IRIS newsletter

IRIS 2021-9

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Publisher:

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

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

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

Executive Director: Susanne Nikoltchev

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

EDITORIAL

In his world-famous play *Waiting for Godot*, Samuel Beckett makes his character Vladimir utter the following sentence: "We are not saints, but we have kept our appointment. How many people can boast as much?" Well, if we look at the implementation of the AVMSD, there are still many EU member states that haven't "kept their appointment". As mentioned in a previous editorial, this is due partly to delays forced by the COVID-pandemic. And yet, things are getting more serious: the reasoned opinion sent by the European Commission to nine EU countries is a further step in the infringement procedure initiated in November 2020. The member states in question have two months to reply to the Commission, or the Commission may refer the case to the Court of Justice of the European Union. In the meantime, a non-EU country "can boast as much": The Swiss Parliament adopted a revision of its film law on 01 October 2021, which introduces quotas for European works for non-linear services as well as an investment obligation for both linear and non-linear services, closely following the AVMSD rules.

Here in Strasbourg, the European Court of Human Rights has been busy producing some very interesting judgments. In two cases concerning the Italian public service broadcaster RAI, the court emphasised the need for pluralism in news and current affairs programmes, and in political platform programmes offered by the public broadcaster. Regarding the intermediary liability for content posted by social media users, the Strasbourg court found that the criminal conviction of a French politician for failing to promptly delete hate speech, posted by others, from his public Facebook account, did not violate the right to freedom of expression as guaranteed under Article 10 ECHR.

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

Table of content

INTERNATIONAL

COUNCIL OF EUROPE

FRANCE

European Court of Human Rights: *Sanchez v. France*

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

The European Court of Human Rights (ECtHR) has delivered a controversial judgment with regard to the criminal liability for posts on Facebook. It found that the criminal conviction of a politician for failing to promptly delete hate speech, posted by others, from his public Facebook account, did not violate the right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR).

The case concerned the criminal conviction of Julien Sanchez, a politician of the radical right-wing *Rassemblement National* (National Rally— RN), who was standing for election to Parliament. Together with the two authors of the offensive comments posted on his Facebook account, Mr Sanchez was prosecuted and convicted by the French courts for incitement to hatred or violence against a group of people or an individual on the grounds of their membership of a specific religion in application of *la loi du 29 juillet 1881* (Law of 28 July 1881 on Freedom of the Press (article 23-24)) and *la loi du 29 juillet 1982 sur la communication audiovisuelle* (Law of 29 July 1982 on audiovisual communication (article 93-3)).

He was ordered to pay a fine of EUR 3000 as well as the sum of EUR 1 000 to the civil-party claimant, in compensation for non-pecuniary damage. Mr Sanchez's conviction was based on his failure to take prompt action in deleting comments containing unlawful hate speech posted by others on the wall of his Facebook account. He was found guilty as the "producer" of an online public communication site, and hence as the principal offender. The *cour d'appel de Nîmes* (Nîmes Court of Appeal) found that the offensive comments had clearly defined the group of people concerned, namely those of Muslim faith, and that associating the Muslim community with crime and insecurity in the city of Nîmes was likely to arouse a strong feeling of rejection or hostility towards that group. Moreover, it held that by knowingly making his Facebook wall public, Mr Sanchez had assumed responsibility for the content of the comments posted and that his status as a political figure required even greater vigilance on his part. After the *Cour de cassation* (Court of Cassation) dismissed his appeal, Mr Sanchez lodged an application with the ECtHR, submitting that his conviction had been in breach of Article 10 ECHR.

The ECtHR emphasised that it attached the highest importance to freedom of expression in the context of political debate. It considered that very strong reasons were required to justify restrictions on political speech and that in the run-up to an election, opinions and information of all kinds should be permitted to circulate freely. In the specific circumstances of the case, however, it found that the French courts' decision to convict Mr Sanchez had been based on relevant and sufficient reasons linked to his lack of vigilance and responsiveness. The judgment refers to the ECtHR's approach in *Delfi AS v. Estonia* (IRIS 2015-7/1) emphasising, in particular, the necessity in a democratic society to combat hate speech, and the responsibility and duty-of-care as an Internet intermediary, regarding this matter. The ECtHR stated that personal attacks by means of insults, ridicule or defamation directed at certain sectors of the population, or incitement to hatred and violence against a person on account of membership of a particular religion, are sufficient for the authorities to make it a priority to combat such behavior when faced with irresponsible use of freedom of expression that undermines the dignity, or even the safety, of the population groups or sectors in question. The ECtHR agreed with the French judicial authorities that the comments at issue were unlawful and in breach of the Facebook terms of use. The ECtHR observed that Mr Sanchez had not been criticised for making use of his right to freedom of expression, particularly in the context of political debate, but had been accused of, and convicted for, a lack of vigilance and responsiveness in relation to the comments posted on the wall of his Facebook account. Mr Sanchez had knowingly made the wall of his Facebook account public, thereby allowing his friends to post comments there. He had thus been under a duty to monitor the content of the statements published and he could not have been unaware that his account was likely to attract comments of a political nature, which by definition were polemical and should therefore have been monitored even more carefully by him. Mr Sanchez' status as a political figure required even greater vigilance on his part. As the conviction to pay a fine of EUR 3 000 was not a disproportionate sanction, the interference in question could thus be seen as 'necessary in a democratic society'. The ECtHR reached the conclusion, by six votes to one, that there had been no violation of Article 10 ECHR.

Judge Mourou-Vikström dissented. She criticised the majority's approach for not being sufficiently consistent with the ECtHR's earlier case-law on the subject of liability of Internet intermediaries, and for imposing a too high a level of liability for users' comments on a Facebook account. Most importantly, in her view, the judgment neglects the disclaimer in *Delfi AS v. Estonia*. The approach in *Delfi AS v. Estonia* only concerned the liability of a professionally managed Internet news portal, run on a commercial basis, and not "other fora on the Internet where third-party comments can be disseminated (..)'" According to the dissenting opinion, the approach and outcome in Sanchez v. France imposing strict liability on the holder of a Facebook account could lead to overbroad censoring of users' comments on Facebook and could have a chilling effect on freedom of expression on the Internet.

This judgment is not final: at its meeting on 17 January 2022 the Grand Chamber panel of five judges decided to refer the case Sanchez v. France (application n° 45581/15) to the Grand Chamber of the European Court of Human Rights.

Arrêt de la Cour européenne des droits de l'homme, cinquième section, rendu le 2 septembre 2021 dans l'affaire Sanchez c. France, requête n° 45581/15

Judgment by the European Court of Human Rights, Fifth Section, in the case of Sanchez v. France, Application no. 45581/15, 2 September 2021

https://hudoc.echr.coe.int/eng?i=001-211777

ITALY

European Court of Human Rights: *Associazione Politica Nazionale Lista Marco Pannella and Radicali Italiani v. Italy* and *Associazione Politica Nazionale Lista Marco Pannella v. Italy*

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

On 31 August 2021, the European Court of Human Rights (ECtHR) delivered two judgments dealing with political pluralism in programmes broadcast by *Radio Televisione Italiana* (the Italian state radio and television service — RAI). In both cases, the ECtHR emphasised the need for pluralism in news and current affairs programmes, and in political platform programmes offered by the public broadcaster. In the first case (*Associazione Politica Nazionale Lista Marco Pannella and Radicali Italiani v. Italy*), the ECtHR found no violation of the right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR), of a political association who had complained about the discontinuance of political platform programmes on RAI. In the second case (*Associazione Politica Nazionale Lista Marco Pannella v. Italy*), the ECtHR found a violation. In that case the ECtHR found that the applicant association had been, if not excluded, at least highly marginalised in the media coverage of political debate, as, on three occasions, it had been excluded from taking part in popular current-affairs television programmes broadcast by RAI.

The first case concerned the discontinuance of certain political programmes, known as political platforms, broadcast by RAI. The applicants, two political associations, complained that this discontinuance had resulted in a breach of their right to impart their ideas and opinions. The ECtHR noted that the programmes had no longer been scheduled as a result of inaction on the part of the "oversight commission" – a political body expressing the wishes of the Italian Parliament as regards public-service broadcasting – which had stopped providing RAI channels with the instructions needed to organise the political broadcasts in question. It had thus been a political choice, within the discretion of Parliament. Furthermore, all of the political groups and parties which had taken part in the political programmes had been affected by the consequences of the discontinuance without distinction. The replacement of those political platforms by more in-depth political debates had also given RAI greater editorial freedom, affording it other possibilities for imparting political ideas and opinions on the television. The discontinuance of the political platforms thus had to be seen in the context of the general evolution of State-run broadcasting in Italy. That evolution had consisted of a gradual reduction in the role of the political authority, and of the recognition of the editorial autonomy of each channel and of the newsrooms responsible for news programming, with the aim of promoting the impartiality, objectivity and pluralism of information. The ECtHR came to the conclusion that the

discontinuance of the political platform broadcasts had not deprived the first applicant association of the possibility of imparting its opinions and that there had been no disproportionate breach of its right to freedom of expression. There had thus been no violation of Article 10. The ECtHR considered however, that the first applicant association had not had an effective legal remedy for the purpose of challenging the discontinuance of the programmes in question and therefore it found a violation of Article 13 of the ECHR (right to an effective remedy). The complaint of the association *Radicali Italiani*, the second applicant, was dismissed as inadmissible, as it had not shown how it had been directly affected by the discontinuance of the political platform programmes.

In the second case, the applicant association (who had also been an applicant in the first case), complained that it had not been invited to take part in political debates scheduled during three major current-affairs programmes broadcast by the public RAI channels. The applicant association had complained to the *Autorità per le garanzie nelle comunicazioni* (Communications Regulatory Authority — AGCOM) of an imbalance, to its disadvantage, on certain television programmes, and that the RAI's three general-interest channels had failed to comply with the obligations stemming from the principles of impartiality and pluralism in the provision of information. The association argued that the news programmes (TG1, TG2 and TG3) broadcast by the three channels in question had not included sufficient reports on the initiatives and awareness-raising campaigns it had launched. It also complained that its representatives had not been invited to appear on the main talk shows broadcast on the three RAI-channels – *Porta a porta, Annozero and Ballarò* – whereas representatives of other political movements had taken part. On two occasions, no further action had been taken on its complaint. Only after the association had applied a second time to an administrative court, alleging a breach of the *res judicata* principle, had the AGCOM finally ordered the RAI to redress the imbalance that had harmed the applicant association's interests. It was clear that the applicant association had been absent from three very popular television programmes, which had become the leading means of presenting political debate and disseminating political ideas and opinions in the media in Italy. The ECtHR considered that the AGCOM's approach had been excessively formalistic, by carrying out an overall assessment of the applicant association's presence during all of the news and current affairs programmes on the RAI-channels, without taking into account the time at which the programmes were screened or their popularity. The ECtHR observed that in general, current-affairs programmes were not subject to a strict requirement of proportional representation of the views of each political formation, but simply had a duty to represent different political opinions in a balanced manner. However, the internal practice employed by the AGCOM and the jurisprudence of the administrative court regarding the application of the general principles on pluralism indicated that "political subjects" enjoyed increased protection of their access to a specific category of current-affairs programmes, including the ones to which the applicant association's complaint had related. Therefore the association as a political organisation had found itself, if not excluded, at least highly marginalised in media coverage of political debate. The ECtHR decided, unanimously, that that exclusion had amounted to a violation of the applicant

association's rights under Article 10 of the ECHR.

Arrêt de la Cour européenne des droits de l'homme, première section, rendu le 31 août 2021 dans l'affaire Associazione Politica Nazionale Lista Marco Pannella et Radicali Italiani c. Italie, requête n° 20002/13

https://hudoc.echr.coe.int/eng?i=001-211593

Judgment of the European Court of Human Rights, First section, case of Associazione Politica Nazionale Lista Marco Pannella and Radicali Italiani v. Italy, Application no. 20002/13, 31 August 2021

https://hudoc.echr.coe.int/eng?i=001-211593

Judgment of the European Court of Human Rights, First section, case of Associazione Politica Nazionale Lista Marco Pannella v. Italy, Application no. 66984/14, 31 August 2021

https://hudoc.echr.coe.int/eng?i=001-211594

REPUBLIC OF TÜRKIYE

European Court of Human Rights: Üçdağ v. Turkey

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

Once again in a case against Turkey, the European Court of Human Rights (ECtHR) has found a violation of the right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR). As the Turkish courts had not sufficiently substantiated why two posts on the Facebook account of an imam could be interpreted as propaganda for a terrorist organisation, the ECtHR found that his conviction amounted to an unjustified interference with his right under Article 10 ECHR.

The case concerned Mr Üçdağ's criminal conviction for disseminating propaganda in favour of a terrorist organisation, on account of two posts published on his Facebook account. Both posts referred to the PKK (the Workers' Party of Kurdistan, an illegal armed organisation). At the relevant time, Mr Üçdağ was a public official working as an imam at a mosque in the Sur district of Diyarbakır. The impugned posts had included two photographs: one of individuals in uniform similar to that of PKK members, and one of a crowd demonstrating in a public street in front of a fire. The posts had originally been shared by two other Facebook users. In March 2017, the Diyarbakır 5th Assize Court found Mr Üçdağ guilty of the offence of disseminating propaganda in favour of a terrorist organisation and sentenced him to one year, six months and 22 days' imprisonment, delivery of the judgment being suspended. Mr Üçdağ's appeal was dismissed.

Relying on Article 10 ECHR, Mr Üçdağ complained before the ECtHR that his right to freedom of expression had been infringed on account of the criminal proceedings instituted against him. The ECtHR considered the suspended sentence to be an interference with Mr Üçdağ's right to freedom of expression. That interference was prescribed by law and pursued a legitimate aim, in compliance with two conditions enshrined in Article 10 § 2 ECHR. The ECtHR came to the conclusion, however, that the interference at issue could not be considered necessary in a democratic society, that condition being the third and most decisive one in the light of Article 10 § 2 ECHR. The ECtHR observed that in describing the impugned posts on Mr Üçdağ's Facebook account, the Turkish courts had merely said that the content in question had been such as to incite violence; that he had glorified, condoned and encouraged the terrorist organisation's methods entailing coercion, violence and threats by sharing that content on his Facebook account; and that he had thereby committed the offence of disseminating propaganda in favour of a terrorist organisation. The ECtHR considered that those decisions lacked an adequate explanation of the reasons why the impugned content had to be interpreted as praising, condoning and encouraging the methods entailing coercion, violence and threats used by the

PKK. It noted that the decisions by the domestic courts had failed to take into account all of the principles established in the Courts' case-law under Article 10 ECHR concerning verbal and written statements presented as fueling or justifying violence, hatred or intolerance. The ECtHR found that the domestic courts had not explained how the sharing of the posts in question could have been considered - in view of their content, context and capacity to lead to harmful consequences, having regard to their potential impact on the social networks under the circumstances of the case - as comprising incitement to the use of violence, armed resistance or uprising, or as amounting to hate speech. The domestic authorities had therefore failed to conduct an in-depth analysis taking account of all the criteria set out in the ECtHR's case-law concerning freedom of expression. On that basis, the ECtHR came to the conclusion that by convicting Mr Üçdağ on a charge of disseminating propaganda in favour of a terrorist organisation by posting the impugned contents on his Facebook account, the domestic authorities had failed to conduct an appropriate balancing exercise, in keeping with the criteria set out in the ECtHR's case-law, between Mr Üçdağ's right to freedom of expression and the legitimate aims pursued (protecting national security and territorial integrity, and preventing disorder and crime). As the Turkish Government had not demonstrated that the grounds relied on by the domestic authorities to justify the impugned measure had been relevant and sufficient, and that that measure had been necessary in a democratic society, the ECtHR found, unanimously, a violation of Article 10 ECHR. The ECtHR also found a violation of Article 6 ECHR (right to fair trial).

Arrêt de la Cour européenne des droits de l'homme, deuxième section, rendu le 31 août 2021 dans l'affaire Üçdağ c. Turquie, requête n° 23314/19

https://hudoc.echr.coe.int/eng?i=001-211581

Judgment by the European Court of Human Rights, Second Section, in the case of Üçdağ v. Turkey, Application no. 23314/19, 31 August 2021

https://hudoc.echr.coe.int/eng?i=001-211581

EUROPEAN UNION

CJEU: Judgment on the Open Internet Regulation and zero tariff options

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 2 September 2021, the Court of Justice of the European Union (CJEU) delivered its judgment in C-34/20, concerning the EU Regulation (2015/2120) on open internet access (Open Internet Regulation), and the compatibility with EU law of "zero tariff options", where an internet access provider applies a "zero tariff' to all or part of data traffic associated with an application or category of applications. Notably, the CJEU ruled that a zero tariff option operated by a German ISP was incompatible with the Open Internet Regulation.

The case involved Telekom Deutschland, an ISP that had been offering its end customers, for some of its packages, an additional option (also referred to as an "add-on option") in the form of a free "zero tariff" option called "StreamOn". Activation of that option allowed the data volume consumed by audio and video streamed by Telekom's content partners not to be counted towards the data volume included in the basic package; and once that data volume had been used up, that generally lead to a reduction in transmission speed. Further, by activating the "StreamOn" tariff option, the customer accepted bandwidth being limited to a maximum of 1.7 Mbit/s for video streaming, irrespective of whether the videos were streamed by content partners or other providers.

In a decision issued in December 2017, the German telecommunications regulator *Bundesnetzagentur* (Federal Network Agency) found that the tariff option operated by Telekom Deutschland did not comply with the obligations arising from Article 3(3) of Regulation 2015/2120, since it had been accompanied by a reduction in the data transmission speed for video streaming to a maximum of 1.7 Mbit/s. Crucially, Article 3(3) provided that providers of internet access services "shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used". Following a referral to the CJEU by the domestic courts, the question before the Court was whether Article 3(3) of the Open Internet Regulation 2015 had to be interpreted as meaning that a limitation on bandwidth on account of the activation of a "zero tariff" option, applied to video streaming, irrespective of whether it was streamed by partner operators or other content providers, was incompatible with the obligations arising from Article 3(3).

First, the CJEU noted that Article 3(3) sought to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users' rights. Second, Article 3(3) precluded any measure which ran counter to the obligation of equal treatment of traffic where such a measure was based on commercial considerations. Crucially, the Court held that a "zero tariff" option, such as that at issue in the main proceedings, drew a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications. It followed, according to the CJEU, that such a commercial practice "[did] not satisfy the general obligation of equal treatment of traffic, without discrimination or interference", laid down in Article 3(3). As such, the Court concluded that Article 3 of the Open Internet Regulation had to be interpreted as meaning that a limitation on bandwidth, on account of the activation of a "zero tariff" option, applied to video streaming, irrespective of whether it had been streamed by partner operators or other content providers, was incompatible with the obligations arising from Article 3(3).

Finally, it should also be noted that the CJEU reached similar conclusions in Cases C-854/1 and C-5/20, also delivered on 2 September, on related "zero tariff" options operated by Vodafone GmbH, which were also found to be incompatible with Article 3(3) of the Open Internet Regulation.

Judgment of the Court of Justice of the European Union (Eighth Chamber), Case C-34/20, Telekom Deutschland GmbH v. Bundesrepublik Deutschland, 2 September 2021

https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0034

Judgment of the Court of Justice of the European Union (Eighth Chamber), Case C-5/20, Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. Vodafone GmbH, 2 September 2021

https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0005

Judgment of the Court of Justice of the European Union (Eighth Chamber), Case C-854/19, Vodafone GmbH v. Bundesrepublik Deutschland, 2 September 2021

https://curia.europa.eu/juris/document/document.jsf;jsessionid=2F167085AE13D2941A2C90D5C8D6B0AD?text=&docid=245531&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=519183

European Commission Recommendation on safety and protection of journalists

Tarlach McGonagle
Institute for Information Law (IViR), University of Amsterdam

The European Commission adopted a new Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union on 16 September 2021. This is the European Commission's first frontal engagement with these topics in a recommendation to the 27 EU Member States. The Recommendation provides guidance to the Member States on how to take "effective, appropriate and proportionate measures to ensure the protection, safety and empowerment of journalists".

It is framed in terms of EU law, policy and support measures. Various rights and principles enshrined in the Charter of Fundamental Rights of the European Union are given pride of place, including freedom of expression, media freedom and pluralism, integrity of the person, liberty and security, and non-discrimination. The main substantive focuses of the Recommendation are: a statement of purpose; general recommendations; three sets of specific recommendations, and 'provision of information, reporting and monitoring'. The general recommendations focus first on how to ensure that all crimes against journalists, offline or online, are investigated and prosecuted in an effective and impartial manner. Their second focus is on how to foster cooperation between law enforcement authorities, journalists and associations representing journalists. The third focus is on how States can support the development of independent response and support mechanisms for journalists and other media professionals facing threats. Such mechanisms could provide legal advice, psychological support, safe places and emergency helplines. The fourth focus is ensuring access to places and sources of information, thereby emphasizing the importance of first-hand reporting as part of the media's public watchdog role. The fifth concerns training, on a continuous basis, for all professions dealing with the protection and safety of journalists, including the judiciary and law enforcement authorities. The need for safety trainings for journalists is also underscored. The final focus within the general recommendations is economic and social protection for journalists and other media professionals and the creation of an enabling professional environment. The three sets of specific recommendations address particular issues of concern: 1) the protection and safety of journalists during protests and demonstrations; 2) ensuring online safety and digital empowerment, and 3) empowering and protecting female journalists and those belonging to minority groups or reporting on equality. They offer Member States mainly practical guidance on how to strengthen or enhance existing approaches to these issues. They encourage trainings for, and cooperation with, law enforcement agencies as support measures for ensuring the safety of journalists while covering protests and demonstrations. They also underscore the importance of good communication and regular dialogue and reporting. For online safety, they promote cooperation

between public authorities and industry, as well as between online platforms and civil society. They also set out various measures of protection against online surveillance. For the empowerment of female journalists and journalists belonging to minority groups, the emphasis is on improving transparency in reporting and data collection on attacks and discrimination. Measures fostering equality and inclusion in the media industry and in newsrooms are also emphasized, as are awareness-raising campaigns and provision of information.The Commission intends to monitor Member States' compliance with the Recommendation. Member States are expected to provide the Commission with all relevant information it needs for monitoring purposes no later than 18 months after the adoption of the Recommendation, and thereafter upon request. The Commission will evaluate the implementation of the Recommendation by Member States and develop key performance indicators for that purpose. On the basis of its impact assessments, the Commission will decide whether additional measures are required to achieve the aims of the Recommendation.

With the adoption of this Recommendation, the European Union is following in the footsteps of the Council of Europe and the OSCE, both of which have already adopted flagship recommendations on the safety of journalists in Europe. The European Commission's Recommendation makes a few cursory references to the Council of Europe's Committee of Ministers' CM/Rec(2016)4 to Member States on the protection of journalism and safety of journalists and other media actors (see IRIS 2016-5:1/3). It aims to support the implementation of the Council of Europe's standards, and in particular" CM/Rec(2016)4. The Commission's Recommendation and CM/Rec(2016)4 cover much similar ground. The former has an ostensibly narrower focus on "other media professionals", whereas the Council of Europe's approach is more expansive: "other media actors" clearly includes non-professional contributors to public debate, such as citizen journalists, bloggers, academics, whistleblowers, etc. The Commission's Recommendation does not explicitly reference OSCE Ministerial Council Decision No. 3/18 - Safety of Journalists (7 December 2018).

European Commission, Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, 16 September 2021

https://digital-strategy.ec.europa.eu/en/library/recommendation-protection-safety-and-empowerment-journalists

European Commission: Call on member states to fully transpose EU audiovisual and telecom rules

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 23 September 2021, the Commission announced that it had sent a reasoned opinion to the Czech Republic, Estonia, Ireland, Spain, Croatia, Italy, Cyprus, Slovenia and Slovakia for failing to provide information about the implementation of the EU Audiovisual Media Services Directive (AVMSD) into their national laws. This is a further step in the infringement procedure initiated in November 2020, when the Commission sent letters of formal notice to 23 Member States for not having notified full transposition (see IRIS 2021-1:1/25).

On the same date, the Commission announced that it had sent a reasoned opinion to Estonia, Spain, Croatia, Ireland, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia and Sweden for not having notified the Commission about the full transposition of the European Electronic Communications Code (EECC). This is a further step in the infringement procedure initiated in February 2021, when the Commission sent letters of formal notice to 24 Member States for not having notified full transposition.

In both cases, the member states in question have two months to reply to the Commission, or the Commission may refer the case to the Court of Justice of the European Union.

Press release of the European Commission, "Audiovisual media: Commission calls on Member States to fully transpose EU rules on audiovisual content", 23 September 2021

https://digital-strategy.ec.europa.eu/en/news/audiovisual-media-commission-calls-member-states-fully-transpose-eu-rules-audiovisual-content

Press release of the European Commission, "EU Electronic Communications Code: Commission calls on Member States to fully transpose new telecom rules into national law," 23 September 2021

https://digital-strategy.ec.europa.eu/en/news/eu-electronic-communications-code-commission-calls-member-states-fully-transpose-new-telecom-rules

POLAND

European Commission: Poland referred to the CJEU for undermining the independence of the national telecommunications regulator

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 23 September 2021, the European Commission decided to refer Poland to the Court of Justice of the European Union for breaching the requirements of the European Electronic Communications Code (EECC), safeguarding the independence of the *Urząd Komunikacji Elektronicznej* (Office of Electronic Communications - UKE) the National Regulatory Authority (NRA) for telecommunications.

Using an urgent procedure in May 2020, Poland had amended certain provisions of the Polish telecommunications law concerning the appointment and dismissal of the Heads of the UKE. With the same amending legislation, the Polish government prematurely dismissed the Head of the UKE as of May 2020, when his mandate should have lasted until September 2021. Under EU rules, the conditions that can result in an early dismissal of an NRA Head must be laid down before the start of the mandate. This is an important safeguard to guarantee the independence of the national regulatory authority from political pressure; a key principle of the EU telecoms regime which was safeguarded by the then applicable Framework Directive, and was recently underscored in the Electronic Communications Code.

Press release of the European Commission, "Commission refers POLAND to the Court of Justice of the European Union for undermining the independence of the national telecommunications regulator", 23 September 2021

https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4611

NATIONAL

BULGARIA

[BG] Implementation of Directive 2019/789 and Directive 2019/790 past deadline, but in the works

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

On 15 September 2021, a procedure for the public consultation on *Проект на Закон за изменение и допълнение на Закона авторското право и сродните му права* (draft Bill for the amendment and supplement to the Copyright and Neighbouring Rights Act – the BIll) was initiated by the *Министерство на културата* (Ministry of Culture).

The consultation is part of the mandatory process for transposing two of the, currently, most important EU directives concerning copyright and the TMT industry (technology, media and telecom industry): 1) Directive 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes; and 2) Directive 2019/790 on copyright and related rights in the Digital Single Market.

This consultation is expected to be the final step before the Bill is (eventually) approved by the Government and submitted to Parliament for voting and adoption. To add a bit of a background, the implementation process regarding the directives in Bulgaria started early on (in June 2020) with preliminary consultations initiated by the Ministry of Culture during which the most relevant stakeholders participated. The aim was to gather their views and use them as a basis for the preparation of a balanced draft bill. A final draft of the Bill, however, was only recently published – more than a year past the said preliminary consultations.

Moreover, the current public consultation was opened more than three months after the implementation deadline stated in the Directives had passed and after the European Commission (EC) had already opened infringement procedures against 23 Member States (including Bulgaria). The conflicting interests of all affected stakeholders and the controversies over some of the texts of the Directives have obviously had a great impact on this delay. Moreover, the political stalemate in the country (with third Parliamentary elections and a presidential election to be held in November), as well as the Covid-19 crisis have made the process even more complicated.

At this stage, the Bill seems to include all the mandatory requirements of Directive 2019/789 and Directive 2019/790 and introduces a handful of the

provisions that are left to the discretion of each Member State by EU legislation. However, it remains to be seen what the final draft will look like following the consultations, considering that the part of the transposing texts that is left to the discretion of Member States can change drastically.

The procedure for public consultation will be open until 15 October and in theory, a prolongation of this period is possible. In any case, it can be assumed that the Bill is unlikely to be voted on and adopted by Parliament earlier than the beginning of 2022. As major changes will follow from the adoption of the Bill, the industry will be closely monitoring all developments.

Публична консултация относно проект на Закон за изменение и допълнение на Закона за авторското право и сродните му права

http://mc.government.bg/page.php?p=141&s=852&sp=914&t=0&z=0

Public consultation on a Draft Bill for amendment and supplement to the Copyright and Related Rights Act

SWITZERLAND

[CH] Switzerland adopts new obligations for audiovisual services

Matthias Bürcher
Federal Office of Culture

After 18 months of deliberation, the Swiss Parliament has adopted a revision of the *Filmgesetz* (Federal Act on Film Production and Film Culture – FiG) on 1 October 2021. The law introduces a quota for European works for non-linear services, as well as an investment obligation for both linear and non-linear services. The regulation closely follows the framework of the Audiovisual Media Services Directive (AVMSD) of the European Union. The volume of investment to films and audiovisual content is expected to increase by CHF 18 million per year.

Non-linear services must include in their offer at least 30% European films (quota) and assure that these titles are labelled and visible (prominence). The obligation also concerns services outside Switzerland if their target public includes Switzerland. Exceptions are made for services with low turnover, showing few films or special interest programs. The 50% quota for linear television is still valid and regulated in the *Bundesgesetz über Radio und Fernsehen* (Federal Act on Radio and Television – RTVG).

Both non-linear and linear services must devote 4% of their turnover to the funding of Swiss films or official co-productions. The obligation concerns private broadcasters, foreign broadcasters with a publicity window to Switzerland, TVOD and SVOD platforms, as well as telecom services providing film content. The public service broadcaster SRG-SSR is not included, because its investment obligation is subject to a separate licence agreement with the government. Free services are not included, either. Exceptions are made for services with low turnover, showing few films or special interest programs. For linear services, the new investment obligation replaces the current obligation in the Radio and Television Act.

The funding will mostly go to Swiss films and official co-productions, which includes theatrical films, but also to narrative audiovisual productions, as long as they comply to the definition of film in the Film Act. The producer of the film must be independent from the service. The service can either buy the licences of existing films, commission or co-produce a film.

Alternatively, the service can invest in publicity for Swiss films and co-productions (up to CHF 500 000 per year), or support institutions that support films (regional funds, festivals). If the service, within a timeframe of four years, does invest less than 4%, then a subsidiary fee is due.

The services must apply to a public registry. Foreign services must indicate a mailing address in Switzerland and specify the responsible persons. The services must report annually on quota, turnover and investment activities. Online services must further communicate the number of views by title. This data can be published periodically. The communication obligation was already introduced in 2016.

The law is still subject to a possible referendum and is expected to be effective on 1 January 2023. The *Bundesamt für Kultur* (Federal Office of Culture - BAK) is charged to implement the law. A decree from the government will further detail the definitions of turnover, film scope, independence of the producer and the production, and investment types.

Filmgesetz – Änderung vom 1. Oktober 2021

https://www.fedlex.admin.ch/eli/fga/2020/727/de

Film Act – revision of 01 October 2021

CYPRUS

[CY] The law of the Public Service Media to incorporate provisions of the Directive 2018/1808/EU

Christophoros Christophorou
Council of Europe expert in Media and Elections

A draft law, amending Chapter 300A of the Law on the Cyprus Broadcasting Corporation, is under discussion in the parliamentary committee on Internal Affairs of the House of Representatives. The draft law would transpose into the law of the public service media (Cyprus Broadcasting Corporation — CyBC) provisions of the new AVMS Directive 2018/1808/EU, as well as introducing other changes.

The main sections of the European Directive that would be incorporated into CyBC's law are the following:

New and amended definitions. Advertising, their distinction from programmes, their timing, duration, placement and prohibited products from advertising. Rules governing the content of advertising in respect of human rights, non-discrimination and the protection of children. Rules on product placement. Access to programmes for persons with disabilities. CyBC's contribution and role in media education, in cooperation with the Radio Television Authority. Programmes provided by and obligations of CyBC in respect of human rights, the protection of minors and their personal data, and the use of means that can ensure the attainment of these goals. Special rules relating to the advertising of children's toys, of gambling and betting services are also included in the draft law. They refer to the timing, the duration and the content of such advertising, as well as to rules they must respect in order to protect minors. The Authority is vested with special powers to monitor and to request the immediate withdrawal of advertisements that may be considered to impair the safety and or development of children.

Επίσημη εφημερίδα , Παράρτημα Έκτο - Νομοσχέδια, 14 Ιουνίου 2021, σσ. 1312-1322.

https://www.mof.gov.cy/mof/gpo/gpo.nsf/All/8D40224EFD72DCA3C22586F40024299F?OpenDocument

Official Gazette, Appendix Six – Draft Laws, 14 June 2021, pp. 1312-1322.

[CY] A draft law for the transposition of the AVMS Directive 2018/1808/EU into national Law

Christophoros Christophorou
Council of Europe expert in Media and Elections

A draft law amending the Law on Radio and Television Organisations N.7(I)1998 is under discussion in the parliamentary committee on Internal Affairs of the House of Representatives aiming at the transposition of the Directive 2018/1808/EU into Cyprus Law.

The draft law will incorporate the amendments of the AVMS Directive 2010/13/EU, introduced with the 2018 Directive, and further amend the Cyprus Law in compliance with provisions of the new Directive. They include, among others, the following:

A new section explicitly provides for the independence of the Cyprus regulator, the Radio Television Authority, from the government and any other body. The Authority should not seek or receive any advice from any entity. However, its supervisory authority, the Minister of the Interior may give advice to the Authority of a general nature, in relation to its competences, which are necessary for the interests of the Republic. Procedures for the appointment of the Authority's Chairperson and members should be transparent and the Authority should also be self-sufficient and independent in terms of human and material /financial resources.

The competences of the Authority are extended on video-sharing platforms, in terms of ensuring compliance with the Law and imposing sanctions for eventual violations. The Authority may also introduce by law measures that give it powers to access media ownership data, provided that privacy offered by law is respected.

In addition to transposing provisions of the Directive, the amending law provides for the following:

The Authority is vested with the power to decide on the licensing procedures and the application documents for the granting of permanent licences. Instead of the existing ten-year validity, the draft suggests that the duration of a licence for audiovisual services is cut down to five years.

A derogation is proposed in relation to the requirements (share-holding, structure, management, etc.) for granting a licence; if the service provider is linked with a legal person of public law, the Authority could disregard any requirements applied for private/commercial entities.

The section on procedures relating to the drawing of a radio frequencies plan refers to the provisions of the Radio Communications Law and the competencies on the matter of the Directorate of Radio Telecommunications, which is under the newly established deputy minister of Research Innovation and Digital Policy.

Finally, the Council of Ministers can dismiss an Authority's member for inability to respond to terms related to the execution of duties guaranteeing the independence and transparency of work of the Authority.

Επίσημη Εφημερίδα, Παράρτημα Έκτο - Νομοσχέδια, 15 Απριλίου 2021, σσ. 633-663

https://www.mof.gov.cy/mof/gpo/gpo.nsf/All/E90F9A3EA0619715C22586B800290847?OpenDocument

Official Gazette, Appendix Six – Draft Laws, 15 April 2021, pp 633-663

[CY] Extension of Temporary Television Licences for one Year to June 2022

Christophoros Christophorou
Council of Europe expert in Media and Elections

Following the switch-over to digital television in July 2011, Cyprus audiovisual media service providers continue to operate with temporary digital licences. The latest extension of licences will be until the end of June 2022. Law 74(I)/2021, amending the basic Law on Radio and Television Organisations (L. 7(I)/1998), authorises the Radio Television Authority to extend the validity of television licences for all operating service providers for one more year. The law was published in the Official Gazette on 28 April 2021. Amendments to the basic Law 7(I)/1998 that would reflect the conditions of the new environment and make it possible to issue permanent licences have been pending for many years. Various amendments were made to the law but none of them have addressed the issues that would enable the issuing of permanent (normal) digital licences. Thus, temporary licences have now been extended until 30 June 2022.

By virtue of the same amending law, temporary licences granted to Legal Entities of Public Law (LEPL) have also been extended for one year, even in cases where they do not fulfil all of the requirements set out by law. This is applicable to *Αρχή Τηλεπικοινωνιών Κύπρου* (Cyprus Telecommunications Authority — CYTA), a semi-governmental organisation that also operates IPTV. Its capital share and structure as a LEPL deviates from the model set in the basic law, which requires, amongst other things, capital share dispersion and a ceiling of 25% per shareholder. CYTA has so far benefited from a special provision voted on in 2011, allowing it to continue to operate in the digital environment.

The amending law also authorises the Radio Television Authority to issue temporary licences to new applicants, also valid until the aforementioned date - the of end June 2022.

This extension of temporary licenses for one year may be the last one and permanent digital licences may be issued before June 2022. This would be possible after a draft law — amending the basic law on Radio and Television Organisations in order to transpose into national law Directive 2018/1808/EU — is adopted by the House of Representatives. In addition to the transposition of the Directive, the draft law provides that the Radio Television Authority is vested with the power to decide on the procedure for the granting of digital licences and the required application documents.

The same draft law provides for a derogation from the obligations of applicants to have a specific shareholding structure, as well as other features in the case of LEPLs, such as the case of CYTA mentioned above.

Finally, while the validity of analogue licences (before the switch-over to digital) used to extend to ten years, the draft law provides for a reduced period of five

years, for digital licences.

Νόμος 74(I)2021 που τροποποιεί τους περί Ραδιοφωνικών και Τηλεοπτικών Σταθμών Νόμους του 1998 έως αρ.2 του 2020

http://www.cylaw.org/nomoi/arith/2021_1_074.pdf

Law 74(I)2021 Amending the Law on Radio and Television Organisations 7(I)1998

GERMANY

[DE] Calls for tender to determine offers that must be easy to find on user interfaces in accordance with “public value” rules

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

On 1 September 2021, the 14 German *Landesmedienanstalten* (state media authorities) published calls for tender pursuant to Article 84 of the *Medienstaatsvertrag* (state media treaty – MStV) in order to determine offers that must be easy to find in user interfaces. Separate calls for tender for video and audio services must be organised in accordance with Article 3(1)(2) of the state media authorities’ *Public-Value-Satzung* (public value rules). They mark the start of the process described in Article 84(5) MStV for determining so-called public value offers of private media (i.e. those that make a significant contribution to the diversity of opinions and offers) which, under the new provisions of the MStV, must be “directly accessible and easy to find” in user interfaces. The calls for tender deliberately leave a degree of flexibility, especially with regard to the individual parts of the application and the documentation that must be submitted under Article 4 of the *Public-Value-Satzung*. This particularly reflects the wide variety of expected applicants (broadcasters, broadcast-like telemedia, telemedia pursuant to Article 2(2)(14)(b) MStV and software-based applications that serve to control them).

The media authority responsible for the determination process is the *Landesanstalt für Medien NRW* (North-Rhine Westphalia media authority). The *Kommission für Zulassung und Aufsicht* (Commission on Licensing and Supervision – ZAK) helps it to fulfil this task in accordance with Articles 105(1)(9) and 104(2)(2) MStV.

According to Article 4(2) of the *Public-Value-Satzung*, in their application for public value status, applicants must include documents that can be used to verify the contribution made, by the audio or video offer, to the diversity of opinions or offers. The *Landesanstalt für Medien NRW* checks the applications, ensuring that the conditions for determining the offer under the *Public-Value-Satzung* are met. For each audio or video offer, the ZAK makes a decision on whether the relevant conditions are met. Its findings are valid for three years from the date recorded in the administrative decision of the *Landesanstalt für Medien NRW*. In accordance with Article 9 of the *Public-Value-Satzung*, the audio and video offers that are awarded public value status are published in a list on the *Landesmedienanstalten* website (“die medienanstalten”) for implementation by providers of user interfaces.

According to Article 7(1) of the *Public-Value-Satzung*, when determining the audio and video offers in accordance with Article 84(3)(2) and 84(4) MStV, only the

criteria listed in Article 84(5) MStV should be taken into account. These are: 1. the amount of time spent reporting on political and historical events, 2. the amount of time spent reporting on regional and local information, 3. the ratio between in-house productions and programme content produced by third parties, 4. the quota of accessible offers, 5. the ratio between trained employees and employees who still need to be trained, involved in creating the programme, 6. the quota of European productions, and 7. the quota of offers for young target groups. The definitions contained in Article 7(2) of the *Public-Value-Satzung* apply, unless different definitions are used in the *Medienstaatsvertrag*. An overall view is taken in accordance with the principles enshrined in Article 8 of the *Public-Value-Satzung*.

The deadline for submitting applications is 30 September 2021. A longer deadline would have meant delaying the decision on which private offers should be easy to find. With the obligation to make subsidised public offers easy to find entering into force on 1 September 2021, any such delay should be avoided.

Ausschreibungen der Landesmedienanstalten zu Public-Value-Inhalten

https://www.die-medienanstalten.de/ausschreibungen

State media authority calls for tender for public value content

[DE] Federal Supreme Court rules on influencers' advertising obligations

Mirjam Kaiser
Institute of European Media Law

In three rulings published on 9 September 2021, in relation to the well-known German social media influencers Leonie Hanne, Cathy Hummels and Luisa-Maxime Huss (case nos. I ZR 90/20, I ZR 125/20 and I ZR 126/20), the *Bundesgerichtshof* (Federal Supreme Court – BGH) decided whether influencer posts should be labelled as advertising.

The proceedings were instigated by an association in competition, which had accused the influencers of engaging in surreptitious advertising pursuant to Articles 8(1)(1), 8(3)(2), 3(1) and 5a(6) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG). According to these provisions, unless an exemption applies, a case can be brought against an entrepreneur who engages in an unlawful commercial practice such as failure to identify the commercial intent of a commercial practice.

The first case (no. I ZR 90/20) concerned a post by Luisa-Maxime Huss, a fitness influencer who uses her Instagram account to post images and video clips of sports exercises, fitness tips and nutrition advice, as well as operating a commercial fitness website offering exercise classes in return for payment. In one of her Instagram posts, she had presented a brand of raspberry jam, along with a so-called "tap tag", which when tapped took the user to the jam manufacturer's website. However, the post had not been labelled as advertising, even though she had been paid for posting it.

In this case, the BGH decided that the post was a commercial practice, within the meaning of Article 2(1)(1) UWG, because the depiction of the jam worked in the manufacturer's favour and the defendant had been remunerated. However, it ruled that the link to the company using a "tap tag" was not, on its own, sufficient to constitute a commercial practice. Rather, it was the overall impression of the post, which was "overly commercial", presenting products without any critical distance or only in a positive light, that made it a commercial practice. In this case, Article 5a(6) UWG had been infringed because the failure to label the post as advertising meant that its commercial intent, which was not clear from the circumstances, had not been sufficiently identified. The BGH also found that the post had breached Article 22(1)(1) of the *Medienstaatsvertrag* (state media treaty – MStV), which requires telemedia, such as the Instagram app, to make advertising clearly recognisable as such and distinctly separate from the other content of the offers provided. In the court's opinion, the influencer had rightly been ordered to remove the post without an advertising label.

The second case (no. I ZR 125/20) concerned beauty, fashion and lifestyle influencer Leonie Hanne, who posted pictures of herself on these themes. The defendant had posted some images without labelling them as advertising and had

therefore been accused of surreptitious advertising. In the BGH's opinion, however, she had not infringed Article 5a(6) UWG because the commercial nature of her posts was clear from the fact that they advertised her own company's products. The court pointed to the fact that she had 1.7 million followers and that her account was mainly used for commercial purposes. Followers would therefore be expected to know that posts from her account would generally be advertising. The provisions of Article 6(1)(1) of the *Telemediengesetz* (Telemedia Act – TMG), concerning commercial communication in telemedia, and those of Article 22(1)(1) MStV, concerning advertising in telemedia, were market conduct rules specific to the telemedia sector. The media law assessments expressed in these specific provisions should not be undermined by the application of the general competition law provisions of Article 5a(6) UWG. The notion of consideration, provided for in Article 6(1)(1) TMG and Article 22(1)(1) MStV, only applied to the promotion of third-party companies and not self-advertising.

In the final case (no. I ZR 126/20), the influencer Cathy Hummels had failed to label posts as advertising, although she always marked her posts with the note "paid partnership". Here also, the court ruled in the influencer's favour. Although her posts constituted commercial practices, they were always advertising her own company, so she had not violated Article 5a(6) UWG. The commercial intent was clear from the circumstances, according to the BGH.

Labelling obligations for influencers are currently a subject of fierce debate in Germany, from both media law and competition law perspectives. Most of the discussion is centred on how big a channel needs to be before it can be regarded as commercial, the definition of advertising, and when and how posts should be labelled. The BGH's decisions have provided some clarity on the subject, but the answers to these questions will continue to depend on the circumstances of the individual case.

Urteil des Bundesgerichtshof vom 9.9.2021 (I ZR 90/20)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=122152&pos=0&anz=1

Federal Supreme Court decision of 9 September 2021 (I ZR 90/20)

Urteil des Bundesgerichtshof vom 9.9.2021 (I ZR 125/20)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=122155&pos=0&anz=1

Federal Supreme Court decision of 9 September 2021 (I ZR 125/20)

Urteil des Bundesgerichtshof vom 9.9.2021 (I ZR 126/20)

http://juris.bundesgerichtshof.de/cgi-

bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=122158&pos=0&anz=1

Federal Supreme Court decision of 9 September 2021 (I ZR 126/20)

[DE] TikTok deletes 91 Nazi profiles and 169 violent videos following media authority warning

Mirjam Kaiser
Institute of European Media Law

According to a press release published on 29 July 2021 by the *Medienanstalt Hamburg/Schleswig-Holstein* (Hamburg/Schleswig-Holstein media authority – MA HSH), one of Germany's 14 media regulators, the TikTok social media platform recently deleted 91 profiles and 169 videos containing either Nazi references or scenes of violence that could be harmful to minors after receiving a notification from the MA HSH.

The TikTok platform is a video portal that enables users to upload music videos or short video clips. It also includes social networking features and is operated by the Chinese company ByteDance.

The MA HSH notifications concerned violations of Article 4(1)(1)(2) of the German *Jugendmedienschutz-Staatsvertrag* (state treaty on the protection of minors in the media – JMStV). Under this provision, telemedia content is illegal if it uses insignia of organisations prohibited under the German Constitution, as defined in Article 86a of the *Strafgesetzbuch* (Criminal Code – StGB). In this case, the profiles and videos contained Nazi symbols such as swastikas, SS runic insignia and the skull and crossbones. These symbols fall under Article 86a StGB, which prohibits their dissemination on account of their association with the Nazi regime in Germany.

According to the MA HSH, the profiles and videos concerned could have a frightening and harmful effect on children and young people, which is why they were prohibited. As part of its investigation, the MA HSH also found 169 other TikTok videos that it thought would have a similar effect. These included scenes of violent fighting and dismemberment from 18-rated computer games such as "*Mortal Kombat*", "*Resident Evil*" and "*The Last of Us*".

TikTok paid particular attention to the notifications received from the MA HSH concerning the 91 profiles, the videos containing Nazi references and the 169 violent videos, because the media regulator holds "preferential reporting status", which enables it to contact the social media operator directly. It acquired this status in July 2021 by becoming a member of TikTok's "Government Reporting Channel". It also holds a similar position in relation to YouTube, Facebook and Instagram, enabling it to contribute to the fight against unlawful content and online hate.

Pressemitteilung der MA HSH

https://www.ma-hsh.de/infothek/pressemitteilung/nach-ma-hsh-meldung-tiktok-loescht-91-nazi-profile-und-sperrt-169-gewaltvideosma-hsh-jetzt-auch-bei-tiktok-mit-bevorzugtem-meldestatus.html

Hamburg/Schleswig-Holstein media authority press release

SPAIN

[ES] The CAC approves the report on the CCMA's fulfillment of its public service missions in 2019

Mònica Duran Ruiz
Catalan Audiovisual Council

The Plenary session of the regulatory authority, *Consell de l'Audiovisual de Catalunya* (Catalan Audiovisual Council — CAC), held on 8 September, approved Agreement 73/2021 on the *Corporació Catalana de Mitjans Audiovisuals*' (Catalan Media Corporation — CCMA) fulfilment of the public service missions assigned by *Ley 22/2005, de 29 de diciembre, de la comunicación audiovisual de Cataluña* (Law 22/2005, of 29 December, on audiovisual communication in Catalonia — LCA). The CAC report analyses the content broadcast and disseminated by the CCMA during 2019.

Among the items treated in the CAC report, it is relevant to mention that, according to the monitoring, the topics that received the most attention on TV3 —the main television generalist channel — were, in order, the relationship between Catalonia and Spain (largely due to the monitoring of the trial in the Supreme Court), international politics, and cultural events.

Regarding political pluralism, the CAC report states that the Government of Catalonia is the executive body that gathers the most speaking time on both TV3 (15.4%) and Catalunya Ràdio (22.1%), unlike in 2018, when it was behind the State executive. In 2018 its presence was reduced because it had not taken office until half a year later, when the application of Article 155 of the Spanish Constitution, whereby Catalonia's autonomy had been temporarily suspended, was lifted. Among the groupings of parties, the interventions of PSC/PSOE (Catalan and Spanish Socialist parties) *with Units per Avançar* are the ones that accumulate the most time on TV3's newscasts, while PDECAT with JUNTSxCAT and the *Crida Nacional per la República* come first on Catalunya Ràdio.

As for language and culture, the report states that the different television and radio channels have Catalan as their main language and Aranese is used in certain broadcasts. Catalan is also the language used in more than 85% of commercials, a figure slightly higher than in 2018 (83.6%). Concerning culture, the report outlines that the CCMA contributes to the promotion of the Catalan cultural industry through various channels, one of which is the broadcasting of programs developed with the participation of independent producers. In 2019, the weight of those productions represented 26.7% of the production time made by TVC (the broadcasting arm of CCMA, whose main channel is TV3) in Catalonia, almost five percentage points more than in the previous year.

In relation to the presence of women, this decreases compared to 2018 and stands at 26.9% on TV3 and 29.9% on Catalunya Ràdio. On another note,

according to the CAC report, the CCMA addresses the diversity of Catalan society both across the grid and within specific programming. Programmes for minors are also very relevant. The CCMA channel that is specifically aimed at children and young people is Super3, which in 2019 increased its broadcasts by half an hour a day.

The CAC report also monitors the implementation of accessibility mechanisms for people with functional diversity. With records similar to 2018, the CCMA televisions channels, broadcast content adapted for people with hearing impairments with the use of subtitling and sign language. The audio description mechanism for the visually impaired significantly increased compared to 2018. In addition, the audio-description service built into on demand content was maintained.

Informe en relació amb el compliment de les missions específiques del servei públic de competència de la Generalitat de Catalunya. Any 2019.

https://www.cac.cat/sites/default/files/2021-09/Informe Servei P%C3%BAblic 2019.pdf

CAC Report in relation to the fulfilment of the specific public service missions competence of the Government of Catalonia. Year 2019 (Agreement 73/2021)

[ES] Audiovisual service providers established in Spain comply with their obligations to finance European works

María T. García Leiva & Pedro Gallo Buenaga

The independent state body responsible for ensuring the proper functioning of the markets in Spain, the CNMC (*Comisión Nacional de los Mercados y la Competencia*), has published a report on the obligation to finance European works in 2019. The dossier reveals a small decrease in investment, compared to the previous year's data, especially in relation to series in the different official languages of the country.

The obligation of advance funding, to which audiovisual service providers established in Spain are subject to, is set out in the *Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual* (General Law on Audiovisual Communication 7/2010): Article 5.3 stipulates that private providers must earmark 5% of their annual revenue to the financing of European works (6% in the case of public operators). In this regard, the total volume of funding fulfilled in 2019 was EUR 360 054 781.26, which represents 7.6% less than the revenue of 2018.

The CNMC monitored this obligation considering a total of 21 audiovisual service providers. As already mentioned, one of the most noteworthy aspects of the report is the decrease in investment in series in the official languages of Spain, which departs from the growing trend recorded in this segment since 2015. Overall, the proportion of investment in series, both in official languages in Spain and in other European languages, accounts for 74.7% of the total investment. In any case, the decrease has been offset by a slightly higher investment in European series production as well as in cinema.

The main investor in European works has been Telefónica-DTS with 27.8%, closely followed by the public corporation RTVE with 25.7% and Atresmedia with 21.5%. Mediaset ranks fourth in terms of the amount of its investment. In general terms, it can be said that in 2019 there was a high level of compliance with the obligation of the operators established in Spain.

Nevertheless, as noted in the report, the latest revision of the Audiovisual Media Services Directive (AVMSD) has yet to be transposed into national legislation. Therefore, some notorious players operating in the Spanish audiovisual market are excluded from complying with the obligation of advance funding. This is the case of so-called over-the-top platforms (OTT), established abroad, that market audiovisual services, such as Netflix, HBO or Prime Video. In accordance with the AVMSD, these players shall be brought into line with this obligation by 19 December 2022.

Informe sobre el cumplimiento en el ejercicio 2019, de la obligación de financiación anticipada de la producción europea de películas

cinematográficas, películas y series para televisión, documentales y series de animación (FOE/DTSA/024/20/ANUAL2019)

https://www.cnmc.es/expedientes/foedtsa02420

Report on the fulfillment of the obligation of pre-financing of the European production of cinematographic films, films and series for television, documentaries and animated series in the financial year 2019 (FOE / DTSA / 024/20 / ANUAL2019)

FRANCE

[FR] CSA considers Eric Zemmour an actor in national political debate and asks audiovisual media to measure his speaking time

Amélie Blocman
Légipresse

At its plenary assembly on 8 September, the board of the *Conseil supérieur de l'audiovisuel* (the French audiovisual regulator – CSA) decided to ask audiovisual media to start measuring the amount of airtime given to essayist and polemicist Eric Zemmour in relation to the national political debate from the following day. Zemmour, who appears to be on the verge of standing in the presidential election, had been making daily appearances on the programme "Face à l'info" broadcast on channel C8 and watched by around 700 000 viewers between 7pm and 8pm each evening. The CSA is responsible for monitoring compliance with the rules on political pluralism in accordance with its decision no. 2017-62 of 22 November 2017, under which a third of airtime devoted to political speeches should be reserved for speeches by the president of the Republic, ministers and their colleagues. As regards the remaining two thirds, "broadcasters should ensure that the political parties and groups that represent the main strands of national political opinion are given a fair share of airtime in accordance with their representativeness".

The CSA considered that "in view of recent developments, Mr Zemmour could now, as a result of not only his statements and actions, but also the debate that they provoke, be regarded as an actor in the national political debate."

On 13 September, noting the CSA's decision, the channel C8 announced that Eric Zemmour would no longer appear as a commentator on the programme "Face à l'info". "Although Eric Zemmour has not declared himself a candidate in the presidential election to be held in seven months' time, the CSA's decision of 9 September means that CNews and Eric Zemmour can no longer continue the programme they were making together," said the channel in a press release. It added that it "regrets the decision, which deprives millions of TV viewers of the chance to hear the commentator's views." On the same day, Zemmour was acquitted by the Paris appeal court after being charged with causing public offence and provoking racial hatred in a speech on immigration and the place of Islam in France at the *Convention de la droite* (right-wing convention), which had been broadcast live on the channel LCI.

Eric Zemmour had already announced, in early September, that he would stop writing a weekly column in the le Figaro daily newspaper in order to promote his book "La France n'a pas dit son dernier mot", which was published on 16 September. Following the CSA's decision, the channel Paris-Première also announced the suspension of the programme "Zemmour & Naulleau" and of its collaboration with the polemicist, which had been due to resume for a new season

at the end of September.

Le CSA demande aux médias audiovisuels de décompter les interventions de M. Éric Zemmour portant sur le débat politique national.

https://www.csa.fr/Informer/Espace-presse/Communiques-de-presse/Le-CSA-demande-aux-medias-audiovisuels-de-decompter-les-interventions-de-M.-Eric-Zemmour-portant-sur-le-debat-politique-national

CSA asks audiovisual media to measure the speaking time of Eric Zemmour in relation to the national political debate

[FR] CSA reviews measures to combat the manipulation of information on online platforms

Amélie Blocman
Légipresse

The *loi du 22 décembre 2018 relative à la lutte contre la manipulation de l'information* (Law of 22 December 2018 on combating the manipulation of information), requires online platform operators to cooperate in this area. For the second year, 11 such operators notified the CSA (the French audiovisual regulator) of the methods they had implemented in the fight against the dissemination of false information: Dailymotion, Facebook, Google (Google Search and YouTube), LinkedIn, Microsoft (Bing and Microsoft Advertising), Snapchat, Twitter, Unify (Doctissimo), Webedia (Jeuxvideo.com), the Wikimedia Foundation (Wikipedia) and Verizon Media (Yahoo Search).

Although the standard of the responses varied hugely, the CSA began by highlighting the progress made in terms of quantity and quality of declared information compared with the previous year. Nevertheless, it called for greater cooperation in certain key areas, such as the operation of algorithmic recommendation and moderation systems, the fight against manipulation of information in the advertising field and the provision of data required for a better understanding of these issues. To this end, the CSA encouraged operators, in particular, to supply more information (confidentially if applicable) on their algorithms, especially algorithmic content recommendation systems.

The declarations also reflected the efforts made by the operators in response to an overabundance of false information linked to the health crisis. While special attention had been paid this year to the measures taken in response to this extraordinary situation, the CSA also noted the implementation of some of the recommendations that it had formulated last year and urged platforms to continue to work this way in the future.

In order to provide more information to the public, the CSA urged the operators to improve the transparency of the measures taken and of their impact. With this in mind, the CSA was taking action itself in the fight against the manipulation of information as part of a process of increased transparency. To this end, in addition to the assessment of the measures implemented by the operators, it had published the declarations produced by the operators for the preparation of this assessment.

The CSA welcomed the meaningful work undertaken to promote content from companies, press agencies and audiovisual communication services, and the partnerships entered into in this regard, and encouraged the platforms to adopt them in the long term. New initiatives had also been taken by some operators against accounts spreading massive amounts of false information and coordinated influence operations. Nevertheless, the CSA noted the lack of information passed on to users on the resulting risks, and wanted to see increased collaborative work

between the actors to fight against such practices.

The CSA also noted a slight improvement in the methods implemented in the fight against commercial communications that carry false information, in particular in the establishment of advertising libraries. However, it called for more quantified data to be provided for a better understanding of the risks involved.

In this general context and with the 2022 elections approaching, the CSA announced that it would pay particular attention to the measures deployed by operators to prevent and, where appropriate, counter these risks of massive manipulation of information, while maintaining freedom of communication.

Lutte contre la diffusion de fausses informations sur les plateformes en ligne, Bilan 2020 du CSA

https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Lutte-contre-les-infox-le-CSA-publie-le-bilan-des-mesures-mises-en-oeuvre-par-les-plateformes-en-ligne-en-2020

CSA, The fight against the manipulation of information on online platforms. Review of measures implemented in 2020.

[FR] Fight against hate speech and illegal online content: new obligations imposed on CSA-monitored platforms

Amélie Blocman
Légipresse

The *loi confortant le respect des principes de la République* (law reinforcing respect of the principles of the Republic), which aims to combat separatism, was published in the Official Gazette on 25 August 2021. Chapter IV of the law contains a substantial range of measures designed to fight hate speech and illegal online content.

Anticipating the transposition of the future European Digital Services Act (DSA), in particular the section concerning online hate, the legislator added an Article 6-4 to the *loi pour la confiance en l'économie numérique* (law on trust in the digital economy – LCEN) of 21 June 2004. The provision imposes new obligations on content-sharing platforms, social networks and search engines regarding the moderation of unlawful content, cooperation with public authorities, transparency in relation to their policy and methods for dealing with hateful content, risk assessment and the creation of systems for users to report illegal content.

Article 6-4 LCEN will apply, until 31 December 2023, pending the adoption of the Digital Services Act .

The law gives the CSA (the French audiovisual regulator) supervisory powers over the moderation systems set up by platforms (new Article 62 of the amended law of 30 September 1986). If operators flout these new obligations, the CSA will be able to fine them up to EUR 20 million or 6% of their global turnover.

A new procedure has been created to combat so-called mirror sites that copy illegal content that has been removed or blocked under court orders (Article 39 of the new law). It will be up to the administrative authority [PG2] to identify and classify illegal content and mirror sites, and to notify technical intermediaries so they can block the relevant content. It will be able to ask both Internet access providers and hosts to block access to content that is identical or similar to content that is deemed illegal under an enforceable court decision.

The law also creates an offence of endangering the life of others by disseminating information concerning their private, family or professional life, which has been added to Article 223-1-1 of the Criminal Code. This offence is committed when an attempt is made to expose a person or their family members to "a direct risk of an attack on them or their property". It is punishable with a three-year prison sentence and a EUR 45,000 fine. The penalty is increased to a five-year prison sentence and a EUR 75000 fine if the victim is a public servant, elected representative, journalist or minor.

Loi n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République publiée au Journal officiel du 25 août 2021

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043964778

Law no. 2021-1109 of 24 August 2021 reinforcing respect of the principles of the Republic, published in the Official Gazette on 25 August 2021

[FR] Health crisis: new funding for cinema operators

Amélie Blocman
Légipresse

Extending the measures introduced at the end of July to stimulate film exploitation by meeting cinemas' cash-flow and investment needs, the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC) announced, on 22 September, the creation of a new fund designed to offset some of the drop in income experienced by cinemas. The aim is to avoid any risk of economic failure that could impact the entire film industry. The lengthy enforced closure of cinemas from 28 October 2020 until 18 May 2021, as well as the health measures imposed when they reopened (limited capacities and curfews), had a lasting impact on the sector's finances. Cinemas have high fixed costs which are only partially covered by existing support measures such as the solidarity fund.

The CNC therefore announced the creation of one-off grants to help cinemas pay their fixed costs. The funding is available to cinemas operated by companies that received so-called "fixed-cost" support from the state under the terms of decree no. 2021-310 of 24 March 2021, up to a maximum of EUR 10 million for the first six months of 2021; to qualify, they must also have been open in 2020, or, if they were first established in 2020 but were prevented from opening by the health restrictions, they must prove that they intended to organise at least one screening for a paying audience before 31 December 2020.

Furthermore, selective one-off grants have been made available to small and medium-sized cinema operators (cinemas that, on average, during the two previous years, accounted for less than 1% of cinema entries in France, either alone or as part of a community of economic interests) which, despite the help they have already been entitled to from the CNC and other state support, find themselves in serious financial difficulties likely to jeopardise their long-term survival as a result of the measures taken to limit cinema attendances or close cinemas altogether.

It should also be noted that the renewal of licences granted before the health crisis to operators of cinemas that had submitted access plans could not be completed before the initial deadline. This was due to the unclear situation of the film exploitation market and the unsuitability of the economic data that the CNC needs to analyse when granting licences. To address this situation, under decree no. 2021-1219 of 23 September 2021, the licences granted to cinemas before the first emergency health measures were imposed in March 2020 were extended by 15 months.

Communiqué du CNC, 20 septembre 2021

https://www.cnc.fr/cinema/actualites/nouvelles-mesures-en-faveur-de-

lexploitation_1530165

National Centre for Cinema and the Moving Image press release, 20 September 2021

UNITED KINGDOM

[GB] Ofcom clears ITV for Piers Morgan's controversial comments about Meghan Markle

Alexandros K. Antoniou
University of Essex

On 1 September 2021, Ofcom, the UK's communications regulator, rejected a record of complaints about Piers Morgan's comments on *Good Morning Britain* in the wake of the Duke and Duchess of Sussex's interview with Oprah Winfrey.

Good Morning Britain (GMB) is a weekday morning news and discussion programme broadcast on ITV. On 8 March 2021, GMB was dominated by the interview between Oprah Winfrey and the Duke and Duchess of Sussex which had been broadcast overnight in the USA. Excerpts from the interview had been made publicly available ahead of its full broadcast in the UK that evening. The programme included a report on how the US was reacting to the interview and focused on two parts which revealed that the Duchess had contemplated suicide and that an unnamed member of the Royal Family had raised concerns about "how dark" her son's skin colour might be.

The following day, the lead presenter Piers Morgan made it very clear during the show that he did not believe a word of what Megan Markle had said, adding that if she read him a weather report, he wouldn't believe it. Mr. Morgan stormed off the GMB set after clashing with weather presenter Alex Beresford over his controversial remarks. By the end of the day, the mental health charity Mind had released a statement showing their deep concern over the statements aired in the show. This was rather awkward for ITV because of their 2021 *Get Britain Talking* mental wellness campaign, in which Mind is a partner. A strong public reaction ensued. Ofcom received more than 57,000 complaints about Mr. Morgan's comments on GMB, making it the most complained-about TV show in Ofcom's history. The same evening, ITV announced that the GMB host resigned from his role on the show after six (often confrontational) years.

The complaints received by the regulator can be grouped under two main categories. The first category related to concerns about Morgan's statements on the Duchess of Sussex's revelations about her mental health and suicidal feelings. The second category related to concerns about the presenter's dispute of the Duchess' personal account of her experiences of racism within the Royal Family during her time as a senior royal. The programme in question raised issues under Section Two of the regulator's Broadcasting Code which outlines standards for broadcast content in respect of harm and offence.

In particular, the rules engaged were Rule 2.1 which provides that "generally accepted standards must be applied to the content of television and radio

services […] so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material" and Rule 2.3 which requires that broadcasters must ensure that potentially offensive material is justified by the context. Under the latter, racist terms and material should be avoided unless their inclusion can be justified by the editorial content of the programme.

As far as the discussion of mental health and suicide in the programme is concerned, Ofcom held, in a 97-page-long ruling, that Piers Morgan was entitled to hold and express strong views that scrutinised the veracity, timing and possible motivations behind the allegations made by the Duke and Duchess of Sussex. Their interview was a major international news story that was a legitimate subject for debate in the public interest. Restricting such views would be "an unwarranted and chilling restriction" to the broadcasters' right to freedom of expression and the audience's right to receive information and ideas without undue interference (Article 10 of the ECHR). However, while the Broadcasting Code does not seek to curb broadcasters' right to include contentious viewpoints, compliance with the Code's rules must be ensured.

The regulator expressly acknowledged that Piers Morgan's statements of disbelief of Meghan Markle's suicidal thoughts had the potential to cause harm and offence to viewers. Without adequate protection by broadcasters, audience members (some of whom were likely to place weight on the presenter's opinions) may have been discouraged from seeking mental health support for fear of facing a similar reaction. As the Chief Executive of Mind explained in the charity's statement: "[…] when celebrities and high-profile individuals speak publicly about their own mental health problems, it can help inspire others to do the same. Sharing personal experiences of poor mental health can be overwhelming, so it's important that when people do open up about their mental health they are met with understanding and support."

Ofcom underlined their concerns about Mr. Morgan's apparent disregard for the seriousness of anyone expressing suicidal thoughts, but nevertheless took the view that the robust and direct challenge to his comments from other programme contributors provided important context for viewers throughout the programme. "Overall, adequate protection for viewers was provided and the potentially harmful and highly offensive material was sufficiently contextualised," Ofcom concluded. Thus, on balance, the programme was not found in breach of Rules 2.1 and 2.3 in respect of the discussion on mental health and suicide. Although the regulator ruled in Mr. Morgan's favour, it reminded ITV to be more cautious when discussing sensitive issues around mental health, e.g., through the use of timely warnings or signposting of support services.

A similar reasoning was followed in relation to the second category of complaints about race. Ofcom considered that the conversations in the programme provided an open and frank debate on the nature and impact of racism, about which there is a high public interest value. Given the seriousness of the allegations made in the interview to Oprah Winfrey, it was legitimate to discuss and scrutinise these

claims. The programme included, however, several contributors who could speak "decisively and with authority" on racial issues, meaning that a range of views was represented, and Mr. Morgan's comments were directly challenged on several occasions. Despite the strong opinions expressed in the programme, which could be highly offensive to some viewers, any potential offence was justified, according to the regulator's view, by the broader context; hence, the comments were not found to be in breach of Rule 2.3 of the Code.

Speaking at a Royal Television Society conference in September 2021, the Chief Executive of Ofcom, Dame Melanie Dawes, defended the regulator's ruling as "quite a finely balanced decision" but "pretty critical" of Piers Morgan. However, BBC presenter Clive Myrie, who interviewed Dame Dawes at the event, told her: "The media forums that I'm on, which include a lot of black broadcasters and producers and people in the industry, were very upset at the Ofcom ruling concerning Piers Morgan, which was about his comments and views on mental health issues, but that race element is there. And their sense is that it [Ofcom] is too white an organisation and would never understand why that ruling was so upsetting to so many people."

Piers Morgan was recently nominated for best TV presenter at the 2021 National Television Awards. On 15 September 2021, it was reported that he would be joining a Rupert Murdoch-owned network as a host of a new show that is planned to air in the US, UK and Australia.

Ofcom Broadcast and On Demand Bulletin, Issue 433 (1 September 2021)

https://www.ofcom.org.uk/__data/assets/pdf_file/0024/223746/Good-Morning-Britain,-ITV,-8-March-2021,-0600.pdf

Mind responds to the Duchess of Sussex, Meghan Markle's interview

https://www.mind.org.uk/news-campaigns/news/mind-responds-to-the-duchess-of-sussex-meghan-markles-interview/

BBC News, Piers Morgan to launch new show on Rupert Murdoch-owned network

https://www.bbc.co.uk/news/entertainment-arts-58586493

LITHUANIA

[LT] Radio and Television Commission adopts rules for codes of ethics for audiovisual media services and video sharing platforms

Indre Barauskiene
TGS Baltic

On 8 September 2021, the *Lietuvos radijo ir televizijos komisija* (Radio and Television Commission of Lithuania — RTCL) approved the description of the requirements to be applied to codes of ethics for audiovisual media services providers and video sharing platform services providers, and for the evaluation of their effectiveness (*Sprendimas dėl Audiovizualinės žiniasklaidos paslaugų teikėjų ir dalijimosi vaizdo medžiaga platformos paslaugų teikėjų taikomų elgesio (etikos) kodeksų ar jų dalių veiksmingumo nustatymo tvarkos aprašo patvirtinimo;* the requirements).

According to the requirements, audiovisual media services providers and video-sharing platform services providers (the providers) must declare that their activities comply with the provisions of a specific code, within six months of its adoption, and inform the RTCL in writing within 30 days of the date of application of the selected legal norms. Those providers will then become bound by the provisions of the declared code and, consequently, they must inform the regulator of any changes and amendments to it.

The requirements also set out the basic terms and conditions that codes of ethics must conform with. For example, a code of ethics must specify its goals and objectives; the arrangements for regular, transparent, and independent monitoring and evaluation of the achievement of the set goals; and any relevant sanctions.

Providers or their associations must adopt a code or adhere to an existing code of behaviour (ethics) dealing with the appropriateness of audiovisual commercial communications aimed at children regarding the recommended moderate consumption of food and drink. Such a code may be adopted as a stand-alone document or as part of an existing code.

Following the provisions of the requirements, the effectiveness of any code of ethics can be evaluated upon receipt of a complaint from an interested party or at the initiative of the RTCL. When assessing the effectiveness of the code and its compliance with the requirements, the RTCL shall determine whether the objectives and goals pursued are clearly understood, whether they are in conformity with the applicable law, whether the procedures for achieving the objectives are properly implemented, and whether the sanctions are effective and proportionate.

If the RTCL finds that the code of ethics is not sufficiently effective, it will inform the provider and set a deadline for the provider to eliminate the deficiencies. In the cases when the provider fails to remedy the deficiencies within the deadline, the RTCL may impose additional requirements that could lead to administrative liability.

Lietuvos radijo ir televizijos komisijos 2021 m. rugsėjo 8 d. sprendimas Nr. KS-154 dėl Audiovizualinės žiniasklaidos paslaugų teikėjų ir dalijimosi vaizdo medžiaga platformos paslaugų teikėjų taikomų elgesio (etikos) kodeksų ar jų dalių veiksmingumo nustatymo tvarkos aprašo patvirtinimo

https://www.e-tar.lt/portal/lt/legalAct/e57ce400113c11ec9f09e7df20500045

Radio and Television Commission of Lithuania Decision No. KS-154 on approval of requirements applied to ethic codes of audiovisual media services providers and video sharing platform services providers and evaluation of their effectiveness, dated 8 September 2021.

NETHERLANDS

[NL] Google not required to reinstate Dutch MP's YouTube video on COVID-19

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 18 August 2021, the Amsterdam District Court (*Rechtbank Amsterdam*) delivered a notable judgment on YouTube's removal of a Member of Parliament's video in the run-up to the recent Dutch parliamentary elections. Crucially, the Court held that YouTube had not violated the politician's freedom of expression, and although YouTube has a "vast reach", it does not have an obligation to allow content that violates its COVID-19 misinformation policy.

The case involved Mr. Wybren van Haga, a Dutch politician and member of the House of Representatives (*Tweede Kamer*), who was critical of the Dutch government's COVID-19 measures. On 11 March 2021, Mr. van Haga uploaded a video to YouTube, entitled, "Is the [infection fatality rate] of Corona comparable to that of the flu? Yes!", and featured an interaction between the MP and the director of the National Institute for Public Health and the Environment's Centre for Infectious Decision Control, during a parliamentary committee hearing on the government's Covid-19 measures. During the hearing, the MP stated that "I still struggle a bit with those [infection fatality rates] (IFR), because I always say that the IFR of Covid is comparable to that of a severe flu". Two days later, YouTube removed the MP's video for violating YouTube's terms of service and Covid-19 misinformation policy, which prohibit "Content claiming that the symptoms, deaths, or contagiousness of COVID-19 are less severe than or as severe as those of a cold or the flu". On 17 March 2021, the final polling day of the Dutch parliamentary elections in 2021, the online news channel Blckbx.tv posted a video on its YouTube channel, of an interview with the MP, discussing YouTube's removal of the MP's video featuring the parliamentary committee clip. During the discussion, the MP stated that "With those mouth caps, it is of course the biggest farce we have experienced"; and "we have been saying for a long time that the IFR, the Infection Fatality Rate, is comparable to that of a severe flu". YouTube also removed this interview video on the same day for violating its Covid-19 misinformation policy.

Following the video removals, Mr. van Haga and Blckbx initiated legal proceedings against Google, seeking orders to have the videos reinstated on YouTube. At the outset, the Court examined the videos, and first held that Google was entitled to remove the videos on the basis of its terms of service, as the MP's statements comparing COVID-19 to the flu violated YouTube's Covid-19 misinformation policy. However, the Court then went on to examine whether this decision had been "unlawful" in light of the claimants' right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR).

First, the Court reiterated that under certain circumstances, the state may have a "positive obligation" under Article 10 ECHR to actively protect freedom of expression in legal relationships between private parties. However, the right to freedom of expression does not imply a right to the "forum" of one's choice. The Court admitted that it was "understandable" that the claimants prefer YouTube because of its "vast reach", but this is not enough to "compel" Google to tolerate claims that violate its COVID-19 policy. The Court noted that Google's Covid-19 misinformation policy is partly based on the EU Code of Practice on disinformation, and as such, was "responding to the call from governments to assist them in the fight against the spread of incorrect information about Covid-19". Furthermore, the Court held that Google's COVID-19 policy was also an elaboration of Google's right to property: in principle, it can set the rules that apply to its platform, including the rule that content that conflicts with its COVID-19 policy is deleted. As such, the right to property can also serve as a "legitimate restriction" on the freedom of expression of others.

Importantly, the Court emphasised that courts can only intervene when obstacles prevent "any effective exercise of freedom of expression", or if the "essence of the right has been destroyed". However, the Court held that this was not the case, as the claimants could also bring their opinions to the attention of the general public in other ways, with "many other channels" at their disposal. As such, YouTube does not have a social obligation to allow the statements of claimants, which are in violation of its COVID policy, nor to facilitate the claimants' contribution to the public debate. The Court concluded that there had been no violation of the claimants' freedom of expression, and dismissed the application for an order against Google.

Rechtbank Amsterdam, ECLI:NL:RBAMS:2021:4308, 18 augustus 2021

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2021:4308

Amsterdam District Court, ECLI:NL:RBAMS:2021:4308, 18 August 2021

[NL] Judgment on removal of political party's video and 7-day YouTube ban

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 15 September 2021, the Amsterdam District Court (*Rechtbank Amsterdam*) delivered a significant judgment on the removal of a Dutch political party's videos from YouTube, and the party's subsequent seven-day prohibition on uploading, posting or livestreaming via YouTube. Notably, building upon earlier case law from the Dutch courts (see IRIS 2020-10/16), the Court applied the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), but ultimately concluded that YouTube's removal of the videos and imposition of a seven-day upload ban, was not unlawful.

The case involved the Dutch political party *Forum voor Democratie*, and began on 17 March 2021, the final polling day of Dutch parliamentary elections in 2021, when the party posted a campaign video featuring a speech by the party's leader on the party's YouTube channel. A second video was posted by the party on 3 June 2021, featuring a speech by the party's leader in the House of Representatives (*Tweede Kamer*), during a debate on the government's Covid-19 measures. The videos included statements by the party leader which were critical of the Covid-19 measures, including criticising "locking up the whole country, half the world for a year and a half, because of a flu variation is insane", that "we walk around with those silly non-working mouth caps, that we stick to those completely nonsensical distance rules", and "blocking excellent first-line drugs, such as ivermectin". Notably, in mid-June, YouTube removed both videos for violating its terms of services and Covid-19 misinformation rules, and issued a "strike" against the party's account, meaning it was prohibited from uploading, posting or livestreaming via YouTube for seven days.

Following the video removals and seven-day ban, the party initiated legal proceedings against Google, seeking a court order for the videos to be reinstated on YouTube; and also sought an order requiring Google to give notice in advance of any proposed removal and an opportunity to object. The Court first held that Google was entitled to find that the videos violated YouTube's terms of service, in particular the party leader's statements criticising mouth caps, comparing Covid-19 to the flu, and claiming ivermectin was an effective treatment for Covid-19; which were statements all prohibited under YouTube's Covid-19 misinformation policy.

However, the Court then held that there may be grounds for deeming removal of the videos "unlawful", according to standards of "reasonableness and fairness", and in this regard, the party had invoked its right to freedom of expression under Article 10 ECHR. First, the Court reiterated that under Dutch law, the right to freedom of expression under Article 10 ECHR may apply in "private law relations". Notably, however, the right to freedom of expression is "not unlimited", and "does

not mean" that Google is obliged to tolerate the political party's statements which are contrary to its Covid-19 rules. Crucially, the Court held that on the basis of its property rights, Google "may in principle set its own rules that apply to its YouTube platform, including the rule that content that violates its Covid-19 policy is removed".

Further, the Court held that the right to freedom of expression does not imply a right to the "forum" of one's choice. The Court admitted that "being able to use a channel such as YouTube is of great importance in today's society in order to be able to propagate a message". However, this does not mean that YouTube has a social "must-carry" obligation for critical voices/political expressions. In addition, under Article 10 ECHR, the "bar for intervention by the government, or the courts, in the freedom of internet platforms to moderate the content published by them is high". Only if the measure prevents "any effective exercise" of freedom of expression, or if the "essence of the right has been destroyed", is the government (judge) obliged to intervene. Crucially, however, the Court held that the high bar had not been reached, as the claimants could bring their opinions to the attention of the public "through a variety of other channels", including the party's website, app, Facebook, Twitter, and Instagram. As such, the removal of the video was not a violation of the politician's freedom of expression and not unlawful.

Finally, the Court ruled there was no legal ground to prohibit YouTube from imposing restrictions on the political party's channel in the future without prior notice.

Rechtbank Amsterdam, ECLI:NL:RBAMS:2021:5117, 15 september 2021

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2021:5117

District Court of Amsterdam, ECLI:NL:RBAMS:2021:5117, 15 September 2021

ROMANIA

[RO] Clarification regarding the video section of an online publication

Eugen Cojocariu
Radio Romania International

On 8 September 2021, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council — CNA) issued a press release offering a clarification regarding video sections of online publications.

The press release, written for online publications that have separate video sections and for those that intend to provide audiovisual media services on demand, set out the information that the CNA had made known in its public meeting of 31 August 2021. Following the analysis of a petition regarding the video section of an online publication, it had identified two possible scenarios in relation to the provisions of Article 1 paragraph (1)(g) of Directive 2010/13/EU and of Article 2 paragraphs (1) and (2) of the CNA Decision no. 320/2012 on the provision of on-demand audiovisual media services.

First, the situation in question could be found in the editorial area of an online magazine. According to the definition given by Directive 2010/13/EU at Article 1 paragraph (1)(a), and taking into account Recital three of Directive (EU) 2018/1808, as well as the provisions of Article 2 paragraph (3) of the CNA Decision no. 320/2012, the editorial area of the online magazine did not represent an audiovisual media service. Not every webpage that contained short video sequences, as auxiliary elements, meant to be examples only, automatically fell within the notion of audiovisual media service and therefore, that aspect did not fall within the competence of CNA;

Second, there could be an autonomous section that met all the criteria established in the definition of on-demand audiovisual media services in accordance with the provisions of Article 1 paragraph (1) lit. g) of Directive 2010/13/EU and of Article 2 paragraph (1) and (2) of the CNA Decision no. 320/2012. In that case, the video section of a site *did* fall within the competence of the CNA, as that section represented an audiovisual media service and had to comply with the regulations in force.

In other words, not every online publication fell within the scope of the CNA's activity. Audiovisual materials inserted into articles published on a website only to illustrate news or information did not constitute on-demand audiovisual media services. However, if the publication had a separate section comprising strictly of audiovisual material, it was to be considered a video-on-demand service.

According to Article (1) paragraph (1)(a) of CNA Decision no. 320/2012, a video-on-demand service is a type of non-linear on-demand audiovisual media service,

which offers the user access, at his or her request and at the time chosen by him or her, to watch films, videos, shows, (live or recorded), as well as other types of video content which was brought together in a programme catalogue, regardless of the form in which they were selected and organised within that catalogue.

In this context, the CNA quoted the Court of Justice of the European Union (CJEU) in the case of *New Media Online*, resolved by Case C-347/14, "the offer of short videos may be subject to regulation on audiovisual media services. This is the situation when the respective offer has an autonomous content and function in relation to those of the journalistic activity of the online newspaper. (...) The Court emphasizes in this regard that, despite the audiovisual elements it contains, an electronic version of a newspaper should not be considered an audiovisual service if these audiovisual elements are secondary and serve only to supplement the supply of press articles written."

The CNA drew attention to the fact that that the provision of audiovisual media services — within the scope of the definitions provided in Article 1 paragraphs 1-3 of the Audiovisual Law no. 504/2002 — through any type of electronic communication network, including the Internet, was subject to the following legal obligations:

- a request for an audiovisual license, in the case of television services, pursuant to Articles 50-55 of the Audiovisual Law;

- notification of the audiovisual media service upon request, in accordance with the provisions of Article 74 paragraph (5) of the Audiovisual Law, as well as with the provisions of Article 3 paragraph (1) of the CNA Decision no. 320/2012, which stipulates the obligation to notify the Council at least 7 days before the beginning of the activity.

Non-compliance with those obligations entailed the sanctioning of audiovisual media service providers, in accordance with the Audiovisual Law and the CNA Decision no. 320/2012. The CNA warned that it would start a process of identifying the providers of audiovisual media services on request that were not complying with the legislation in force.

Comunicat de presă 08.09.2021. În atenția publicațiilor online care au secțiuni video distincte și a celor care intenționează să furnizeze servicii media audiovizuale la cerere.

https://cna.ro/Comunicat-de-pres,11344.html

Press release 08.09.2021. For the attention of online publications that have separate video sections and those that intend to provide audiovisual media services on request.

[RO] Legislative procedure terminated for the modification of the PSB Law

Eugen Cojocariu
Radio Romania International

The legislative procedure for the modification of the Romanian Public Service Broadcasters Law, initiated by more center-right Romanian MPs, was concluded on 2 June 2021 by the initiators, who have asked the Parliament to end the procedure (see inter alia IRIS 2014-7/30, IRIS 2015-6/33, IRIS 2015-8/26, IRIS 2016-5/28, IRIS 2017-3/26, IRIS 2017-8/31, IRIS 2017-10/31, IRIS 2018-1/35, IRIS 2018-2/30, IRIS 2018-6/29, IRIS 2018-7/27, IRIS 2021-6/18).

The draft Law had received negative opinions from the Legislative Council as well as from the Economic and Social Council. The two bodies argued the draft Law proposed that, instead of the existing two politically appointed positions for the Romanian public Radio and Television broadcasters (President of the Board of Administration-Director General), there would be four politically appointed positions (President of the Board of Administration and, respectively, Director General). The negative opinions also stressed that the proposed increase of the salaries for the members of the Boards of Administration would have incurred in an increase in the spending of the two public broadcasters.

The above mentioned bodies also considered that the role and powers of the Director General (CEO) are not totally clear and that there are overlaps with the powers of the President of the Board. The Director General would have been, at the same time, a member of the Board of Administration (a deliberative body), politically appointed, and an executive manager, under the control of the Board. It is necessary that the appointment of the Director General be made through a competition, stated the Economic and Social Council.

On the other hand, the Legislative Council and the Economic and Social Council argued that the proposed modification, according to which the members of the Board of Administration are not allowed to be employees of the public broadcasters (they and their relatives, up to and including the second degree), violates the right to work and restricts the right of employees to freely elect their two representatives (out of the total 13) on the Board of Administration, according to the law. Thus, the right to choose and be elected is violated, and the employees who would represent the employees of the PSBs on the Board would be forced to resign or to suspend their employment contract, in the conditions in which they were hired through an open competition.

The main modification consisted of splitting the function of President of the Board of Administration and Director General (CEO) into two separate functions, President of the Board and, separately, Director General (CEO), in order to better define the roles and competencies and to have different persons for the strategic and the executive top management. Another provision was that the members of the Board of Administration of the Romanian public radio and TV are not allowed to be employees of those companies (they and their relatives, up to and including

the second degree).

Avizul Consiliului Economic şi Social

http://cdep.ro/proiecte/2021/100/70/3/ces173.pdf

Opinion of the Economic and Social Council

Avizul Consiliului Legislativ

http://cdep.ro/proiecte/2021/100/70/3/cl173_2021.pdf

Opinion of the Legislative Council

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE