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EDITORIAL

Last month, two important copyright-related EU directives, the Directive on Copyright in the Single Market (DSM) and the Directive on television and radio programmes (Sat-Cab), reached their implementation deadline. While it is true that not all member states have yet implemented them, this is partly due to delays forced by the COVID-pandemic. Germany, for example, adopted its implementing law just before the deadline; Denmark adopted a partial transposition that entered into force just in time to meet the deadline, while there are still other countries lagging behind. Two facts may also have had an impact in this delayed transposition: first, the European Commission took its time in delivering the highly expected Guidance on Article 17 DSM, concerning the responsibilities of online content sharing platforms; second, there is a pending judgment of the Court of Justice of the European Union (CJEU) in the case C-401/19 that will have implications for the implementation by the Member States of said Article 17. In fact, in the words of the Commission, the Guidance may need to be reviewed following that judgment. Interestingly, while waiting for this decision, the CJEU has further clarified the liability of video sharing platforms in the Google/Cyando case.

Beyond copyright issues, last month saw the Council of Europe Conference of Ministers responsible for Media and Information Society, entitled, 'Artificial Intelligence – Intelligent Politics: Challenges and opportunities for media and democracy', in which a Final Declaration and four Resolutions were adopted. In passing, if you are interested in how artificial intelligence is applied in the audiovisual sector, you can watch this entertaining video presentation of our IRIS Special, which you can read here.

You can read about these and many other developments in our electronic pages.

More than ever, we wish you a relaxing summer break!

Stay safe and enjoy your read!

Maja Cappello, editor

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INTERNATIONAL

COUNCIL OF EUROPE

Ministerial Conference on Artificial Intelligence, Media and Democracy

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The Council of Europe Conference of Ministers responsible for Media and Information Society, entitled, 'Artificial Intelligence – Intelligent Politics: Challenges and opportunities for media and democracy', organised jointly with the Republic of Cyprus, was held online on 10-11 June 2021. The previous ministerial conference on similar issues ('Freedom of Expression and Democracy in the Digital Age: Opportunities, Rights, Responsibilities') was held in Belgrade in 2013 (see IRIS 2014-2:1/3).

Participating ministers in the Conference adopted a Final Declaration and four Resolutions:

1) Resolution on freedom of expression and digital technologies

2) Resolution on the safety of journalists

3) Resolution on the changing media and information environment

4) Resolution on the impacts of the COVID-19 pandemic on freedom of expression

The Final Declaration introduces the key focuses of the theme-specific resolutions in a scene-setting way. It provides a detailed survey of: the opportunities and threats arising from the design and deployment of a range of digital technologies, including artificial intelligence (AI); threats and violence against journalists and other media actors; ongoing developments in the media and online environments, and the particular challenges for freedom of expression during the COVID-19 pandemic and infodemic. One of the Conference's key themes is central: how existing threats to the safety of journalists and to freedom of expression and media freedom are accentuated in times of crisis. Against this backdrop, the Final Declaration invites the Council of Europe "to pursue, as a matter of priority and with due allocation of resources, its efforts [...] to uphold and guarantee the effective enjoyment of the rights protected by Article 10 of the European Convention on Human Rights".

The Final Declaration also invites the Council of Europe to "continue to provide annual assessments of the state of freedom of expression in Europe, under the

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authority of the Secretary General of the Council of Europe, with concrete proposals for action, including as regards journalists' safety, and the promotion of a favourable environment for journalism resting on the standards of professional ethics in the digital age". It is useful to note that a draft recommendation on promoting a favourable environment for quality journalism in the digital age was submitted to the Committee of Ministers in March 2020, but it has not been adopted yet. The draft recommendation provides detailed guidance to member States on these issues.

Central focuses of the Resolution on freedom of expression and digital technologies include how digital technologies and AI tools are being used by media and news organisations, journalists, and online platforms, and how they affect users' autonomy and experiences. Duties and responsibilities, transparency and media and information literacy are all important themes. There is also due attention for "effective human oversight over automated journalistic processes"; verification processes for the accuracy of content and the credibility of sources; "protection from the dangers of data exploitation", and "exposure to full diversity of media content and sources, especially with respect to marginalised groups".

The previous ministerial conference in 2013 provided an important impetus for the Council of Europe's work on the safety of journalists. The second Resolution adopted at the latest ministerial conference continues that work, emphasizing how important it is for Member States to fully and effectively implement Committee of Ministers CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors (see IRIS 2016-5:1/3). The Participating Ministers commit "to devise, based on [...] CM/Rec(2016)4 and best practices of Council of Europe member States and other jurisdictions, dedicated national action plans on the safety of journalists, setting a comprehensive and effective programme of activity, with urgency-based priorities and adequate resources for their implementation". Such dedicated national action plans should be characterized by strong political leadership and the effective involvement of relevant actors. The "specific risks, challenges and threats that women journalists and other media actors face on account of their gender, also in the online sphere" are singled out for prompt and decisive action. The need to address threats and violence against journalists and other media actors on grounds of various characteristics is also identified. The Ministers further "commit to dedicate specific attention and resources to stemming impunity for killings of, attacks on and ill-treatment of journalists and other media actors". Continued support for the Platform to promote the protection of journalism and the safety of journalists was also called for.

Besides the general focuses of the Resolution on the changing media and information environment, viz., fast-paced developments in the field and their various implications for society and for individuals, there are noteworthy specific focuses on responsibility for online content; the promotion of media and information literacy (MIL) projects, and online electoral communication. For instance, the Resolution invites the Council of Europe to "[d]evelop guidance on online electoral communication, campaigning and media coverage, in the light of

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the changes in campaigning techniques, to ensure a platform neutral application of the principles of fairness, transparency and equal opportunity in politic al processes, as well as the application of [Council of Europe] data protection principles".

The Resolution on the impacts of the COVID-19 pandemic on freedom of expression was drafted largely in response to the pandemic and infodemic that have defined the past 18 months, but it also looks ahead. Its central message is to underscore the importance of robust and resilient frameworks of protection for freedom of expression, media freedom, pluralism and diversity, and public debate. The Resolution recognises the importance of MIL projects and of close cooperation with "journalists and media associations to explore the long-term structural conditions needed to promote an enabling economic environment for media, including during times of crisis, that does not reduce their role to fact-checking or publishing government messages but one that fosters media freedom, pluralism and diversity by facilitating coverage of the widest possible range of voices and opinions".

The Final Declaration and each of the Resolutions envisage regular review, in consultation with relevant stakeholders, and reporting on implementation measures.

The Russian Federation entered an interpretive statement at the adoption of the Conference's final documents, in which it sets out its objections to various premises and positions, and "dissociates itself from the content of" the Resolutions on the safety of journalists and on the impacts of the COVID-19 pandemic on freedom of expression. The objections concern inter alia the use of the terms "gender", "sexual orientation" ("in the list of grounds for threats, abuse and intimidation faced by journalists") and "other media actors" (which it intends to apply "only to media professionals as provided for in the national legislation of the Russian Federation"). The interpretive statement claims there is "no sufficient scientific data and evidence confirming that women-journalists are affected by the mentioned human rights violations more than men". The Russian Federation explains why it is "unable to support the activities of" the Platform to Promote the Protection of Journalism and Safety of Journalists and that it "sees no need to develop a national action plan on the safety of journalists" due to the protection afforded by the existing national legal framework. These objections are strikingly at odds with some of the main lines of the Conference's outcome documents.

Final Declaration and Resolutions, Council of Europe Conference of Ministers responsible for Media and Information Society, 'Artificial Intelligence – Intelligent Politics: Challenges and opportunities for media and democracy', 11 June 2021,

https://www.coe.int/en/web/freedom-expression/media2021nicosia

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UNITED KINGDOM

European Court of Human Rights (Grand Chamber): Big Brother Watch and Others v. the United Kingdom

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On 25 May 2021 the Grand Chamber of the European Court of Human Rights (ECtHR) delivered its long awaited judgment on bulk interception of personal data and mass surveillance by security and intelligence services in the case of Big Brother Watch and others v. the United Kingdom. After its Chamber judgment of 13 September 2018 (IRIS 2018-10/1) the case was referred to the Grand Chamber of the ECtHR. The Grand Chamber judgment elaborates a general framework of principles regarding bulk interception and confirms that the UK regime of interception of communications not only violates the privacy rights under Article 8 of the European Convention on Human Rights (ECHR) but also the journalists' right to protect their sources, as guaranteed under Article 10 ECHR. In the meantime the UK has updated its surveillance rules under new legislation, the Investigatory Powers Act 2016 (IPA 2016), which came into force in 2018. The ECtHR did not examine the new legislation in its judgment. The new legal regimes are currently subject to challenge before the domestic courts in the UK and it would not be open to the Grand Chamber to examine the new legislation before those courts have first had the opportunity to do so.

The judgment in the case of Big Brother Watch and Others v. the United Kingdom deals with a complex set of statutory laws, codes of conduct, procedures and monitoring instruments on the bulk interception of communications, intelligence sharing and requesting data from communications service providers (CSPs). The applications with the Strasbourg Court were lodged by organisations and individuals active in campaigning in civil liberties issues, by a newsgathering organisation and by a journalist, complaining about the scope and magnitude of the electronic surveillance programmes operated by the Government of the UK. The applications were lodged after Edward Snowden revealed the existence of surveillance and intelligence sharing programmes operated by the intelligence services of the United States and the UK. The applicants believed that the nature of their activities meant that their electronic communications and/or communications data were likely to have been intercepted or obtained by the UK intelligence services.

For the general approach elaborated in the Grand Chamber's judgment, we refer to the contribution in this IRIS-issue about the case of Centrum för Rättvisa v. Sweden. Both judgments extensively focus on the fundamental safeguards which are the cornerstone of any Article 8 compliant bulk interception regime and they introduce and describe the eight requirements to secure adequate and effective guarantees in terms of the "foreseeability" and "necessity in a democratic

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society" of such a regime. After evaluating each of the eight requirements, the Grand Chamber reaches the conclusion that the legal framework on bulk interception in the UK viewed as a whole, did not contain sufficient "end-to-end" safeguards to provide adequate and effective guarantees against arbitrariness and the risk of abuse. Accordingly it finds a violation of Article 8 ECHR. In particular it identifies several fundamental deficiencies in the regime, such as the absence of independent authorisation, the failure to include the categories of selectors in the application for a warrant, and the failure to subject selectors linked to an individual to prior internal authorisation. These weaknesses concern not only the interception of the contents of communications but also the interception of related communications data. Therefore the Grand Chamber finds that the legal basis of the bulk interception regime did not meet the "quality of law" requirement and was therefore incapable of keeping the "interference" to what was "necessary in a democratic society".

With regard to the complaint of a journalist and a newsgathering organisation that the bulk interception regime in the UK also violated the right of journalists to protect their sources as guaranteed under Article 10 ECHR, the Grand Chamber confirms the finding of the Chamber judgment of 2018. The ECtHR reiterates that the protection of journalistic sources is one of the cornerstones of freedom of the press, and that interference cannot be compatible with Article 10 ECHR unless it is justified by an overriding requirement in the public interest. A crucial safeguard is the guarantee of ex ante review by a judge or other independent and impartial decision-making body with the power to determine whether a requirement in the public interest exists that overrides the principle of protection of journalistic sources prior to the handing over of such material. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established. Applying these principles in the bulk interception context the ECtHR finds that under the UK regime confidential journalistic material could have been accessed by the intelligence services either intentionally, through the deliberate use of selectors or search terms connected to a journalist or news organisation, or unintentionally, as a "bycatch" of the bulk interception operation. Where the intention of the intelligence services is to access confidential journalistic material, for example, through the deliberate use of a strong selector connected to a journalist, or where, as a result of the choice of such strong selectors, there is a high probability that such material will be selected for examination, the ECtHR considers that the interference will be commensurate with that occasioned by the search of a journalist's home or workplace. Therefore the Grand Chamber requires that before the intelligence services use selectors or search terms known to be connected to a journalist, or which would make the selection of confidential journalistic material for examination highly probable, the selectors or search terms must have been authorised by a judge or other independent and impartial decision-making body invested with the power to determine whether they were "justified by an overriding requirement in the public interest" and, in particular, whether a less intrusive measure might have sufficed to serve the overriding public interest. The UK bulk interception regime did not guarantee such an ex ante review by a judge or other independent and impartial decision-making body.

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On the contrary, where the intention was to access confidential journalistic material, or that was highly probable in view of the use of selectors connected to a journalist, all that was required was that the reasons for doing so, and the necessity and proportionality of doing so, be documented clearly. The Grand Chamber also finds that there were insufficient safeguards in place to ensure that once it became apparent that a communication which had not been selected for examination through the deliberate use of a selector or search term known to be connected to a journalist nevertheless contained confidential journalistic material, it could only continue to be stored and examined by an analyst if authorised by a judge or other independent and impartial decision-making body invested with the power to determine whether its continued storage and examination was "justified by an overriding requirement in the public interest". Instead, all that was required was that "particular consideration" should be given to any interception which might have involved the interception of confidential journalistic material, including consideration of any possible mitigation steps. In view of these weaknesses, and those identified by the ECtHR in its considerations of the complaint under Article 8 of the Convention, it finds that there has been a breach of Article 10 ECHR, specifically with regard to the protection of journalistic sources.

Finally the Grand Chamber also finds a violation of Article 8 and 10 with regard to the regime permitting the acquisition of retained data from communication service providers, as the practices in this domain were in breach with EU Law. As the access to retained data from CSPs was not limited to the purpose of combating "serious crime" and as there was also a lack of prior review by a court or an independent administrative body, this part of the operation of the UK regime is found as not being in accordance with the law within the meaning of Article 8 and 10 ECHR. However, the legal framework and practices related to the receipt of intelligence from foreign intelligence services, including the receipt of material intercepted by the NSA under PRISM and Upstream, was found in accordance with Article 8 and 10 ECHR. The Grand Chamber finds that the United Kingdom had in place adequate safeguards for the examination, use and storage of the content and communications data received from intelligence partners, as well as for the onward transmission of this material and for its erasure and destruction.

The Grand Chamber judgment contains in annex some highly interesting (partly) concurring opinions and partly dissenting opinions, arguing that the Grand Chamber judgment should go considerably further in upholding the importance of the protection of private life and correspondence, in particular by introducing stricter minimum safeguards, but also by applying those safeguards more rigorously to the impugned bulk interception regime, including in the initial stage of mass surveillance practices and the receipt of intelligence from foreign intelligence services. One of the opinions expresses the hope that in future cases the ECtHR "will interpret and further develop the principles in a way which will properly uphold democratic society and the values it stands for".

Judgment by the European Court of Human Rights, Grand Chamber, case of Big Brother Watch and Others v. the United Kingdom, Application nos.

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58170/13, 62322/14 and 24960/15, 25 May 2021

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SWEDEN

European Court of Human Rights (Grand Chamber): Centrum för Rättvisa v. Sweden

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In a judgment of 19 June 2018, the Third Section Chamber of the European Court of Human Rights (ECtHR) found that the bulk interception of electronic signals in Sweden for foreign intelligence purposes, on the basis of Swedish Signals Intelligence Act, did not violate the right to privacy and correspondence under Article 8 of the European Convention on Human Rights (ECHR), nor the right to an effective remedy under Article 13 ECHR (see IRIS 2018-8/3). After referral, the Grand Chamber of the ECtHR in its judgment of 25 May 2021 came to the final conclusion that the Swedish bulk interception regime however does contain some shortcomings, and it found a violation of Article 8 ECHR. Especially the lack of guarantees when making a decision to transmit intelligence material to foreign partners, and the absence of an effective ex post facto review violates the right to privacy.

The applicant in this case is a Swedish human rights not-for-profit organisation, Centrum för Rättvisa (Centrum). In its complaint with the Strasbourg Court it alleged that the Swedish legislation and practice in the field of signals intelligence and secret surveillance had violated and continued to violate its privacy rights under Article 8 ECHR. The Centrum also complained that it has had no effective domestic remedy (Article 13 ECHR) through which to challenge this violation.

The Grand Chamber first notes that the domestic remedies available in Sweden to persons who suspect that they are affected by bulk interception measures are subject to a number of limitations. This limited availability of remedies cannot sufficiently dispel the public's fears related to the threat of secret surveillance. The ECtHR is of the opinion that the Centrum does not need to demonstrate actual personal and victim status, as being potentially at risk of seeing its communications or related data intercepted and analysed. The Grand Chamber finds that an examination of the relevant legislation in abstracto is justified.

The ECtHR is in no doubt that bulk interception is of vital importance for the states in identifying threats to their national security and that it appears that, in present-day conditions, no alternative or combination of alternatives would be sufficient to substitute for bulk interception power.

However, in view of the risk that a system of secret surveillance set up to protect national security and other essential national interests may undermine or even destroy the proper functioning of democratic processes under the cloak of defending them, there must be adequate and effective guarantees against abuse.

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This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law.

In general terms the Grand Chamber views bulk interception as a gradual process in which the degree of interference with individuals' Article 8 rights increases as the process progresses. In order to minimise the risk of the bulk interception being abused, the ECtHR considers that the process must be subject to "end-to-end safeguards". This means that, at the domestic level, an assessment should be made at each stage of the process of the necessity and proportionality of the measures being taken; that bulk interception should be subject to independent authorisation at the outset, when the object and scope of the bulk operation are being defined; and that the operation should be subject to supervision and independent ex post facto review. In the Court's view, these are fundamental safeguards which are the cornerstone of any Article 8 compliant bulk interception regime. Therefore the ECtHR examines whether the domestic legal framework clearly defines:

- The grounds on which bulk interception may be authorised;

- The circumstances in which an individual's communications may be intercepted;

- The procedure to be followed for granting authorisation;

- The procedures to be followed for selecting, examining and using intercept material;

- The precautions to be taken when communicating the material to other parties;

- The limits on the duration of interception, the storage of intercept material and the circumstances in which such material must be erased and destroyed;

- The procedures and modalities for supervision by an independent authority of compliance with the above safeguards and its powers to address non-compliance;

- The procedures for independent ex post facto review of such compliance and the powers vested in the competent body in addressing instances of non-compliance.

After evaluating each of the eight requirements, the Grand Chamber reaches the conclusion that the legal framework in bulk interception in Sweden contains adequate and effective safeguards and guarantees to meet the requirements of "foreseeability" and "necessity in a democratic society". The ECtHR finds that the Swedish bulk interception system is based on detailed legal rules, is clearly delimited in scope and provides for pertinent safeguards. The grounds upon which bulk interception can be authorised in Sweden are clearly circumscribed, the circumstances in which communications might be intercepted and examined are set out with sufficient clarity, its duration is legally regulated and controlled and the procedures for selecting, examining and using intercepted material are accompanied by adequate safeguards against abuse. The same protections apply

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equally to the content of intercepted communications and communications data. Crucially, the judicial pre-authorisation procedure and the supervision exercised by an independent body serve in principle to ensure the application of the domestic legal requirements and to limit the risk of disproportionate consequences affecting Article 8 rights. The Grand Chamber is satisfied that the main features of the Swedish bulk interception regime meet the ECHR requirements on quality of the law and considers that the operation of this regime kept within the limits of what is "necessary in a democratic society".

The Grand Chamber finds, however, that the Swedish bulk interception also contains shortcomings that are not sufficiently compensated by the existing safeguards and that there is considerable potential for bulk interception to be abused in a manner adversely affecting the rights of individuals to respect for private life. There is especially an absence of a requirement in the Signals Intelligence Act or other relevant legislation that, when making a decision to transmit intelligence material to foreign partners, consideration is given to the privacy interests of individuals. This shortcoming may allow information seriously compromising privacy rights or the right to respect for correspondence to be transmitted abroad mechanically, even if its intelligence value is very low. The ECtHR also refers to the absence of a possibility for members of the public to obtain reasoned decisions in some form in response to inquiries or complaints regarding bulk interception of communications and that this weakens the ex post facto control mechanism to an extent that generates risks for the observance of the affected individuals' fundamental rights. This lack of an effective review at the final stage of interception cannot be reconciled with the Court's view that the degree of interference with individuals' Article 8 rights increases as the process advances and falls short of the requirement of "end-to-end" safeguards to provide adequate and effective guarantees against arbitrariness and the risk of abuse. For this reason the Grand Chamber, by fifteen votes to two, finds that there has been a violation of Article 8 ECHR. It finds that no separate issue arose from the application of Article 13 ECHR. Four judges concur with the finding of the majority, as they found that the judgment should go considerably further in upholding the importance of the protection of private life and correspondence, in particular by introducing stricter minimum safeguards, but also by applying those safeguards more rigorously to the impugned bulk interception regime.

Judgment by the European Court of Human Rights, Grand Chamber, case of Centrum för Rättvisa v. Sweden, Application no. 35252/08, 25 May 2021

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EUROPEAN UNION

European Commission: Guidance on Article 17 of Directive on Copyright in the Digital Single Market

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European Audiovisual Observatory

On 4 June 2021, the European Commission released its Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market (DSM).

According to the Commission, the aim of this guidance is to support a correct and coherent transposition of Article 17 across the member states, paying particular attention to the need to balance fundamental rights and the use of exceptions and limitations, as required by Article 17(10). The guidance could also be of assistance to market players when complying with national legislations implementing Article 17.

Among the issues clarified by the guidance, the following can be highlighted:

- Article 17 DSM is a lex specialis to Article 3 of Directive 2001/29/EC (InfoSoc Directive) and Article 14 of Directive 2000/31/EC (e-commerce Directive). It does not, however, introduce a new right in the Union’s copyright law. Rather, it fully and specifically regulates the act of "communication to the public"’ in the limited circumstances covered by this provision.

- With regard to definitions, member states should explicitly set out in their implementing laws the definition of online content-sharing service provider" in Article 2(6) (first paragraph) in its entirety and explicitly exclude the service providers listed in Article 2(6) second paragraph, while specifying that this list of excluded service providers is not exhaustive. They should also refrain from quantifying "large amount" in their national law in order to avoid legal fragmentation through a potentially different scope of service providers covered in different member states. The acts of communication to the public and making content available in Article 17(1) should be understood as also covering reproductions necessary to carry out these acts. Member states should not provide for an obligation on online content-sharing service providers to obtain an authorisation for reproductions carried out in the context of Article 17. The notion of "best efforts" is not defined and no reference is made to national law, hence it is an autonomous notion of EU law and it should be transposed by the member states in accordance with this guidance and interpreted in light of the aim and the objectives of Article 17 and the text of the entire Article.

- Regarding best efforts, service providers should, as a minimum, proactively engage with rightsholders that can be easily identified and located, notably those

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representing a broad catalogue of works or other subject matter. In particular, proactively contacting collective management organisations (CMOs) to obtain an authorisation should be considered as a minimum requirement for all online content-sharing service providers.

- Automated blocking should in principle be limited to manifestly infringing uploads. Uploads, which are not manifestly infringing, should in principle go online and may be subject to an ex post human review when rightsholders oppose by sending a notice. There is an exception to this principle regarding content earmarked by rightholders. Rightsholders may choose to identify specific content, the unauthorised online availability of which could cause significant economic harm to them. Service providers should exercise particular care and diligence in application of their best efforts obligations before uploading content, which could cause significant economic harm to rightholders. This may include a rapid ex ante human review. This would apply for content which is particularly time sensitive (e.g. pre-released music or films or highlights of recent broadcasts of sports events). This heightened care for earmarked content should, however, be limited to cases where there is a high risk of significant economic harm, which ought to be properly justified by rightholders. Moreover, this mechanism should not lead to a disproportionate burden on service providers or to a general monitoring obligation. Online content-sharing service providers should be deemed to have complied, until proven otherwise, with their best efforts obligations if they have acted diligently as regards content which is not manifestly infringing, taking into account the relevant information from rightsholders. By contrast, they should be deemed not to have complied, until proven otherwise, with their best effort obligations and be held liable for copyright infringement if they have made uploaded content available disregarding the information provided by rightholders, including – as regards content that is not manifestly infringing content - the information on earmarked content.

According to the Commission, the guidance as such is not legally binding, and it may need to be reviewed following the coming judgment of the Court of Justice of the European Union in the case C-401/19 (see IRIS 2019-9/5).

Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM/2021/288 final

https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:288:FIN

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GERMANY

Court of Justice of the EU: Case Google/Cyando

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 22 June 2021, the Grand Chamber of the Court of Justice of the EU (CJEU) issued a judgment on the joined cases C-682/18 and C-683/18. The case concerned several infringements of the intellectual property rights held by Mr Peterson and Elsevier committed by users of the video-sharing platform operated by YouTube and the file-hosting and -sharing platform operated by Cyando, respectively. The judgment follows the German *Bundesgerichtshof* (Federal Court of Justice) request for a preliminary ruling concerning the interpretation of Article 3(1) and Article 8(3) of the InfoSoc Directive, of Article 14(1) of the e-commerce Directive, and of the first sentence of Article 11 and Article 13 of the Enforcement Directive.

The first question referred to in each of the two cases concerned whether Article 3(1) of the Copyright Directive must be interpreted as meaning that the operator of a video-sharing platform or a file-hosting and -sharing platform, on which users can illegally make protected content available to the public, itself makes a 'communication to the public' of that content, within the meaning of that provision. The CJEU ruled that the said operator does not make a 'communication to the public' of that content unless, beyond merely making that platform available, it contributes to giving access to such content to the public in breach of copyright. This would be the case, inter alia, where the operator has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it; or where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform; or where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content, or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform to illegally communicate protected content to the public via that platform.

The CJEU analysed the second and third questions together. The referring court had asked whether Article 14(1) of the e-commerce Directive must be interpreted as meaning that the activity of the operator of a video-sharing platform or a file-hosting and -sharing platform falls within the scope of that provision, to the extent that its activity covers content uploaded to its platform by platform users. If that

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were the case, the referring court wished to know, in essence, whether Article 14(1)(a) of said directive must be interpreted as meaning that, for that operator to be excluded under that provision from the exemption of liability provided for in Article 14(1), it must have knowledge of specific illegal acts committed by its users relating to protected content that was uploaded to its platform. The CJEU ruled that the activity of the operator falls within the scope of that provision, provided that that operator does not play an active role of such a kind as to give it knowledge of or control over the content uploaded to its platform. For such an operator to be excluded from the exemption from liability provided for in Article 14(1), it must have knowledge of, or awareness of, specific illegal acts committed by its users relating to protected content that was uploaded to its platform.

The fourth question referred to concerned whether Article 8(3) of the InfoSoc Directive precludes a situation where the rightsholder is not able to obtain an injunction against an intermediary whose services are used by a third party to infringe the rights of that rightsholder unless that infringement has previously been notified to that intermediary and that infringement is repeated. The CJEU answered in the negative, with the exception that, before court proceedings are commenced,infringement has first been notified to that intermediary and the latter has failed to intervene expeditiously in order to remove the content in question or to block access to it and to ensure that such infringements do not recur. It is, however, for the national courts to satisfy themselves, when applying such a condition, that the condition does not result in the actual cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightsholder.

Judgment of the Court of Justice of the EU (Grand Chamber), Joined Cases C-682/18 and C-683/18, Frank Peterson v Google et al and Elsevier Inc. v Cyando AG, 22 June 2021

https://curia.europa.eu/juris/document/document.jsf;jsessionid=13F16B59740306B6EE23A141F8C00E3B?text=&docid=243241&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=21406025

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SPAIN

European Commission: Spain needs to recover incompatible aid from certain DTT operators

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European Audiovisual Observatory

On 10 June 2021, the European Commission concluded that the aid received by terrestrial operators for the digitisation and extension of the terrestrial television network in remote areas of Spain was against EU State aid rules. Following the annulment of a 2013 Commission decision (see IRIS 2013-7/5) by the Court of Justice for inadequate reasoning as to the selectivity of the measure (see IRIS 2018-2/5), an additional in-depth investigation confirmed that the measures adopted by Spain between 2005 and 2008 to facilitate the switch from analogue to digital television constituted incompatible State aid. The aid was granted for the digital switch-over as well as for the operation and maintenance of the digital television network. In particular, the measures lack technological neutrality, since they envisage digital terrestrial television (DTT) as the only technology for the subsidised digital switch-over. Alternative technologies (such as satellite) could not benefit from the aid measures. The measures are selective because they benefit only DTT operators, although DTT and satellite technologies are in a comparable factual and legal situation (satellite technology could have been used for the digital switch-over in remote areas). On this basis, the Commission concluded that the scheme cannot be considered compatible with the internal market on the basis of Article 107(3)(c) or Article 106(2) of the Treaty on the Functioning of the European Union (TFEU).

EU State aid rules require that incompatible State aid is recovered without delay in order to remove the distortion of competition created by the aid. Spain will have to determine the amount to be recovered from each individual beneficiary, in line with the methodology set out under the Commission decision.

SA.28599 Aid for the deployment of digital terrestrial television (DTT) - Spain (with the exception of Castilla-La Mancha)-ES

https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_28599

Press release of the European Commission of 10 June 2021

https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2928

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LATVIA

European Commission: Decision to suspend broadcast of Rossiya RTR in Latvia compatible with AVMS Directive

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On 7 May 2021, the European Commission delivered an important decision, finding that the Latvian National Electronic Mass Media Council's 12-month suspension of the television channel Rossiya RTR in Latvia, due to incitement to violence or hatred, was compatible with the EU's Audiovisual Media Service Directive (AVMDS). This follows a recent EU Court of Justice judgment on restricting transmissions of broadcasts from other EU member states on the basis of incitement to hatred (IRIS 2019-8/3), and earlier European Commission decisions on this issue (see IRIS 2018-7/7 and IRIS 2017-6/5).

The case concerned Rossiya RTR, which is a Russian-language television channel retransmitted from Sweden into Latvia by the audiovisual media service provider "Federal State Unitary Enterprise - The Russian Television and Radio Broadcasting Company". Importantly, under Article 3(1) AVMSD, member states "shall not restrict retransmissions" of audiovisual media services from other member states for "reasons which fall within the fields coordinated by this Directive". This includes incitement to hatred, which is covered under Article 6 AVMSD. However, a member state may "provisionally derogate" from Article 3(1) where: (a) the television broadcast coming from another member state manifestly, seriously and gravely infringes Article 6, (b) during the previous 12 months, the broadcaster has infringed the provision "on at least two prior occasions", and (c) the broadcaster has notified the European Commission of the measures that it intends to take. The Commission must then deliver a decision on whether the measure is compatible with EU law. Crucially, in late 2020 and early 2021, the Latvian National Electronic Mass Media Council notified the European Commission and Swedish authorities that it had identified several infringements of Article 6 AVMSD in the television programmes of Rossiya RTR, and it intended to temporarily restrict retransmission of its television programmes in Latvia. Then, on 8 February 2021, the Council adopted a decision, which suspended the channel for a period of 12 months. The Council held that in "several cases" the content broadcast by Rossiya RTR constituted incitement to violence or hatred, including "references to military destruction, notably against Ukrainians"; "calls for a military invasion of Baltic states, including Latvia"; and "military actions against Latvia and other Member States (such as Estonia, Germany, Lithuania and Sweden)".

In the Commission's decision of 7 May 2021, the Commission reviewed the Council's decision, and found that it was compatible with EU law. First, the Commission held that the broadcasted statements could be considered as an

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incitement to violence or hatred, as they involved “unambiguous language” that could be considered as an “action intended to “direct specific behaviour” and, “creating a feeling of animosity or rejection with regard to a group of persons”. Crucially, the Commission held that the fact that the statements had been made in political talk shows and during live broadcasts “does not change their qualification”, given their “extreme and hateful character”. Furthermore, the broadcaster had provided “no indication” that the hosts of the programmes had “corrected or taken distance” from the statements. Importantly, the Commission considered that the programmes “manifestly, seriously and gravely infringed” Article 6 AVMSD, as the statements made during the programmes “partly relate to present and past conflicts involving Russia”, and contained “threats of occupation or destruction of other states, including Latvia”, and that Latvia has a “sizable Russian-speaking minority which appears to be the addressee of Rossiya RTR in Latvia”, and that consequently “tensions within Latvia, with its history as a former part of the Soviet Union, could arise”. Finally, the Commission held that the sanctions imposed – a 12-month retransmission suspension – was not manifestly disproportionate.

European Commission, Decision on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council to restrict retransmission on its territory of an audiovisual media service from another Member State, C(2021) 3162 final, 7 May 2021

https://digital-strategy.ec.europa.eu/system/files/2021-05/C%282021%293162_final_EN.pdf

European Commission, Decision of Latvia to suspend broadcast of the TV channel 'Rossiya RTR' compatible with EU law, 7 May 2021

https://digital-strategy.ec.europa.eu/en/news/decision-latvia-suspend-broadcast-tv-channel-rossiya-rtr-compatible-eu-law

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NATIONAL

BULGARIA

[BG] Court practice on the prohibition of surreptitious commercial communication

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By Penalty Decree No. РД-10-2-15.01.2019 *Съвет за електронни медии* (the Council for Electronic Media - CEM) has imposed a sanction of the amount of BGN 3 000 on *Българско национално радио* (the Bulgarian National Radio – BNR) for violation of Article 75, paragraph 1, second sentence of the *Закон за радиото и телевизията* (the Radio and Television Act - RTA) for broadcasting a surreptitious commercial communication.

The reason for this was a song performed by children within a children programme on the radio channel *Радио София* (Radio Sofia). What triggered the events is that the text of the song included repetitively the brand name of one of the most famous soft drinks worldwide. The media regulator found that the song emphasized the positive qualities of the product while the melody and the words were catchy and easy to remember, thus actually advertising the soft drink in violation of the law and without any indications that this is a commercial communication.

The CEM has established that there has been no announcement of a commercial communication prior to the song. In light of this the media regulator finds it was a surreptitious commercial communication as there is clearly a representation in words and sound of a trademark which is intended to serve as advertising and might mislead the public (in the current case the fragile children auditory) as to its nature.

In its defense the BNR pleads that the representation shall not be considered as intentional as it is not done in return for payment or for similar consideration. This argument has, however, not been taken into account by the CEM, as the existence of a payment is not a mandatory part for committing a surreptitious commercial communication. The second argument of the BNR is that the brand of the soft drink was used as a generic term for a soft drink considering its worldwide popularity. It also argued that the song is an old recording from the 90s and it represented the spirit of the 90s pop culture. None of these, however, were accepted as valid and reasonable arguments.

The penalty decree has been appealed by the BNR before *Софийски районен съд* (the Sofia Regional Court – SRC). The court upheld the decree of the CEM. It firmly clarified in its motives that the four prerequisites for establishing a

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surreptitious commercial communication are all present in the case, namely:

1) existence of a representation in words or pictures of goods, services, the name, the trademark or the activities of a producer of goods or a provider of services;

2) the representation is broadcasted in a channel;

3) the representation is intended to serve as advertising;

4) the representation is misleading the public as to its nature.

The court found that the first two elements are obviously present since the text of the child song is repeatedly referring to the brand name and there is no prior signal for the existence of a commercial communication. The third element has also been found present because the song clearly emphasizes the qualities of the product by referring directly or indirectly to: 1) the consumer qualities of the goods, including the taste of the product; and 2) description of the form and visual qualities of the product. Thus, despite the objections that there have been no specific qualities of the product (respectively that there are no specific qualities of the product and therefore no advertising), the court has found the third element present.

The final element has also been established. The court emphasizes phrases from the lyrics which state that the brand is “magically good” and through its consumption “children will grow”. According to SRC these phrases could easily mislead children that the drink is healthy and by consuming it they will grow happy and healthy. The court goes on to add that the song is performed by children which makes the message conveyed more perceptible for children. As the representation has been in the form of a children song, the court found that it could form a subconscious positive reaction to the specific soft drink. It finally stated that the content has been obviously directed to children.

Based on this interpretation, the decision of the media regulator and its findings that there is indeed a surreptitious commercial communication was upheld by the SRC.

The decision of the court entered into force in 2020, but it was just recently published on the webpage of the CEM and so was not public until now. However, it is worth mentioning that the decision was not appealed before the last instance where the administrative court could have eventually established a somewhat different approach.

Nevertheless, the decision shows that the CEM and the courts will apply a strict and conservative approach where the physical, mental or moral development of minors may be impaired. Although this specific case law is not considered source of law in Bulgaria, it has strong practical value. The penalty decree of the CEM and the subsequent interpretation by the SRC can be used as guidance and shall be considered by players in the market (moreover in the context of the latest amendments placing higher standards for protection of minors).

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Наказателно постановление № РД-10-2-15.01.2019 г. на СЕМ

https://www.cem.bg/controlbg/1223

Penalty Decree № RD-10-2-15.01.2019 of the CEM

Решение на Софийски Районен съд от 04.02.2020 г.

https://www.cem.bg/controlbg/1358

Decision of the Sofia District Court of 4 February 2020

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BELARUS

[BY] Media legislation tightened

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The Parliament of Belarus has recently adopted a number of significant amendments to media law, law on assembly, and criminal law of the country. They were introduced to Parliament by the Council of Ministers on 31 March and 9 April 2021 and adopted less than two months later, on 26 May 2021.

The Statute “On amending legislation in the sphere of mass media” introduces new provisions to the 2008 Statute “On the Mass Media” (see IRIS 2008-8/9). They include, among others, (1) general restrictions on the establishment of new mass media outlets by persons who were previously founders of mass media or owners of online resources, that ceased activities based on a court or administrative decision in Belarus; (2) an obligation for the online mass media outlets (or “network publications”, see IRIS 2018-8/11) to use the same title and domain name; (3) a ban on the dissemination of the results of public opinion polls related to the political situation and on elections, in the absence of specific state accreditation of the pollsters; (4) a possibility for the employer to dismiss a journalist on the grounds of any violation of any of his/her duties as prescribed in the Statute “On the Mass Media” (that include a duty to follow the law at large), (5) wider possibilities (including violation of any law) to strip a journalist of accreditation, which in Belarus means a confirmation of his/her right to collect and disseminate any information on general interest developments in the country; (6) a ban on the use of hyperlinks to online resources with materials banned for dissemination in the mass media. The statute enters into force on 26 June 2021.

The Statute “On amending the Law of the Republic of Belarus On Mass Events in the Republic of Belarus” prohibits live coverage of any mass events, if they are not formally sanctioned by the authorities.

Amendments to the Criminal Code of Belarus introduce a ban on the so-called “false news” if it is deemed “harmful” to “public or state interests” of Belarus, and criminalize expressions that challenge official information or statements of Belarusian authorities on the issues of public interest, including on the state political, economic, social, military or international affairs or human rights in Belarus. They increase penalties for defamation of public authorities and officials, including the President, as well as those “close to them”. Among other things, new provisions provide for sentencing for up to five years of imprisonment for “intentional” collecting, providing, or disclosing private information or personal data of public officials and those of their inner circle, if these acts are committed “in relation to public officials’ performance of their official duties”.

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The OSCE Representative on Freedom of the Media, Teresa Ribeiro, commissioned legal reviews of these acts and based on them stated that the recently adopted laws in Belarus seriously contradict international human rights standards on freedom of expression and freedom of the media, including the commitments taken by the country within the Organization.

Об изменении законов по вопросам средств массовой информации

https://pravo.by/document/?guid=3961&p0=H12100110

On amending legislation in the sphere of mass media No. 110-Z, on 24 May 2021.

Об изменении Закона Республики Беларусь "О массовых мероприятиях в Республике Беларусь

https://pravo.by/upload/docs/op/H12100108_1621890000.pdf

On amending the Law of the Republic of Belarus "On Mass Events in the Republic of Belarus" No. 108-Z, on 24 May 2021

OSCE Media Freedom Representative warns of further serious restrictions on freedom of expression in recently adopted Belarusian laws, press release, 24 June 2021

https://www.osce.org/representative-on-freedom-of-media/490895

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GERMANY

[DE] *Bundestag* adopts revised Film Support Act

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On 20 May 2021, the German *Bundestag* (lower house of parliament) adopted the *Gesetz zur Änderung des Filmförderungsgesetzes* (Act amending the Film Support Act, doc. 10/27515). This so-called 'minor amendment' is designed to provide further guidance on the collection and use of the film levy and to adapt the Act to current pandemic-driven changes to market conditions. At the same time, it places greater focus on ecological aspects of the film production support mechanism.

The *Filmförderungsgesetz* (Film Support Act – FFG) regulates the financial support provided to the German film industry by the *Filmförderungsanstalt* (Film Support Agency – FFA) via the so-called *Filmabgabe* (film levy). Its general objective is to safeguard the German film industry and strengthen it as a cultural and economic asset. The FFG is also designed to uphold and improve the quality and diversity of the German film landscape. The amendment adopted by the *Bundestag* was designated as a 'minor amendment' because it allows provisions for the film industry to be adapted to exceptional situations, in particular those resulting from the current pandemic. It enables the FFA to react flexibly, mainly by making it easier to adjust the eligibility requirements for receiving support, how the funding is used, and blackout periods. It also, in the new Article 55a, for example, calls for greater ecological sustainability in film-making, while under the new Article 59a, financial support is only available for project films if ecological sustainability is taken into account through effective measures in the film-making process. In Article 143(2)(1) of the amended Act, reference film funding can now also be used to pay for measures designed to keep a company afloat if it suffers financial hardship as a result of force majeure. The rules on the composition of the FFA's management bodies have also been amended. In order to promote diversity, especially gender equality, the amendment contains new provisions on the make-up of the FFA board of directors (see Article 6 *et seq*. FFG) and executive committee (see Article 12 *et seq*. FFG). A third sentence is added to the rule concerning the FFA president in Article 15(1) FFG, requiring either the president or a vice-president to be female. These changes are designed to increase gender equality in the FFA's management bodies. Article 2 FFG, which governs the FFA's tasks, now also mentions the need to provide fair working conditions (see Article 2(1)(9)), to protect the needs of people with disabilities and to safeguard diversity (see Article 2(2)).

The draft amendment has been submitted to the *Bundesrat* (upper house of parliament) and should enter into force on 1 January 2022. A standard amendment of the FFG is expected in 2024 because the 'minor amendment' only has a short, two-year lifespan on account of the difficulty of predicting the

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pandemic’s long-term effects on the film industry.

Vorgang der Gesetzgebung (BT-Drs. 10/27515)

https://dip.bundestag.de/vorgang/gesetz-zur-%C3%A4nderung-des-filmf%C3%B6rderungsgesetzes/272973?term=filmf%C3%B6rderungsgesetz&f.wahlperiode=19&f.typ=Vorgang&rows=25&pos=1

Legislative procedure doc. 10/27515

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[DE] *Bundestag* finally approves Copyright Act amendment

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On 31 May 2021, the German *Bundestag* (lower house of parliament) adopted the federal government bill of 12 February 2021 bringing the copyright law into line with the requirements of the Digital Single Market. The new legislation is designed to implement the Digital Single Market Directive (DSM Directive (EU) 2019/790).

The main purpose of the bill is to reform the copyright liability of online platforms. Under its provisions on platform liability and extended collective licences, new legal instruments are introduced in German copyright law. It also amends numerous provisions of the *Urheberrechtsgesetz* (Copyright Act – UrhG) and *Verwertungsgesellschaftengesetz* (Collecting Societies Act – VGG). One particularly controversial topic during the legislative process was how Article 17 of the DSM Directive should be implemented. In this regard, the bill adopted by the *Bundestag* will create a new *Urheberrechts-Diensteanbieter-Gesetz* (Copyright Service Provider Act – UrhDaG), which regulates the copyright liability of upload platforms for new content uploaded by users (Article 1 UrhDaG). Under the bill, platform operators are generally liable unless they have taken sufficient measures to prevent copyright-infringing content being uploaded. Such measures include upload filters, which have been heavily criticised, especially on the grounds that they might restrict freedom of expression and artistic freedom. These fundamental rights are recognised in the bill through provisions on quotations, caricatures, parodies and pastiches (see Article 5 UrhDaG), which are designed to ensure that artistic freedom and social communication are adequately protected. In addition, when copyright-protected works are used, authors are entitled to receive direct remuneration from platforms under Article 4(3) UrhDaG. According to Articles 14 and 15 UrhDaG, a complaints procedure will be created for cases involving unresolved disputes between platforms, rightholders and users. Another important new instrument designed to implement the DSM Directive is the granting of extended collective licences, which should make it easier to use works on a contractual basis (see Article 51 VGG-E). In order to implement Article 15 of the DSM Directive, new rules are also introduced concerning the ancillary rights of press publishers in Articles 87f to 87k UrhG-E, bringing these into line with EU law. Following the removal of Article 24 UrhG on the free use of works, permitted uses of caricatures, parodies and pastiches are governed by Article 51a UrhG-E.

The amended Act, which entered into force on 7 June 2021, also implemented the Online SatCab Directive (EU) 2019/789, which contains new regulations on online exploitation of broadcast programmes. This change was introduced in response to the judgment of the Court of Justice of the European Union of 29 July 2019 in the Pelham case.

Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes vom 31. Mai 2021

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https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%27bgbl121s1204.pdf%27%5d#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s1204.pdf%27%5D__1623248346902

Act of 31 May 2021 bringing copyright law into line with the requirements of the Digital Single Market

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[DE] Injunction claim against future broadcasting of scenes from “Die Auserwählten” rejected

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In a decision of 18 May 2021 (case No. VI ZR 441/19), the *Bundesgerichtshof* (Federal Supreme Court – BGH) ruled that the plaintiff was not entitled to an injunction against future broadcasting of scenes from the film “Die Auserwählten” in order to protect his own image rights and dismissed his application.

The legal dispute was linked to sexual abuse suffered over a period of several years by the plaintiff, among others, as a pupil at the Odenwaldschule in the 1980s. Since 1998, he had been trying to raise awareness of the abuse through the press and by participating in a documentary film. In 2011, he also published an autobiography describing what had happened at the Odenwaldschule. He later received the *Geschwister-Scholl-Preis*, at which point he stopped using his pseudonym. In 2014, the ARD broadcast the film “Die Auserwählten”, which portrays the sexual abuse at the Odenwaldschule and shows where it actually occurred. The plaintiff is depicted as the main character in the film, in which he refused to take part before production began. Claiming that his right to privacy in the form of his own image rights had been violated, he filed for an injunction against further broadcasting of scenes from the film.

After the initial claim was rejected by the district court and a subsequent appeal was also dismissed, the matter was referred to the 6th civil chamber of the BGH. However, the BGH also refused to grant the injunction. It disagreed with the plaintiff’s argument that the portrayal of the fictional character would lead to viewers drawing conclusions about him and therefore concluded that the broadcasting of scenes from the film did not infringe his own image rights under Article 22(1) of the *Kunsturhebergesetz* (Art Copyright Act – KUG), which was based on the right to privacy enshrined in the German constitution. The mere portrayal of a real person by an actor was not a portrait of the person, according to the BGH. Only the actor himself could make such a claim, since he retained his own personality while playing the role and remained recognisable in his own right. In order for someone’s own image rights to be violated, there would need to be a deceptive likeness between himself and the actor, i.e. his character would need to be played by someone who looked like him. Since this was not the case here, the plaintiff could not claim a breach of Article 22(1) KUG. His application for an injunction under Articles 1004(1)(1) and 823(1) of the *Bürgerliches Gesetzbuch* (Civil Code – BGB) in conjunction with Articles 2(1) and 1(1) of the *Grundgesetz* (Basic Law – GG) on the grounds that his general privacy rights had been violated was also dismissed. Although the BGH recognised that the plaintiff was affected by the parallels between his own story and that of the character in the film, his privacy rights carried less weight because he himself had openly discussed the subject in public in the past. The defendant’s artistic and film-making freedom therefore took priority.

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Pressemitteilung des BGH

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021097.html;jsessionid=5A8543E67593F55FD9824AB70C690354.1_cid368

Federal Supreme Court press release

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[DE] Price increase clause in Netflix terms and conditions is unlawful

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In a decision of 15 April 2021, the *Bundesgerichtshof* (Federal Supreme Court – BGH) rejected a complaint from Netflix about a court's refusal to hear its appeal against a lower-instance decision concerning the general terms and conditions of the video-on-demand service and certain advertising practices in Germany. As a result, the previous ruling of the *Berliner Kammergericht* (Berlin Court of Appeal) of 20 December 2019 (5 U24/19) became final, forcing Netflix, among other things, to amend the clause in its terms and conditions regarding price increases which, at least where its service in Germany was concerned, had been deemed unlawful.

Netflix International B.V., which has its headquarters in the Netherlands, also provides a subscription-based video streaming service in Germany. In 2017, customers subscribing to the service via the Netflix website, after entering their personal details, had to click on a button labelled "*MITGLIEDSCHAFT BEGINNEN KOSTENPFLICHTIG NACH GRATISMONAT*" (Start membership. Fee applies after free month). They also had to accept the company's terms and conditions, which contained the following rule: "Our subscription offer and prices for the Netflix service may change from time to time. However, you will be informed of any such changes at least 30 days before they enter into force." The *Verbraucherzentrale Bundesverband* (vzbv), the federation of Germany's 16 consumer organisations and 25 other consumer and socially oriented organisations, launched court proceedings against both the commercial nature of the order button and the price increase clause. It argued that the order button was primarily designed to advertise the free first month and was potentially misleading because it was not necessarily clear to consumers that clicking on it created a payment obligation. It also claimed that the price increase clause breached the requirement for company terms and conditions to be transparent because it did not explain what factors might lead to a price increase, leaving Netflix free to raise its prices whenever it chose to without any form of control. It concluded that both of these practices infringed consumer protection rules enshrined in German civil law (Article 312j(3) of the *Bürgerliches Gesetzbuch* (Civil Code – BGB) on obligations in electronic commerce and Articles 307(1) and 308(4) BGB on business terms and conditions). The Berlin Court of Appeal upheld the vbzv's complaint. It ruled that the order button for an online subscription should clearly and exclusively mention the consumer's obligation to pay and not contain any advertising that might divert attention away from it. Although price adjustment clauses were not, in principle, unlawful, they were if they allowed a company to increase an initially agreed price without any restriction above and beyond any increase in its own costs, and therefore not only to mitigate a fall in profits but to increase its profit margin. Such clauses were (only) admissible if price rises were linked to an

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increase in costs and if individual cost components and their weighting in the calculation of the overall price were disclosed, i.e. as a response to actual fluctuations in the cost of providing the video-on-demand service. Netflix appealed to the BGH against the court's decision not to allow its ruling to be appealed. The BGH's decision rejecting its application therefore only concerns procedural aspects: an appeal to the BGH is only possible in Germany if (among other things) the amount in dispute reaches a certain threshold, which it did not in this case. The *Kammergericht* had only set this at EUR 17,500 in relation to the price increase clause. According to the BGH, Netflix had failed to dispute this sum in time and with sufficient force in the prior proceedings. The arguments put forward by Netflix, one of the world's largest producers of audiovisual content in the form of films and TV series, whose method of setting subscription prices was therefore extremely complicated and depended in particular on fluctuating licensing costs, had been submitted too late.

While the decisions of the BGH and the lower-instance courts are primarily based on consumer protection and procedural law, they are also relevant to economic aspects of the audiovisual market surrounding Netflix, although they only concern the Netflix service in Germany. Although Netflix failed to assert the economic importance of the price adjustment clause in time, the clause is totally impractical for consumers, competitors and licensors, as well as Netflix itself.

Beschluss des BGH vom 15. April 2021

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=I%20ZR%2023/20&nr=118591

Federal Supreme Court decision of 15 April 2021

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DENMARK

[DK] Partial transposition of the DSM Directive

Terese Foged
Legal expert

On 3 June 2021 Denmark passed a bill in parliament, whereby the DSM directive Article 15 on press publications and Article 17 on online content-sharing service providers plus the SatCabII directive are implemented in the Danish Copyright Act. The key concept of the new legislation is rights clearance.

Going further than the SatCabII directive, the new legislation also introduces a possibility of 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 works with an organisation (a collecting society, i.e. collective management organisation) comprising a substantial number of right holders of this type of works – 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 was introduced after a short public hearing process and it was put forward in parliament on 26 March 2021. During the treatment in the parliament committee for culture many questions were posed to the Minister for Culture and a hearing with the various stakeholders was held.

The law will enter into force at short notice on 7 June 2021, i.e. just in time to meet the same deadline of the two directives. According to the preparatory works, implementation of the remaining DSM directive will take place in a coming bill.

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

Similarly, according to the new legislation itself the purpose is to modernise copyright, taking into account the development of digital technologies and particularly the access to copyrighted material via the internet.

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The preparatory works stress that user-driven tech giants, such as for example YouTube, are among the most important sources of access to content online, which is why 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 big platforms negotiate rights. Therefore the motive behind the implementation of Articles 15 and 17 is to create a better functioning market place for copyright and thus ensure that the rightsholders' position vis-à-vis the tech giants is strengthened so that fair terms, including payment, to rightsholders when the tech giants use their content online are obtained by the new legislation.

Articles 15 and 17 concern services that will often act internationally, and according to the preparatory works a high level of harmonising is consequently required, and it is therefore the assessment of the Ministry of Culture that the implementation must be very close to the wording of the directive.

The SatCabII directive implies an update of the rules on broadcasters' primary activity that has moved from satellite to include online services plus an update on distributors' retransmission that has moved from traditional cable to include other platforms, including online.

But as mentioned, the new Danish legislation goes further than the SatCabII directive. The preparatory works note that TV distributors have started offering streaming services, including non-broadcaster originated services, to their customers as part of a TV package. This calls for expansion of the existing licensing scheme on redistribution of broadcaster linear TV channels and streaming services.

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

The Ministry of Culture stresses in its press release of 3 June 2021 that the new rules regard the liability of online services, not the liability of private persons.

Forslag til Lov om ændring af lov om ophavsret (Implementering af dele af direktiv om ophavsret og beslægtede rettigheder på det digitale indre marked og direktiv om regler for udøvelse af ophavsretten og beslægtede rettigheder, der gælder for visse af tv- og radioselskabernes onlinetransmissioner og retransmissioner af tv- og radioprogrammer m.v.). Vedtaget af Folketinget ved 3. behandling den 3. juni 2021

https://www.ft.dk/samling/20201/lovforslag/L205/som_vedtaget.htm

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 rules on the exercise of copyright and related rights applicable to certain online

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broadcasts by television and radio broadcasters and retransmissions of television and radio programmes, etc.)

Kulturministeriet, "Ny virkelighed for tech-giganten", 03.06.2021

https://kum.dk/aktuelt/nyheder/ny-virkelighed-for-tech-giganter

Press release of the Ministry of Culture, 3 June 2021

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FRANCE

[FR] CNIL issues formal notices to 20 organisations in breach of new rules on cookies

Amélie Blocman
Légipresse

On 25 May 2021, the *Commission nationale de l'informatique et des libertés* (French data protection authority – CNIL) announced that it had issued 20 formal notices to organisations, including international players in the digital economy and public bodies, for breaching the new rules on cookies. On 1 October 2020, the CNIL had published its guidelines and a new recommendation on consent to targeted advertising and the use of trackers in order to implement the principles of the General Data Protection Regulation (GDPR), which include the need to obtain explicit consent to collect personal data. Website and mobile application providers had been given six months, i.e. until the end of March 2021, to comply with the new guidelines.

After beginning its investigations at the start of April, the CNIL found that a number of organisations were still not allowing Internet users to “refuse cookies as easily as they can accept them.” It therefore decided to issue formal notices to those whose practices did not comply with the legislation on cookies. These unnamed organisations had one month to comply and faced fines of up to 2% of their turnover if they failed to do so. In December 2020, the CNIL fined Google and Amazon EUR 100 Million and EUR 35 Million respectively for non-compliant information banners under pre-GDPR legislation. It pointed out that this was the “first campaign of investigations” and that “similar actions will be carried out in the coming months”.

Communiqué de presse de la CNIL du 25 mai 2021

https://www.cnil.fr/fr/cookies-une-vingtaine-organismes-mis-en-demeure

CNIL press release of 25 May 2021

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[FR] CSA issues CNews with formal notice concerning unbalanced airtime access for regional election candidates

Amélie Blocman
Légipresse

The *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory body – CSA) recommendation of 4 January 2011 concerning the principle of political pluralism on radio and television during election periods, which applied to all television services from 10 May 2021, required five weekly surveys to assess the amount of speaking time allocated to different candidates in the run-up to the first round of regional elections held on 20 and 27 June 2021. The various lists of candidates were entitled to fair access to airtime during the period concerned. The CSA takes into account the contribution made to the electoral debate by each list of candidates and the political parties or groups that support them. In accordance with the amended recommendation of 17 March 2021, which applied to the forthcoming regional council elections, the CSA, taking into account the weekly surveys of airtime allocated to the lists of candidates and their backers, is responsible for ensuring fair presentation and access. Under Article 42 of the Law of 30 September 1986, it must, in due time, issue formal notices if it appears that this principle is likely to be breached across the whole period under review on account of imbalances that have already been noted.

In the case at hand, the observations submitted by the broadcaster showed that, between 10 and 28 May 2021, CNews invited the *Rassemblement national* (National Rally) lead candidate in Paris to appear in various studio-based discussion and news programmes nine times during the run-up to the regional elections of 20 and 27 June 2021. Almost every time, he was introduced as an election candidate, either orally or in on-screen captions. Furthermore, analysis of his appearances on screen showed that, contrary to the broadcaster's claim, he discussed major topics relevant to the campaign for the forthcoming Île-de-France regional elections, such as public security. However, even though he spoke for a total of around one hour and was therefore given a prominent forum in which to comment on these topics, as well as significant exposure that would benefit his candidacy, the broadcaster only declared around 7 minutes of this time in its list of regional election news coverage. The CSA therefore believed that, in its declaration of news coverage linked to the campaign for the regional elections in Île-de-France, the broadcaster should account for all the speaking time given to the candidate concerned.

Once this correction had been made, the amount of airtime given to the regional election candidates in Île-de-France and their supporters in CNews programmes between 10 and 28 May 2021 had been imbalanced in favour of the list of *Rassemblement national* candidates. Furthermore, in its observations addressed to the CSA on 7 June, the broadcaster said it intended to "make up for lost time for [this] list [of candidates]". As a result, the unbalanced presentation and access to airtime for the different lists of candidates was likely to be exacerbated, even

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though the first round of voting was due to be held shortly afterwards.

As a result, the CSA held that the principle of fair access to airtime for the different lists of candidates would not be respected by the channel during the period under consideration, i.e. from 10 May to 18 June 2021. It therefore issued a formal notice to the channel, demanding that it comply with the recommendation of 4 January 2011 and the amended recommendation of 17 March 2021.

Décision n° 2021-654 du 9 juin 2021 mettant en demeure la société d'exploitation d'un service d'information

https://www.legifrance.gouv.fr/download/pdf?id=krhNG7b02GLxYuf6Vrr_T8cjOaSnmckGpdjQ_Y0FEFg=

Decision no. 2021-654 of 9 June 2021 issuing a formal notice to a news broadcaster

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[FR] Editorial reporting and opinion-based journalism: Council for Ethical Journalism issues two opinions on TV news programmes

Amélie Blocman
Légipresse

On 26 May 2021, the *Conseil de déontologie journalistique et de médiation* (Council for Ethical Journalism and Mediation – CDJM), a self-regulatory body, published four new opinions, two of which concerned well-known television and radio journalists. Since it was created in December 2019, the CDJM has received 407 referrals from members of the public regarding 164 different journalistic activities. It has issued an opinion in 34 of these cases, including the two described below, and dismissed 111, while 19 are still pending.

In the first case, the CDJM received a complaint from a representative of the Sud Éducation trade union concerning a report in the programme “C à vous” broadcast on France 5 in October 2020 following the murder of the teacher Samuel Paty. The journalist was accused of altering the comments of a member of the aforementioned trade union, who had spoken to France Inter the previous day, and claiming that Sud Éducation was an organisation that “forgives torturers”. In its opinion, the CDJM wrote that the trade unionist’s comment had been based on two ideas: firstly, “grief, contemplation and solidarity” and, secondly, a refusal to exploit Samuel Paty’s assassination in order to create an “outpouring of Islamophobia”. The CDJM pointed out that, although the reporter had expressed ideas, beliefs or value judgments and was entitled to freedom of expression, his work still had to meet ethical standards. It considered that, in this case, the reporter had flouted certain ethical rules, including the principle that “information essential to an understanding of the facts should not be withheld and documents should not be misrepresented”.

In the second case, the CDJM again issued an opinion concerning a report broadcast on the news channel LCI in January. In particular, using two short excerpts, the journalist concerned had criticised “the fascination [of Jean-Luc Mélenchon, a radical left-wing figure] with powerful men”, especially Donald Trump. He was also accused of reporting inaccurate and false information, and altering documents, since the chosen excerpts had been edited in such a way that “Mr Mélenchon’s words were given the exact opposite meaning”. In the CDJM’s view, this case raised the issue of editorial reporting. It did not think it needed to comment on the opinion put forward by the journalist in his analysis of a politician’s views. However, it held that the excerpts used by the journalist to support his analysis had been edited in a way that deliberately omitted elements essential to an understanding of the words quoted, and had changed their meaning. Therefore, the ethical obligation not to withhold information essential to an understanding of the facts and not to misrepresent documents had not been met.

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Meanwhile, on 3 June 2021, the CDJM published its first recommendation, entitled “Correcting errors: good practices”. This short, practical guide stresses the importance for journalists to correct their errors “systematically, quickly, explicitly, fully and visibly”. It distinguishes between different types of error (minor, significant or serious) and forms of publication (published content or content that can be edited online). It also lists good habits to adopt on digital media such as websites or social media accounts.

Avis du CDJM sur les saisines no 20-120 et no 21-005 publiés le 26 mai 2021

https://cdjm.org/2021/05/26/le-cdjm-publie-quatre-nouveaux-avis-2/

CDJM opinion on referrals 20-120 and 21-005 published on 26 May 2021

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[FR] Reassignment of Ligue 1 TV rights: competition authority rejects Canal Plus complaint against LFP

Amélie Blocman
Légipresse

On 29 January 2021, the Canal Plus Group complained to the French competition authority about practices allegedly used by the *Ligue de Football Professionnel* (Professional Football League – LFP) when retendering the rights to broadcast Ligue 1 football matches following the collapse of Mediapro in January 2021. It accused the LFP of abusing its dominant position by only retendering the rights held by Mediapro without including those in package 3 (covering matches shown at 9pm on Saturdays and 5pm on Sundays) that had been awarded on 29 May 2018 to beIN Sports and subsequently sold on to Canal Plus.

In parallel with proceedings lodged with the commercial court, which rejected its requests on 11 March 2021, Canal Plus filed a complaint with the competition authority, accusing the LFP firstly of imposing unfair trading conditions and, secondly, of discriminating against it in relation to other buyers of Ligue 1 broadcasting rights. Canal Plus also demanded interim measures requiring the LFP to organise a new bidding process, this time including all the Ligue 1 rights (including package 3), and to suspend the execution of any contracts resulting from the LFP's latest market consultation.

While these commercial court and competition authority proceedings were still pending, Canal Plus and the LFP concluded a general agreement, which was made public on 4 February 2021, concerning the rights to broadcast Ligue 1 and Ligue 2 matches until the end of the 2020/21 season.

In a decision of 11 June 2021, the competition authority rejected the complaint by Canal Plus and its associated request for interim measures on grounds of insufficient evidence. Firstly, it held that the LFP's decision not to include package 3 in the market consultation had been both necessary and proportionate. The LFP could not be forced to end its contract with beIN Sports for package 3, since that contract had been correctly drawn up, had never been challenged in court, and had been properly implemented. Furthermore, given the current health crisis, which had harmed football clubs' future income prospects, it had not been in the LFP's interests – quite the contrary – to terminate the package 3 contract. The competition authority also noted that the LFP's tendering procedures appeared, as things stood, both compliant with its recommendations and identical for all potential candidates. Moreover, the fact that Canal Plus bore the full financial burden associated with package 3 under the sublicensing agreement freely signed with beIN was irrelevant when analysing possible discrimination.

The 2021 market consultation therefore did not appear discriminatory because all bidders in the same situation had been given identical treatment. In view of all this, the competition authority rejected the complaint by Canal Plus and, as a

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result, its associated request for interim measures.

On the same day, the LFP redistributed the broadcasting rights for Ligue 1 matches: for EUR 250 Million per season, Amazon bought the broadcasting rights previously held by the collapsed broadcaster Mediapro, covering eight matches per matchday for the 2021–24 period. In protest at this decision, Canal Plus immediately announced it would stop broadcasting French league matches the following season: “After the failure of the Mediapro deal in 2018, Canal+ regrets the Professional Football League’s decision to accept Amazon’s offer today instead of that proposed by its traditional partners, Canal+ and BeIN Sports,” it announced. Its battle with the LFP therefore appears unresolved.

Décision 21-D-12 du 11 juin 2021 relative à des pratiques mises en œuvre par la Ligue de football professionnel dans le secteur de la vente de droits de diffusion télévisuelle de compétitions sportives

https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2021-06/21d12.pdf

Decision 21-D-12 of 11 June 2021 concerning practices implemented by the Professional Football League in the sale of rights to broadcast sports competitions on television

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ICELAND

[IS] A media support scheme for private media

Heiðdís Lilja Magnúsdóttir
The Media Commission (Fjölmiðlanefnd), Iceland

On 25 May 2021 the Icelandic Parliament agreed to provide financial state support to private media companies. With amendments made to the Media Act No 38/2011, state funding will provide for *ad hoc* subsidies to private media companies, covering part of their editorial costs for the dissemination of news, and news related content, and also the cost of social issues coverage. All private news media service-providers, tv, radio, print and web media, can apply to receive the media subsidies but will have to fulfil certain criteria put forth in the newly amended Media Act.

The total funding amounts to ISK 400 million (about EUR 2.5million) per year. Applicants can receive support amounting to a maximum of 25% of their salary costs or contract payments to reporters, journalists, editors, assistant editors, photographers, proof-readers, lay-out and camera people. No single applicant can receive more than 25% of the total funding per year.

The overall purpose of the media subsidies is to strengthen the position of Icelandic media facing the challenges of competition from foreign streaming and social media services.The purpose of the original legal proposal of the Minister of Education and Culture was also to provide a fixed, predictable long-term support framework for the private media. However, with the changes made to the proposal by the Parliament, the support scheme will expire 1 January 2023.

The staff of the Icelandic Media Commission (*Fjölmiðlanefnd*) will process applications for the media suppor., A new commission, consisting of three people, will make decisions on the allocation of the support. The commission members will be nominated by the State Treasurer and appointed by the Minister of Education and Culture. Individual decisions on grants made by the commission will not be subject to an appeal within the public administration system.

Lög um breytingu á lögum um fjölmiðla, nr. 38/2011 (stuðningur við einkarekna fjölmiðla)

https://www.althingi.is/altext/151/s/1503.html

Act amending the Media Act, no. 38/2011 (support for private media)

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ITALY

[IT] Administrative Court orders RAI to allow access to documents related to journalistic investigation

Francesco Di Giorgi & Luca Baccaro

On 18 June 2021, the Lazio Administrative Court (TAR Lazio, section III) ruled on a request lodged by an Italian lawyer against RAI, concerning the access to some documents related to a journalistic investigation carried out by “Report”, a popular TV show on RAI 3.

According to the applicant, the investigation shed a negative light on his professional activities, depicting him as the person behind the unclear management of public funding by some local public bodies and some of their advisors. Therefore, he asked RAI to be granted access to the documents on which the investigation was based, in order to collect evidence for the purposes of defamation proceedings.

RAI denied access, first claiming not to be a public body to which the Administrative Court could order the duty of access and, secondly, that the access would violate the journalist's right not to reveal their sources, pursuant to Article 2, clause 3, of Law No. 69/1963, a rule connected with the freedom of the press principle.

With regard to the nature of RAI as a public body, the Administrative Court stated that even though RAI is formally a private-public company, it preserves a lot of elements of a public body such as the financing through the TV licence fee and the public service media mission, which place it among the “managers of public services” expressly mentioned by the Law No. 241/1990 that governs the right of access.

With reference to the documents, the Court decided that RAI must reveal the documents referred to in the request for information sent by the “Report” journalists to the local public bodies involved in the investigation concerning the applicant’s involvement, together with the feedback provided by the aforementioned bodies. According to the judgment, given that the documents concern the exchange between public bodies, the protection of journalistic sources shall not be invoked as a limit to the right of access exercised by the applicant in order to defend his interest in a future trial.

TAR Lazio, sez. III, Sentenza n. 2504/2021 of 06.18.2021

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm&nrg=202100198&nomeFile=202107333_01.html&subDir=Provvedimenti

TAR Lazio, section III, Judgment no. 2504/2021 of 18 June 2021

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[IT] Public consultation on the parental control system in the electronic communications field

Francesco Di Giorgi & Luca Baccaro

With the decision No. 160/21/CONS published on 7 June 2021, the Italian Authority for Communications (Agcom) launched a public consultation on the parental control system in the electronic communication field, pursuant Article No. 7-*bis* entitled “Protection system for minors from the risk of cyberspace”, provided by the Law Decree No. 28 of 30 April 2021.

The abovementioned rule lays down that the electronic communication supply contracts – including television operators - must provide free and “activated by default” parental control systems, able to filter inappropriate content for minors and to block content reserved for an adult audience.

The operators must guarantee appropriate forms of advertising of the implemented systems.

In case of violations of the described duties, Agcom gives notice to the operator to cease its conduct and give back any sums unjustifiably charged to users, indicating in any case a deadline of not less than sixty days.

Although the provision sets relevant regulatory duties, it doesn’t set any details; for this reason, the public consultation aims to give some indications for implementing the measures through some dedicated Guidelines which, starting from the framework of the rights and obligations already provided for by current legislation, provide some clear indications on the conduct to be followed and on the supervisory activity exercised by the Authority.

In particular, the decision points out that the Guidelines are necessary from a technical point of view, because of the diversity of the solutions implemented, potentially capable of creating different levels of protection for minors.

Moreover, the Guidelines aim to define the mode in which Agcom will exercise its supervisory powers.

The public consultation will be open for 120 days.

Delibera n. 160/21/CONS - Avvio del procedimento istruttorio finalizzato all’attuazione dell’art. 7-bis del decreto-legge 30 aprile 2020, n. 28 in materia di "Sistemi di protezione dei minori dai rischi del cyberspazio

https://www.agcom.it/documents/10179/22914048/Delibera+160-21-CONS/9530d62d-44d8-42b8-8ea4-e62ddfd2162a?version=1.0

Agcom, Resolution n. 160/21/CONS

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LITHUANIA

[LT] Supreme Administrative Court on surreptitious advertising

Indre Barauskiene
TGS Baltic

On 5 May 2021, Lithuania's Supreme Administrative Court confirmed that the republishing of a private company's press release can constitute surreptitious advertising.

The case was initiated by the complaint of a private person P.P., asking whether the news media outlet UAB 15min have disseminated surreptitious advertising by publishing the article: "New travel trends: all-inclusive or everything unexpected?". In this article the media outlet basically republished the press release of the travel agency UAB Baltic Tours Group, thus P.P. claimed that this is surreptitious advertising which is masked as news, and not marked as a "Partner Content". Thus, P.P. submitted a complaint to the State Consumer Rights Protection Authority (Vartotojų teisių apsaugos tarnyba - the Authority) to initiate an investigation for a breach of the Law on Advertising in the Republic of Lithuania (Lietuvos Respublikos reklamos įstatymas - the Law on Advertising). However, the Authority refused to start the investigation. Such action initiated an appeal to the administrative courts of Lithuania.

An important aspect to note is the fact that UAB 15min and UAB Baltic Tours Group had no agreement between themselves and there was no payment for the republishing of the press release.

The court of the first instance – Vilnius Regional Administrative Court (*Vilniaus apygardos administracinis teismas*), on 30 September 2019, rejected the applicant's complaint. The court found that the text of the publication did not correspond to the concept of surreptitious advertising: the publication was not paid for, it was not intended to advertise services, and it only transmitted previously published information, therefore, the average consumer could not be objectively misled by the purpose of such information.

However, on 5 May 2021, such a decision was reversed by the Supreme Administrative Court of Lithuania (*Lietuvos vyriausiasis administracinis teismas* - the Court), who noted that remuneration is not a prerequisite to determining whether advertising is surreptitious advertising. The Court noted that the main focus should be made on the promotion of relevant economic behavior, as mentioned in Article 2(1) of the Law on Advertising of the Republic of Lithuania. Moreover, it is not required that the dissemination of certain information should actually encourage the purchase and/or consumption of the products. If a consumer did not buy the goods (did not purchase the service), this does not

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mean that their economic behavior was not affected. At the same time, the Court noted Article 2 (5) of the Law on Advertising requires an assessment of whether the information disseminated may mislead consumers as to the actual purpose of providing this information. In this specific case, one had to determine whether the information provided can be seen as an attempt not to disclose the true purpose of the publication.

The Court concluded that the fact that the publication does not contain an exact reference to an identifiable press release does not release it from liability. Moreover, following the guidelines of the Court, the logical and grammatical analysis of the statements of the employees of UAB Baltic Tours Group (such as "10 unforgettable nights, each morning of which begins with spectacular adventures and the day does not stop surprising"; "We offer even more experiences on the experience trip to Bali", "This trip is comprehensive and unforgettable, and the feedback from the travelers is great. When they return, they even come to us to share their impressions a few days later, and this is the best assessment of our diligent work") allows concluding that they encouraged the purchase of a trip to Bali from UAB Baltic Tours Group, despite the fact that the text does not directly emphasize the specific service, which presupposes reasonable suspicions that the Law on Advertising has been violated.

Lietuvos vyriausiojo administracinio teismo 2021 m. gegužės 5 d. nutartis administracinėje byloje Nr. eA-2900-415/2021

Ruling of the Supreme Administrative Court of Lithuania in administrative case No. eA-2900-415/2021, dated 5 May 2021.

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NETHERLANDS

[NL] New law on online gambling and media advertising

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On 1 April 2021, an important new law on online gambling and gambling advertising (Online Gambling Act) (*Wet Kansspelen op afstand*) came into force, including notable amendments to the Dutch Media Act (*Mediawet*) (see IRIS 2021-1/24). Due to the difficulty of regulating increasingly popular (illegal) foreign gambling websites, the Dutch parliament enacted a legal response. With this new law, the ban on online gambling and the advertising of gambling has been lifted to improve regulation of the market. With the amendment to the Dutch law on gambling, gambling service providers can now request a permit for online gambling, which would be valid from 1 October 2021. It is expected that ending the ban will lead to a significant increase in advertising campaigns and online targeting.

To maintain certain standards of protection, the new law is paired with strict standards on how and when to advertise (online) gambling. The legal amendment strives to assert more regulatory control while preventing gambling addictions, Internet fraud and crime, and protecting consumer interests. To do so, the rules governing advertising in the Media Act have also been amended. The Media Act is designed to ensure a safe form of advertising of gambling by, for example, restricting advertising on television to a timeslot outside of 06:00 to 21:00.

The restrictions on advertising, however, go further than the new permit rules and a dedicated timeslot. First, under Article 4 of the Online Gambling Act, athletes and celebrities that are popular among young people are not allowed to feature in advertising to avoid the promotion of online gambling. When collaborating with an influential figure, it is necessary to carry out research to determine the effect of such advertising. If the target audience is inappropriate or the reach is too large, advertising will not be allowed.

Second, Article 4 further stipulates that advertising cannot be targeted at anyone below the age of 25, anyone with gambling problems, or to anyone with mental health problems or disorders. It is particularly difficult to manage such restricted advertising, as it is challenging to profile online users in accordance with data protection principles. The law on online gambling prohibits the use of personal data in advertising campaigns. Furthermore, according to Article 9 of the EU General Data Protection Regulation, for example, the processing of sensitive personal data such as health data is prohibited with limited exceptions.

The Dutch Gambling Authority (*Kansspelautoriteit*) will be responsible for the enforcement of these new rules. To protect against illegal gambling practices, it is tasked with monitoring and regulating permit compliance. In doing so, the Authority will evaluate whether permit holders take the necessary steps to

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prevent gambling addictions. In addition, it can impose injunctions against advertising agencies, media companies, and payment services, to prevent illegal distribution and use of online gambling services. Finally, Dutch Media Authority (*Commissariaat voor de Media*) will monitor compliance with the new rules contained in the Media Act.

Ministerie van Justitie en Veiligheid, Staatscourant 4507, Regeling van de Minister voor Rechtsbescherming van 21 januari 2021, nr. 3181155, houdende bepalingen ter uitvoering van de Wet kansspelen op afstand (Regeling kansspelen op afstand), 1 februari 2021

https://zoek.officielebekendmakingen.nl/stcrt-2021-4507.html

Ministry of Justice and Security, Dutch Government Gazette 4507, Regulation of the Minister for Legal Protection of 21 January 2021, no. 3181155, regarding the provisions for the implementation of the Online Gambling Act, 1 February 2021

Commissariaat voor de Media, Reclame voor online kansspelen, 3 mei 2021

https://www.cvdm.nl/actueel/reclame-voor-online-kansspelen

Dutch Media Authority, Advertising for online gambling, 2 May 2021

Rijksoverheid, Wet Kansspelen op afstand treedt in werking, 1 april 2021

https://www.rijksoverheid.nl/actueel/nieuws/2021/04/01/wet-kansspelen-op-afstand-treedt-in-werking

Dutch Government, Law on online gambling enters into force, 1 April 2021

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[NL] New support measures for film industry following easing of COVID-19 restrictions

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On 27 May 2021, the Netherlands Film Fund (*Nederlands Filmfonds*), the national agency responsible for supporting film production and film-related activities in the Netherlands, launched an important new scheme of support measures for the film industry in the Netherlands. This followed the announcement by the Dutch government that COVID-19 restrictions on cinemas and movie theatres in the Netherlands would be eased from 5 June 2021, with cultural institutions such as theatres, cinemas and concert halls being allowed to open for a maximum of 50 visitors per room (for previous measures, see IRIS 2020-5/18, IRIS 2020-6/8 and IRIS 2020-7/17). The new scheme is entitled Full Circle, and is one of the Film Fund's support measures in the context of COVID-19 support measures, and has a subsidy ceiling of EUR 3 500 000.

The new scheme is designed to support film distributors during the reopening period of cinemas and movie theatres following a long closure during the COVID-19 restrictions (see IRIS 2020-5/8). The Film Fund states that the purpose of the new scheme is to "increase the visibility of Dutch talent and their films on the big screen and to support the film chain as a whole". The scheme is targeted at Dutch feature films, full-length animation films, and documentaries (major film productions) that were made with a support measure from the Film Fund.

First, in terms of eligibility, film distributors that have continuously released films in Dutch cinemas and movie theatres for at least two years prior to the application may apply. As an exception, a production company in collaboration with a film marketing, publicity agency or film distributor, is also eligible to apply. Further, only Dutch majority feature films, full-length animation films or documentaries with a Film Fund contribution, of which all shooting days have been completed by 31 August 2021, are eligible. Second, the theatrical release aimed at the best possible reach in cinemas and movie theatres must take place in 2021 or the first half of 2022. Third, in terms of specific support, where there is a budget for prints and advertising (P&A) of up to EUR 60 000, an increased distribution contribution can be requested up to EUR 30 000. Crucially, there is no mandatory personal P&A investment of 20% by the applicant. Furthermore, where there is a budget for print and advertising of EUR 60 000 or more, the applicant can request an additional distribution contribution. The applicant's own investment for print and advertising is 100% matched by the Fund up to a maximum contribution of EUR 100 000. For both application options, a maximum of 15% of the Fund contribution may be spent on (hired) staff and overheads, up to a maximum amount of EUR 12 000. Both fund contributions are cost-reducing and therefore do not have to be repaid. Finally, the scheme will apply from 31 May 2021 until 31 September 2021.

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Filmfoonds, Full Circle, 27 mei 2021

https://www.filmfonds.nl/page/8785/full-circle

Dutch Film Fund, Full Circle, 27 May 2021

Filmfonds, Nieuwe steunmaatregel Distributie: Full Circle, 27 mei 2021

https://www.filmfonds.nl/page/10015/nieuwe-steunmaatregel-distributie-full-circle

Dutch Film Fund, New distribution aid measure: Full Circle, 27 May 2021

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ROMANIA

[RO] Prorogation of the analogue radio switchover

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The President of Romania, Klaus Iohannis, promulgated on 13 May 2021 the Law on the approval of Government Ordinance No. 5/2019 for the extension of a term in order to ensure the continuity of public services of radio programs on the territory of the country. (see inter alia IRIS 2011-4/33, IRIS 2013-6/30, IRIS 2014-4/26, IRIS 2014-5/29, IRIS 2014-9/27, IRIS 2015-5/33, IRIS 2016-2/26, IRIS 2017-1/29, and IRIS 2019-4/30).

The President promulgated the Law on the approval of Government Ordinance No. 5/2019 for the extension of a term provided in article 2 (1) of Government Emergency Ordinance No. 18/2015 on establishing the necessary measures to ensure the transition from analogue terrestrial television to digital terrestrial television and the implementation of multimedia services at national level.

The object of the law is to extend, until December 31 2025, the term provided in Article 2 paragraph (1) of the Government Emergency Ordinance No. 18/2015 in order to ensure the continuity of public services of radio programs on the territory of the country, but also of the access to the broadcasted information for Romanians abroad.

GEO No. 18/2015 established that the rights to use the radio frequencies granted according to Law No. 504/2002, with the subsequent amendments and completions, for the provision by terrestrial radio of public broadcasting services, may be extended, on a temporary basis, until August 31 2019. The GO No. 5/2019 was adopted due to the fact that no measures were taken in time for the digital switchover of the radio programs in Romania.

The proposed measures strictly aim at extending the validity period of the license for the use of radio frequencies for terrestrial transmission of public radio programs in the long, medium, short and ultra-shortwave bands, from 31 August 2019 to 31 December 2025. The owner that transmits the public radio programs fulfills a public service consisting in ensuring the continuity of the right to information of the population at national level, stated the initiators of the draft law. The project was motivated by the need to avoid a legal gap and interruptions in the terrestrial broadcasting of the public radio programs and to offer the Romanian public the continuity of public radio programs, as well as guaranteeing the access to radio information for Romanians abroad.

The digital switchover in Romania is substancially delayed, both in terms of television and radio.

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Proiect de Lege privind aprobarea Ordonanţei Guvernului nr.5/2019 pentru prorogarea unui termen prevăzut în art.2 alin.(1) din Ordonanţa de urgenţă a Guvernului nr.18/2015 privind stabilirea unor măsuri necesare pentru asigurarea tranziţiei de la televiziunea analogică terestră la televiziunea digitală terestră şi implementarea serviciilor multimedia la nivel naţional - Expunerea de motive

http://cdep.ro/proiecte/2019/500/30/2/em699.pdf

Draft Law on the approval of the Government Ordinance no.5 / 2019 for the extension of a term provided in art.2 paragraph (1) of the Government Emergency Ordinance no.18 / 2015 on establishing the necessary measures to ensure the transition from analogue terrestrial television to digital terrestrial television and the implementation of multimedia services at national level - Reason

Proiect de Lege privind aprobarea Ordonanţei Guvernului nr.5/2019 pentru prorogarea unui termen prevăzut în art.2 alin.(1) din Ordonanţa de urgenţă a Guvernului nr.18/2015 privind stabilirea unor măsuri necesare pentru asigurarea tranziţiei de la televiziunea analogică terestră la televiziunea digitală terestră şi implementarea serviciilor multimedia la nivel naţional - Forma pentru promulgare

http://cdep.ro/pls/proiecte/docs/2019/pr532_19.pdf

Draft Law on the approval of the Government Ordinance no.5 / 2019 for the extension of a term provided in art.2 paragraph (1) of the Government Emergency Ordinance no.18 / 2015 on establishing the necessary measures to ensure the transition from analogue terrestrial television to digital terrestrial television and the implementation of multimedia services at national level - Form for promulgation

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UNITED STATES OF AMERICA

[US] Facebook bans Trump for 2 years

Kelsey Farish
Dac Beachcroft

Former U.S. President Donald Trump has been banned from Facebook for two years. In a blog post sharing the decision on 4 June 2021, Facebook committed to being more transparent about content moderation decisions, and about how such decisions impact individuals. Account holders will now be able to see if and when any of their content was removed, why, and what the penalty was. However, Facebook also called for “thoughtful regulation” from legislators, and explained that its internal policies were not a replacement for such legislation.

By way of background to the present case, a violent mob of thousands stormed the US Capitol Building in Washington, DC on 6 January 2021. Then-president Donald Trump made a video post in which he said, (inter alia): "I know your pain. I know you’re hurt. We had an election that was stolen from us. [...] We love you. You’re very special. [...] I know how you feel. But go home and go home in peace." Approximately 90 minutes later, Facebook removed the video as it violated the platform’s policies on praising dangerous individuals and organisations.

Mr Trump then shared, as a text post, the following: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously and viciously stripped away from great patriots who have been badly and unfairly treated for so long. Go home with love in peace. Remember this day forever!"

Facebook removed the post ten minutes later, and then imposed a 24-hour restriction of Mr Trump’s posting privileges. In light of his public statements in the following hours with respect to the Capitol riots, Facebook extended the restriction "indefinitely and for at least the next two weeks until the peaceful transition of power is complete".

Facebook’s decision to ban Mr Trump was referred to the Facebook Oversight Board on 21 January, the day after current President Joe Biden was safely inaugurated. The board is an independent, quasi-judicial body established in 2018 to ensure Facebook’s processes comply with its policies and legal obligations.

In its decision of 5 May 2021, the board upheld Facebook’s decision to suspend Mr Trump’s access in principle. However, Facebook’s decision to impose an “indefinite” ban was deemed improper, as such a penalty is neither clear nor consistent with Facebook’s rules for severe violations. Instead, the board emphasised that the appropriate penalty should be either content removal, time-bound period of suspension, or permanent account deletion (see IRIS 2021-2/33)

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On 4 June, Nick Clegg, Facebook's VP of Global Affairs, posted the company's response to the board by way of a blog post entitled "*In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit*". In the blog, Mr Clegg noted that "the board instructed us to review the decision and respond in a way that is clear and proportionate, and made a number of recommendations on how to improve our policies and processes".

Mr Clegg acknowledged that any penalty Facebook applies, or indeed chooses not to apply, will be controversial. Some people believe it is not appropriate for a private company to suspend an influential political leader from its platform, whereas others believe Mr Trump should have "immediately been banned for life".

The politics aside, the decision of the board in May as well as Facebook's own statement in June solidify the platform's commitment to following three key types of documentation when it comes to regulating content.

Firstly, Facebook will adhere to its internal policies, such as its Facebook's Community Standards and Terms of Use. Secondly, it will also turn to its corporate values, to include "voice", "safety", and "dignity". Thirdly but no less importantly, Facebook will refer to international legal standards such as the UN Guiding Principles on Business and Human Rights, and the International Covenant on Civil and Political Rights.

That said, Facebook appears to prefer avoiding content moderation decisions itself. Instead, Mr Clegg emphasised that absent "frameworks agreed upon by democratically accountable lawmakers, the board's model of independent and thoughtful deliberation is a strong one that ensures important decisions are made in as transparent and judicious a manner as possible". However, he continued, "the Oversight Board is not a replacement for regulation, and we continue to call for thoughtful regulation in this space".

In Response to Oversight Board, Trump Suspended for Two Years

https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump/

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