have existed for the past two years. The amendments also abolished the existing ban (Article 53) for the public authorities, including parliament, government and municipal authorities, to be the owners or beneficiaries of audiovisual media service providers. The ban shall still remain for political parties, "religious cults" and trade unions.

Law on amendments to the Code of the Republic of Moldova on Audiovisual Media Services N 174/2018

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NETHERLANDS

[NL] Vlogger ordered to pay damages over YouTube video published without consent

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 9 December 2020, the District Court of Amsterdam (*Rechtbank Amsterdam*) delivered an important judgment on the liability of vloggers and social media influencers for audiovisual content published without consent on YouTube and Instagram which violates the right to private life. The judgment contains important principles on the filming of private individuals in public areas without consent, and the subsequent publication of such videos on large video-sharing platforms such as YouTube.

The case arose in May 2018, when the defendant, a well-known Dutch musician and vlogger, published a video on his YouTube channel for his many followers which depicted a public altercation between an individual (the claimant) who had been accused of theft by another person. The vlogger had filmed the 10-minute public altercation during which the claimant had been followed by another person who was accusing him of bicycle theft; however, towards the end of the video, the person admits to having been mistaken about the theft. The vlogger later uploaded the video to his YouTube channel, seeking to highlight the issue of "prejudice" in society.

However, the claimant initiated legal proceedings against the vlogger, claiming that, due to the publication of the video and the publishing of his image without consent, he had suffered harassment as well as damage to his right to reputation and private life. The vlogger agreed to remove the video from his YouTube channel, however, the claimant sought over EUR 10 000 in damages over the video. The court first recognised that the case involved a conflict between the vlogger's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), and the claimant's right to protection of his reputation under Article 8 ECHR, and specifically against accusations of unlawful conduct. The court then examined the specific circumstances of the filming, and held that the vlogger had not taken sufficient account of the legitimate interests of the claimant in publishing the video on YouTube, and "should have realised the negative consequences the disclosure of these images could have for the claimant in this context." Importantly, the court held that while it "may be the case that in today's society a lot of filming is done, that does not mean that everything may be made public, and the interests of those being filmed must be taken into account." Furthermore, the court rejected the defendant's argument that the end of the video revealed the accusation of theft to be mistaken, holding that for the most part of the video, the claimant was portrayed as a thief, which had led to him experiencing adverse effects. As such, the court held that the publication of the video had been unlawful, but rejected the claimant's claim of

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EUR 10 000. Instead, the court ultimately ordered the vlogger to pay damages and costs totalling EUR 1 000.

District Court of Amsterdam, ECLI:NL:RBAMS:2020:5820, 9 December 2020

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[NL] Judgment on mayor’s Twitter post linking the political party *Forum voor Democratie* with fascism

Saba K. Sluiter
Institute for Information Law (IViR), University of Amsterdam

On 15 January 2021, the District Court of Rotterdam (*Rechtbank Rotterdam*) delivered an important judgment on the protection of political debate on social media platforms, especially concerning harsh criticism of political parties during election periods (see also IRIS 2020-5/16). Notably, the court ruled that a Twitter post by the mayor of a small town linking the well-known political party *Forum for Democratie* to fascism and Nazism was not unlawful.

The case arose right after the Dutch regional elections in 2019 (*Provinciale verkiezingen*), when the mayor posted a message in response to the speech given by Thierry Baudet, the national leader of the political party *Forum voor Democatie* . In the Twitter post, the mayor draws a parallel between the speech of Thierry Baudet and fascism. The message referred to Baudet's speech alongside pictures of books about fascism and Nazism. The mayor removed the message within two days of it being posted. The plaintiff, who had voted for Thierry Baudet, was offended by the message and asserted that his reputation had been damaged because the Tweet falsely established a connection between *Forum voor Democratie* and fascism. He claimed damages of EUR 1 750.

The court noted that there was a conflict between two rights: the mayor's right to freedom of expression and the right to respect for privacy, specifically the reputation of the plaintiff. The court then proceeded to balance these rights by applying ECHR and corresponding case law. First, the court held that the expression contained a value judgment, which made it less relevant whether the statement was supported by facts, as it could not be regarded as either true or false. The court added that it was not up to the court to decide whether the ideas of a politician or a political party fit within a (reprehensible) political movement or not. Secondly, the case at hand dealt with political speech as part of a public debate. There is little scope for limitations of freedom of speech as part of a public debate. Based on these two factors, the court held that freedom of speech prevailed, and that the Twitter post had not been unlawful. Finally, the court noted that a statement about a political party is, in principle, not unlawful towards the voters of that party, not even if they are deeply affected by the message. This provided an additional reason as to why the claim had to be dismissed.

Rechtbank Rotterdam, ECLI:NL:RBROT:2021:197, 15 januari 2021

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2021:197

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