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EDITORIAL

Summer is over, most people are getting back to work, whether at home or at the workplace, and so are we, with a newsletter full of interesting topics! Among them prominently stands the opinion of the Advocate General Saugmandsgaard Øe on Case C-401/19 and its important implications for the regulation of copyright in the European Union. At national level, there is an ongoing controversy in Poland around the amendment to the Law on Radio and Television concerning foreign ownership of Polish media. In other EU countries, legislative efforts to implement the AVMSD continue to bear fruit: in Portugal, Decree-Law No. 74/2021 harmonises national and European requirements concerning State support to production, and extends taxes and investment obligations to video sharing platforms and VOD operators. In France, the on-demand audiovisual media services decree foresees that foreign VOD providers, aimed at French audiences, can be made subject to the same rules, on financial contributions to cinematographic and audiovisual production, as French-based services by way of derogation from the country-of-origin principle. In Spain, the Ministry of Economic Affairs and Digital Transformation of the Spanish Government submitted the Draft Law on Audiovisual Communication to a public hearing on 29 June 2021.

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

Stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

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COUNCIL OF EUROPE

BELGIUM

European Court of Human Rights: *Hurbain v. Belgium*

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

The European Court of Human Rights (ECtHR) found that a court order to anonymise an article in a newspaper's electronic archive did not violate the publisher's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The judgment relates to the "right to be forgotten" as part of the right to privacy under Article 8 ECHR, in particular in respect of media archives (see also Iris 2013-9/1 and Iris 2018-8/1). The ECtHR held that the order to anonymise the name of a driver who had caused a fatal accident in the online archived version of an article published twenty years previously was justified from the perspective of Article 10 ECHR. The ECtHR however clarified that this finding could not be interpreted as involving an obligation for the media to check their archives on a systematic and permanent basis: the media are only required to do so and to weigh up the various rights at stake, when they receive an explicit request to that effect.

The applicant in this case is the publisher of the daily newspaper *Le Soir.* He was ordered by a civil judgment in 2013 to render anonymous the digital version of an article published in the newspaper in 1994 and added to the online archive in 2008, in order to respect an individual's claim on the right to be forgotten. The article mentioned the full name of the individual, G., a driver who had caused a fatal road accident. The court order to anonymise the article was confirmed by the court of appeal in 2014 and upheld by the *Cour de Cassation* (Supreme Court) in 2016. *Le Soir*'s publisher, Mr Hurbain, lodged an application with the ECtHR complaining that the order for anonymisation was a breach of Article 10 ECHR. The Belgian government defended the decision of the domestic courts, while G. intervened in the proceedings before the Strasbourg Court, claiming protection under Article 8 ECHR and his right to be forgotten. The ECtHR left no doubt that in this case the rights under Article 8 and 10 needed to be balanced. More precisely, the rights of an individual who had been the subject of an online publication had to be weighed against the public's right to be informed about events of the past and contemporary history, in particular with the help of digital newspaper archives.

The ECtHR observed that the requirement for a publisher to anonymise an article whose lawfulness had not been questioned carried a risk of a chilling effect on

press freedom, in other words the risk that the press might refrain from keeping certain news stories in its online archives or that it might omit individual elements from articles which might later become the subject of such a request. It also recognized that altering the archived version of an article would undermine the integrity of the archive and thus its very essence. Therefore domestic courts need to be particularly vigilant when granting a request for anonymisation or modification of the digital version of an archived article for the purposes of ensuring respect for a person's private life. The ECtHR clarified however that the right to maintain online archives available to the public was not an absolute right. This right had to be weighed against other rights. In that context, the criteria to be taken into account when making or keeping an archived publication available online were in principle the same as those used by the ECtHR in the context of an initial publication. In such cases the so-called "Axel Springer criteria" need to be applied (Iris 2012-3/1), although the ECtHR admitted that the relevance of some criteria may change with the passage of time in the case of archived articles.

The ECtHR noted in particular that a search on the newspaper's website or on Google, just by entering the first name and surname of the driver concerned, immediately brought up the article in question. It agreed that to keep the article online could cause indefinite and serious harm to the driver's reputation, giving him a virtual criminal record, although he had not only served his sentence after a final conviction but had also been rehabilitated. G. was not a public person, and neither did the article at issue, 20 years later, contribute to a debate of public interest. The ECtHR confirmed that the most effective way to ensure respect for G's private life, without disproportionately affecting the newspaper's freedom of expression, was to anonymise the article on the newspaper's website by replacing the individual's full name with the letter X. A relevant factor is also the passage of time (about 20 years) since the printed article's original publication: with the passage of time, a person should have the opportunity to reconstruct their life without being confronted with their past mistakes by members of the public. Name searches have become a common practice in today's society, and often searches are conducted merely out of curiosity. Another important factor is that the anonymisation on the website of *Le Soir* would not affect the text of the original article. The ECtHR explained that the nature of the measure imposed in this case ensured the integrity of the archived article as such, since it was only a matter of anonymising the online version of the article, *Le Soir* being authorised to retain the original digital and paper archives. An interested person could always request access to the original version of the article, even in digital form. It was therefore not the article itself, but its accessibility on the website of the newspaper *Le Soir,* that had been affected by the court order. The ECtHR agreed with the findings by the domestic court that the interference with Mr Hurbain's rights had not been arbitrary or manifestly unreasonable, and that the anonymization would be the most effective and proportionate measure. The reasons given by the domestic courts had thus been relevant and sufficient, and the measure imposed on Mr Hurbain could be regarded as proportionate to the legitimate aim pursued (right to respect for the driver's private life) and as striking a fair balance between the competing rights at stake. Therefore the ECtHR, by six votes to one, came to the conclusion that the civil judgment

ordering *Le Soir* to anonymise the article at issue had constituted an interference, but not a violation with the right under Article 10 ECHR. The ECtHR explained that the conclusion it had reached in the present case did not involve any obligation for the media to check their archives on a systematic and permanent basis. When it comes to the archiving of articles, the media do not need to make an *ex ante* verification whether the rights under Article 8 ECHR are respected. They are only required to make such verification, and therefore to weigh up the various rights at stake, when they received an express request to that effect.

The dissenting opinion of Judge Pavli emphasizes more than the majority's finding the importance of the integrity of news archives and the maintenance of Internet archives as a critical aspect of the role of the press in a democracy. According to Judge Pavli, the Court's judgment goes against an emerging but clear European consensus that right to be forgotten claims in the online realm can, and should, be effectively addressed through deindexation of search engine results. To fulfil their Article 10 function, digital press archives must be complete and historically accurate: any tampering with their content could undermine their underlying purpose, which is to maintain a full historical record. Judge Pavli argues in essence that G's privacy rights could have been adequately protected by removing the article from name-based search results on general search engines: such a measure would have prevented the article from becoming easily accessible through curiosity-driven or other random search queries. At the same time, it would have preserved the integrity of press archives and allowed full access to the unaltered original source to those persons (journalists, researchers or others) who might become specifically interested in the past events covered in the article.

This judgment is not final: at its meeting on 11 October 2021 the Grand Chamber panel of five judges decided to refer the case *Hurbain v. Belgium* (application no. 57292/16) to the Grand Chamber of the European Court of Human Rights

Arrêt de la Cour européenne des droits de l'homme, troisième section, rendu le 22 juin 2021 dans l'affaire Hurbain c. Belgique, requête n° 57292/16

https://hudoc.echr.coe.int/eng?i=001-210467

Judgment of the European Court of Human Rights (Section III) in the case Hurbain v. Belgium (application no. 57292/16), 22 June 2021

Grand Chamber Panel's decisions - October 2021

https://hudoc.echr.coe.int/eng-press?i=003-7149113-9692407

GEORGIA

European Court of Human Rights : Gachechiladze v. Georgia

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

The European Court of Human Rights (ECtHR) found a violation of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), on account of the administrative-offence proceedings and the resulting sanctions for disseminating images on social media and on the packaging of condoms deemed by the domestic courts in Georgia to be unethical advertising. The ECtHR found no demonstration of the existence of a pressing social need to interfere with the advertising and it considered the prioritisation of views on ethics of the members of the Georgian Orthodox Church unacceptable in the balancing of various values protected under the ECHR and the Constitution of Georgia.

The applicant, Ms Ani Gachechiladze, is the producer of condoms under the brand name Aiisa (which means “that thing”). The designs of the condom packaging varied and included depictions of popular fictional characters, former and current historical and political figures, references to political events and religion, various objects such as lollipops, quotes from literature and music, popular slogans, wordplay, designs expressing support of the LGBT community and satirical images. The condoms were sold online and via vending machines. After a complaint by the chairman of the conservative civil-political movement “Kartuli Idea” [Georgian Idea], that Aiisa had used designs which were insulting to the religious feelings of Georgians, an administrative procedure was initiated against Ms Gachechiladze.

In 2018 the Tbilisi City Court delivered a decision finding that four disputed designs constituted unethical advertising as they breached public morals. It ordered Ms Gachechiladze to pay a fine of approximately EUR 165 and to cease using and disseminating the relevant designs on the products and on social media, and to issue a product recall in respect of the products already distributed. The Tbilisi Court of Appeal, sitting as a court of final instance, confirmed this judgment. It emphasized that Ms Gachechiladze should have been aware that the depiction of figures and religious symbols on items of a sexual nature, such as condoms, are perceived in Georgia as an insult to religion, religious symbols and monuments. As each of the four advertisements at issue were found to be insulting actions in conflict with public morals, they fell within the definition of “unethical advertising” under the Advertising Act. The interference with Ms Gachechiladze right was considered necessary in a democratic society from the perspective of Article 10 ECHR.

In its judgment of 22 July 2021 the ECtHR disagreed with most of the findings by the Georgian courts. The ECtHR does not accept the wide margin of appreciation claimed by the Georgian authorities on the basis that it concerned commercial speech. The ECtHR is of the opinion that the applicant's brand also appears to have been aimed at initiating and/or contributing to a public debate concerning various issues of general interest. In particular, the declared objective of the brand, expressed at the time of its launch, was to shatter stereotypes, and "to aid a proper understanding of sex and sexuality". Furthermore, several designs used by the brand also appear to have been a social as well as political commentary on various events or issues. In such circumstances, the margin of appreciation afforded to the domestic courts is necessarily narrower compared to situations concerning solely commercial speech (see also IRIS 2018-3/4).

After evaluating each of the four advertisements at issue, the ECtHR concluded that at least with regard to three of the four disputed designs the reasons adduced by the domestic courts were not relevant and sufficient to justify an interference under Article 10(2) ECHR. The ECtHR accepted the finding by the domestic courts that one of the designed advertisements could be seen as a gratuitous insult to the object of veneration for Georgians following the Orthodox Christian faith. But the ECtHR in principle disagreed with the apparent implication in the domestic courts' decisions that the views on ethics of the members of the Georgian Orthodox Church took precedence in the balancing of various values protected under the ECHR and the Constitution of Georgia. The ECtHR reiterated that in a pluralist democratic society those who choose to exercise the freedom to manifest their religion must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith (see also IRIS 1995-1/1 and IRIS 2005-10/3). As the ECtHR found that the interference against at least three of the four disputed designs was not necessary in a democratic society, it concluded unanimously to the finding of a violation of Article 10 ECHR.

European Court of Human Rights, Fifth Section, in the case of Gachechiladze v. Georgia, Application no. 2591/19, 22 July 2021

https://hudoc.echr.coe.int/eng?i=001-211123

EUROPEAN UNION

BELGIUM

Court of Justice of the European Union: Case Mircom v. Telenet BVBA

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 17 June 2021, the CJEU delivered its judgment on Case C-597/19. The request was made in proceedings between Mircom International Content Management Consulting (M.I.C.M.) Limited, referred to as "Mircom", the holder of certain rights over a large number of pornographic films produced by eight undertakings established in the United States and Canada, and the Internet access provider Telenet BVBA. It concerned the latter's refusal to provide information enabling its customers to be identified on the basis of several thousand IP addresses collected from a peer-to-peer network, where certain Telenet clients, by using the BitTorrent protocol, had allegedly made available films from Mircom's catalogue.

In its judgment, the CJEU held that uploading pieces, previously downloaded, of a media file containing a protected work using a peer-to-peer network constitutes "making [a work] available to the public", even though those pieces are unusable in themselves and the uploading is automatically generated when the user has subscribed to the BitTorrent client sharing software in giving his or her consent to its application after having duly been informed of its characteristics.

Moreover, a holder of intellectual property rights such as Mircom may benefit from the system of protection of those rights, but its request for information, in particular, must be non-abusive, justified and proportionate.

Finally, the CJEU held that EU law does not preclude, in principle, the systematic registration, by the holder of intellectual property rights or by a third party on his or her behalf, of IP addresses of users of peer-to-peer networks whose Internet connections have allegedly been used in infringing activities, or the communication of the names and postal addresses of users to that holder or to a third party for the purposes of an action for damages. However, such initiatives and requests must be justified, proportionate, not abusive, and provided for by a national legislative measure which limits the scope of rights and obligations under EU law.

Judgment of the Court of Justice of the European Union (Fifth Chamber) of 17 June 2021, Case C-597/19, Mircom International Content Management & Consulting (M.I.C.M.) Limited v Telenet BVBA (intervening parties: Proximus NV, Scarlet Belgium NV)

https://curia.europa.eu/juris/document/document.jsf?text=&docid=243102&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4809352

EU{EC} - EUROPEAN UNION (ALL)

Regulation on addressing the dissemination of terrorist content online enters into force

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 6 June 2021, the new EU Regulation on addressing the dissemination of terrorist content online came into force, following a three-year passage through the legislative process, beginning with the Commission's proposal first published in autumn 2018 (see IRIS 2019-1/4). The purpose of the new Regulation is to establish uniform rules across the EU to address the misuse of hosting services for the dissemination of terrorist content online, and will be directly applicable in all EU member states from June 2022. Notably, the Regulation will permit competent national authorities to issue orders requiring hosting services providers to remove certain "terrorist content" within specific timeframes.It also introduces a range of new obligations on certain hosting services providers to address the misuse of their services for the dissemination of terrorist content.

Importantly, at the outset, the concept of "terrorist content" is given an extensive definition under Article 2(7) of the Regulation, which includes material that incites the commission of a terrorist offence (as defined under the 2017 EU Directive on combatting terrorism), where such material "directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed". Notably, this definition is subject to Article 1(3), which importantly states that material disseminated to the public for "educational, journalistic, artistic or research purposes", including material which represents an expression of polemic or controversial views in the course of public debate, "shall not be considered" terrorist content.

Crucially, Section II of the Regulation contains new provisions on measures to address the dissemination of terrorist content online. The most consequential is contained in Article 3, where the national designated authorities will have the power to issue "removal orders" requiring hosting service providers to remove or "disable access" to terrorist content in "all Member States". Notably, under Article 3(3), hosting service providers are required to remove or disable access to terrorist content in all member states as "soon as possible and, in any event, within one hour of receipt of the removal order". Of note, Article 3(4) sets out a number of elements that must be included in a removal order, including a "sufficiently detailed statement of reasons explaining why the content is considered to be terrorist content".

Of further note is Article 5, which allows for the designation of certain hosting service providers as "exposed to terrorist content", and once designated, these

hosting services are required to include in their terms and conditions and apply provisions to “address the misuse of its services for the dissemination to the public of terrorist content”. A hosting service provider can be so designated if it received “two or more final removal orders in the previous 12 months”. Crucially, under Article 5(3), such hosting services are also required to take “specific measures” to protect their services against the dissemination of terrorist content, including (a) appropriate “technical” measures to identify and expeditiously remove or disable access to terrorist content; and (b) implementing mechanisms for users to report or flag alleged terrorist content.

In terms of safeguards and accountability, Article 7 imposes new transparency obligations on hosting service providers, including the publication of annual transparency reports on action taken to address the dissemination of terrorist content, including on the number of items of terrorist content removed or which access has been disabled following removal orders or specific measures. Importantly, under Article 9, users will have the right to challenge a removal order before national courts of the member state. Further, Article 10 requires hosting service providers to put in place complaint-handling mechanisms for users whose content has been removed or access thereto has been disabled, and requesting the reinstatement of the content or of access thereto.

Finally, EU member states will be required to designate a national authority as competent to issue removal orders and enforce the Terrorist Content Regulation by 7 June 2022, the date upon which it will apply.

Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online (entry into force, 6 June 2021)

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0784&from=EN

European Commission, Security Union: EU rules on removing terrorist content online enter into force, 7 June 2021

https://digital-strategy.ec.europa.eu/en/news/security-union-eu-rules-removing-terrorist-content-online-enter-force

POLAND

Advocate General: Opinion on Case C-401/19

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 15 July 2021, Advocate General (AG) Saugmandsgaard Øe delivered his highly awaited opinion on Case C-401/19. This case concerns an action brought on the basis of Article 263 TFEU by the Republic of Poland asking the Court to annul Article 17(4)(b) and (c), in fine, of Directive (EU) 2019/790 of the European Parliament and of the Council from 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC and, in the alternative, to annul Article 17 in its entirety. This provision imposes on those providers obligations to monitor the content posted by the users of their services in order to prevent the uploading of protected works and subject matter which the rightsholders do not wish to make accessible on those services. Such preventive monitoring will, as a general rule, take the form of filtering that content using software tools. According to the applicant, such filtering raises complex questions with regard to the freedom of expression and information of users of sharing services, guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union (“the Charter”). That preventive monitoring would constitute a limitation on the exercise of the right to freedom of expression, guaranteed in Article 11 of the Charter. That limitation would not be compatible with the Charter since it would undermine the "essence" of that fundamental right or, at the very least, fail to comply with the principle of proportionality.

In his Opinion, the AG explained that the EU legislature may, while observing freedom of expression, impose certain monitoring and filtering obligations on certain online intermediaries, provided, however, that those obligations are circumscribed by sufficient safeguards to minimise the impact of such filtering on that freedom. The EU legislator had a margin of discretion to reconcile freedom of expression with respect for intellectual property rights. Nevertheless, the new regime entails a significant risk of "over-blocking" lawful information, and the use of automatic content recognition tools increases that risk, since these tools are not able to understand the context in which such protected subject matter is reproduced. The EU legislator therefore had to provide sufficient safeguards to minimise that risk. Accordingly, the EU legislator recognised that, for the right to make legitimate use of protected subject matter to be effective, providers of online sharing services are not allowed to preventively block all content reproducing the protected subject matter identified by the rightholders, including lawful content. It would not be sufficient for users to have the possibility, under a complaints and redress mechanism, to have their legitimate content re-uploaded after such preventive blocking. Moreover, those providers cannot be turned into judges of online legality, responsible for coming to decisions on complex copyright

issues. Consequently, sharing service providers must only detect and block content that is "identical" or "equivalent" to the protected subject matter identified by the rightholders, that is to say content the unlawfulness of which may be regarded as manifest in the light of the information provided by the rightholders. In ambiguous situations, the content concerned should not be the subject of a preventive blocking measure.

As Article 17 of Directive 2019/790 contained enough safeguards with regard to the rights of users, the AG proposed that the Court should rule that that provision is valid and, consequently, that it should dismiss the action brought by the Republic of Poland.

Subsequent to the drafting of this Opinion, two important documents were published:

- The judgment in YouTube and Cyando (see IRIS 2021-7/4) does not, in the AG's view, call into question the considerations developed in his Opinion.

- The Commission's Guidance on the application of Article 17 of Directive 2019/790 (see IRIS 2021-7/5) sets out what the Commission had submitted before the Court and reflects the explanations given in points 158 to 219 of the AG's Opinion. However, the AG disagrees with the possibility to "earmark" subject matter the unauthorised uploading of which "could cause significant economic harm to them". If, as the AG states in his Opinion, "this is to be understood as meaning that those same providers should block content *ex ante* simply on the basis of an assertion of a risk of significant economic harm by rightsholders – since the guidance does not contain any other criterion objectively limiting the 'earmarking' mechanism to specific cases – even if that content is not manifestly infringing, I cannot agree with this, unless I alter all the considerations set out in this Opinion."

Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021, Case C-401/19, Republic of Poland v European Parliament, Council of the European Union

https://curia.europa.eu/juris/document/document.jsf?text=&docid=244201&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2429875

NATIONAL

BULGARIA

[BG] CEM report on the snap parliamentary elections in July 2021

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

On 12 August 2021, *Съвета за електронни медии* (the Council for Electronic Media – CEM). published its *Специализиран мониторинг на аудио- и аудио-визуално съдържание за парламентарния вот на 11.07.2021 г.* (Specialized report of audio and audio-visual content for the parliamentary vote on 11July 2021 – the Report). In the Report, CEM presents the data and findings based on the specialised monitoring process of the activity of media service providers during the pre-election campaign.

The main purpose of the monitoring process was to establish the way in which the providers of media services reflect upon the pre-election campaign of the political parties and if they comply with the requirements of *Изборен кодекс* (the Election Code) and *Закон за радиото и телевизията* (the Radio and Television Act).

For the first time, the Report also includes information on the performance of the on-demand media services which broadcasted audio and audio-visual content related to the elections. Specifically, the report focuses on six online platforms.

Based on this observation CEM has concluded that, in comparison with the regular elections held on 4 April 2021, the snap elections took place in a calmer environment, despite the epidemic situation. The Covid-19 disease was displaced by traditional hot topics such as corruption, abuses of power, problems in the judiciary, health care, etc.

CEM points out that ministers were frequent guests in radio and television studios, some even participating several times in specific programs. According to the regulator, the media coverage on the work of the executive bodies makes a strong imprint on electoral attitudes.

Furthermore, the Report found that in the pre-election content there was a lack of political debates and leadership clashes. The interest in pre-election debates, therefore, decreased in comparison with the regular elections held on 4 April 2021 from 70.6% to 66.2%, according to data from the Exact poll commissioned by CEM.

The Report also notes the mixture of editorial and agitational content (i.e. between political propaganda and journalism). CEM underlines the behavior of the

hosts of the talk shows and the journalists, who do not clearly distinguish between the two types of messages, as the main reason. As a consequence, CEM asks the legislators to define more clearly and unambiguously the terms “political advertising” and “political agitation”.

Finally, CEM Report underlines the huge amount of freely broadcasted content which was mainly provided by the national media providers.

Специализиран мониторинг на аудио- и аудио-визуално съдържание за парламентарния вот на 11.07.2021 г.

https://www.cem.bg/controlbg/1371

Specialized monitoring of audio and audio-visual content for the parliamentary vote on 11.07.2021

CZECHIA

[CZ] Court upholds the Broadcasting Council's decision on unfair commercial practices

Jan Fučík
Česká televize

The Broadcasting Council of the Czech Republic imposed a fine of CZK 200 000 (EUR 8 000) on Telemedia InteracTV Production Home Limited, as the advertiser, for violating Article 2 paragraph b) of the Act on the Regulation of Advertising, which was committed by entering a teleshopping block entitled "*Line of Love*", broadcast on 21 August 2017 from 10:10 a.m. to 11:11 a.m. on the *JOJ Family program*. This is an unfair business practice according to Article 4 paragraph 1 of Act No. 634/1992 Coll., on consumer protection (hereinafter the “Consumer Protection Act”), in that within the teleshopping block competitors were not explicitly notified in writing on the screen that they would have to wait on the telephone line even though the presenter will not talk to any competitor. Based on these findings, the Council concluded that the absence of this information on the television screen during the broadcast of the teleshopping block was likely to significantly distort the economic behavior of the consumer. If the viewer did not have this essential information available, in breach of competition rules, he could decide to call the game phone number and take part in the game, as he was not informed that, even though he called the phone number, that he could wait a long time to be switched to the studio on the game phone line, even though the host may not talk to them. If, on the other hand, the viewer were explicitly informed of this fact on the television screen, then he would certainly reconsider his decision to participate in the game. According to the Council, such conduct constituted an unfair commercial practice.

Telemedia brought an action against this decision of the Council before the Municipal Court in Prague, stating that it clearly considered that the operating conditions had not been violated in any way. At the time of the broadcast of the teleshopping block, the conditions of operation were duly published and made available to all competitors on the website, to which a link was provided directly on the television screen. The applicant considered that the publication of the operating conditions on the screen could be made by the inclusion of a link with which the operating conditions are accessible to all on the internet. According to the Municipal Court, the Council stated that the business practice of offering the viewer to participate in the game, presented via a teleshopping block, without being shown on the screen the information specified in Article IV (8) of the Operating Conditions, was capable of substantially changing the economic behavior of the consumer, on the grounds of the contested decision cited above. The consumer would have reconsidered their original intention to accept the offer of potentially participating in the game for a financial amount (and thus the acquisition of the service offered) if the essential information that the time spent

waiting on the gaming phone line at the connection to the studio does not depend on whether the presenter in the studio is talking to someone, but this information has not been adequately provided to the consumer. The Court upheld the contested Council decision.

Rozsudek Městského soudu v Praze č.j. 10A 58/2018 ze dne 13.7.2021

https://www.rrtv.cz/cz/files/judikaty/6125a5e2-c5dc-464a-ac4a-3b903bc37dce.pdf

Judgment of the Municipal Court in Prague no. 10A 58/2018 of 13.7.2021

GERMANY

[DE] Federal Administrative Court extends media rights to information from German Federal Intelligence Service

Christina Etteldorf
Institute of European Media Law

In two recent decisions, the *Bundesverwaltungsgericht* (Federal Administrative Court – BVerwG), Germany's highest ordinary administrative court, ordered the *Bundesnachrichtendienst* (Federal Intelligence Agency – BND) to show greater transparency towards journalists. Under these decisions, the BND is required to disclose to journalists the identity of parties, involved in court proceedings, who had fought against the disclosure of press contacts in a separate court procedure, and that of media representatives invited to hold 'informal briefings' with the BND. These information rights also give media representatives the opportunity, for both reporting and research purposes, to assess the relationships between the BND, as one of the three German federal intelligence services with specific responsibility for foreign civil and military intelligence, and other media representatives.

Both procedures relate to a connected case that, in essence, concerns 'background' or 'informal' briefings to which the BND had invited selected media representatives since 2016. A correspondent from a well-known daily newspaper who had not been invited to these briefings had asked the BND for information about which journalists had been invited. He had claimed he was trying to investigate whether the BND had been improperly collaborating with certain selected journalists, a subject that was strongly in the public interest. After the BND refused his request, the correspondent had appealed to the courts and, at the end of 2019, had finally been granted the right to such information for 2016 and 2017 by the BVerwG (case no. 6 A 7.18). A newspaper publisher had appealed to the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) against this decision in order to prevent the information being released, but the BVerfG had rejected the complaint. However, it had not disclosed which newspaper publisher had lodged the request. The newspaper correspondent had then asked the BND and the BVerfG to reveal the identity of the complainant and its lawyers, as well as the content of the complaint, on the grounds that this information could reveal, as part of his research, whether the complaint to the BVerfG had been made as a favour to the BND. When both the BND and the BVerfG refused his request, he took further legal action.

In its first ruling of 23 March 2021 (BVerwG 6 VR 1.21), the BVerwG upheld the action, with respect to the BND, by imposing interim measures, ordering the BND to reveal the identities of the complainants and their legal representatives, and to indicate whether they had been among the circle of media representatives who had been invited to background briefings. The BVerwG based its decision on the

freedom of the press that was protected under the German Constitution and enjoyed by all journalists, whichever media they worked for. It stressed that it was essentially up to the media themselves to judge which information they needed in order to prepare a report on a particular subject. The only exception would be if their research was based on pure speculation and information obtained out of the blue. However, this was not the case here, as the BVerwG stressed with a particular reference to the German interior minister's comment that this type of "ad hoc advance briefing is a standard feature of public authorities' media relations work". Moreover, possible collusion between federal authorities and selected press organisations was a matter of considerable public interest.

In a separate procedure, the same newspaper correspondent asked for information about when and for what reason the BND had invited media representatives to its premises in Berlin, since June 2019. He also wanted to know which media representatives the BND had spoken to individually and on what dates, and which media they represented. In a ruling of 8 July 2021, the BVerwG (case no. 6 A 10.20) partially upheld this request, agreeing that information about 'informal briefings' should be disclosed, but not details of individual conversations. The legitimate private interests of the journalists and media concerned did not outweigh the right to information which, here also, was directly based on the fundamental right to the freedom of the press. The BND could not argue that disclosing the names would breach editorial confidentiality and the protection of sources because the information requested would not reveal any link to a specific investigation and its disclosure would therefore not risk exposing actual research activities. Neither would the media representatives' general privacy rights be breached because the information concerned their professional lives, which were of a public nature. However, the situation was different when it came to the disclosure of names and dates of individual conversations.

Beschluss des BVerwG

https://www.bverwg.de/de/230321B6VR1.21.0

Decision of the Federal Administrative Court

Pressemitteilung Nr. 48/2021

https://www.bverwg.de/de/pm/2021/48

Press release no. 48/2021

[DE] Federal Constitutional Court rules on Saxony-Anhalt's blocking of the public broadcasting fee increase

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

In a decision published on 20 July 2021, the First Senate of the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) decided that, by failing to approve the *Erster Medienänderungsstaatsvertrag* (first amended state media treaty), the *Land* of Saxony-Anhalt had violated the freedom of broadcasting enjoyed by public broadcasters under Article 5(1)(2) of the *Grundgesetz* (Basic Law – GG). The provisions of Article 1 of the first amended state treaty – including the plan to increase the public broadcasting fee by EUR 0.86 from EUR 17.50 to EUR 18.36 proposed by the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission for Determining the Financial Requirements of Broadcasters – KEF) – will be applied provisionally with effect from 20 July 2021 until new state treaty provisions governing the adequate funding of broadcasters ARD, ZDF and Deutschlandradio have entered into force.

The decision concerns the three-stage process used to determine the public broadcasting fee, which is based on the BVerfG decision of 22 February 1994: in the first stage, ARD, ZDF and Deutschlandradio submit their funding requirements based on their programming decisions. In the second stage, the KEF examines whether the programming decisions fall within the scope of the broadcasting mandate and whether the ensuing funding requirements have been calculated in accordance with the principles of efficiency and economy. In the third stage, the *Länder* determine the fee. The governments and parliaments of the *Länder* base their decision on the fee proposed by the KEF.

The KEF's latest proposal to raise the broadcasting fee for the 2021 to 2024 funding period was incorporated into the first amended state media treaty, which was signed by the heads of all 16 *Land* governments in June 2020. The treaty provided for the amendments to enter into force on 1 January 2021. During 2020, the legislative bodies of 15 *Länder* granted approval for the first amended state media treaty to be transposed into *Land* law. Saxony-Anhalt was the only *Land* not to approve the amended treaty by 31 December 2020, preventing its entry into force.

In its decision, the BVerfG points out that the state has a duty to provide public broadcasters with adequate funding, corresponding to the broadcasters' constitutional right to receive such funding. The state's duty to provide funding under Article 5(1)(2) GG is incumbent upon the *Länder* as a federal sharing of responsibility, whereby each *Land* bears joint responsibility. One special feature of this federal sharing of responsibility is that, while the *Länder* are responsible for passing legislation on the funding of public broadcasting, the way in which public broadcasting is currently organised and financed means that only inter-*Land* (i.e. nationwide) legislation can give effect to the fundamental rights protection

afforded under Article 5(1)(2) GG. In the absence of any other agreement, state treaty provisions concerning adjustments to the public broadcasting fee can only enter into force with the unanimous approval of all 16 *Länder*. Within the federal sharing of responsibility, the *Länder* have to ensure that public broadcasting is properly funded, so each *Land* has a specific constitutional duty to act.

Turning to recent developments in the media landscape, the BVerfG stresses the growing significance of the role of public broadcasters in providing genuine, thoroughly researched information that distinguishes between fact and opinion, avoids distorting reality and does not focus on the sensational but rather serves as a counterweight that safeguards diversity and provides guidance. This is particularly true in times of increasingly complex information, on the one hand, and partisan viewpoints, filter bubbles, fake news and deep fakes on the other.

If a *Land* does not fulfil its share of the collective responsibility and the constitutional right to funding becomes impossible to satisfy as a result, this in itself constitutes a violation of the freedom of broadcasting. This is because broadcasting cannot presently be funded at the inter-*Land* (i.e. nationwide) level without approval from all the *Länder*. It follows that any justification for not fulfilling the constitutional right to funding must likewise be supported by all the *Länder* in order to be constitutionally tenable. Under the current system agreed upon by the *Länder*, it is not sufficient for one single *Land* to refuse to increase the fee – especially not without tenable justification. Saxony-Anhalt's argument that it had for years been trying in vain to persuade the other *Länder* to agree to structural reforms of public broadcasting does not justify deviating from the evaluation of the funding requirements. The state media treaty's adoption was not tied to any plans to structurally reform the public broadcasting organisations or to reduce the scope of programming on offer, and it would be constitutionally impermissible to pursue such objectives via the determination of the public broadcasting fee. Insofar as Saxony-Anhalt was aiming to identify further pandemic-related conditions that might be relevant to determining the broadcasting fee, it did not sufficiently describe any factual circumstances that could justify a deviation, nor did it explain what conclusions it had drawn therefrom.

The BVerfG refrained from ordering an increase in the public broadcasting fee with retroactive effect from 1 January 2021. An assessment of how the failure to adjust the fee has affected the public broadcasting organisations can be carried out using the process agreed in the state treaty. It should however be noted that under the current system, this would require a statement by the KEF and a new amended state treaty adopted with the unanimous approval of the *Länder*. Compensation requirements arising from the failure to adjust the fee would have to be taken into account. The complainants are generally entitled to such additional compensatory funding. When the public broadcasting fee is next determined, the legislator must take the need for compensation into account. The additional funding required by the public broadcasters as a result of investments being postponed and essential reserves being used up will have to be taken into consideration. It will also be necessary to examine how the COVID-19 pandemic might have affected the public broadcasters' funding requirements and whether fee increases would be reasonable for the general public.

Beschluss des BVerfG

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/07/rs20210720_1bvr275620.html

Pressemitteilung des BVerfG

https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2021/bvg21-069.html;jsessionid=B6C3C24A912D5EA00FC0328C72B71930.2_cid386

Federal Constitutional Court press release

[DE] Federal Supreme Court finds Facebook terms of use ineffective in relation to hate speech

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In rulings of 29 July 2021 (III ZR 179/20 and III ZR 192/20), the *Bundesgerichtshof* (Federal Supreme Court – BGH) decided that Facebook's terms of business, governing the deletion of users' posts and the blocking of accounts when its internal standards had been breached, were ineffective. This was especially the case if Facebook did not agree to inform users about the removal of their posts, at least in retrospect, and about the intention to block their accounts in advance, indicate the reason for doing so, and grant them the opportunity to respond and request a new decision. Users whose posts have been deleted or whose accounts have been blocked in accordance with these terms of business are therefore entitled to have their accounts reactivated and, where appropriate, to injunctive relief against future blocking of their accounts and deletion of their posts.

The two similar cases concerned the deletion of posts and (partial) blocking of accounts on the grounds that Facebook considered its conditions of use had been violated in relation to hate speech. Facebook had deleted two posts containing hostile remarks about migrants and temporarily blocked the relevant user accounts. In the most recent court proceedings, an appeal court had dismissed actions disputing Facebook's behaviour and requesting the full reinstatement of the deleted posts. However, the BGH disagreed on the grounds that the court had failed to demonstrate that Facebook was entitled to delete posts and block accounts on the basis of its terms of use and community standards. Although these had been effectively included in the contractual relationship between the parties – a pop-up window with an "I agree" button was sufficient for this – they were ineffective because they unreasonably disadvantaged users under Article 307(1)(1) of the *Bürgerliches Gesetzbuch* (German Civil Code – BGB).

The BGH based this assessment on the notion that the current system failed to provide the necessary balance between conflicting constitutionally protected interests. It was necessary to balance users' freedom of expression on the one hand (Article 5(1)(1) of the *Grundgesetz* (Basic Law – GG)) and, in particular, Facebook's occupational freedom on the other (Article 12(1)(1) GG). In the weighing up process, the BGH concluded that Facebook, on the basis of its occupational freedom, was, in principle, entitled to require users to adhere to certain communication standards that extended beyond those laid down in criminal law (e.g. libel, slander, incitement of the people). However, the company could not reserve an unlimited right to take down posts that breached its communication standards and block the user account responsible. Rather, the requirement for reasonable business terms enshrined in Article 307(1)(1) BGB meant that users' right to freedom of expression also needed protecting. In order for its terms of use to be effective, Facebook therefore needed to ensure that users were informed about the removal of their posts, at least in retrospect, and about the intention to block their accounts in advance, indicate the reason for

doing so, and grant them the opportunity to respond and request a new decision.

With regard to social networks' practice of taking down individual posts, there has been discussion for some time now as to whether and to what extent companies can and/or should be obliged to take reasonable account of users' fundamental rights. Although the BGH ruling does not assume that a private company has a constitutional obligation in this respect, it addresses the issue from the angle of general German civil law provisions in which the imprecise definition of legal concepts means it is possible or even necessary to take fundamental rights into consideration. The BGH lays down concrete guidelines on the protection mechanisms that must be in place in order to sufficiently take into account freedom of expression, without unreasonably harming the interests of social network operators. The proposed information obligations and complaint mechanisms are not a new idea: such systems are already provided for in the German *Netzwerkdurchsetzungsgesetz* (Network Enforcement Act – NetzDG), on the basis of which Facebook is required to take down criminally unlawful content within certain deadlines and, at the same time, take legally established precautions to protect freedom of expression. However, the NetzDG only concerns certain types of illegal content, which are not necessarily congruent with the definition of hate speech contained in Facebook's community standards. According to the BGH's decision, similar protection must, in future, also apply to content of this nature that does not exceed the threshold of libel or incitement of the people and that is therefore not covered by the NetzDG. This is consistent with developments at EU level, where the proposed Digital Services Act, for example, includes plans to introduce corresponding transparency and information obligations, as well as complaint mechanisms, for online platforms.

Pressemitteilung des BGH Nr. 149/2021

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021149.html

Federal Supreme Court press release no. 149/2021

[DE] KJM orders blocking of Cypriot pornography portal

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Following numerous violations of the *Jugendmedienschutz-Staatsvertrag* (State Treaty on the Protection of Minors in the Media – JMStV), the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM) ordered the blocking of a pornographic website in a case referred to it by the *Landesanstalt für Medien NRW* (North-Rhine Westphalia media authority – LfM NRW). Many user profiles on the widely used German-language website provide unrestricted access to pornographic content, that is clearly likely to seriously impair the development of minors, without any form of age verification system designed to ensure only adults can view it.

According to Article 4(2) JMStV, pornographic content, unless it is absolutely unlawful – such as hard-core pornography (i.e. pornography featuring children, adolescents, violence or animals) – is only permissible in telemedia services and only "if the provider has ensured that such content is accessible to adult persons only (closed user group)".

An age verification system is required in order to comply with this rule. The KJM has devised and published clear guidelines that such systems should follow.

In March 2020, the KJM had examined the website in question and, since it breached the provisions of the JMStV, had lodged a complaint against the provider, which was established in Cyprus, an EU member state, and banned it in its current form. The provider had been told that it could meet its obligations under the JMStV by setting up a so-called closed user group in order to prevent children and adolescents accessing it. However, since it had not changed the way it operated, the KJM has now contacted the host provider and ordered it to block the website in Germany. It considered this measure necessary because the host provider had so far done nothing, even though the LfM NRW had informed it of the illegal nature of the website in its current form, and the fact that it had been banned in Germany.

By taking this unprecedented step, the KJM is endeavouring to exert its authority in the field of youth protection in a way that extends beyond this individual case.

Although the blocking order is not yet legally binding, the KJM and the LfM NRW have shown that they are persevering in their efforts to enforce the law in order to protect children and young people in the media. Their perseverance is necessary in the light of the procedural requirements, laid down in the EU Audiovisual Media Services Directive and E-Commerce Directive, regarding deviations from the country-of-origin principle for the protection of young people.

Pressemitteilung der KJM

https://www.kjm-online.de/service/pressemitteilungen/meldung/kjm-ordnet-sperre-

gegen-grosses-pornoportal-an

KJM press release

[DE] ZAK objects to cooperation between Google and German Health Ministry over online health portal

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On 15 June 2021, the *Landesmedienanstalten* (state media authorities) ruled on the first six cases linked to possible discrimination against journalistic and editorial providers by media intermediary Google on the basis of the *Medienstaatsvertrag* (state media treaty – MStV), which came into force on 7 November 2020.

Since the treaty came into force, media intermediaries have been subject to German media regulation aimed at protecting diversity of opinion. Search engines, which are a type of media intermediary, aggregate and select third-party editorial content and present it in the form of search results. According to Article 94(2)(2) MStV, they are prohibited from systematically and unfairly blocking websites. The state media authorities are responsible for monitoring search engine operators' efforts to ensure that media content can be found without discrimination. They also check whether media intermediaries make clear the criteria they use to automatically select and present media content.

In proceedings brought against Google Ireland Ltd. by the *Medienanstalt Hamburg/Schleswig-Holstein* (Hamburg/Schleswig Holstein media authority – MA HSH), the state media authorities' *Kommission für Zulassung und Aufsicht* (Commission on Licensing and Supervision – ZAK) objected to a breach of the principle of non-discrimination enshrined in Article 94 MStV. A complaint filed under Article 94(3)(1) MStV by Wort & Bild Verlag Konradshöhe GmbH & Co. KG, a publishing company that operates the website www.apotheken-umschau.de, was also upheld.

Both procedures relate to cooperation between Google and the German Federal Health Ministry, under which content from the national health Internet portal www.gesund.bund.de was given special prominence in the German version of the Google search engine between 10 November 2020 and 10 February 2021. The ZAK found that this cooperation had unfairly discriminated against other providers of journalistic and editorial content. Since the arrangement had already been ended on the basis of a cartel law decision, there was no need to apply for a prohibition order.

However, on formal grounds, the ZAK rejected four further complaints concerning *Google News Showcase* lodged by regional publishing companies that were not part of this service. *Google News Showcase*, a news portal first made available in Germany on 1 October 2020, only displays the content of participating publishers. The four complainants feared that integration of *Google News Showcase* into the Google search engine would give an unfair advantage to the participating publishing companies.

The main reason why these four complaints were rejected was the fact that the four regional publishers, as far as the evidence suggested, had not actively sought to participate in the *Google News Showcase*. Under the MStV, there was no need to wait for an invitation from Google. Furthermore, the ZAK believed there were strong arguments to suggest that *Google News Showcase* should not be classified as a media intermediary, but as a media platform as defined in the MStV. For that reason, there was no need to make a decision on the complainants' allegation of discriminatory conduct based on Article 94 MStV.

Following this complaint procedure, however, the ZAK will verify whether *Google News Showcase* made its criteria of access transparent in accordance with Article 85 MStV, making particular reference to the rules for media platforms and user interfaces that entered into force on 1 June 2021.

Pressemitteilung der ZAK

https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/neue-vorschriften-zur-diskriminierungsfreiheit-zak-entscheidet-die-ersten-faelle

ZAK press release

SPAIN

[ES] Regulator calls on RFEF to amend proposal for commercialising football audiovisual rights

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European Audiovisual Observatory

On 6 July 2021, the Spanish regulator *Comisión Nacional de los Mercados y de la Competencia* (CNMC) called on the *Real Federación Española de Fútbol* (Spanish Football Federation - RFEF) to amend its proposal for commercialising the 2021-2024 audiovisual rights of the new *Primera RFEF* category in Spain, Europe and international markets. According to the CNMC, the RFEF proposal does not comply with certain aspects established in Royal Decree-Act 5/2015, which regulates the audiovisual broadcasting rights of professional football. The RFEF should amend its commercialisation proposal in the following aspects:

- restrict the powers granted to it regarding "the joint commercialisation of the audiovisual rights included in the scope of this Royal Decree-Act".

- eliminate the reference to the ownership of rights that are not recognised.

- not include commercial opportunities and obligations relating to advertising which are not covered by the applicable legal regulations and which are unjustified and contrary to the principle of freedom of enterprise.

- not include reservations of rights, non-exclusive rights, included rights, reserved rights, other rights, etc., which are not justified.

- amend those aspects identified in the report that are contrary to the principles of publicity, transparency, competition and non-discrimination in the process of awarding rights.

The CNMC also stated that the RFEF proposal will be subject to Articles 1 and 2 of Act 15/2007 on the Defence of Competition, and to Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), in all those aspects that exceed the scope of protection set out in Royal Decree-Act 5/2015.

Informe sobre la propuesta de la RFEF para la comercialización de los derechos audiovisuales en España, Europa e internacional de la nueva categoría Primera RFEF para las temporadas 2021-2022/2023-2024, INF/CNMC/079/21 Nueva categoría Primera RFEF

https://www.cnmc.es/expedientes/infcnmc07921

Report on the RFEF's proposal for the commercialisation of the audiovisual rights in Spain, Europe and internationally of the new category Primera RFEF for the seasons 2021-2022/2023-2024, INF/CNMC/079/21 New category Primera RFEF

[ES] Second Draft Law on Audiovisual Communication

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Within the framework of the transposition of Directive 2018/1808 on audiovisual media services into Spanish law, the Ministry of Economic Affairs and Digital Transformation of the Spanish Government submitted the Draft Law on Audiovisual Communication again to a public hearing on 29 June 2021.

This latest version incorporates some of the contributions received in the previous consultation period held in December 2020. It is expected therefore that some of the comments sent up to 12 July in this new round of consultation will also be incorporated into the final text.

The main new features of the Draft Law on Audiovisual Communication are as follows:

Promotion of European audiovisual works: The percentages linked to funding obligations destined to European works of independent producers are increased, establishing a minimum of 3.5% for audiovisual works in any format and 2% for films (0,9% and 1,8%, respectively, in the previous version).

Gender equality: Respect for gender equality and non-discrimination is established, which translates, among other measures, into the promotion of the drafting of and adherence to self-regulation codes to protect users from content that may violate the dignity of women or promote sexist, discriminatory or stereotyped values. The production of audiovisual works directed or produced by women is also encouraged.

Accessibility: With the aim of making the audiovisual market inclusive, the percentage of accessible content is increased, including pay television and video on demand services.

Protection of minors: Protection in relation to alcoholic beverage advertising is reinforced by establishing restrictive schedules and prohibiting commercials being aimed directly at minors while promoting a vision of social, sexual, personal, family, sporting or professional success derived from its consumption. A reinforced protection slot during the afternoon on free-to-air television has been reintroduced after being eliminated in the first draft of the law.

State Public Service Media financing. An amendment of the Law 8/2009 on the financing of the *Corporación de Radio y Televisión Española* (Spanish Radio and Television Corporation - CRTVE) has been introduced, modifying the parties obliged to contribute to the financing of the corporation. Firstly, it is established that all agents in the audiovisual market competing for the same target audience are obliged to finance public service television; these include free-to-air linear television, linear pay television, video on demand and video sharing platforms. The notable novelty in this second draft is that the obligation is extended to

providers of video on demand services and video exchange platforms. Secondly, the direct contribution of telecommunications operators for the part of their business that does not correspond to their audiovisual activity is eliminated. This tax was the subject of constant conflict between the Government and the operators, causing the European Commission to force its elimination when reaching the Court of Justice of the European Union in the form of a request for a preliminary ruling, referred by the national court (cases C-119/18, C-120/18 and C-121/18), which was resolved by order on 21 March 2019 in favour of telecommunications operators. Last, but not least, new mechanisms are introduced so that CRTVE can benefit from certain advertising formats – banned all in all under current legislation.

Segundo Anteproyecto de Ley General de la Comunicación Audiovisual

https://avancedigital.mineco.gob.es/es-es/Participacion/Paginas/DetalleParticipacionPublica.aspx?k=363

Second Draft of the General Law of Audiovisual Communication

FRANCE

[FR] CNC announces EUR 90 million of new funding for cinemas, film production and distribution

Amélie Blocman
Légipresse

On 29 July, the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC) adopted eight new support measures designed to stimulate film exploitation, production and distribution, thanks to one-off state funding totalling EUR 90 million. The CNC president commented, "The public authorities are fully aware of the health pass's impact on cinema attendance and the entire film industry. The CNC will be watching how the situation develops very closely, so we can ensure the health pass is successfully implemented while, at the same time, supporting the recovery."

Cinemas will therefore be allocated EUR 59.3 million of new funds to offset the loss of income caused by their enforced closure that ended on 19 May and the health restrictions that were imposed when they reopened (reduced numbers and curfews), and to support the sector's economic recovery. The funding will cover the fixed costs of the large cinema chains and provide one-off grants to the most vulnerable cinemas, while all cinemas will receive cross-sector compensation for their loss of income.

Meanwhile, film producers will receive EUR 16.7 million of new funding in addition to the support measures already in place, while an unprecedented offer of further assistance has been made to companies that produced at least one film whose exploitation or production was disrupted by the health crisis, creating extra costs that exceeded the cross-sector support already provided by the state.

Film distributors, on the other hand, will receive EUR 14 million of new funding in the form of greater support for cinema releases until spring 2022 and a selective fund for the most vulnerable companies.

Finally, in order to support the success of the *pass Culture* (culture pass), funding for measures to promote film among young people will be made available for programming initiatives, events and cinema communication aimed at 15- to 25-year-olds.

Sector representatives and the ministers of culture and the economy agreed to review the situation on 30 August.

CNC, communiqué du 29 juillet 2021

https://www.cnc.fr/professionnels/actualites/le-conseil-dadministration-du-cnc-adopte-de-nouvelles-aides-en-soutien-des-salles-de-la-production-et-de-la-distribution-cinematographiques-pour-90-m_1509975

CNC press release of 29 July 2021

[FR] Conseil d'État refuses to suspend extension of health pass to cinemas and cultural venues with more than 50 guests from 21 July

Amélie Blocman
Légipresse

On 20 July 2021, the *Conseil d'État* (Council of State) received several suspension requests and applications for the protection of fundamental freedoms from professional cultural organisations in response to the decree of 19 July 2021 in which the Prime Minister had extended the obligation for visitors to cultural and leisure venues accommodating more than 50 guests to present a so-called health pass (negative COVID test, vaccination or recent recovery certificate) from 21 July. While the applicants did not dispute the legitimacy of the reasons for extending the health pass requirement, they criticised the circumstances in which the decree had been implemented, especially the fact that its entry into force came at a different time to that governing cafés and restaurants, which had initially been scheduled for 1 August (it ultimately entered into force on 9 August following the publication of the law of 6 August on the management of the health crisis). They also claimed the decree unlawfully infringed their freedom of expression and freedom to undertake economic activity, and condemned the inevitable drop in cinema ticket sales that would result.

According to the *Conseil d'État* judge responsible for urgent applications, scientific data showed that the health situation had deteriorated again in the short period leading up to 21 July 2021 on account of the increasing transmission of the Delta variant of the COVID-19 virus across the country (sharp rises in infection rates, hospital admissions and critical care admissions). The judge thought this data could become even more worrying in early August, with the vaccination rate deemed insufficient (46.4% of the population had been fully vaccinated by 20 July) to result in a sustained drop in infection rates.

The judge also noted that the law of 31 May 2021 urgently needed amending, especially in order to review the list of venues, establishments, services and events to which access was dependent on presentation of a health pass. Therefore, as the applicants themselves recognised, the measures provided for in the decree would only be applicable for a short time, no longer than 12 days, after the date of the hearing.

In these circumstances, the judge ruled that the disputed decree did not, on the date of his order, constitute a serious and obvious unlawful infringement of the applicants' fundamental freedoms. Their applications were therefore rejected.

On 29 July, the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC) adopted eight new support measures designed to stimulate film exploitation, production and distribution, with a total value of EUR 90 million. Under the law on the management of the health crisis, promulgated on 6 August 2021 following the French president's announcements of 12 July 2021, a pass may be required to participate in any cultural or leisure

activity until 15 November 2021, with no visitor number threshold. The law also extended the health pass requirement to bars, restaurants, long-distance trains and aeroplanes, as well as some shopping centres and health institutions.

Conseil d'État (réf.) 26 juillet 2021, n° 454792, 454818, SACD et a.

https://www.conseil-etat.fr/actualites/actualites/le-juge-des-referes-du-conseil-d-etat-ne-suspend-pas-l-extension-du-passe-sanitaire

Conseil d'Etat, 26 July 2021, no. 454792, 454818, SACD et al.

[FR] Highly degraded local film exploitation situation can justify CNC's refusal to approve open-air film screenings

Amélie Blocman
Légipresse

In a decision of 30 June 2021, the president of the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC) refused to authorise nine open-air film screenings that were due to be held in the municipality of Garenne-Colombes every Saturday in July and August. The municipal authority then asked the administrative court's urgent applications judge, on the basis of Article L. 521-2 of the Code of Administrative Justice, to stay the execution of the CNC's decision and order the CNC to allow it to organise open-air screenings in accordance with Article L. 214-6 of the Code of Cinema and the Moving Image. Under these provisions, permission to organise open-air and/or free film screenings, other than those organised by cinema operators, must be granted by the CNC president "taking into account the date of issue of the film screening certificate, the place and number of screenings, the social and cultural benefits of the screenings and the local film exploitation situation."

The municipal authority therefore asked the *Conseil d'État* (Council of State) to annul the order under which the urgent appeals judge had rejected its request.

The *Conseil d'État* noted, firstly, that the investigation had established that cinemas located around the Garenne-Colombe municipality, most of which were independent, had seen their turnover fall significantly in 2020 and since the start of 2021 as a result of the health restrictions. While the Garenne-Colombes municipal authority claimed that the organisation of nine free open-air screenings would not disrupt the economic balance of these cinemas, and concerned old films that they were no longer showing, the initial judge had correctly considered that their sharp reduction in turnover had created a highly degraded local exploitation situation, which justified the decision not to grant the requested permission in accordance with Article L. 214-6 of the Code of Cinema and the Moving Image. The municipal authority had therefore been wrong to dispute the urgent applications judge's view that the disputed decision did not constitute a serious and manifestly unlawful breach of the freedom to access cultural works.

Secondly, the fact that other municipal authorities, where the situation was different, had organised open-air film screenings did not mean that the disputed decision, which had been taken under an authorisation process laid down by law, constituted a serious and manifestly unlawful breach of the principle of free administration of local authorities.

The *Conseil d'État* concluded that the municipal authority of Garenne-Colombes had no grounds to dispute the decision of the Cergy-Pontoise administrative court's urgent applications judge to refuse its request.

Conseil d'État (ord. réf.), 16 juillet 2021, n° 454526, Commune de la Garenne-Colombes

http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-16/454526

Conseil d'Etat, 16 July 2021, no. 454526, Garenne-Colombes municipal authority

[FR] Neighbouring rights: competition authority fines Google EUR 500 million

Amélie Blocman
Légipresse

The *Syndicat des éditeurs de presse magazine* (Magazine Press Publishers' Union – SEPM), the *Alliance de Presse d'Information Générale* (General Press Alliance – APIG) and the AFP news agency have appealed to the French competition authority, accusing Google of infringing the interim measures imposed against it on 9 April 2020. The competition authority had found that, following the adoption of the Law of 24 July 2019 creating a neighbouring right for press publishers and agencies, Google had unilaterally decided to stop posting article excerpts, photographs and videos within its various services unless publishers allowed it to do so free of charge. The authority had considered this behaviour likely to constitute an abuse of a dominant position. Pending a decision on the merits, it had imposed a series of injunctions against Google. This decision was upheld by the Paris appeal court in a judgment on 8 October 2020.

In its decision, the competition authority considered that the companies Google LLC, Google Ireland Limited and Google France had ignored several injunctions contained in its decision, in particular the requirement to negotiate in good faith. It accused Google of unilaterally deciding that the negotiations should focus on a global partnership known as Showcase, which was mainly aimed at enabling publishers to offer new services and in which the neighbouring rights attached to current uses of protected content were merely an ancillary component without any distinct financial value. Google had also limited, without justification, the scope of the negotiations by refusing to include press agency content used in publications (images, for example) and press companies that did not publish "general and political information".

The authority also accused Google of failing to provide publishers and press agencies with the information they needed for a transparent assessment of how much money they were entitled to, as required under Article L. 218-4 of the Intellectual Property Code. The information it had provided had been either incomplete or late. Google had also violated its obligation to exercise neutrality in the negotiations, imposed under the decision of 9 April 2020, by linking negotiations on remuneration for current use of content protected by neighbouring rights with the conclusion of other partnerships that could have an impact on the posting and indexing of the content of publishers and press agencies.

Taking into account the seriousness of the breaches, the authority fined Google EUR 500 million. It also ordered the American company to offer the publishers and press agencies that had lodged the appeal remuneration for current uses of their protected content, and to give them the information they needed to assess such an offer, or face daily fines if it failed to do so within two months.

Autorité de la concurrence, décision 21-D-17 du 12 juillet 2021 relative au respect des injonctions prononcées à l'encontre de Google dans la décision n° 20-MC-01 du 9 avril 2020

https://www.autoritedelaconcurrence.fr/sites/default/files/2021-07/20-mc-01.pdf

Competition authority decision 21-D-17 of 12 July 2021 on compliance with the injunctions imposed against Google in decision no. 20-MC-01 of 9 April 2020

[FR] New obligations for on-demand audiovisual media services

Amélie Blocman
Légipresse

As expected, since it constitutes one of the key elements of the current reforms resulting from the transposition of the Audiovisual Media Services Directive, the on-demand audiovisual media services (SMAD) decree was published and entered into force on 1 July 2021. Under the decree, foreign video on demand (VOD) platforms aimed at French audiences can be made subject to the same rules on financial contributions to cinematographic and audiovisual production as French-based services by way of derogation from the country-of-origin principle (Article 43-7 of the Law of 30 September 1986).

The decree lays down the rules applicable to on-demand audiovisual media services (SMADs), which include subscription-based, pay-per-view and free VOD services, as well as catch-up TV services, in relation to their contribution to European and French cinematographic and audiovisual production, the prominence given to these works, advertising, sponsorship and teleshopping. It replaces Decree No. 2010-1379 of 12 November 2010 concerning on-demand audiovisual media services.

In future, VOD services must devote at least 20% of the turnover they generate in France to the funding of European or French cinematographic and audiovisual production. The proportion is increased to 25% for services that offer films less than 12 months after their release. The ratio between cinematographic and audiovisual works will be laid down in an agreement to be concluded with the *Conseil supérieur de l'audiovisuel* (the French audiovisual regulator – CSA) within four months, with each category representing at least 20% of the total contribution. French-based service providers with a net annual turnover greater than EUR 1 million are required to sign such an agreement, which should set out their contribution obligations as well as their duty to offer and showcase these works and to provide rightsholders with access to exploitation data concerning their works. Those that fall outside French jurisdiction can choose whether or not to sign such an agreement.

A significant proportion of this contribution (three quarters for film production, two thirds for audiovisual production) will support independent production, which is defined according to criteria aimed at guaranteeing the preservation and development of local intangible heritage in France and the distribution of works. SMADs may not have any direct or indirect financial interests in production companies and the rights must not exceed 36 months in duration, while coproduction shares, income rights, distribution mandates and secondary rights are not permitted. Diversity clauses must also be included in order to prevent the contribution being focused on big-budget films or certain genres (e.g. animation).

Chapter III of the decree requires at least 60% of the works in service providers' catalogues to be European, and at least 40% of these to be original French productions. It also contains rules on promoting these works via visuals, trailers and specific sections on the home page, and on recommending content to users through programme searches or promotional campaigns. Such conditions will be clarified in the agreement with the CSA. Finally, the rules governing commercial messages on these services are the same as for television services as defined in the decree of 27 March 1992.

This decree will be complemented by reform of the financing obligations applicable to television services (the so-called *TNT* (DTT) decree, currently in the final stages of negotiation with industry professionals) and modernisation of the media chronology system, in order to give these platforms, as compensation for their new obligations, shorter windows for showing films after their release in cinemas. Although the government had given the parties involved a deadline of 30 June, negotiations have stalled. If they fail, the government could intervene by way of a decree, but such a decree would need to be submitted for an opinion and a three-month examination by the European Commission.

Décret n° 2021-793 du 22 juin 2021 relatif aux services de médias audiovisuels à la demande

https://www.legifrance.gouv.fr/download/pdf?id=DDaclTsbssrrsYbYBQHvadAWhRDD8LWdMqRihxSDaKo=

Decree no. 2021-793 of 22 June 2021 on on-demand audiovisual media services

UNITED KINGDOM

[GB] Republic Bharat's programme breached Ofcom rules by including unjustified derogatory and offensive language

Julian Wilkins
Wordley Partnership

Ofcom determined that Republic Bharat's current affairs discussion programme had breached Rules 3.3 and 2.3 of the Broadcasting Code by allowing its presenter and some of the guests to make statements that amounted to derogatory and abusive treatment of Pakistani people. Further, the content was potentially offensive and not sufficiently justified by the context. Republic Bharat is a satellite TV channel, broadcasting mainly in the UK, and predominantly in Hindi. The station's Ofcom licence is held by Worldview Media Network Limited (WM).

Rule 3.3 of the Code states: "Material which contains abusive or derogatory treatment of individuals, groups, religions, or communities must not be included in television [...] services [...] except where justified by the context." Whilst Rule 2.3 states: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context. Such material may include [...] offensive language. Discriminatory treatment or language (for example on the grounds of religion or belief). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence."

Ofcom considered the audience's and broadcaster's right to freedom of expression pursuant to Article 10 of the European Convention of Human Rights. On 16 July 2020 a discussion programme presented by Arnab Goswani called *The Debate with Arnab* debated the Pakistan court martial and sentencing to death of an Indian national Mr Kulbhuscan Jadhav for alleged spying. His conviction was a source of much controversy and included the Indian government successfully applying to the International Court of Justice (ICJ) for an order that Mr Jadhav have access to Indian consular officials and legal representations. Although visits were allowed, including a visit from Jadhav's wife and mother, India had made allegations of non-compliance with the ICJ order, for instance the visits were filmed.

Apart from Mr Goswani there were four Indian and three Pakistani guests as panellists. The discussion was very heated and mainly dominated by the Indian guests and the presenter shouting down the Pakistani guests.

Some of the comments included the presenter saying to one Pakistani guest: "Hamid please don't behave like a Pakistani please on my programme [...] Please behave like a human being." Another comment from one of the Indian guests was: "listen you pathetic little Pakistani." Other comments likened all Pakistanis to

terrorists.

Ofcom noted that some of the Pakistani panellists' comments were inflammatory, for instance suggesting that Kulbhushan would have been hung by now were it not for Pakistani mercy. Another comment: "Did Kulbhushan Jadhav come here to get his sister married?" Such a statement is considered insulting in both Indian and Pakistani culture.

WM argued that the language was not derogatory but reference to the fact that similar Indo-Pakistan debates become a shouting match and comments were not made with malice but just a refection that India and Pakistan did not "see eye to eye with one another."

Ofcom recognised that its Code does not prohibit the broadcast of material or the inclusion of people or groups whose views and actions have the potential to cause offence. Likewise, a broadcaster had the right to be fundamentally critical of the Pakistani Government but a distinction had to be made between criticism of the government and its people. However, parts of the programme were used to abuse guests merely for being Pakistani and matters were not assisted by the presenter not moderating the debate. Whilst the Pakistani guests made derogatory remarks Ofcom considered these were in response and in defence.

Ofcom did not accept that the "combative" and "tit for tat sparring match" was typical of Asian news channels and their communities. Ofcom determined that they did not accept the debate was within UK audience expectations for Republic Bharat.

Taking account of contextual factors including the genre and editorial content, the service on which the programme is broadcast, and the likely size and expectations of the audience there was no justification for the derogatory and abusive language used against the Pakistani people included in the programme. In conclusion Rule 3.3 had been breached.

In Ofcom's view, the channel's audience which was predominantly the Indian community in the UK was unlikely to have expected to view the content of *The Debate with Arnab* without sufficient contextual justification or appropriate information to avoid or minimize the level of potential offence and, therefore, Rule 2.3 was breached.

Issue 430 of Ofcom's Broadcast and On Demand Bulletin 5 July 2021

https://www.ofcom.org.uk/_data/assets/pdf_file/0021/221457/The-Debate-with-Arnab,Republic Bharat's.pdf

[GB] The Dyson Report considers the BBC's investigation of 1995 Panorama's interview with HRH Princess of Wales lacked integrity and transparency.

Julian Wilkins
Wordley Partnership

The Dyson Report ("the Report") published on 14 May 2021 held that the BBC fell short of its high standards of integrity and transparency by failing to mention to the public its investigation in 1995 and 1996 into the shortcomings of Martin Bashir's ("Bashir") Panorama interview with HRH Princess of Wales (HRH). Also, Tony Hall (now Lord Hall), then the BBC's Managing Director of News and Current Affairs, could not have concluded from the BBC's investigation at the time that Bashir, who had secured the interview, was an honest and honourable man. *Panorama* is a weekly current affairs programme screened on BBC1.

The Report's Terms of Reference were set by Lord Dyson and approved by the BBC on the basis that Lord Dyson considered them appropriate. The Report had been commissioned as a consequence of ongoing criticism of the BBC's failure to properly account for the shortcomings about how the interview with HRH had been procured and the lack of reprimand against Martin Bashir who eventually had admitted he had used fake bank statements to encourage HRH's brother, the Earl Spencer ("ES"), to consider Bashir as the right person to interview his sister.

The interview with HRH was aired on 20 November 1995 during which she was explicit about her difficulties with the Royal Family and marital problems with her husband Prince Charles.The Report found that Bashir had commissioned graphic designer Matt Wiessler to produce fake bank statements indicating that a former employee of ES and HRH's Private Secretary had received payments from the media company, News International, with the implication that they had betrayed her trust.

Bashir had shown the fake statements to ES. The Report considered Bashir using the fake statements portrayed himself as someone who could be trusted to interview HRH. Such conduct was a serious breach of the 1993 BBC's producer's guidelines.

When Wiessler saw the broadcast interview he reported his concerns to Tim Gardam, Head of Weekly Programmes in BBC News and Current Affairs. This led to Gardam investigating the matter and Bashir providing an account of the faked documents. Gardam accepted what Bashir had said but asked for him to produce independent evidence that HRH had not been shown the statements. On 22 December 1995 Bashir produced a note from HRH saying she had not seen the statements. Gardam was not aware the fake statements had previously been shown by Bashir to ES.

Gardam had not considered the possibility that HRH had been influenced to do the interview as a consequence of her brother seeing the statements. No approach was made to ES for his version of events.

Newspaper reports suggested that something was amiss which led to Bashir admitting to Gardam that the fake statements had been shown to ES. The BBC decided that it must find out the entire truth behind Bashir's activities. Bashir was interviewed by senior BBC staff, Tim Suter and Richard Peel, and the conclusions were expressed in a letter from Tony Hall. Although this letter was probably not sent despite Bashir's conduct breaching guidelines. Again, there was no approach to ES.

Media reports continued of inappropriate conduct and a full inquiry was commissioned by Lord Hall and was undertaken by Gardam's successor Anne Sloman. Mr Bashir was unable or unwilling to give Sloman and Hall any credible explanation of why he had commissioned the fake bank statements, and why he had shown them to ES for his version of what had happened.

The Report concluded that Hall and Sloman were woefully ineffective for failing to interview ES and the reasons for not doing so were rejected. There was no scrutiny of Bashir's account with any degree of scepticism and caution even though Bashir had lied three times and he was unable to explain why he had produced fake statements. Lord Hall could not have concluded that Bashir was an honest and honourable man. The Report determined Bashir had, by using the fake statements, deceived and induced ES to arrange a meeting with HRH.

Despite the extensive media coverage elsewhere, the answers given by the BBC to specific questions by the press were evasive. Also, by failing to mention on any BBC news programme the fact they had investigated Bashir's conduct and the outcome of the investigations, the BBC fell short of its high standards of integrity and transparency.

Dyson Report, BBC

https://www.bbc.co.uk/aboutthebbc/reports/reports

ITALY

[IT] AGCOM concludes four proceedings on the respect for pluralism by companies operating in the media and electronic communications sectors

Francesco Di Giorgi & Luca Baccaro

With the decisions No. 209/21/CONS and 210/21/CONS published on 28 June and decisions No. 234/21/CONS and 235/21/CONS published on 30 July 2021, AGCOM concluded four proceedings about the respect for pluralism by companies operating in the media and electronic communications sectors.

The proceedings were initiated pursuant to Article 4-bis, paragraph 1, of the Legislative Decree No. 125 of 7 October 2020, the rule which aims to avoid that the presence of the same company in the electronic communications and media sectors, given the convergence between the two fields, could have a distorting effect on media pluralism.

The rule was introduced following the ruling by the Court of Justice of the European Union - Case C-719/18 - which stated that Article 43, paragraph 11, of TUSMAR (Consolidated Law on Media Services) was against the EU principle of freedom of establishment (see IRIS 2020-9/11).

The evaluation of potential risk to media pluralism is therefore no longer linked to exceeding the revenue thresholds (40% of the electronic communication market and 10% of one of the SIC markets), but is based on the analysis of criteria such as revenues, barriers to entry, level of competition (plus other criteria defined by the Authority in each particular case), from which it is possible to determine if the position of the company in both sectors - also through shareholdings capable of determining “significant influence” pursuant to Article 2359 of the Italian civil code - actually implicates distorting effects or harmful consequences on media pluralism.

In case of a positive response, AGCOM shall apply one of the actions set by Article 5 TUSMAR, as the inhibition of the harmful act or operations or the imposition of measures affecting the structure of the company.

All the proceedings ended with a dismissal.

With the decision No. 210/21/CONS, AGCOM established that the position of Sky Italia does not affect media pluralism because, with reference to the electronic communication market, the company is a new entrant with a negligible market share; on the media sector side, despite Sky being an important television broadcaster with significant market shares in the pay-TV sector, the Authority verified an important replacement effect of online platforms which acquire the most attractive content for viewers, as shown by the recent bid for Serie A football rights.

The dismissal provided by decision 234/21/CONS on Fininvest- Mediaset (Fininvest group) was taken because the group, with reference to the electronic communication sector, is exclusively active in the national market for terrestrial radio and television broadcasting services which, according to the investigation, are both pluralistic and not concentrated markets. With regard to the media sector, AGCOM shared the same conclusion of the Sky proceedings, acknowledging the increasingly strong competitive pressure on traditional broadcasters by the new online platforms.

With regard to proceeding No. 235/21/CONS against Telecom Italia, AGCOM noted that the company was a leader in various electronic communications markets, especially in broadband and ultra-broadband connectivity and over-IP voice, as well as one of the major mobile operators; however, as far as the media market is concerned, the company offers paid audiovisual media services of third parties and holds a small market share.

Finally, the proceeding No. 209/21/CONS concerned the position of Vivendi with regard to its shareholding in Mediaset and Telecom Italia. The AGCOM investigation established that the presence of Vivendi both in TIM and in Mediaset is sufficient to determine the effects on pluralism because of a series of factors such as: i) the leader position of Telecom in fixed and mobile networks; ii) the relevant Mediaset share of the SIC; iii) the eventual opportunity to offer media/TLC bundled services that could become mutually strategic, with consequent exploitation of the leverage effect in the respective market power. However, according to AGCOM evaluation, the analysed factors could cause only a potential risk: if Vivendi is capable of exercising a “significant influence” in the management of Telecom Italia, the same cannot be said regarding the position of Vivendi in Mediaset. Indeed, the parties signed some agreements that provide a progressive and significant reduction in Vivendi's shareholding in Mediaset and some instant commitments aimed at excluding any active role of Vivendi in the management of Mediaset. For these reasons, AGCOM also dismissed this last proceeding, although specifying that the implementation of the agreements and the commitments taken by the parties will be monitored in order to ensure full compliance with the current framework for the protection of pluralism.

Delibera n. 209/21/CONS Archiviazione del procedimento ai fini delle verifiche di cui all’articolo 4-bis, comma 1, del decreto-legge 7 ottobre 2020, n. 125, come convertito con modificazioni dalla legge 27 novembre 2020, n. 159 (Vivendi S.E.- Telecom Italia S.p.A. - Mediaset S.p.A.)

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=23462893&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution no. 209/21 / CONS Filing of the procedure for the purposes of the checks referred to in Article 4-bis, paragraph 1 of the Decree-law no. 125 of 7 October 2020, as converted with amendments by law no. 159 of 27 November

2020 (Vivendi S.E. - Telecom Italia S.p.A. - Mediaset S.p.A.)

Delibera n. 210/21/CONS Archiviazione del procedimento ai fini delle verifiche di cui all'articolo 4-bis, comma 1, del decreto-legge 7 ottobre 2020, n. 125, come convertito con modificazioni dalla legge 27 novembre 2020, n. 159 (Sky Italian Holdings S.p.A.)

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=23463059&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution no. 209/21 / CONS Filing of the procedure for the purposes of the checks referred to in Article 4-bis, paragraph 1 of the Decree-law no. 125 of 7 October 2020, as converted with amendments by law no. 159 of 27 November 2020 (Sky Italian Holdings S.p.A.)

Delibera n. 234/21/CONS Archiviazione del procedimento ai fini delle verifiche di cui all'articolo 4-bis, comma 1, del decreto-legge 7 ottobre 2020, n. 125, come convertito con modificazioni dalla legge 27 novembre 2020, n. 159 (Fininvest S.p.A.- Mediaset S.p.A.)

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=23821101&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution no. 234/21 / CONS Filing of the procedure for the purposes of the checks referred to in Article 4-bis, paragraph 1 of the Decree-law no. 125 of 7 October 2020, as converted with amendments by law no. 159 of 27 November 2020 (Fininvest S.p.A.- Mediaset S.p.A.)

Delibera n. 235/21/CONS Archiviazione del procedimento ai fini delle verifiche di cui all'articolo 4-bis, comma 1, del decreto-legge 7 ottobre 2020, n. 125, come convertito con modificazioni dalla legge 27 novembre 2020, n. 159 (Telecom Italia S.p.A.)

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=23821231&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution no. 235/21 / CONS Filing of the procedure for the purposes of the checks referred to in Article 4-bis, paragraph 1 of the Decree-law no. 125 of 7 October 2020, as converted with amendments by law no. 159 of 27 November 2020 (Telecom Italia S.p.A.)

[IT] AGCOM passes modifications to the regulation on copyright enforcement online

Ernesto Apa& Marco Bassini
Portolano Cavallo

On 22 July 2021 the Italian Communications Authority (AGCOM) adopted Resolution No. 233/21/CONS, which contains significant amendments to the regulation on copyright enforcement online approved via Resolution No. 680/13/CONS (hereinafter, the 'Regulation'). Said modifications reflect both regulatory and technical developments occurred over the last years, as a result of the emerging challenges that digital technologies have posed to copyright protection.

The changes mainly concern two key aspects, that is the extension of the subjective scope of application of the Regulation, and the consequent extension of administrative sanctions for failure to comply with AGCOM orders.

Both modifications implement the provisions introduced by Article 195-bis of the Law-Decree No. 34 of 19 May 2020, passed into Law No. 77 of 17 July 2020 (the so-called "*Decreto rilancio*").

On one hand, in accordance with paragraph 1 of Article 195-bis, the power of AGCOM to issue orders for the enforcement of copyright online is extended against information society service providers that rely, albeit indirectly, on national phone numbers. This modification follows the spread of new channels that facilitate the unauthorized circulation of copyrighted materials via instant messaging services and constitutes a long-awaited achievement. Indeed, in a press release connected to a dismissal decision delivered in 2020 (Resolution No. 164/20/CONS), AGCOM had already made clear that services such as the one offered by Telegram by allowing users to create public channels that can be freely accessed by anyone, including for sharing every type of content, in fact created new avenues for copyright infringements. However, AGCOM pointed out that the only measure it could take pursuant to the Regulation under such circumstances, i.e., ordering mere conduit providers to disable access to the website in question, was disproportionate. Indeed, the Regulation did not grant AGCOM any power to order the selective removal of content in the case of service providers located outside Italy.

Following the introduction of Article 195-bis, paragraph 1, of *Decreto rilancio,* the reach of AGCOM powers in this respect has been extended. Article 8, paragraph 4-bis, of the Regulation now provides that, in case digital works are made available unlawfully by service providers that rely, albeit indirectly, on national phone numbers (e.g., instant messaging services), AGCOM is entitled to require the selective removal of the relevant works or the adoption of measures aimed to prevent their further upload. AGCOM is now also empowered to order that providers disable access to infringing works by adopting appropriate measures for

the effective protection of copyright. The extension of the enforcement powers derives from the inclusion of operators such as instant messaging service providers among the potential recipients of AGCOM orders directed to bring to an end or prevent copyright infringements (Article 8, paragraph 2).

As to the second novelty, Article 8, paragraph 7, of the Regulation now provides that in case Internet service providers fail to comply with AGCOM orders, including those adopted pursuant to the provisions above, AGCOM may apply the administrative sanctions established by Article 1, paragraph 31, of Law No. 249 of 31 July 1997. It is worth noting that the aforementioned Article 195 of the *Decreto rilancio*, under paragraph 2, introduced a specific provision regarding failure to comply with AGCOM orders adopted for the enforcement of copyright online. Under such circumstances, an administrative sanction ranging from Eur 10,000 up to 2% of the annual turnover of the financial year preceding the service of the notice of infringement shall apply. The provision established by Article 195, paragraph 2, aims to remedy to the debated lack of sanctioning powers by AGCOM after the Council of State (the top administrative court in Italy) ruling No. 4993 of 5 July 2019.

The amendments to the Regulation will become effective 30 days from the date of publication of the resolution in comment (2 August 2021).

Delibera n. 233/21/CONS - Modifiche al Regolamento in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=23845469&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution no. 233/21 / CONS - Amendments to the Regulations on the protection of copyright on electronic communications networks

LITHUANIA

[LT] Additional rights to protect copyright more effectively granted to the Radio and Television Commission

Indre Barauskiene
TGS Baltic

On 29 June 2021, *Seimas* (the Parliament of Republic of Lithuania) has adopted amendments to the *Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas* (Law on Copyright and Related Rights of the Republic of Lithuania, hereinafter "the Law"), the aim of which is to solve the practical problems faced by the *Lietuvos radijo ir televizijos komisija* (Radio and Television Commission of Lithuania - RTCL) in performing the functions assigned to effectively protect copyright on the Internet.

Pursuant to the new provisions of the Law, the RTCL has been granted the right to issue binding instructions to a payment, financial or other institution to terminate payments or other financial transactions to an entity performing infringing activities on the Internet.

Since 1 April 2019, following the entry into force of the new version of the Law on Copyright and Related Rights, RTCL had already the right to give binding instructions to Internet access service providers to remove domain name or blocking access to websites that contain illegally published copyrighted content in order to be more effective and efficient enforcement of copyright and related rights in the digital environment.

The Law Amending Article 78 of the Law will enter into force on 1 November 2021.

2021 m. birželio 29 d. Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymo Nr. VIII-1185 78 straipsnio pakeitimo įstatymas Nr. XIV-460.

https://www.e-tar.lt/portal/lt/legalAct/64f369b0df2511eb9f09e7df20500045

The Law No. XIV-460 Amending Article 78 of the Law on Copyright and Related Rights of the Republic of Lithuania No. VIII-1185, 29 June 2021

[LT] Supreme Court annuls suspension of Russian TV

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On 12 May 2021 the Supreme Administrative Court of Lithuania in a final judgment annulled the 2018 decisions of the Radio and Television Commission of Lithuania (RTCL), the national media regulator, on the 12-month suspension of the Russian state TV channel (IRIS 2018-4/32) and on imposing a monetary penalty on the Lithuanian cable and IPTV company INIT for its failure to comply with the suspension (IRIS 2018-7/24). The Supreme Administrative Court has also been an appeal instance in relation to the judgment of the Vilnius Regional Administrative Court in this case.

The judgment reviewed various claims of the applicants, INIT and the non-commercial partnership Rosmediakom (co-founded by state Russian TV), as well as counter claims by the defendant, RTCL, on the material and procedural aspects of its decisions.

The Supreme Administrative Court found that out of the 11 commissioners of the RTCL that took part in the votes on its decisions under the dispute, two were faculty of the national university, which has a valid radio licence, while a third commissioner hosted a morning TV show - *Basketball World*. This violates the law, governing that members of the media regulator shall not have contractual relationships with entities providing services in broadcasting. Having established this procedural fault on behalf of the RTCL in adopting the decisions, the Supreme Administrative Court annulled the judgment of the court of first instance and made a new decision that annulled the two decisions of the media regulator. It also had to pay the costs to the applicants in the case.

Lietuvos Vyriausiasis Administracinis Teismas), administracinė byla Nr. eA-668-624/2021,teisminio proceso Nr. 3-61-3-00788-2018-7

http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=e6fa65a9-919a-4f27-b63b-390d506d8872

Supreme Administrative Court of Lithuania, Judgment no. 3-61-3-00788-2018-7 of 12 May 2021 in administrative case no. eA-668-624/2021

NETHERLANDS

[NL] Supreme Court decision on disclosure of ISP customer data over illegal downloading

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On 25 June 2021, the Supreme Court of the Netherlands (*Hoge Raad*) delivered an important decision on when an Internet service provider (ISP) is required to disclose customer data associated with IP addresses identified as being used for potential copyright infringement (see IRIS 2020-1/18 and IRIS 2020-7/16). Notably, the Supreme Court upheld a court of appeal ruling, concluding that an ISP (Internet Service Provider) was not required to provide customer data to a film distributor, that sought to pursue individuals for possible violation of intellectual property rights, as the privacy interests of the ISP customers were not sufficiently safeguarded.

The case involved Dutch FilmWorks (DFW), which is a large independent film distributor in the Netherlands in the field of cinema, video-on-demand and television. It is also a co-distributor of the US film *The Hitman's Bodyguard* (the "film"), and is entitled to take action on behalf of the film's rightsholders for infringement of intellectual property rights. Ziggo is one of the largest telecommunications providers and ISPs in the Netherlands. In 2017, DFW commissioned a German company to monitor the unauthorised sharing of the film via BitTorrent networks, which allows peer-to-peer file sharing. Following the monitoring, DFW requested that Ziggo provide the names and addresses of Ziggo customers associated with 174 IP addresses. Ziggo refused to release the data, and DFW initiated legal proceedings against Ziggo. On 8 February 2019, the District Court of Midden-Nederland rejected DFW's claim to order Ziggo to disclose the customer data; and on 5 November 2019 the Court of Appeal of Arnhem-Leeuwarden also rejected an appeal by DFW (see IRIS 2020-1/18).

Following the lower court rulings, DFW lodged an appeal with the Supreme Court, and in a significant decision on 25 June 2021, the Supreme Court upheld the Court of Appeal's judgment, without adopting its own reasons. As such, the Court of Appeal's judgment now becomes final. In this regard, the Court of Appeal had held that the case involved a balancing act between DFW's interest in protecting its intellectual property rights, and Ziggo's interest in protecting the personal data of its customers. This balancing involved Ziggo customers' right to personal data under Article 8 of the EU Charter of Fundamental Rights (the Charter) and Article 8 of the European Convention on Human Rights (ECHR). It also involved DFW's right to property under Article 17 of the Charter and Article 1 of Protocol 1 ECHR. Notably, the court recognised that DFW had a legitimate interest in the provision of certain personal data from Ziggo. Of note, the court took into account that individuals who had downloaded the film via BitTorrent had thereby intentionally infringed the intellectual property rights of DFW. As such, DFW had a legitimate

interest in identifying the potential infringers, and to recover damages, by making requests to ISPs to provide the name and address details of the potential infringers. However, after balancing these interests, the court concluded that it would not issue an order for Ziggo to disclose the customer data. The court held that DFW had not made it sufficiently clear when it would use a certain action in relation to a Ziggo customer, which could range from sending a warning letter, to recovering costs and damages by issuing a summons. The court considered that Ziggo would be unable to adequately inform its customers in advance of the consequences of the provision of personal data to DFW. Secondly, the court considered that DFW was also not sufficiently transparent as to the amounts it would claim from these Ziggo customers, and the costs it would claim to have incurred to track down these Ziggo customers. As such, the consequences of the transfer of the Ziggo customers' personal data could not be properly estimated. Furthermore, the court held that DFW had not made it clear how the rights of the Ziggo customers involved would be effectively guaranteed.

Finally, having upheld the Court of Appeal's judgment, the Supreme Court also ordered DFW to pay the costs of the proceedings.

Hoge Raad der Nederlanden, ECLI:NL:HR:2021:985, 25 juni 2021

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2021:985

Supreme Court of the Netherlands, ECLI:NL:HR:2021:985, 25 June 2021

[NL] Supreme Court upholds politician's insult conviction over televised speech and interview

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On 6 July 2021, the Supreme Court of the Netherlands (*Hoge Raad*) delivered its closely-watched judgment concerning the conviction of Dutch politician Geert Wilders for group insult over comments made during a televised speech and media interview (see IRIS 2017-2/25 and IRIS 2020-9/13). Importantly, the Supreme Court held that Wilders' conviction for group insult should be upheld, and did not violate the right to freedom of expression. Notably, no sentence had been imposed on Wilders by the lower courts, which the Supreme Court also upheld.

The case arose in 2014 in the run-up to the Dutch municipal elections. On 19 March 2014, during a public meeting, Wilders asked an audience whether they wanted more or fewer Moroccans. In response, the audience cheered "Fewer! Fewer! Fewer!" numerous times. Wilders then said, "Well, then we are going to take care of that." Both Wilders' statements and the cheering of the audience were broadcast by the Dutch public broadcaster NOS. Earlier, on 12 March 2014, Wilders had given an interview to a reporter, while out in a market, where he stated that certain voters were voting for "a city with fewer problems and, if possible, fewer Moroccans." The Dutch Public Prosecution Service charged Wilders with incitement to hatred, incitement to discrimination, and group insult.

In December 2016, The Hague District Court convicted Wilders of group insult and incitement to discrimination, but found him not guilty of incitement to hatred. Wilders appealed the convictions, and on 4 September 2020, The Hague Court of Appeal upheld the conviction for group insult. The court held that Wilders had aimed to discredit all those with a Moroccan background on the sole ground that they belonged to this population group, and that his statements, even if made in the context of a political debate, were "unnecessarily offensive". However, in relation to incitement to hatred, the court of appeal acquitted Wilders. Essentially, the court found that there was insufficient proof that Wilders had intended to incite hatred or discrimination, but was rather "seeking political gain" with his statements. Notably, the court of appeal decided not to impose a sanction on Wilders. The court held that it had to take account of the special circumstances of the politician, noting that he was a democratically elected representative, and that he had made the statement in that capacity.

In its judgment of 6 July 2021, the Supreme Court upheld the court of appeal's ruling. First, the Supreme Court noted that group insult is criminalised under Article 137c of the Criminal Code, and in determining whether a group has been insulted, the Supreme Court held "it is not just about the words that have been used, but also about the context in which such a statement was made". The Court emphasised that the context consisted of the fact that, after Wilders' earlier statement about fewer Moroccans in the media interview on 12 March 2014 had

caused such controversy, the speech Wilders was to give at the public meeting of 19 March 2014 had been “pre-discussed” by Wilders. The question was raised whether only “Moroccans” or “criminal Moroccans” should be mentioned, and Wilders had approved the proposal to only speak of “Moroccans in general”. The Supreme Court ruled that in the speech, Wilders had “deliberately spoken about this group as a whole” and had been “unnecessarily offensive”. As such, the Supreme Court held Wilders had “insulted” this group, which is prohibited under Article 137c of the Criminal Code. Crucially, the Supreme Court held that the fact that Wilders “spoke as a politician does not change this”. The Court accepted that “it is true that a politician should be able to raise matters of general interest, even if he thereby offends or disturbs others”; however, that “does not alter the fact” that a politician “bears the responsibility in the public debate” to prevent the spreading of statements that are “contrary to the law, and to the fundamental principles of the democratic constitutional state, including statements that directly or indirectly incite intolerance”. Finally, the Supreme Court found that the non-imposition of a sanction had been “sufficiently reasoned” by the court of appeal.

Hoge Raad der Nederlanden, ECLI:NL:HR:2021:1036, 6 juli 2021

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2021:1036

Supreme Court of the Netherlands, ECLI:NL:HR:2021:1036, 6 July 2021

POLAND

[PL] "Lex TVN" - is media independence in Poland under threat?

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On 11 August 2021, the Polish Parliament (lower chamber) adopted an amendment to the Law on Radio and Television, commonly referred to as "lex TVN". Why there is a controversy around this bill? The opposition points out that it targets TVN, a TV station allegedly unfavourable to the government, while the ruling party argues that the bill aims to prevent the Polish media from being bought by companies from non-democratic countries such as Russia, China or Arab states. The passing of the bill by the Parliament coincided with the TVN group applying for an extension of its licence.

A provision has been introduced to the draft law on radio and television broadcasting, according to which TV and radio stations in Poland may have owners only from the European Economic Area (EEA), which includes European Union countries as well as Norway, Iceland and Liechtenstein. According to the draft, a licence to distribute radio and television programs may be obtained by an entity based in an EEA member state, provided that it is not dependent on a foreign person outside the EEA. However, the coming into force of this law only hits the TVN station, which is owned by the US corporation Discovery, because the US is not part of the European Economic Area and, moreover, Americans are the only foreign owners of media in Poland out of the EEA. Therefore, the law is referred to as "lex TVN". The law, passed by the Parliament, has been met with a wave of criticism and protests in Poland, because it targets a TV station that is allegedly not favourable to the ruling party. Opposition politicians, experts, as well as citizens, went out onto the streets to protest against the passed amendment to the law. They claim that the law poses a real threat to the freedom and independence of the media in Poland. These actions are also criticized by representatives of non-governmental organisations, who emphasise that the media are a key element of a democratic state and a tool for controlling the authorities. The draft act may also cause concern among foreign investors. Concern about the regulation has been expressed by the US authorities and the European Commission. The Discovery Corporation itself has issued a statement that the media law is an attack on independent media and freedom of the press and is aimed directly at TVN. A day after the Parliament had passed the bill, Discovery informed the President of Poland that it was taking legal action for violation of the bilateral agreement between the United States and Poland. Discovery alleges that the Polish authorities violated bilateral obligations, including fair and equitable treatment of reciprocal investments, non-infringement of reciprocal investments through arbitrary and discriminatory decisions, equal

treatment in licensing and prohibition of expropriation without compensation.

On 9 September 2021, the Senate, the upper chamber of the Polish Parliament, rejected the bill in a vote. The justification was that the amended act should not become part of the legal system as it violates a number of provisions of the Polish Constitution, the Treaty on Business and Economic Relations between the Republic of Poland and the United States of America as well as the Treaty on the Functioning of the European Union. The amendments of the Senate must be adopted or rejected by the Parliament (lower chamber) with an absolute majority of votes in the presence of at least half the number of deputies. It is difficult to say at this point whether the ruling party will find such a majority. If it does, the bill will be sent to the president's desk. The president has recently indicated that he may block the TVN law. He may also refer the bill to the Constitutional Tribunal, which may decide whether or not the law will become binding.

Parlimentary draft amending the Law on Radio and Television

US-Poland Business and Economic Relations Treaty (Signed 21 March 1990; Entered into Force 6 August 1994; Amended 1 May 2004)

https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005367.asp

Uchwała Senatu RP w sprawie ustawy o zmianie ustawy o radiofonii i telewizji

https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1535

Resolution of the Senate of the Republic of Poland on the bill amending the Law on Radio and Television

PORTUGAL

[PT] Cinema and Audiovisual – New rules and taxes for operators

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On 25 August 2021, Decree-Law No. 74/2021 regulating the Portuguese Cinema and Audiovisual Law (Law No. 55/2012, of 6 September 2012, amended by Law No. 28/2014, Law No. 82 - B/2014, and Law No. 74/2020) was published. This Decree-Law harmonises national and European requirements concerning State support to production, and extends taxes and investment obligations to video sharing and VOD operators.

As such, from 1 January 2022, video sharing services will have to pay the 4% exhibition tax already applied to cinema theatres and Pay TV services. VOD operators will have to pay 1% of their relevant revenues in Portuguese territory (excluding those with a yearly income lower than EUR 200,000 or with less than 1% of market share) and will have to invest in Portuguese language productions (in a statement to a Portuguese newspaper the Culture ministry has indicated that this would amount to EUR 4 million). According to Article 30 of the Decree-Law, the public service media operator is to invest 10% of its tax-funded yearly allowance in the production of Portuguese language films, series, documentaries or animation films (the present value is 8%).

Decreto-Lei n.º 74/2021 de 25 de agosto

https://dre.pt/application/conteudo/170175411

Decree-Law 74/2021 of 25th of August

Noticiário Expresso, "Plataformas de "streaming" vão ter de investir pelo menos €4 milhões em cinema independente e em língua portuguesa"

https://expresso.pt/cultura/2021-08-26-Plataformas-de-streaming-vao-ter-de-investir-pelo-menos-4-milhoes-em-cinema-independente-e-em-lingua-portuguesa-0e9fdf7d

Expresso news story with Culture ministry statement

RUSSIAN FEDERATION

[RU] Foreign IT giants receive special law

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On 1 July 2021 a law was signed into force by the President, with an aim to provide “equal conditions of work for Russian and foreign entities on the territory of the Russian Federation” (Article 2). It foresees that all Internet companies, including social media, that service (daily) at least 500 000 users in Russia and do it through: (1) either providing resources in Russian (or other languages of the RF), or (2) publishing advertising targeting customers in Russia, or (3) processing personal data of clients from Russia, or (4) receiving monetary means from Russian individuals and legal entities, shall open their official branches, representative offices or subsidiaries with a direct online account with *Roskomnadzor* (Federal Service for Supervision of Communications, Information Technology and Mass Media) and strictly follow the norms of the Russian law (Article 4).

A failure to comply with this requirement shall result in sanctions on the foreign entity such as a ban on advertising by or on this entity, a ban on search results with its resources, a ban on personal data concerning trans-border transfers, limitation of money transactions, a partial or complete ban on access to the services provided (Article 9).

Federal Statute on the activities of foreign entities in information-telecommunication network, "the Internet" on the territory of the Russian Federation, N236-FZ of 1 July 2021

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