IRIS newsletter

IRIS 2021-5

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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Web Design:

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Coordination: Cyril Chaboisseau, European Audiovisual Observatory
ISSN 2078-6158

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EDITORIAL

Two years ago, in these very same electronic pages, I joyfully wrote (paraphrasing Heinrich Heine): *...in the wonderful month of May flowers bloom, birds sing, and the Festival de Cannes opens its doors to the whole fauna and flora of international cinema.* This is, as you know, something we will have to renounce for the second consecutive year. COVID pandemic *oblige*, this year the festival has been moved to the beginning of July, and (as it reads on the Festival's website) the event will take place in strict compliance with the government health measures in force in France for the period of the Festival. Let's keep our fingers crossed!

Talking about cinema(s): in France, where more than 400 feature films are queueing to be projected onto the silver screen, the CNC has adopted an emergency measure in order to make it easier to release new films outside cinema theatres without the need to pay back CNC funding. In parallel to this decision, the French competition authority has clarified the framework and conditions under which temporary consultation between distributors on film release dates could be compatible with competition law. In Italy, a new Commission in charge of verifying the correct classification of cinematographic works by distributors and producers has been created. In the words of the Italian Minister of Culture, with this decree, "film censorship has been abolished and the system of controls and interventions that still allowed the State to intervene on the freedom of artists has been definitively ended". But just as the audiovisual sector extends beyond the silver screen, our newsletter also covers other areas: from the co-regulation of commercial communications in Spain to the withdrawal of the European Commission's 2019 Commitment Decision involving major film studios and Sky UK; from new rules affecting the media sector in Bulgaria to a Dutch court judgment on an offensive COVID-19 broadcast and incitement to hatred; from Germany's voluntary self-monitoring body for multimedia service providers approval of Disney+'s new extended child protection functions to the Danish draft implementation of EU copyright directives.

Stay safe and enjoy your read!

Maja Cappello, editor European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

CROATIA

European Court of Human Rights: Bon v Croatia

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

The European Court of Human Rights (ECtHR) has once more taken into consideration some specific features of offensive statements distributed over the Internet in a case applying Article 10 of the European Convention on Human Rights (ECHR). The applicant, an environmental activist, was convicted and fined for insulting a local politician, stating in public that the latter had "acted like a real cockroach". The ECtHR found that the criminal conviction for insult violated the activist's right to freedom of expression as guaranteed under Article 10 ECHR. The Court referred to the fact that the insulting statement had been posted on the website of a local NGO, with only a limited impact, and without the activist's knowledge and consent.

The applicant, Ranko Bon, is the president of a regional branch of the Green Party in Croatia. At a round table organised by the National Forum for the Environment, held at the Centre for Journalists in Zagreb in 2009, in front of an audience of approximately fifty people, Bon gave a presentation in which he asserted that there had been an excess of instruments of power in his hometown Motovun. According to Bon there was a democratic deficit, due to the fact that everything was happening "in darkness", behind closed doors, far from the eyes of the public. In that context, he also said that the then head of the Motovun Municipality, S.V., had been acting "like a real cockroach". Bon's speech was recorded without his knowledge and published, without his consent, on the website of an environmental non-governmental organisation (NGO). S.V. subsequently lodged three criminal complaints against Bon accusing him of defamation and insult. Bon was found guilty of insulting S.V., in particular by referring to him as "a real cockroach". This statement was considered to aim at harming S.V.'s honour or reputation. Bon was fined for 3 500 EUR and ordered to bear the costs of proceedings to the amount of 130 EUR. This conviction was confirmed on appeal and the Constitutional Court dismissed Bon's complaints as ill-founded.

Before the ECtHR Bon argued that his criminal conviction had violated his right to freedom of expression guaranteed under Article 10 ECHR. The judgment of the ECtHR focusses on the question as to whether the interference with Bon's right to freedom of expression could be justified as necessary in a democratic society. It qualifies the present case as a conflict between concurrent rights, namely S.V.'s

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right to reputation, as part of his private life guaranteed under Article 8 ECHR, on the one hand, and Bon's right to freedom of expression on the other. In such a context, the ECtHR evaluates whether the domestic courts applied the criteria established in its case-law on the subject, and whether the reasons that led them to take the impugned decisions were sufficient and relevant to justify the interference with the right to freedom of expression. The Court observes that Bon as an environmental activist and the president of a local branch of a political party, had given a presentation at a public gathering of a scientific nature, at which, among other things, the manner of conducting local environmental politics had been discussed. Therefore it considers that the discussion in the present case was clearly one of public interest and the subject of social debate. S.V., as head of the Motovun Municipality, was a public figure and therefore he should have had a higher threshold of tolerance towards any criticism directed at him while conducting local politics. Furthermore the impugned statement had been made only to a limited number of people with a particular interest, while Bon did not have the intention to make his presentation available to the general public. It was without his knowledge or consent that his presentation had been privately recorded and posted on the website of a local NGO, with only a limited impact. The Court further observes that the domestic courts limited their analysis to the fact that Bon had called S.V. "a real cockroach", without embarking on an analysis of whether Bon's statement could have been a value judgment not susceptible of proof. The domestic courts also failed to carry out an adequate analysis to assess the context in which the impugned expression had been used, summarily dismissing Bon's contention that the impugned part of his speech had been purely metaphorical. With regard to the nature and severity of the sanction imposed, the ECtHR notes that Bon was convicted in criminal proceedings and consequently received an entry in his criminal record, while the fine imposed on Bon – approximately 3 500 EUR – was substantial. The sanction imposed had also negative repercussions on Bon's further engagement as an environmental activist since thereafter he retreated from his local political engagement and from all public activities, whereas S.V. was re-elected at the subsequent local elections. The ECtHR concludes that the domestic courts did not put forward relevant and sufficient reasons for the interference with Bon's freedom of expression or give due consideration to the principles and criteria laid down in the Court's case-law for balancing that freedom with another individual's right to respect for his or her private life. The domestic courts exceeded the margin of appreciation afforded to them and failed to strike a reasonable balance of proportionality between the measures restricting Bon's right to freedom of expression and the legitimate aim pursued. There has accordingly been a violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, First Section, sitting as a Committee, in the case of Bon v. Croatia, Application no. 26933/15, 18 March 2021

https://hudoc.echr.coe.int/eng?i=001-208646

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UKRAINE

European Court of Human Rights: *Sedletska v. Ukraine*

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The right for journalists to protect their sources also prohibits the judicial authorities to have access to journalists' data stored on the server of a mobile telephone operator. That is the essence of a judgment recently delivered by the European Court of Human Rights (ECtHR). The ECtHR found a violation of the protection of journalistic sources as part of the right to freedom of expression under Article 10 of European Convention on Human Rights (ECHR). In an early stage of the procedure the ECtHR, by way of an interim measure, had already requested the Ukrainian authorities to abstain from accessing any of the data received from the journalist's mobile telephone operator on the basis of two court orders that were complained about in this case.

The applicant, Ms. Nataliya Yuriyivna Sedletska, is a journalist at the Kyiv office of Radio Free Europe/Radio Liberty. She is also the editor-in-chief of a television programme that focuses on corruption. In 2017 Sedletska was summoned to the Prosecutor General's Office (PGO) for questioning about a meeting she allegedly had with Mr. S., the head of the National Anticorruption Bureau of Ukraine (NABU), who was charged for violation of privacy (of Ms. N.) and disclosure of confidential information concerning an ongoing criminal investigation against a prosecutor (Mr. K.). Sedletska informed the PGO that, as a journalist, she communicated with many law-enforcement officials, including with the head of the NABU, Mr. S, and she claimed that she could not be interviewed as a witness if it would lead to the identification of her journalistic sources. For the same reason, she refused to answer questions related to the alleged meeting with S. and to either confirm or deny her presence at that meeting. Half a year later the PGO submitted a request to a District Court in Kyiv for access to Sedletska's communications held by her mobile service provider JSC "Kyivstar", over a period of 16 months. The requested data included dates, times, call durations, telephone numbers, sent and received text messages (SMS, MMS), and the location of Sedletska at the time of each call or message. The same day an investigating judge of the District Court issued an order authorising the collection of the requested data. This order was confirmed but narrowed in territorial scope by a judgment of a Kyiv City Court of Appeal. In the meantime the PGO investigator wrote a letter to the mobile service provider JSC "Kyivstar" clarifying that data was only required about the dates, times and locations of the mobile telephones of Sedletska and one other person, near six specified streets and places in Kyiv. It was also indicated that this information should be provided without any other data being disclosed. Sedletska and her lawyer asked JSC "Kyivstar" and the PGO whether the investigation had had access to Sedletska's mobile telephone data. The request was refused on the basis of the confidentiality of the ongoing investigation.

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However, already a few weeks earlier Sedletska had applied for an interim measure by the ECtHR under Rule 39 of the Rules of the Court. Promptly the ECtHR indicated to the Ukraine Government that, in the interests of the parties and the proper conduct of the proceedings, they should ensure that the public authorities abstain from accessing any of the data specified in the order of the District Court concerning Sedletska. A few weeks later, the ECtHR extended the interim measure indicating to the Government of Ukraine to ensure that the public authorities abstain from accessing any data mentioned in the ruling of the Kyiv City Court of Appeal concerning Sedletska, until further notice. Half a year later, in February 2019, the PGO informed the Government's Agent that they had not carried out any of the actions authorised by the court orders in Sedletksa's case, taking into account the requirements imposed under Rule 39.

In her application lodged before the ECtHR, Sedletska complained that the court orders allowing the PGO to access her mobile telephone communications data had constituted an unjustified interference with her right to the protection of journalistic sources, violating Article 10 of the ECHR. She also argued that her rights under Article 13 had been violated, due to the absence of effective remedies for her complaints under Article 10 of the ECHR. Sedletska submitted that both the measure of interference authorised by the domestic courts and the persistent uncertainty as to whether or not the respective court orders had been enforced and whether the confidentiality of her sources could be compromised had had a prohibitive chilling effect on her activity as an investigative journalist. In third-party interventions Media Legal Defence Initiative and Human Rights Platform submitted that the confidentiality of journalistic sources posed new legal challenges in view of technological advances and the emergence of new types of media, communications and information processing. They suggested that that pre-eminence of the protection of journalistic sources in the broadest sense was crucial to the preservation of the public watchdog function of the modern media. According to the Ukraine Government, Sedletska's allegations that the disputed measure could result in the identification of her journalistic sources and that her communications data could be used for ulterior motives were unsubstantiated and did not violate her rights under the ECHR.

The ECtHR holds that the impugned authorisation, regardless of whether either of the two relevant court orders had been enforced, had amounted to an interference with Sedletska's rights under Article 10 of the ECHR. Next, the ECtHR focuses on the crux of Sedletska's argument concerning the relevance and sufficiency of the reasons provided by the judicial authorities for authorising the interference with her protected data. It reiterates that limitations on the confidentiality of journalistic sources calls for the most careful scrutiny, having regard to the importance of the protection of journalistic sources for press freedom in a democratic society. The Court also emphasises that any interference potentially leading to the disclosure of a source cannot be considered "necessary" under Article 10 § 2 unless it is justified by an overriding requirement in the public interest. It refers to a series of cases concerning searches of journalists' homes and workplaces and the seizure of journalistic material, including communications data, in which the Court recognised that such measures, even if unproductive, constituted a more drastic type of interference than a targeted order to divulge

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the source's identity, since such measures had allowed the relevant authority to obtain access to a broad range of the material used by the journalists in discharging their professional functions. The ECtHR finds the scope of the data access authorisation in the first court order was grossly disproportionate to the legitimate aims of investigating a purported leak of classified information by S. and protecting Ms. N.'s private life. The Court agrees that the new data access authorisation given by the Court of Appeal, which replaced the District Court's authorisation and was limited essentially to the collection of her geolocation data over a sixteen-month period, could remove the aforementioned threat of identification of Sedletska's sources unrelated to the proceedings against S., assuming that the PGO had not previously received any such data from Sedletska's mobile operator, as alleged by the Government. But the court order gave access to Sedletska's data precisely to test an assumption that S. had met with her in order to provide her with confidential information relevant to her activity as an investigative journalist and, if so, to use her data as evidence in criminal proceedings against S. The fact that the name of Sedletska's source was known to the authorities and that he was implicated in a criminal offence did not as such remove Sedletska's own protection under Article 10 of the ECHR. To justify such an interference with the journalist's rights the Court of Appeal should have indicated why the interest in obtaining Sedletska's geolocation data sought by the PGO was of a vital nature for combatting serious crime and should have ascertained that there were no reasonable alternative measures for obtaining the information sought by the PGO. The order should also have demonstrated that the legitimate interest in the disclosure clearly outweighed the public interest in the non-disclosure. As the Court of Appeal's order did not sufficiently respond to these requirements, the ECtHR is not convinced that the data access authorisation given by the domestic courts was justified by an "overriding requirement in the public interest" and, therefore, necessary in a democratic society. There has accordingly been a violation of Article 10 of the ECHR. In view of its relevant findings under Article 10 of the ECHR, the ECtHR does not find it necessary to address the complaint under Article 13.

Judgment by the European Court of Human Rights, Fifth Section, in the case of Sedletska v. Ukraine, Application no. 42634/18,1 April 2021

https://hudoc.echr.coe.int/eng?i=001-208882

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EUROPEAN UNION

European Commission: 2019 Commitment Decision involving major film studios and Sky UK withdrawn

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On 31 March 2021, the European Commission withdrew an important 2019 Commitment Decision which had made commitments binding a number of well-known film studios and the broadcaster Sky UK to address the Commission's concerns regarding clauses in the studios' licensing contracts for pay-TV with Sky UK (see IRIS 2019-4/6 and IRIS 2015-9/1). The film studios were Disney, NBCUniversal, Sony Pictures, and Warner Bros. According to the Commission, the clauses at issue "prevented Sky UK from allowing EU consumers outside the United Kingdom and Ireland to subscribe to Sky UK's pay-TV services to access films via satellite or online", and also required NBCUniversal, Sony Pictures and Warner Bros. to "ensure that broadcasters other than Sky UK are prevented from making their pay-TV services available in the United Kingdom and Ireland". Crucially, Disney, NBCUniversal, Sony Pictures and Warner Bros. had committed to not applying these clauses in existing film licensing contracts for pay-TV with any broadcaster in the European Economic Area (EEA), and had also committed to refraining from (re)introducing such clauses in film licensing contracts for pay-TV with any broadcaster in the EEA. Sky would also neither apply existing clauses nor (re)introduce new ones in its film licensing contracts for pay-TV with Disney, Fox, NBCUniversal, Sony Pictures and Warner Bros.

However, in December 2020, the Court of Justice of the European Union (CJEU) delivered a judgment in Case C-132/19 P *Groupe Canal + v. Commission*, which annulled a related 2016 Commitment Decision which had made commitments binding on Viacom Inc. and Paramount Pictures International Limited (see IRIS 2015-9/1 and IRIS 2019-4/6). The CJEU held that the Commission's decision to make binding an operator's commitment not to apply certain contractual clauses *vis-à-vis* its contracting partner, such as Groupe Canal +, which had only the status of an interested third party, when that contracting partner did not consent to it, constituted an interference with the contractual freedom of that contracting partner, and went beyond the provisions of Article 9 of Regulation No 1/2003. The CJEU concluded that, by adopting the 2016 Decision, the Commission rendered the contractual rights of third parties meaningless, including the contractual rights of Groupe Canal + *vis-à-vis* Paramount, and thereby infringed the principle of proportionality, with the result that the decision at issue must be annulled.

Following the CJEU's judgment, the Commission stated in its Decision on 31 March 2021, that "[i]n light of the annulment of the 2016 Decision, it is appropriate to withdraw the 2019 Decision, since the scope of the commitments made binding

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by that Decision are essentially identical to those of the 2016 Decision."

Finally, this brings to a close the antitrust proceedings that began back in 2014 with the Commission's investigation into restrictions affecting cross border provision of pay TV services. Before the withdrawal of the 2019 Decision and closure of the proceedings, Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky confirmed to the Commission they had no observations on the proposed withdrawal.

European Commission, Case AT. 40023 - Cross-border access to pay-TV, 31 March 2021

https://ec.europa.eu/competition/antitrust/cases/dec_docs/40023/40023_10990_9.pdf

Judgment of the Court (Second Chamber) of 9 December 2020, Case C-132/19 P, Groupe Canal + v European Commission

https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0132

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European Commission: Launch of European News Media Forum

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On 23-25 March 2021, the European Commission held the first edition of the European News Media Forum, which was a structured dialogue on the issue of the safety of journalists, and the preparation of a Commission Recommendation on the safety of journalists. In the recently adopted European Democracy Action Plan (see IRIS 2021-2/4), the European Commission had stated that it would set up the Forum to strengthen cooperation with stakeholders on media-related issues, and would organise a structured dialogue involving Member States and other stakeholders, bringing in the expertise of the Council of Europe, OSCE and UNESCO.

The purpose of the Forum was to provide an opportunity for discussion of the main issues related to safety of journalists, and was attended by a range of stakeholders, including representatives of the journalistic and news media community, self-regulatory bodies (media/press councils), civil society, the Council of Europe and other international organisations, as well as representatives of the Member States and their media regulatory authorities. The Forum sought to gather input for the Commission's planned Recommendation on the safety of journalists. The Commission stated it would seek to ensure "better and targeted implementation" of a number of requirements set out in the Council of Europe's Committee of Ministers' Recommendation on the protection of journalism and safety of journalists and other media actors (see IRIS 2016-5/3). Furthermore, the Commission's Recommendation will also address the online dimension of journalists' safety, given the "growing digital threats that media professionals are facing", and will pay specific attention to gender-based threats, as female journalists are particularly exposed to attacks.

The Forum was organised around four modules, namely: (I) journalists on the ground - ensuring unrestrained operation of journalists and addressing the impact of the COVID-19 pandemic on the journalistic community; (IIa) journalists' protection - ensuring physical safety of journalists; (IIb) journalists' protection - addressing online threats and digital empowerment; and (III) journalists and equality - addressing gender-based attacks and supporting journalists representing minorities. A number of discussion papers were also published on the modules, and all interested parties were invited by the European Commission to provide written contributions addressing the questions included in the discussion papers.

Finally, the Commission stated that the structured dialogue will be a central step in the preparation of the Commission's Recommendation on ensuring safety of journalists in the EU, which is planned to be adopted in 2021.

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European Commission, European News Media Forum on Safety of Journalists, 25 March 2021

https://digital-strategy.ec.europa.eu/en/events/european-news-media-forum-safety-journalists

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NATIONAL

BOSNIA-HERZEGOVINA

[BA] New rules to extend broadcasters' editorial responsibility to their online content

Maida Ćulahović
Communications Regulatory Agency

The Council of the Communications Regulatory Agency of Bosnia and Herzegovina (CRA) has approved draft amendments to the CRA Rules governing the provision of audiovisual and radio media services, with a view to extend the licensees' editorial responsibility to their online content. More specifically, it is proposed that all content published on broadcasters' official websites or websites marked with their logo is subject to the same basic tier of rules as the broadcast content, in terms of incitement to violence, hatred and discrimination, prejudice to public health and safety, protection of minors and their privacy, as well as the right of reply.

The proposed amendments are currently open for public consultation until 14 May 2021. If adopted, the scope of regulation will effectively be expanded to include the prevention of harmful content in media service providers' online activities.

The legal framework on electronic media is currently being amended, among other things in order to transpose the revised AVMSD provisions. Online content is not in CRA's current remit; however it had become broadcasters' widespread practice to publish content on their websites which is either directly linked to the broadcast programme - most notably news items - or treats the broadcast content in more detail, not necessarily ensuring the same level of respect for professional standards. Rather than a separate service, the current proposal therefore considers the broadcaster's online content to be directly linked to that provided under the licence issued for the provision of media services.

Nacrt pravila o izmjeni i dopunama pravila 77/2015 o pružanju audiovizuelnih medijskih usluga

https://rak.ba/bs-Latn-BA/articles/5213

Public consultation of Draft Rule on Amendments to the Rule 77/2015 on Provision of Audiovisual Media Services

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BULGARIA

[BG] New regulations affecting the media sector

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

On 19 March 2021 a new *Закон за предоставяне на цифрово съдържание и цифрови услуги и за продажба на стоки* (Supply of Digital Content and Digital Services and Sale of Goods Act – the Act) was promulgated in *Държавен вестник* (State Gazette). With this, Bulgaria has transposed two EU directives: 1) Directive 2019/770 on digital content and digital services; and 2) Directive 2019/771 on certain aspects concerning contracts for the sale of goods.

The Parliament has adopted a rather strange approach where both directives are transposed in a single legal act. At the same time, multiple amendments have been made to *Закон за защита на потребителите* (the Consumer Protection Act) which generally transposes most of the consumer related directives until now.

The Act concerns all traders supplying goods, digital content, and digital services to consumers. The new regulation applies to all contracts for the supply of digital content or digital services where the consumer pays or undertakes to pay a price. Where consumers do not pay but provide personal data, which the trader uses for purposes other than supplying the service/content and fulfilling their legal obligations, the trader's activity will also fall within the scope of the Act. Thus, a lot of traders need to be extra cautious about the fact that the scope of the Act includes anyone who uses consumers' data for any purpose other than supplying service/content and fulfilling legal obligations. There is no requirement that these purposes are necessarily commercial, neither that the use of data generates income for the trader, etc. For example, a trader using the contact details of their users for the purpose of sending them a newsletter about social activities and campaigns, is supposed to be subject to the Act.

In accordance with the directives, a digital service is defined as a service allowing the consumer: 1) to create, process, store or access data in digital form; or 2) the sharing of, or any other interaction with data in digital form uploaded or created by the consumer or other users of that service. Digital content is defined as any data produced and supplied in digital form.

Looking at these definitions they seem to cover a wide range of contracts for the supply of digital content and services. These include, *inter alia*, contracts for supply of content like computer programs, applications, video files, audio files, music files, digital games, e-books or other e-publications, as well as the supply of various digital services such as video and audio sharing services, hosting services, word processing or games offered in the cloud computing environment and social

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media, etc.

The Act applies independently of the medium used for the transmission of, or for giving access to, the digital content or digital service. This includes downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media. OTT services, video-sharing platforms or video-on-demand services obviously fall within the scope of the Act. Thus, they will have to comply with these new rules and eventually revise their terms and conditions.

As a general comment, the Act does not seem to establish entirely unknown concepts and rights/obligations but is rather aimed at introducing special rules needed for the development of technology. It is introducing rules for digital services and digital content, adapted to their specificity – requirements for updating services or content, rules regarding liability in case of non-compliance of the service or content upon integration, special rights of users of digital services and content, such as when they may terminate the contract, for which periods they owe compensation for non-compliance, and in what time frames they may file a complaint.

The Act will enter into force on 1 January 2022. With some minor exceptions it will be applicable to all contracts for supply of digital content and digital service, and even for some concluded before this date.

It remains to be seen to what extent the various providers will comply with the Act and whether they will start preparing early or leave any action until 2022.

Finally, a brief mention will be made that, on 09 March 2021 amendments were promulgated to *Закон за електронните съобщения* (the Electronic Communications Act - ECA) by which the European Electronic Communications Code (EECC) has been transposed.

With the implementation of the EECC the local law stipulates numerous new rules for subscribers of TV services, new powers to the telecom regulator, changes to the coordination procedures between the telecom and the media regulator, rules and requirements concerning the interoperability of TV and radio reception equipment, radio spectrum management, and many others affecting the intertwined telecom and media sector.

Закон за предоставяне на цифрово съдържание и цифрови услуги и за продажба на стоки

https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=156454

Supply of Digital Content and Digital Services and Sale of Goods Act

Закон за изменение и допълнение на Закона за електронните съобщения

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https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=156329

Act amending and supplementing the Electronic Communications Act

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GERMANY

[DE] FSM approves additional Disney+ youth protection functions

Mirjam Kaiser
Institute of European Media Law

In a press release on 15 March 2021, the *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V.* (voluntary self-monitoring body for multimedia service providers – FSM) announced that it had granted a seal of approval to Disney+ on account of its new extended youth protection functions.

The FSM is a non-profit organisation recognised by the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM) as a self-regulatory body in the telemedia sector. One of its tasks is to assess the suitability of youth protection systems designed to ensure the effective protection of minors on the Internet. According to Article 11 of the *Jugendmedienschutz-Staatsvertrag* (State Treaty on the Protection of Minors in the Media – JMStV), such systems are suitable if they permit age group-differentiated access to telemedia and provide for state-of-the-art identification.

In the case at hand, the FSM examined the extended youth protection functions of the Disney+ streaming portal. The Walt Disney Company (Benelux) B.V., which offers the Disney+ service in Germany, became an FSM member in January 2021, thereby agreeing to comply with relevant legislative provisions and the KJM's criteria for youth protection systems.

Disney+, which is designed to be used by the whole family, developed extended youth protection functions alongside its existing child profile system. The streaming service decided to update its youth protection concept when it launched the 'Star' general entertainment service, which includes a channel within the Disney+ video-on-demand service and is primarily aimed at teenagers and adults. The new youth protection functions are meant to improve the protection of children from unsuitable material. Individual age ratings can be assigned to different user profiles so protection measures can be further tailored to the user's individual requirements. A separate age rating can be set for each profile, selected from those recognised under youth protection legislation (0, 6, 12, 16 and 18). Profiles can also be protected with a PIN. In the opinion of the FSM's independent advisory body, the new functions comply with Article 11(2) JMStV. The FSM seal of approval shows users that the Disney+ streaming platform is an entertainment service that meets youth protection requirements.

The FSM's decision will now be submitted to the KJM, which will check that the FSM acted within its powers when adopting it.

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Pressemitteilung der FSM, 15. März 2021

https://www.fsm.de/de/presse-und-events/fsm-vergibt-guetesiegel-fuer-erweiterte-jugendschutzfunktion-von-disney

FSM press release, 15 March 2021

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[DE] German media regulators issue statement on DSA and DMA

Christina Etteldorf
Institute of European Media Law

On 30 March, the 14 German media regulatory authorities issued a joint statement explaining their views on the proposed Digital Services Act (DSA) and Digital Markets Act (DMA) as part of the European Commission's consultation process. They stressed, in particular, that a general legal framework for global online services must take into account the specific needs of the media. The media authorities expressed particular concern about a lack of practical detail and the proposed supervisory structures.

In the German regulators' view, the Commission's proposals are based on a starting position that does not fully reflect reality. They are founded, in particular, on false assumptions concerning a situation of conflict between regulatory authorities at European level, competence-related difficulties at member state level and a lack of harmonisation between protective purposes in different sectors. This means that the proposed rules are problematic. In concrete terms, the media authorities would like to see improvements to the orders provided for in Articles 8 and 9 of the DSA and to the supervisory structure.

In relation to possible orders against foreign service providers, the media authorities warn that the regulation of key requirements is either non-existent or unclear. In particular, they believe that it is necessary to clarify what illegal content is in this context, how such orders are to be delivered and the legal consequences for providers that do not comply with them. The fact that orders must be drafted in the language declared by the provider is also an unreasonable barrier, according to the media regulators. They also consider that the fundamental right to the freedom of expression is threatened by Article 12 DSA, which enables intermediaries to include, in their terms and conditions, restrictions on the use of their services outside statutory regulations. Where journalistic media services are concerned, this could lead to the dual control of content (which is already monitored by the media regulators) by the platforms.

As regards to the proposed supervisory structures, the media authorities support the Europeanisation of these structures, but harbour concerns about the creation of Digital Services Coordinators and a European Board for Digital Services. They believe it would be better, at least where the distribution of media-relevant content is concerned, to rely on existing structures, competences and forms of media regulation, which should in any case not be impaired by horizontal solutions. For effective cross-border law enforcement, sufficiently clear rules of procedure and stable sectoral networks are required. In the media sector, such structures already exist within the European Regulators Group for Audiovisual Media Services (ERGA) created under the AVMSD. In connection to this, the media authorities are also critical of the extended discretionary powers given to the Commission to monitor very large online platforms. They call for the sovereignty of the authorities, in receiving countries, to be protected in spite of the

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Commission’s involvement, and for response timeframes to be (more) significantly shortened by the Commission.

Stellungnahme der deutschen Medienanstalten zu Digital Services Act und Digital Markets Act

https://www.die-medienanstalten.de/fileadmin/user_upload/die_medienanstalten/Ueber_uns/Positionen/20210330_DSA_DMA_Stellungnahme_DLM_final.pdf

Statement of the German media authorities on the Digital Services Act and Digital Markets Act

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[DE] KEK publishes report on video streaming data

Christina Etteldorf
Institute of European Media Law

On 3 March 2021, the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media – KEK) published a study it had commissioned from the Fraunhofer Institute for Open Communication Systems (FOKUS) on the recording of video streaming usage data. The report primarily considers the different technical approaches that can be used and how the regulatory framework should be shaped accordingly.

The KEK is responsible for monitoring compliance with the rules protecting the diversity of opinion on national commercial television and taking relevant decisions. Mechanisms for measuring video and TV streaming usage are therefore vital for the KEK in terms of the current German media concentration law and the possible future development of an overall market model that takes into account both linear broadcasting and on-demand services. The report commissioned by the KEK therefore begins by analysing how and to what extent streaming providers, metering service providers and market research companies measure such usage.

Based on this information, the study reaches the interim conclusion that streaming providers, in particular, can access usage data that can be used to verify their compliance with the media concentration law. However, after further analysing and comparing the methods observed, it concludes that uniform data collection standards are required if the data collected by different providers is to be comparable. Although usage data and download figures for individual streams can be used to measure the impact of individual services on the formation of public opinion, they do not yet provide an overall picture. They therefore do not meet the requirements of current legislation, which aims to protect the diversity of opinion through various provisions of the *Medienstaatsvertrag* (State Media Treaty, especially Articles 59 *et seq*.).

The study therefore recommends, in the longer term, devising a comprehensive technical data collection system, together with a representative panel, e.g. one that covers all video usage (covering all moving image content, regardless of provider, end device and usage situation) and uses a standardised method for collecting data. The data collection framework must be flexible enough to accommodate the dynamic market conditions of the media sector. However, the challenge here lies in the creation of common data formats and quality standards. Along with provisions on the structure and semantics of data, the study mainly proposes guidelines on the comparability of live TV via broadcasting, the Internet and on-demand content, which need to be coordinated with market participants. However, this would require legal provisions giving the KEK access to the relevant data. This could be linked to the existing rules on the collection of usage data by the KEK in Article 61 of the State Media Treaty (determination of television audience shares).

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In the KEK's opinion, the study provides an important basis for the necessary reform of the media concentration law. With consumer behaviour steadily shifting towards the online and on-demand market, this data is an extremely important tool for evaluating the overall market power of media companies and their influence on public opinion.

Pressemitteilung der KEK vom 03. März 2021

https://www.kek-online.de/service/pressemitteilungen/meldung/kek-veroeffentlicht-gutachten-zur-nutzungserfassung-von-video-streaming-angeboten

KEK press release, 3 March 2021

Studie „Ansätze für eine Nutzungserfassung von Video-Streaming-Angeboten" des Fraunhofer-Institut für offene Kommunikationssysteme FOKUS

https://www.kek-online.de/fileadmin/user_upload/KEK/Publikationen/Gutachten/Gutachten_Nutzungserfassung_Video-Streaming-Fraunhofer_FOKUS.pdf

Study on "Approaches to the collection of video streaming usage data", Fraunhofer Institute for Open Communication Systems (FOKUS)

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[DE] Online Copyright Clearance System is launched and arranges block of streaming site

Mirjam Kaiser
Institute of European Media Law

A new *Clearingstelle Urheberrecht im Internet* (Online Copyright Clearance System – CUII) has been created to promote joint solutions for dealing with websites that systematically infringe copyright and ancillary intellectual property rights in Germany. The CUII was launched as an independent body at the start of the year on the basis of a code of conduct adopted on 18 January 2021. The code was signed by companies regularly affected by infringements of copyright and intellectual property rights on the Internet, i.e. Internet access providers on the one hand and holders of such rights or their associations from the music, film, gaming and scientific publications sectors on the other.

The CUII is intended to combat systematic infringements of copyright and ancillary intellectual property rights. It does so by blocking access to websites after they have been examined using objective criteria that access providers voluntarily agree to apply. It uses so-called Domain Name System (DNS) blocking, which blocks access to websites that commit systematic, i.e. large-scale copyright infringements.

Blocking requests submitted to the CUII, by an Internet access provider or rightsholder, require a unanimous decision by a three-person examination committee set up by the CUII. The committee is chaired by retired Federal Supreme Court judges familiar with this area of the law. Its recommendation is forwarded to the *Bundesnetzagentur* (Federal Networks Agency – BNetzA), which only authorises a DNS block if the provisions of the Net Neutrality Regulation (Regulation (EU) 2015/2120) are met. Provided the BNetzA concludes that the equal treatment of Internet content has been respected and the general ban on content-blocking has not been infringed, the website may be blocked. The blocks themselves are implemented by the Internet access providers that have signed the code of conduct, which include Germany's largest providers (Telekom Deutschland, Vodafone, 1&1, Telefónica and Mobilcom-Debitel). A block prevents a website from being assigned an IP address and therefore stops the site being accessed. This process has previously been recognised in case law (see CJEU ruling of 27 March 2014, case no. C-314/12), which enables the CUII to implement DNS blocks more effectively and more quickly, thus avoiding long, expensive legal proceedings. However, critics fear that blocking procedures that are not based on a court decision or judicial procedure could result in Internet censorship or restrict freedom of expression and information.

In a press release published on 11 March 2021, the *Bundeskartellamt* (Federal Cartels Office – BKartA) announced that the CUII did not infringe cartel law provisions. Having analysed the new system, it had no objections to its launch and proposed remit. It referred to the security mechanisms put in place, such as

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the need for a unanimous decision and consultation with the BNetzA. The efficiency of the project, which may have positive effects on Internet rights management, was also taken into account.

Also on 11 March, the BNetzA reported that it had blocked a streaming website on the CUII's recommendation for the first time. It had blocked several domains of the provider Serien.sx (including s.to, serienstream.sx and serienstream.to), whose websites offered free streams of television series, after the CUII had found that its content clearly infringed copyright. According to the BNetzA, the DNS block in this case was compatible with net neutrality requirements because it was necessary to enforce national legislation. If the circumstances changed, the DNS block could be re-examined.

Webseite der CUII

https://cuii.info/ueber-uns/

CUII website

Pressemitteilung des BKartA, 11 März 2021

https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2021/11_03_2021_DNS%20Clearingstelle.html;jsessionid=DBB2A9E72D0E99590FE975C3AB6A9FED.2_cid381?nn=3591286

Federal Cartels Office press release, 11 March 2021

Pressemitteilung der BNetzA, 11. März 2021

https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2021/20210311_Clearingstelle.html?nn=265778

Federal Networks Agency press release, 11 March 2021

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DENMARK

[DK] Draft implementation of EU copyright directives

Terese Foged
Legal expert

After a short public hearing on 26 March 2021, a bill was introduced in parliament which implements in Danish law Articles 15 and 17 of the Directive 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive) as well as the Directive 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (SatCab II Directive). The bill's keyword is rights clearance.

Going further than the SatCab II Directive, the bill also proposes a possibility for clearing rights via extended collective licensing when TV distributors and other third parties redistribute independent streaming services, i.e. non-broadcaster streaming services such as Netflix, HBO Nordic, Disney + and the like. Extended collective licence implies that according to the law, a user – who has made an agreement on a particular exploitation of a certain type of work with an organisation (a collecting society, i.e. collective management organisation) comprising a substantial number of right holders of this type of work – obtains the right to use works of the same type owned by non-members of the organisation, in the same manner and on the terms that follow from the agreement with the organisation. The organisation must be approved by the Ministry of Culture for extended collective licence regarding the area in question. Provisions on extended collective licensing already exists for redistribution of streaming services from broadcasters.

The bill observes that the purpose of the two directives is to harmonise the EU Member States' legislation with the specific aim of modernising copyright in light of digital development, especially technologies that give access to copyrighted material such as films and music via the Internet.

Similarly, the bill's purpose is to modernise copyright, taking into account the development of digital technologies and particularly the access to copyrighted material via the Internet.

The bill stresses that user-driven tech giants, for example YouTube, are among the most important sources for access to content online, and that they are the means to secure broader access to cultural and creative works and to provide opportunities for new business models for the cultural and creative sector. However, there is a need for a fair and well-functioning marketplace when these big platforms negotiate rights. Therefore, the intent with the implementation of Articles 15 and 17 of the DSM Directive is to create a better functioning market

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place for copyright, and by this, secure that the rightsholders' position vis-à-vis the tech giants is strengthened to the end that fair terms, including payment, to rightsholders when the tech giants use their content online are obtained.

Articles 15 and 17 of the DSM Directive regard services that will often act internationally, and that is why, according to the bill (the preparatory works), a high level of harmonising is required. It is therefore the assessment of the Ministry of Culture that the implementation must be very close to the wording of the directive.

The SatCab II Directive implies an update to the rules on broadcasters' primary activity that has moved from satellite to include online services; plus an update to distributors' retransmission that has moved from traditional cable to include other platforms, including those online.

But as mentioned, the Danish bill goes further than the SatCab II Directive. The preparatory works note that TV distributors have started offering streaming services, including non-broadcaster originated, to their customers as part of a TV package. This calls for expansion of the existing licensing scheme on the redistribution of broadcaster streaming services.

Finally, the purpose of the proposed legislation is to establish that enterprises which carry out independent business offering content from several TV channels and/or online services - i.e. in the way that there are two independent economies - must clear rights (that are not cleared already) with a collective organisation, irrespective of the technique employed.

If the bill is passed, the law will enter into force on 7 June 2021, meaning just in time to meet the similar deadline of the two directives. The implementation of the remaining DSM directive will take place in a coming bill.

Forslag til Lov om ændring af lov om ophavsret (Implementering af dele af direktiv om ophavsret og beslægtede rettigheder på det digitale indre marked samt direktiv om regler for udøvelse af ophavsretten og beslægtede rettigheder, der gælder for visse af TV- og radioselskabernes onlinetransmissioner samt retransmissioner af TV- og radioprogrammer m.v.)

https://www.ft.dk/ripdf/samling/20201/lovforslag/l205/20201_l205_som_fremsat.pdf

Draft Act amending the Copyright Act (Implementation of parts of the Directive on copyright and related rights in the digital single market and the Directive on the rules governing the exercise of copyright and related rights applicable to certain online broadcasts by TV and radio broadcasters and retransmissions of TV and radio programmes, etc.)

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SPAIN

[ES] New agreement for the promotion of co-regulation concerning commercial communications on television

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 6 April 2021, the Spanish regulator *Comisión Nacional de los Mercados y la Competencia* (National Commission on Markets and Competition - CNMC), and the independent advertising self-regulatory organisation *Asociación para la Autorregulación de la Comunicación Comercial* (AUTOCONTROL) signed an agreement to promote the co-regulation of commercial communications on television.

AUTOCONTROL manages the Spanish system of self-regulation of commercial communication which helps to ensure the correct application and compliance with the General Act 7/2010 on Audiovisual Communication, and other advertising rules. The agreement states that television operators and advertisers will be encouraged to voluntarily use the prior verification tool (Copy Advice®), managed by AUTOCONTROL, for audiovisual commercial communications on television. This tool consists of a non-binding assessment of the correctness of advertisements or draft advertisements, prior to their broadcast, at the request of the advertiser itself, its agency or the medium where the campaign is to be broadcast. Broadcasters may inform the CNMC of any prior positive assessment provided by AUTOCONTROL in cases of a complaint by the regulator. AUTOCONTROL will keep the CNMC regularly informed about the decisions adopted by its Advertising Jury, as well as about its activity of voluntary prior control of advertising.

AUTOCONTROL will use the guiding criteria for the appropriate time classification of television content established in the Code of Self-Regulation of Television Content and Children. When a complaint concerning the protection of children is received within the framework of the "Agreement for the promotion of self-regulation of television content and children", AUTOCONTROL will resolve it according to the Regulations of its Advertising Jury and will inform the parties concerned, the CNMC and the adhering television operators and publish it in AUTOCONTROL's magazine, website or other media.

In the context of an ex officio investigation, on its own initiative or as a result of a complaint received, the CNMC may request AUTOCONTROL's opinion and intervention on specific commercial communications that have not been subject to prior consultation. In such cases, AUTOCONTROL’s Advertising Jury will decide in accordance with its Regulations. In the event that such communications have already been subject to positive prior consultation, AUTOCONTROL will inform the CNMC of their content.

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The agreement also provides for the creation of a Commission composed of three representatives of both parties of the agreement. This Commission will be responsible for the implementation and constant monitoring of the development and application of the agreement, for ensuring compliance with it, and for resolving conflicts or discrepancies, holding regular meetings for this purpose.

Convenio para el fomento de la corregulación sobre comunicaciones comerciales en televisión entre la Comisión Nacional de los Mercados y la Competencia (CNMC) y la Asociación para la Autorregulación de la Comunicación Comercial (AUTOCONTROL), 6 April 2021

https://www.cnmc.es/sites/default/files/3433891_0.pdf

Agreement for the promotion of co-regulation on commercial communications on television between the National Commission for Markets and Competition (CNMC) and the Association for the Self-Regulation of Commercial Communication (AUTOCONTROL), 6 April 2021

La CNMC y AUTOCONTROL firman un nuevo acuerdo para el fomento de la corregulación sobre comunicaciones comerciales en televisión

https://www.cnmc.es/prensa/autocontrol-convenio-20210420

Press release of the CNMC, 20 April 2021

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FRANCE

[FR] CNC facilitates initial film release via other distribution methods until cinemas reopen

Amélie Blocman
Légipresse

“Between mid-May and the beginning of summer, we will create a timetable for the gradual resumption of cultural activities,” said French president Emmanuel Macron on 31 March 2021 during his televised address announcing new restrictions on movement within France. The following day, the prime minister told parliament, “This reopening will take place as soon as the health situation allows it. The government will present this reopening strategy to parliament in due course.” Meanwhile, with more than 400 French and foreign feature films awaiting the reopening of cinemas, which have been closed since 31 October 2020, screen congestion appears inevitable.

“It is vital that each film reaches its audience,” said Dominique Boutonnat, president of the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC). With this in mind, on 1 April 2021, the CNC adopted an emergency measure in order to make it easier to release new films outside cinemas. The films concerned will be able to be shown for the first time via a distribution network that does not include the cinemas for which they were originally intended, without the need to pay back CNC funding. Unlike the similar measure put in place last spring, this one-off exemption will not be limited to video-on-demand, but will cover all forms of distribution, including DVD, television, subscription platforms, etc.

Examined on a case-by-case basis, applications will be discussed with industry professionals and can be submitted to the CNC as long as cinemas remain closed and up to one month after they reopen. However, support will not be granted on the basis of income generated outside cinemas, since this will remain dependent on the film being screened in cinemas.

The CNC president pointed out that this measure does not bring into question media chronology or the changes to exploitation windows currently being discussed within the film sector. If necessary, it could be supplemented with an agreement between distributors setting out a film release schedule, subject to the approval of the *Autorité de la concurrence* (competition authority), which the *Médiateur du cinéma* (cinema ombudsman) has asked for an opinion on such an arrangement.

Délibération n° 2021/CA/07 du 31 mars 2021 modifiant le règlement général des aides financières du Centre national du cinéma et de l'image

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animée

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043336210

Decision no. 2021/CA/07 of 31 March 2021 amending the general rules on financial aid of the National Centre for Cinema and the Moving Image

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[FR] CSA fines CNews EUR 200,000 for comments inciting hatred and discrimination

Amélie Blocman
Légipresse

On 17 March 2021, the *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory body – CSA) imposed a fine of EUR 200,000 against the CNews television channel following comments made by Eric Zemmour during the programme "Face à l'info" broadcast on 29 September 2020. Talking about the situation of foreign unaccompanied minors in France, the political commentator said several times that “most” or “all” of them were, or at least would become, “thieves”, “rapists” and “murderers”, and that France should put a stop to this “invasion”.

In a decision dated 27 November 2019, the CSA had already issued a formal warning to CNews, requiring it to comply with the provisions of its licence following remarks made by the same commentator during a previous edition of the same programme. According to the audiovisual regulator, these remarks had constituted a “forceful rejection of Muslims in general that was likely to encourage discrimination on religious grounds”. Issued in accordance with Article 15 of the Law of 30 September 1986, the channel’s licence states, in particular, that “the broadcaster shall ensure that its programmes (...) do not encourage discrimination on the grounds of race or origin (...), religion or nationality”, and that “the broadcaster is responsible for the content of the programmes it broadcasts and must in all circumstances retain control over what is being broadcast”.

In its decision of 17 March 2021, the CSA observed that the comments in question, which had been made by someone with a high media profile, had been broadcast during prime-time hours. It considered that the commentator’s repeated use of aggressive words that stigmatised foreign unaccompanied minors by claiming they were likely to commit criminal acts had sent out a strong message of rejection. Although the comments had been made during a legitimate debate on France’s policy to admit foreign unaccompanied minors and its immigration policy in general, they had incited hatred of foreign unaccompanied minors and conveyed numerous defamatory stereotypes likely to encourage discriminatory behaviour. The CSA also stressed that none of the other people in the studio had reacted strongly to the comments. It concluded that the broadcaster had lost control over what was being broadcast, especially since, as the Canal Plus Group’s ethics committee pointed out in its opinion of 22 October 2020, the programme had not been shown live and had not been edited. The fine of EUR 200,000 was justified, “taking into account the nature and the seriousness of the infringements, especially since they were committed in a programme that had already been the subject of a formal warning on 27 November 2019, which the ethics committee had brought to the channel’s attention.”

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Décision du CSA du 17 mars 2021 portant sanction à l'encontre de la Société d'exploitation d'un service d'information (S.E.S.I.)

https://www.csa.fr/Informer/Espace-presse/Communiques-de-presse/Le-Conseil-superieur-de-l-audiovisuel-sanctionne-la-chaine-CNews

CSA decision of 17 March 2021 imposing a sanction against CNews

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[FR] CSA orders Canal Plus to respect its obligations to contribute to audiovisual production

Amélie Blocman
Légipresse

After finding that the Société d'Edition de Canal Plus (SECP) had failed to meet its obligations to contribute to the development of audiovisual production in the 2018 and 2019 financial years, the *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory body – CSA) ordered the company to meet these obligations, which were laid down in Articles 40, 42 and 43 of the Decree No. 2010-747 of 2 July 2010 and which included an obligation to promote independent and French-language productions.

Canal Plus and its special-interest television channels (Comédie+, Piwi+, Télétoon+, Planète, Planète A&E, Planète CI, Seasons, Polar+, Cstar Hits France) had asked to pay a combined contribution for the years in question. The dispute concerned the basis for assessing the size of this contribution, since the SECP had subtracted from its total income a figure that it claimed had been generated by a complementary service beneficial to users.

However, the CSA considered that the current regulations were designed to take into account all the income that the broadcaster derived from its activities, including when, as was the case here, they were only indirectly linked to the broadcast of cinematographic works. For example, according to Article 33(2) of the decree of 2 July 2010, film service subscriptions included those that provided access both to the film service itself and to one or more services of a different type, such as those offered as part of a package. According to its calculations, Canal Plus should have invested at least EUR 56.15 Million in 2018 but had only spent EUR 50.38 Million. For the 2019 financial year, it had invested EUR 51.15 Million but should have spent EUR 56.66 Million. In the future, this calculation problem could also arise in relation to video-on-demand platforms, which will soon be required to contribute to audiovisual and cinematographic production in France under the AVMS decree that is currently being adopted. In its opinion of 17 March 2021 on the draft decree, the CSA noted in particular that this problem could affect certain platforms that combined different activities, such as Amazon, for example.

In order to ensure the regulator can effectively monitor production funding obligations and impose appropriate sanctions, the bill "on the regulation and protection of access to cultural works in the digital age", to be debated in parliament from 18 May 2021, amends the procedure and allows it to issue bigger fines in such cases.

Décision n° 2021-252 du 3 mars 2021 portant mise en demeure de la société d'édition de Canal Plus, JORF du 26 mars 2021

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https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043290779

Decision no. 2021-252 of 3 March 2021 to issue a formal order against the Société d'Edition de Canal Plus, Official Gazette of 26 March 2021

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[FR] Safeguarding of cultural creativity and founding of ARCOM: audiovisual reforms continue

Amélie Blocman
Légipresse

In the final phase of the legislative reforms initiated at the end of 2020 to transpose the AVMS Directive, the bill "on the regulation and protection of access to cultural works in the digital age" was presented to the Council of Ministers on 8 April 2021 and will be debated by the Senate on 18 and 19 May 2021. The government's decision to approve an expedited procedure means the new law could be adopted by the summer.

The bill incorporates and reinforces some of the provisions of the bill on audiovisual communication and cultural sovereignty in the digital age that was tabled in December 2019, the parliamentary examination of which was interrupted by the health crisis. It has two main objectives: firstly, to safeguard cultural creativity by strengthening anti-piracy tools and protecting catalogues of outstanding films; and secondly, to create the *Autorité de régulation de la communication audiovisuelle et numérique* (Regulatory Authority for Audiovisual and Digital Communication – ARCOM), a "new robust, powerful regulator geared up for the continuing convergence of audiovisual and digital media", by merging the *Conseil Supérieur de l'Audiovisuel* (the national audiovisual regulatory authority – CSA) with the Hadopi (High Authority for the Dissemination of Works and the Protection of Rights on the Internet).

The bill therefore strengthens measures to combat Internet piracy on streaming, direct download and referencing websites that make money by providing online access to works in breach of copyright, in particular by creating a 'blacklisting' mechanism and a system for combating mirror sites. It also makes provision for an emergency ad hoc mechanism for fighting sports piracy, rendered necessary by the inherent urgency of live sports broadcasts.

The newly created ARCOM will implement these new anti-piracy tools. Armed with greater powers than the current regulatory bodies, it will be responsible for all matters related to audiovisual and digital content, whether fighting piracy, safeguarding minors or protecting the public from disinformation and online hatred. The composition of the ARCOM board reflects its broader remit and stronger powers (conciliation procedure, investigative powers). In particular, in order to ensure the ARCOM can effectively monitor production funding obligations and impose appropriate sanctions, the relevant procedure is amended and bigger fines can be issued.

Finally, under the new bill, the continued exploitation obligation set out in Article L132-27 of the Intellectual Property Code, which currently only applies to producers, will apply to anyone who acquires French works, whatever their status or nationality. An obligation to give notice six months prior to the transfer of rights will enable the Minister of Culture, if necessary, to impose obligations

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guaranteeing the continued exploitation of French works in these catalogues. Under current legal provisions, it is not possible, within the context of free movement of capital as defined in European law, to guarantee public access to French works from audiovisual or film catalogues that are the subject of “predatory” acquisitions.

Projet de loi relatif à la régulation et à la protection de l’accès aux œuvres culturelles à l’ère numérique

http://www.senat.fr/leg/pjl20-523.html

Bill on the regulation and protection of access to cultural works in the digital age

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[FR] Temporary consultation between distributors on film release schedule compatible with competition law

Amélie Blocman
Légipresse

On 16 April 2021, the *Autorité de la concurrence* (competition authority) issued an opinion in response to a request submitted by the *Médiateur du cinéma* (cinema ombudsman) in February 2021. In accordance with Article L. 213-6, para. 2, of the *Code du cinéma et de l'image animée* (Cinema and Moving Image Code), the ombudsman asked the competition regulator to examine the possibility of consultation between film distributors aimed at agreeing a regulated film release schedule until the situation returned to normal. It asked the competition authority to "set out the framework of what it is possible to do at this stage" in order to allow distributors to engage in negotiations. In mid-March 2021, the stock of films concerned was estimated at around 400, which would mean releasing 50 to 60 films per week to ensure they were all released within a reasonable period of time. By way of comparison, since 2016, the average number of new films released per week has been around 14. The distributors therefore need to actively consider possible solutions for when cinemas reopen.

The competition authority therefore outlined the framework and conditions under which temporary consultation between distributors on film release dates could be compatible with competition law. It thought the envisaged consultation would probably be classified as an agreement that restricted competition at both French and European levels. However, in the case of a dispute, the parties to the agreement could, under certain conditions, benefit from an individual exemption, such as that provided for in Article 101(3) TFEU and Article L. 420-4(I)(2) of the *Code de commerce* (Commercial Code). They could begin by demonstrating that the agreement would help to promote economic progress and provide verifiable evidence of this. In this regard, in its referral, the ombudsman explained that the agreement would aim to preserve the diversity of films and the widest distribution of works in accordance with the general interest during an exceptional period characterised both by the accumulation of an unprecedented stock of films and by probable sanitary restrictions when cinemas reopened. Furthermore, in a previous opinion issued in 2009 (09-A-50 of 8 October 2009), the competition authority had noted that cultural objectives could be accepted as part of economic progress. In addition, agreements allowing the improvement of production and distribution through better services or better quality were recognised as sources of qualitative economic progress.

Secondly, the parties to the agreement should demonstrate that the net effect of the agreement would be at least neutral from the cinema operators' point of view and that it would not be detrimental to spectators because it would give them access to a diverse range of films of all types. Thirdly, they should establish the inadequacy, given the exceptional nature of the current situation, of alternative options to consultation between distributors on a film release schedule, such as,

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for example, programming commitments or derogations from media chronology through the direct distribution of films via video-on-demand platforms or television channels. Finally, they should demonstrate that competition would be preserved for a substantial part of the film distribution sector, and that the stakeholders involved would continue to compete on many parameters not included in the agreement.

As long as the parties to the agreement demonstrated that these conditions were met, the competition authority considered that such an agreement between distributors on a time-limited schedule for the release of films when cinemas reopened could, in this particular context, benefit from an individual exemption. Distributors could therefore begin negotiations within this framework.

Autorité de la concurrence, avis 21-A-03 du 16 avril 2021 relatif à une demande d'avis du Médiateur du cinéma sur les modalités de sortie des films en salle

https://www.autoritedelaconcurrence.fr/fr/avis/relatif-une-demande-davis-du-mediateur-du-cinema-sur-les-modalites-de-sortie-des-films-en#:~:text=En%20savoir%20plus-,Dans%20un%20contexte%20marqu%C3%A9%20par%20l'amplification%20du%20ph%C3%A9nom%C3%A8ne%20d,projet%20de%20concertation%20des%20distributeurs

Competition authority opinion 21-A-03 of 16 April 2021 following a request by the cinema ombudsman for an opinion on cinema release arrangements

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UNITED KINGDOM

[GB] Advertising watchdog warns Instagram influencers over compliance

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On 18 March 2021, the Advertising Standards Authority (ASA), the UK's regulator of advertising across all media, published its research on whether influencer ads are appropriately disclosed on social media. The regulator's report revealed a "disappointing overall rate of compliance" with its rules requiring ads on social media to be clearly signposted as such.

The UK Code of Non-broadcast Advertising and Direct and Promotional Marketing (CAP Code), which applies to ads in all non-broadcast media, including digital platforms, requires that marketing communications must be "obviously identifiable" as such (Rule 2.1). There are equivalent rules in the Code for broadcast media. Marketers must leave consumers in no doubt over when they read, "like" or otherwise engage with advertising content. This is underpinned by the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). If influencers fail to make it sufficiently clear that they are being paid to promote a product or service, they are in breach of the CAP Code. The brands with which non-compliant influencers are working are held equally responsible for failing to adequately disclose advertising content.

The prominent use of #ad is recommended by the ASA as the clearest way of communicating the nature of advertising content. Alternatively, transparency can also be promoted by using a platform's own branded content tools, e.g., Instagram's Paid Partnership tool which can help communicate the existence of a commercial relationship between a creator and a business.

In 2020, the number of complaints received by the regulator about influencers increased by 55% from the previous year. This is despite the advisory information that has been made available by the ASA on "making clear that ads are ads" and a series of rulings on inadequately labelled influencer advertising. As the regulator's 2021 Influencer Monitoring Report notes, the ASA continues to see "far too many incidences of non-disclosure".

Although the Authority's rules on appropriate ad disclosure apply to all types of media where influencers choose to advertise, the ASA's assessment focused on Instagram content because the majority of complaints tended to be raised in relation to this platform and its features. For the purposes of its monitoring exercise, approximately 24 000 individual Instagram "Stories" across 122 UK-based influencers were assessed over a three-week period in September 2020. The regulator identified nearly one in four of these Stories as marketing (as

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opposed to editorial content). Compliance rates were “far below” what was anticipated. The ASA considered that 65% of these ads were insufficiently labelled as advertising. Ads in the beauty, food and fitness, clothing and leisure sectors were found to have particularly low rates of compliance.

More specifically, the following shortcomings emerged: first, inconsistent disclosure of ad content spanning a number of consecutive Stories; second, instances where posts, IGTV or Reels content were accurately disclosed as an ad but their corresponding Story was not; third, poor visibility of labelling (e.g., small fonts) which made it difficult to spot an ad; fourth, lack of clarity in disclosing affiliate content (i.e. a marketing model whereby an affiliate generates traffic to a brand's website in exchange for a commission, usually a percentage of sales) which still counts as advertising; and finally, instances where influencers relied on bios or previous posts to communicate to consumers their connection to a product.

The ASA put on notice all the influencers monitored (including the brands that featured in undisclosed ads) and requested assurances of future compliance. Enforcement action is likely to be taken if follow-up monitoring spot checks indicate further instances of non-compliance. This might include promoting their non-compliance not only through the regulator’s website but also through its own targeted paid search ads.

ASA Influencer Monitoring Report

https://www.asa.org.uk/uploads/assets/dd740667-6fe0-4fa7-80de3e4598417912/Influencer-Monitoring-Report-March2021.pdf

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ITALY

[IT] Agcom fine on RAI annulled

Francesco Di Giorgi & Luca Baccaro

On 29 March 2021, the Italian Administrative Courts(TAR Lazio) in charge, adopted a judgment (No. 3800/2021) concerning the sanction imposed by Agcom on RAI for violation of pluralism and of public radio and television service obligations. Following the RAI complaint the Court annulled the resolution No. 69/20/CONS of the 13 and 14 February 2020, concerning "*Conclusion of the proceedings initiated against RAI pursuant to Article 48 of the Consolidated Law for the alleged non-fulfillment of the radio and television general public service obligations and of the national service contract - 2018-2022 (Proc. N. 13/19 / DCA - 2732 / RC)*". With the abovementioned resolution, the Authority gave notice to RAI of removing the infringements ascertained with reference to the obligations under Article 48, paragraph 1, of the TUSMAR and, at the same time, imposed a pecuniary sanction pursuant to and for the effects of the following paragraph 7. According to the resolution, RAI would not have guaranteed the adversarial principles in a huge series of news and information programs in 2019, since the discussion of the topics were shown only from the point of view of the journalist, the television host or the anchormen, without any contextualisation which could have guaranteed the audience to actually contextualise the events.

According to the Court decision, Agcom ran into a procedural irregularity, given that the findings on which the assessment was based didn't coincide with the objections carried out during the procedure. In particular, the decision states that the final objections were "ontologically and chronologically different from those initially contested". The Court also highlighted that the modification of the disputed facts and objections without the involvement of the PBS, before the end of the investigation, were also in clear violation, not only with the general canons of procedural participation, but also with the same Article 48 of the TUSMAR. In light of the "strong" power of control by the Authority in a similar investigation, RAI had the right to be involved in every phase of the procedure. As a consequence of the statements, the Court ordered "the substantial modification of the charge entails [...] the illegality of the outcome of the provision, with reference to both the warning and the pecuniary sanction". Agcom is therefore called to restart the procedure from "the phase in which the detected illegality and the new exercise of power in compliance with the violated provisions" occurred.

TAR per il Lazio, sez. III ter, sentenza del 29 marzo 2021, n. 3800

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm

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&nrg=202002269&nomeFile=202103800_01.html&subDir=Provvedimenti

Judgment of TAR Lazio no. 3800, 29 March 2021

Delibera n. 69/20/CONS - Conclusione del procedimento avviato nei confronti della Rai ai sensi dell'art. 48 del Testo Unico per il presunto inadempimento degli obblighi di servizio pubblico generale radiotelevisivo e del Contratto nazionale di servizio – 2018-2022 (Proc. n. 13/19/DCA - 2732/RC)

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=17807954&_101_INSTANCE_FnOw5lVOIXoE_type=document

Agcom resolution no. 69/20/CONS of 13 and 14 February 2020

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[IT] Communications Authority launches survey on the services delivered by online platforms

Ernesto Apa& Marco Bassini
Portolano Cavallo

By resolution no. 44/21/CONS adopted on 4 February 2021, the Italian Communications Authority has launched a survey (*indagine conoscitiva*) on the services provided by online platforms. The survey aims to serve a variety of purposes: to allow AGCOM to categorize the said services; to assess the main issues and their effects; to craft a map of the existing legal framework applicable to digital services and online platforms; to determine the most pressing issues that regulators are supposed to address; to select best practices based on a comparative overview of different legal systems; to influence the adoption of new methodologies and strategies by the Italian Communications Authority in the digital regulatory context.

The survey will consist of four sections, namely: a) categorization of the existing infrastructural services available on the market; b) definition of the issues generated by or associated with each type of service; c) drafting of the applicable legal framework at national, European and international level; d) categorization of and comparison between the regulatory and case law stances in each Member State and at international level.

For each activity and service, the survey will identify the main providers, the relevant problems, most notably related to the protection of individual rights and to the economic and competition law aspects, and the applicable legal sources at national and European level with respect to the aforesaid issues.

The Italian Communications Authority will be vested with the power to seek and obtain data and information, to hear the relevant parties and to cooperate with national and international research institutions.

The survey shall be completed within 180 days as of 9 February 2021.

Delibera n. 44/21/CONS - Avvio di un'indagine conoscitiva relativa ai servizi offerti sulle piattaforme online

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=21747443&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution no. 44/21/CONS of 4 February 2021

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[IT] Decree establishing the Commission for the classification of cinematographic works

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European Audiovisual Observatory

On 2 April 2021, the Italian Minister of Culture, Dario Franceschini, signed the decree establishing the Commission for the classification of cinematographic works at the General Directorate for Cinema of the Ministry of Culture. This Commission will be in charge of verifying the correct classification of cinematographic works by distributors and producers in accordance with the Legislative Decree No. 203 of 7 December 2017 (see IRIS 2018-2/24). In the words of the Minister, with this decree, "film censorship has been abolished and the system of controls and interventions that still allowed the State to intervene in the freedom of artists has been definitively left behind". The Commission is chaired by the President Emeritus of the Council of State, Alessandro Pajno, and is made up of 49 members chosen from among experts of proven professionalism and competence in the film sector and in pedagogical-educational aspects connected to the protection of minors or in social communication, as well as designated by parents' associations and animal protection associations.

Communicato stampa dal Ministero della Cultura, "Cinema, Franceschini: abolita definitivamente la censura cinematografica", 5 Aprile 2021

https://www.beniculturali.it/comunicato/20346

Press release of the Ministry of Culture, 5 April 2021

D.M. 151 02/04/2021 Nomina della Commissione per la classificazione delle opere cinematografiche

https://www.beniculturali.it/comunicato/dm-151-02042021

Decree establishing the Commission for the classification of cinematographic works

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[IT] Referral to CJEU of preliminary questions regarding advertising time limits

Francesco Di Giorgi & Luca Baccaro

On 25 March 2021, the Italian Council of State referred some preliminary questions to the Court of Justice of the European Union about the advertising time limits.

In 2017, Agcom sanctioned three media service providers of the RTI group (“Canale 5”, "Italia 1" and “Rete 4”) for the violation of advertising time limits, pursuant to Article 38, paragraph 2 of the legislative decree 31 July 2005, No. 177 (the Italian media legislation, also known as “TUSMAR”).

According to this provision, self promotion of broadcasters' programs is not included in the hourly limit for advertisements.

The alleged violation comes from the inclusion in that limit of the self-promotion of the programs of "R101", a radio station owned by the RTI group. Agcom argued that the limit was applicable only to the television programs of the broadcaster provider and not also to the radio programs, among others, provided by a different company of the same group.

In 2019, the Regional Administrative Court of Lazio (the Italian Administrative court of first instance) rejected the three complaints agreeing with Agcom's position.

With Ordinance No. 2504/2021 of 25 March 2021, the Council of State referred some preliminary questions to the Court of Justice of the European Union, all aimed at asking about the compatibility of the Italian media legislation with the general relevance for the EU law of the notion of group.

In particular, the Court asked if the notion of group, as generally recognised in the EU antitrust framework as a “single economic entity”, is also applicable to media legislation, considering the convergence process between the various forms of communication. Or, if that framework, including advertising time limits, is part of an independent field of legislation.

It’s important to underline that Directive 2018/1808, amending the Audiovisual Media Services Directive, acknowledges that “many broadcasters are part of larger broadcasting groups and make announcements not only in connection with their own programmes and ancillary products directly derived from those programmes, but also in relation to programmes and audiovisual media services from other entities belonging to the same broadcasting group. Transmission time allotted to such announcements should also not be included in the maximum amounts of transmission time that may be allotted to television advertising and teleshopping.”

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In this context, the Council of State asked if the above mentioned recital shall be considered as an interpretative parameter for the legislation in force at the time of the procedure or if the statement has an innovative capacity only relevant for the future cases.

Consiglio di Stato, Ordinanza n. 2504/2021, 25.03.2021

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=cds&nrg=201906079&nomeFile=202102504_18.html&subDir=Provvedimenti

Council of State, Ordinance no. 2504/2021 of 25 March 2021

Delibera n. 295/17/CS - Provvedimento nei confronti della società R.t.i. Reti Televisive Italiane S.P.A. (servizio di media audiovisivo in ambito nazionale "Canale 5") per la violazione della disposizione contenuta nell'art. 38, comma 2, del decreto legislativo 31 luglio 2005, n. 177 (Contestazione n. 15/17/DCA - Proc. 2691/MRM)

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=9291830&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution no. 295/17/CS

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LATVIA

[LV] Latvian regulator issues fines for spreading fake news about coronavirus

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The regulatory approach to disinformation (especially during the coronavirus pandemic) is a subject high on the media law agenda in the EU and its member states, and in the context of the European Democracy Action Plan. How regulators within the EU deal with disinformation is therefore important, and not only in terms of legal comparisons.

With this in mind, the sanction recently issued by the Latvian regulator for coronavirus-related disinformation attracted particular attention, including beyond the Baltic state's borders. On 2 March 2021, the *Nacionālā elektronisko plašsaziņas līdzekļu padome* (National Electronic Mass Media Council – NEPLP) ruled that the channel Prvi Baltijas Kanāls Latvija (the Latvian edition of the First Baltic Channel) operated by Prvi Baltijas Kanāls Ltd. (PBK) had disseminated false and misleading information about the coronavirus and its infectivity, thereby endangering public health or creating a serious risk that public health would be endangered. The media regulator considered that the media company had infringed the programming requirements of Article 26(1)(9) of the Latvian Electronic Media Act, under which electronic media channels and programmes are prohibited from disseminating content that could endanger or create serious risks to public health. The Electronic Media Act also requires electronic media providers to ensure that facts are presented in their programmes fairly, objectively, accurately and without bias. Commentaries and opinions must be separated from news and the individuals responsible for them must be named. Facts should be presented in documentaries and news bulletins in a manner that does not intentionally mislead the public.

The NEPLP ruled that false information broadcast by the channel could increase the risk of infection among family members, in particular older people and children. Misleading information could also deter people from following safety procedures in educational institutions and from abiding by national restrictions. This in turn could lead to and reinforce the uncontrolled spread of the coronavirus. The regulator found that PBK had (a) failed to take the necessary steps to obey the law, including assessing the truthfulness of the information that it had broadcast, its impact on public health and the potential risks, and (b) allowed the dissemination of false information.

According to the NEPLP, audiovisual media must bear in mind that they were responsible for broadcasting verified facts in their programmes and ensuring that the overall context of their programmes was not misleading to the average viewer

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with no relevant specialist knowledge. They had editorial freedom as long as they did not break the law. Freedom was not arbitrary. Each media company bore editorial responsibility for the programmes and information that it broadcast. Electronic media were legally obliged to check the accuracy of all facts contained in their programmes, whether they were produced by the company itself or by an independent producer.

The NEPLP considered that the infringements committed by PBK to be serious because they posed a threat to public health, which was closely protected, in an emergency situation. The information disseminated by the channel could affect people's decisions to comply with state-imposed restrictions, which in turn could jeopardise the functioning of the health system as a whole.

The NEPLP therefore fined PBK the maximum of EUR 10,000 for the infringement committed in the programme 'Zdorovje' on 27 December and EUR 6,000 for that committed in the programme 'Zitj Zdorovo' on 30 December.

NEPLP konstatē nepatiesas informācijas izplatīšanu "Pirmajā Baltijas Kanālā", 02.03.2021

https://www.neplpadome.lv/lv/sakums/padome/padomes-sedes/sedes-sadalas/neplp-konstate-nepatiesas-informacijas-izplatisanu-%E2%80%9Cpirmaja-baltijas-kanala%E2%80%9D.html

Latvian regulatory authority press release of 2 March 2021

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MALTA

[MT] Interview with the Leader of the Opposition deemed to be fair and impartial

Pierre Cassar
University of Malta

On 26 March 2021, the Broadcasting Authority decided on a complaint by the Nationalist Party filed under Article 34 of the Broadcasting Act. This article stipulates that any party that feels that it has been unfairly treated in a broadcast, has the right to complain and ask the regulator to intervene.

The complaint concerned a current affairs programme broadcast on the public service television station, which consisted of a one-on- one interview with the Leader of the Opposition. In its complaint, the Nationalist Party (PN) alleged that the journalist/presenter opted for a hard-line approach in the way he addressed his questions to the Opposition Leader whereas he was more lenient towards the Prime Minister in another edition of the same programme anchored by the same journalist. The PN further contended that the journalist concerned made it a point to ask some awkward questions to the guest and acted on a number of inferences as if they were fact. The complainant asked the regulator to rule in its favour and decree that the programme in question constituted a case of partiality.

Given the current restriction in place, the Authority asked the parties to make their submissions virtually during a sitting held on 11 March 2021. During its submissions, the Secretary General of the Nationalist Party argued that while his party was all in favour of investigative journalism and the right for journalists to ask questions, this was a case of two weights and two measures as the leader of the Opposition was treated very differently to the Prime Minister by the same journalist. The complainants argued that even the tone and attitude of the journalist were contrasting during the two broadcasts.

Meanwhile, the state broadcaster, represented by its Registered Editor and the Chairperson of the Editorial Board, refuted these allegations and stressed that both party leaders were treated equally as contemplated by the Constitution and the provisions of the Broadcasting Act. Both the Prime Minister and the Leader of the Opposition were afforded equal time during two separate editions of the current affairs programme.

After discussing the submissions, the Broadcasting Authority concluded that the complaint filed by the Nationalist Party was not justified given that the state broadcaster had made it a point to transmit two programmes within the same series to include a one-on-one interview with the Prime Minister and another with the Leader of the Opposition. According to the regulator, this constituted balance and impartiality as required by law.

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The Broadcasting Act further argued that journalists have every right to ask awkward questions to their guests especially considering that this was a current affairs programme. The regulator also opined that the line of questioning, including follow-up questions, depended on the themes being discussed and it was unrealistic to expect the journalist to ask the same questions to the two guests in separate editions of the programme.

By way of conclusion, the Broadcasting Authority deemed that the complainant, in this case the Nationalist Party, had no grounds for a remedy as contemplated by law. In its decision, published on its website and communicated to the parties concerned, the regulator concluded by reiterating the importance that all journalists, particularly those working for the public broadcaster, should always strive for integrity so as to ensure that they are perceived to be impartial in their work.

Deċiżjoni rigward ilment imressaq mill-Partit Nazzjonalista kontra PBS Ltd rigward il-programm Insights li xxandar fit-22 ta' Jannar 2021

http://www.ba-malta.org/tvm-insights-22-ta-jan-2021

Decision on a complaint lodged by the Nationalist Party against PBS Ltd regarding the Insights program broadcast on 22 January 2021

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NETHERLANDS

[NL] Court of Appeal judgment on offensive COVID-19 broadcast and incitement to hatred

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On 2 March 2021, the Amsterdam Court of Appeal delivered an important judgment on offensive expression and the limits of satirical and artistic expression in the media. The Court held that there should be no prosecution for incitement to hatred or group insult over the broadcast of an offensive satirical song about Covid-19 and Chinese individuals.

The defendant in the case was the presenter of a well-known programme, which regularly includes a segment responding to current events in a satirical manner. In February 2020, the defendant broadcast the so-called “Corona song” as part of the programme, which was sung by of a fictional character voiced by the defendant, and entitled “Voorkomen is beter dan Chinezen” (Prevention is better than Chinese). The defendant claimed the purpose of the satirical song was to ridicule the opinion of people who thought Chinese food could cause COVID-19, and included the lyrics “Het komt allemaal door die stink Chinezen … Corona heb je zo” (“It's all because of those stinky Chinese … you’ll have Corona in no time”).

Following the broadcast, an anti-discrimination hotline received thousands of complaints, and the broadcast was reported to the police over incitement to hatred. The defendant later issued an apology on the programme, and apologised to representatives of the Chinese community in the Netherlands. Importantly, in June 2020, the public prosecutor decided not to prosecute the defendant for incitement to hatred or group insult. However, in August 2020, a number of anti-racism organisations initiated legal proceedings under a special legal provision which allows a decision of the public prosecutor to be reviewed by the Court of Appeal.

In its judgment on 2 March 2021, the Court of Appeal reviewed the public prosecutor’s decision to not prosecute for both group insult and incitement to hatred, and concluded that there should be no prosecution against the defendant over the broadcast. The Court began by noting that it was required to assess whether a criminal court judge could reach a conviction for a criminal offence. The Court then examined whether the broadcast was punishable under Article 137c of the Criminal Code, which criminalises insulting a group of people based on race. The Court applied a three-step test, namely (a) was the statement offensive in itself; (b) does the context in which the statement was made take away the offensive nature of the statement; and (c) was the statement “unnecessarily offensive”?

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The Court noted that when determining whether expression is punishable, the right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR) plays a “major role”. In this regard, the Court referred to the European Court’s case law that artistic expression enjoys a “high degree of protection”, as do statements in the media which contribute to public debate. Furthermore, in a democracy there must, in principle, also be room for statements that shock, offend or disturb. Applying these principles, the Court first noted that the lyric “It's all because of those stinky Chinese” was offensive in and of itself. However, the Court held that the song fell “within the context of satire”. Crucially, the Court held it was “artistic expression”, where the defendant’s intention was to ridicule an opinion - the opinion of a number of Dutch people that Chinese food could cause Covid-19. The limits of artistic expression and what is permissible is “high” under Article 10 ECHR. Finally, the Court held that while the statements were offensive and “not particularly tasteful”, they could not be regarded as “unnecessarily offensive by a criminal court”, given the purpose of the song was to ridicule an opinion.

The Court also examined whether the broadcast could constitute incitement to hatred. The Court acknowledged that people of Chinese descent have often been victims of (so-called) jokes and bullying for decades. However, the Court reiterated that for a successful prosecution, it would have to be proven that the defendant intentionally incited hatred, discrimination or violence as a result of the Corona song. However, given the defendant’s intention was to ridicule an opinion, a criminal judge would not impose a conviction.

Gerechtshof Amsterdam, ECLI:NL:GHAMS:2021:581, 2 maart 2021

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2021:581

Amsterdam Court of Appeal, ECLI:NL:GHAMS:2021:581, 2 March 2021

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[NL] New guidelines on privacy rules for political parties during election campaigns

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 16 February 2021, the *Autoriteit Persoonsgegevens* (Dutch Data Protection Authority - AP) published important new Guidelines for political parties on the protection of privacy during election campaigns, including the use of political microtargeting. The Guidelines were published in the run-up to the Dutch parliamentary elections held on 15-17 March 2021. The European Commission also recently announced in the European Democracy Action Plan that it will examine “restricting” microtargeting in the political context, and propose legislation on political advertising in 2021 (see IRIS 2021-2/4).

The Guidelines begin by noting that political parties are increasingly using personal data (or hiring companies for this purpose) to reach their members, and send tailored online political messages, known as political microtargeting. The AP states that political parties are, of course, permitted to campaign digitally, but political parties must adhere to privacy rules. As such, the purpose of the Guidelines is to provide guidance to political parties engaging in online campaigning.

The Guidelines set out a number of important issues. First, political parties should determine whether planned campaign activity requires the processing of personal data, and investigate whether a less-invasive method of campaigning is possible. Second, when engaging in political microtargeting, political parties should appoint a data protection officer or an external expert to oversee the use of personal data. Third, there are specific rules on the use of public information available online. The Guidelines state that political parties “cannot simply use information that people themselves put on the internet to send a political message to these people”. Importantly, the data processing operations on the Internet from where political parties intend to "scrape" this kind of data and make profiles, must comply with the General Data Protection Regulation (see IRIS 2018-6/7), even if the data is public. Crucially, processing personal data about a person’s political opinions is permitted only in specific circumstances, such as when a person has given explicit consent. Finally, the Guidelines state that when political parties engage companies in relation to political campaigning, parties should only engage with companies that offer guarantees that they are GDPR-compliant. Political parties are advised to determine whether data sets containing personal data have been lawfully collected, and companies must have this documented.

The AP concluded by stating that it monitors compliance with the GDPR by political parties, and that elections and microtargeting are a “special area of attention” over the next three years.

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Dutch Data Protection Authority, AP publishes manual for privacy during election campaigns, 16 February 2021

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SLOVENIA

[SI] Update on media legislation proposals and European Parliament debates on media freedom

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COMMSOL

In 2020, IRIS reported on a range of legislative proposals from the Slovenian government relevant to the media sector. These included the following: a draft proposal for amending the Law on Audiovisual Media Services (see IRIS 2020-9/12 and IRIS 2021-1/26); a draft law on creating a Super Regulator, which proposes a merger between the Agency for Communication Networks and Services (AKOS) and five other regulators (see IRIS 2020-10/14); and draft amendments to the Slovenia Radio and Television Act, the Mass Media Act and the Slovenia Press Agency Act (see IRIS 2020-8/21).

There was a strong national critical response from Slovenian stakeholders, journalists and experts concerning the three laws (Slovenia Radio and Television Act, the Mass Media Act and the Slovenia Press Agency Act). In addition, international organisations have also expressed concern regarding various aspects of these laws and their threat to the freedom of the media in Slovenia (The European Alliance of News Agencies (EANA), the European Broadcasting Union (EBU), the European Federation of Journalists (EFJ), and the South East Europe Media Organisation (SEEMO)). To date none of the procedures relating to these legislative proposals have been finalised. At the end of 2020, the Government suspended the funding of the *Slovenska Tiskovna Agencija* (Slovenian Press Agency - STA), which is a public institution.

An analysis of “The Situation of Democracy, the Rule of Law and Fundamental Rights in Slovenia” was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), for the Democracy, Rule of Law and Fundamental Rights Monitoring Group (DRFMG). This document focuses on freedom of expression and information, media freedom and pluralism, and also on the judiciary, on checks and balances and other issues. With regard to media freedom, the analysis provides a detailed chronology of the issues and events that have raised concern regarding media freedom in Slovenia, alongside the responses of international organisations to the situation.

The situation in Slovenia was discussed at a meeting held on 5 March 2021, by the DRFMG in the context of a discussion on media freedom in Poland, Hungary and Slovenia. A second discussion was held with the monitoring group, a range of experts, and the Slovenian Prime Minister and Minister of Culture on 26 March 2021, after which the DRFMG issued a statement regretting that the exchange of views was interrupted when the Prime Minister left the meeting. The DRFMG has published a list of questions to the Slovenian government which were not

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addressed during the meeting.

European Parliament Briefing: 04-03-2021: Media freedom under attack in Poland, Hungary and Slovenia

https://www.europarl.europa.eu/news/en/agenda/briefing/2021-03-08/6/media-freedom-under-attack-in-poland-hungary-and-slovenia

European Parliament Press release of 25 March 2021: Media freedom in Slovenia: MEPs to continue taking stock of recent developments

https://www.europarl.europa.eu/news/en/press-room/20210322IPR00514/media-freedom-in-slovenia-meps-to-continue-taking-stock-of-recent-developments

Statement by the Democracy, Rule of Law and Fundamental Rights Monitoring Group, 26 March 2021

https://www.europarl.europa.eu/news/en/press-room/20210319IPR00448/statement-by-the-democracy-rule-of-law-and-fundamental-rights-monitoring-group

"The Situation of Democracy, the Rule of Law and Fundamental Rights in Slovenia". Report for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, for the Democracy, Rule of Law and Fundamental Rights Monitoring Group

https://www.europarl.europa.eu/cmsdata/231906/SLOVENIA%20IDA%20DRFMG.update.pdf

DRFMG Members' follow-up questions to the Exchange of views on the situation in Slovenia in relation to Democracy, Rule of Law and Fundamental Rights, held on Friday, 26 March 2021, 13.30-16.30.

https://www.europarl.europa.eu/cmsdata/231681/DFRMG%2031.03.2021%20-%20Follow-up%20questions%20to%20SL%20authorities.pdf

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UKRAINE

[UA] Supreme Court on sanctions against Ukrainian TV channels

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The President of Ukraine introduced, with his Decree of 2 February 2021, broad sanctions (see IRIS 2017-7/33) against the assets of a member of the national Parliament and certain Ukrainian companies affiliated with him, as well as other persons, who were, in particular, accused of disseminating “pro-Russian propaganda.” Among others, these sanctions enabled the power to annul licenses and stop broadcasting of the national TV channels Zik-TV, NewsOne and 112-Ukraina for five years.

The decree was appealed in the Supreme Court of Ukraine by a citizen of Ukraine who claimed that it violated his right to receive information and freedom of expression, as guaranteed by the Ukranian Constitution, Article 10 of the European Convention on Human Rights, and national laws. The applicant also said that the Decree does not point to the aim of the restrictions, andthat their proportionality, and therefore legality, are doubtful. The applicant asked the Supreme Court to annul the Decree.

The Supreme Court reviewed the case on 19 March 2021 and came to the conclusion that the aim of the Decree was protection of the national security of Ukraine and the sanctions introduced therein were proportionate to the aim.

As to the information rights of the citizen, the Court said that the person was not deprived of his right to seek and obtain information of similar content, through the Internet, of some other TV channels “of analogous nature”. Specifically, the Court said, that “at the time of applying with the complaint, some of the TV channels under sanctions were still available online, in particular through a YouTube channel. The applicant failed to explain why an access through the Internet to the indicated TV channels was unacceptable or overwhelmingly burdensome. The applicant is not deprived by the Decree of the opportunity to use other information resources analogous to those of which access was stopped by the Decree. Therefore, the applicant has not substantiated a violation of rights by the restrictions introduced by the State, which witnesses the absence of a violation of the rights and freedoms of the applicant.”

The Court dismissed the application. Its decision can be appealed in the Grand Chamber of the Supreme Court within 30 days.

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УКАЗ Президента України - Про рішення Ради національної безпеки і оборони України від 2 лютого 2021 року "Про застосування персональних спеціальних економічних та інших обмежувальних заходів (санкцій)"

https://ips.ligazakon.net/document/view/U043_21?an=1&ed=2021_02_02

Decree of the President of Ukraine "On decision of the Council of National Security and Defence of Ukraine of 2 February 2021, No 43/2021, 'On application of personal special economic and other restrictive measures (sanctions)'"

Верховний Суд у складі колегії суддів Касаційного адміністративного суду. Рішення, адміністративне провадження №П/9901/26/21

https://reyestr.court.gov.ua/Review/95723166

Supreme Court in the composition of the collegium of judges of the Administrative Court of Cassation. Decision 19 March 2021 in the case No 9901/26/21

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[UA] Supreme court on freedom of access to Russian social media

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On 4 November 2020, the Grand Chamber of the Supreme Court of Ukraine upheld the decision taken earlier by the Administrative Cassation Court, a chamber of the Supreme Court of Ukraine, in the case challenging the Decree of the President of Ukraine on sanctions in relation to certain Russian social media and electronic mail services.

The Decree of the President of 14 May 2020 introduced the decision of the Council on National Security and Defence of Ukraine, which superseded, extended and amended earlier sanctions against Russian legal and physical persons (see IRIS 2017-7/33). In particular, it maintained sanctions against certain Internet companies, including the popular email service Mail.ru and the social networks Odnoklassniki (OK.ru) and Vkontakte (VK). The sanctions mean, inter alia, that any of these companies shall not use telecommunication networks in Ukraine.

The Decree was appealed by a citizen of Ukraine, who proved to be a user of OK.ru and VK, as well as in possession of an email account on Mail.ru, and claimed that the sanctions violated his right to receive information and freedom of expression, as guaranteed by Article 10 of the Convention on Human Rights.

The Supreme Court said that the Decree has a legitimate aim of an “urgent and effective response to the threats to the national security of Ukraine” (para 42), which corresponds to the provisions of Article 10 of the Convention. They are prescribed by the national law, including the 2014 Statute “On Sanctions”. They are “necessary in a democracy”, as there was an urgent need to introduce and continue the sanctions in view of the “facts of aggression against Ukraine” (para 44).

The Supreme Court said that the claimant did not substantiate a violation of his rights by sanctions against these particular services while other “analogous” online services remain free of governmental interference in Ukraine (para 45).

Therefore the President of Ukraine acted in a lawful and legal manner while introducing these necessary and proportionate restrictions (para 48).

The Grand Chamber dismissed the application. This decision is final and may not be further appealed.

Decision of the Grand Chamber of the Supreme Court, case No. 9901/138/20, 4 November 2020

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UNITED STATES OF AMERICA

[US] Curtains up for the Shuttered Venue Operators Grant

Kelsey Farish
Dac Beachcroft

The Shuttered Venue Operators Grant (SVOG) programme has commenced in the United States as of early April 2021. With funding of USD16.2 billion (EUR 13.5 billion) available, these grants are hoped to provide much-needed financial support to cinemas, theatres, and other performance venues hit by the coronavirus pandemic across the United States.

Organisations eligible for SVOGs will be those with "defined performance and audience spaces", and include cinemas and theatres, live venue operators or promoters, performing arts organisations, talent representatives, and certain other cultural venues. The scheme will be administered by the U.S. Government's Small Business Administration (SBA) and applications are to be made online through sba.gov.

Formerly known as the Save Our Stages Act 6, SVOG was passed into law in December 2020 as Section 324 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act. In March 2021, the SVOG budget was bolstered by a further USD1.25 billion (EUR 1 billion) under President Biden's new American Rescue Plan Act of 2021, also called the COVID-19 Stimulus Package.

Applicants will be able to seek grants of up to USD10 million (EUR 8.4 million), or 45% of 2019 gross revenue, whichever is the smaller amount. The grant may be used to cover payroll, payments to independent contractors, mortgages and rents, as well as alterations to facilities to meet health and safety protocols as performances begin to resume. The SVOGs will be awarded in several stages, with the first tranche expected to be given to entities that suffered a 90% or greater revenue loss between April 2020 through to December 2020 due to the COVID-19 pandemic. The SBA has committed to reserve at least USD 2 billion (EUR 1.7 billion) of funding for smaller entities with fewer than 50 employees.

As with all government grant schemes, certain conditions and restrictions do apply. For example, they will not be awarded to publicly traded corporations, or those which "present live performances of a prurient sexual nature". Grant recipients must also have a connection to the United States, either physically or through payment of U.S taxes or use of American products, materials or labour. Each application will be considered on a case-by-case basis and requires submission of documentary evidence through a dedicated online portal.

Notwithstanding the above caveats, the availability of SVOGs will be welcome news for many creators, performers and other stakeholders in the sector. By way

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of example, new COVID-19 cases started to diminish in and around Hollywood in April 2021, and accordingly, more film and television projects have started (or indeed, restarted) production. Noting that on-location filming had been curtailed for months, in observance of strict health protocols, FilmLA (the partner film office for the City and County of Los Angeles) President Paul Audley recently said he was “optimistic that the local film economy will soon be back on track”.

Many state,local film and media boards, including FilmLA and the New York City Mayor's Office of Media and Entertainment, are offering resources on how to apply. Official video tutorials have been published by the SBA on YouTube, and some government as well as not-for-profit organisations have established dedicated advice hotlines and helpdesks. Applications initially opened online at sba.gov on 8 April, but were almost immediately suspended due to technical problems (current as of 11 April).

COVID-19 Relief: Shuttered Venue Operators Grant official site

https://www.sba.gov/funding-programs/loans/covid-19-relief-options/shuttered-venue-operators-grant

FilmLA issues update on pandemic-era film permitting

https://www.filmla.com/filmla-issues-eighth-update-on-pandemic-era-permitting/

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[US] Facebook's Oversight Board decision on former President Trump's suspension

Francisco Javier Cabrera Blázquez
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On 6 January 2021, a mob stormed the Capitol Building in Washington, D.C. while a joint session of Congress was assembled to count electoral votes. During these events, then-President Donald Trump posted two pieces of content which, according to Facebook, violated its Community Standard on Dangerous Individuals and Organizations. Accordingly, Facebook removed both posts and blocked Mr Trump from posting on Facebook or Instagram for 24 hours. On 7 January 2021, after further reviewing Mr Trump's posts, his recent communications off Facebook, and additional information about the severity of the violence at the Capitol, Facebook extended the block "indefinitely and for at least the next two weeks until the peaceful transition of power is complete." On 21 January 2021, Facebook referred this case to its Oversight Board (FOB), which reached a decision on 5 May 2021.

FOB's purpose is "to promote free expression by making principled, independent decisions regarding content on Facebook and Instagram and by issuing recommendations on the relevant Facebook company content policy". According to FOB, Facebook was justified in suspending Mr Trump's accounts extending that suspension for the following reasons:

- "We love you. You're very special" in the first post and "great patriots" and "remember this day forever" in the second post violated Facebook's rules prohibiting praise or support of people engaged in violence;

- In maintaining an unfounded narrative of electoral fraud and persistent calls to action, Mr Trump created an environment where a serious risk of violence was possible. There was a clear, immediate risk of harm and his words of support for those involved in the riots legitimized their violent actions. As president, Mr Trump had a high level of influence and the reach of his posts was large (35 million followers on Facebook and 24 million on Instagram).

Furthermore, FOB stated that Facebook's imposition of an 'indefinite' suspension, with no criteria for when or whether the account will be restored, did not follow a clear, published procedure, as 'indefinite' suspensions are not described in the company's content policies (removing the violating content, imposing a time-bound period of suspension, or permanently disabling the page and account).

Within six months of FOB's decision, Facebook must re-examine the penalty imposed on Mr Trump and decide the appropriate penalty, which must be based on the gravity of the violation and the prospect of future harm. It must also be consistent with Facebook's rules for severe violations, which must, in turn, be clear, necessary and proportionate. Should Facebook decide to restore Mr Trump's accounts, the company must apply its rules to that decision, including

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any changes made in response to the Board's policy recommendations. In this scenario, Facebook must address any further violations promptly and in accordance with its established content policies.

In its decision, FOB also provided a policy advisory statement, in which it made a number of recommendations to guide Facebook's policies in regard to serious risks of harm posed by political leaders and other influential figures.

Press release of Facebook's Oversight Board, "Oversight Board upholds former President Trump's suspension, finds Facebook failed to impose proper penalty", May 2021

https://oversightboard.com/news/226612455899839-oversight-board-upholds-former-president-trump-s-suspension-finds-facebook-failed-to-impose-proper-penalty/

Facebook's Oversight Board, Case decision 2021-001-FB-FBR

https://www.oversightboard.com/decision/FB-691QAMHJ

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