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EDITORIAL

In Europe, there are many traditions associated with the end of the year's festivities: decorated trees, manger scenes, carol singing, and naturally, presents! Be it on the 6th, the 24th or the 25th of December, or even on the 6th of January, children young and old receive gifts brought from faraway countries by Santa Claus, the Befana or the Three Wise Men, to name just a few. And while the European Audiovisual Observatory has neither flying reindeers nor camels or magical broomsticks, we would like to join this marvelous tradition by presenting you with our latest work: a Mapping report on national remedies against online piracy of sports content. Made at the behest of the European Commission, this report provides a comprehensive analysis of the remedies adopted at national level in the EU and in the UK against online piracy of sports content.

We are now in 2022, a year of great expectations. While we hope that Omicron will be the last letter of the Greek alphabet that we will need to remember, we will probably have to continue accepting painful but necessary restrictions for quite a while. And while the new German government has taken its first steps, elections in Portugal, France, Hungary and Sweden will certainly mark the future of the European Union for the next few years. Of course, while events unfold, we will continue providing you with information such as the one found in this newsletter: among other issues, you can read about three judgments of the ECtHR, a European Commission proposal for a Regulation on the transparency and targeting of political advertising, an amendment to the German State Media Treaty, the Italian transposition of the AVMSD and two copyright directives, and the signature of a media chronology agreement in France.

We wish you a happy and successful new year, in which by the way the Observatory will celebrate its thirtieth anniversary! Stay safe and enjoy your read!

Maja Cappello, editor

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INTERNATIONAL

COUNCIL OF EUROPE

ITALY

European Court of Human Rights : *Biancardi v. Italy*

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

While the case of *Hurbain v. Belgium* (IRIS 2021-8:/27) on the right to be forgotten and the accessibility and integrity of online news archives is pending before the Grand Chamber of the European Court of Human Rights (ECtHR), the ECtHR has delivered a new judgment on this matter. In *Biancardi 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) in a case where the editor-in-chief of an online newspaper was held liable under civil law for not having de-indexed an article despite the request by the private individuals named in the article to remove it from the Internet.

The applicant in the case, Mr Biancardi, was the editor-in-chief of an online newspaper. In 2008, he had published an article concerning a fight, followed by a stabbing, which had taken place in a restaurant. The article mentioned the names of the persons involved (amongst them V.X. and W) and the fact the police had closed the restaurants of the owners who had been involved in the fight. The article also mentioned the possible motive for the fight, which probably related to a financial quarrel about the ownership of a building. Two and a half years later V.X. and W sent a formal notice to Mr Biancardi asking that the article be removed from the Internet, but to no avail. A few weeks later V.X. and W lodged two claims with the District Court of Chieti against, respectively, Google Italy S.r.l. and Mr Biancari, pursuant to Article 152 the Personal Data Protection Code. At the court hearing in 2011, Mr Biancardi indicated that he had de-indexed the article in question, with a view to settling the case. The court excluded Google Italy S.r.l. from the proceedings following V.X.'s withdrawal of his claim towards this party and it decided that, in the light of the information that Mr Biancardi had supplied there was no need to examine the part of V.X.'s complaint regarding the request for the article to be removed from the Internet. However, as for the remainder of the complaint, concerning the breach of the claimants' right to respect for their reputation, the court awarded to each claimant EUR 5 000 in compensation for non-pecuniary damage and EUR 2 310 for costs and expenses. The court noted in particular that the information concerning the claimants had been published on 29 March 2008 and had remained accessible on the Internet until 23 May 2011, notwithstanding V.X.'s formal notice to the applicant asking that the article in question be removed from the Internet in September 2010. In the court's view,

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the public interest in the right to provide information had by then been satisfied and, at least as from the date of V.X. sending the above-mentioned formal notice, the processing of his personal data had not been in compliance with the Personal Data Protection Code. The court concluded that there had been a breach of the claimants' reputation and right to respect for their private life. The court also noted that the information at issue was easily accessible by simply inserting the claimants' names into the search engine, and that the nature of the relevant data, as regards judicial proceedings, was sensitive. The Supreme Court upheld this judgment.

Under Article 10 ECHR Mr Biancardi argued before the ECtHR that the interference in his freedom of expression and his right to inform the public had been unjustified. He also complained that the financial penalty imposed on him in terms of compensation for non-pecuniary damage had been excessive. Mr Biancardi's claim was also supported by several third-party interveners, such as the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, the Reporters' Committee for Freedom of the Press, the Media Lawyers Association and Media Legal Defence. They argued that journalistic articles should not be de-listed and that the erasure of accurate information from online news records ran directly contrary to the values protected by Article 10 ECHR and amounted to press censorship. They also submitted that individuals should not be empowered to restrict access to information concerning themselves and published by third parties, except when such information had an essentially private or defamatory character or when the publication of such information was not justified for other reasons.

Referring to its judgments on personal data and Internet archives in Węgrzynowski and Smolczewski v. Poland (IRIS 2013-9/1) and M.L. and W.W. v. Germany (IRIS 2018-8/1) the ECtHR observed that the present case did not relate to the content of an Internet publication, nor to the way information was published. The essence in this case was Mr Biancardi's failure to de-index the article concerning V.X. and his restaurant and his decision to keep the article easily accessible, despite the fact that the claimant had asked that the article be removed from the Internet. The finding of Mr Biancardi's liability had more precisely been a consequence of the failure to de-index from the Internet search engine the tags to the article at issue, which would have prevented anyone accessing the article by simply typing out the name of V.X. or of his restaurant. An obligation to de-index material could be imposed not only on Internet search engine providers, but also on the administrators of newspaper or journalistic archives accessible through the Internet. The ECtHR noted that a clear distinction is to be made between, on the one hand, the requirement to de-list or "de-index" and, on the other hand, the permanent removal or erasure of news articles published by the press. In the instant case Biancardi was found to be liable solely on account of the first requirement. There was no requirement to permanently remove the article, nor was there any intervention regarding the anonymisation of the online article in this case. The ECtHR acknowledged that the strict application of the six criteria set out in Axel Springer AG v. Germany (IRIS 2012-3/1) would be inappropriate in the present circumstances. In this case special attention was paid

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to (i) the length of time for which the article was kept online; (ii) the sensitiveness of the data at issue and (iii) the gravity of the sanction imposed on the editor-in-chief of the online newspaper. The ECtHR observed inter alia that the relevance of the right to disseminate information decreased over the passage of time, compared to V.X.'s right to respect for his reputation, that it concerned sensitive data related to criminal proceedings and that Mr Biancardi was held liable under civil and not criminal law. The ECtHR is also of the view that the severity of the sentence and the amount of compensation awarded for non-pecuniary damage could not be regarded as excessive, given the circumstances of this case. The ECtHR concluded that the finding by the domestic jurisdictions that Mr Biancardi had breached V.X.'s right to respect for his reputation by virtue of the continued presence on the Internet of the impugned article and by his failure to de-index it constituted a justifiable restriction of his freedom of expression. The ECtHR emphasised in particular the fact that no requirement was imposed on Biancardi to permanently remove the article from the Internet. Therefore the ECtHR, unanimously, found that there has been no violation of Article 10 ECHR.

European Court of Human Rights, First Section, in the case of Biancardi v. Italy, Application no 77419/16, 25 November 2021

https://hudoc.echr.coe.int/eng?i=001-213827

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REPUBLIC OF TÜRKIYE

European Court of Human Rights: *Vedat Şorli v. Turkey*

Dirk Voorhoof
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Once again the European Court of Human Rights (ECtHR) has found a violation of the right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR) in a case against Turkey. This time, the ECtHR found that the pre-trial detention and criminal conviction for insulting the Turkish president Recep Tayyip Erdoğan in two posts on Facebook amounted to a violation of the right to freedom of (political) speech.

The case concerns the criminal proceedings instituted against Mr Şorli for insulting the President of the Turkish Republic, on account of two satirical posts which he shared on his Facebook account in 2014 and 2016. The first Facebook post consisted of a caricature featuring the former US President Barack Obama kissing the President of the Turkish Republic, who was depicted in a female dress. A speech bubble above the image of the Turkish President contained the following words written in Kurdish: “Will you register ownership of Syria in my name, my dear husband?”. The second post contained photos of the President and the former Prime Minister of Turkey, beneath which the following comments were written: “May your blood-fuelled power be buried in the depths of the earth/May the seats you hold on to by taking lives be buried in the depths of the earth/May the lives of luxury you lead thanks to stolen dreams be buried in the depths of the earth/May your presidency, your power and your ambitions be buried in the depths of the earth”. Mr Şorli was placed in pre-trial detention for two months and two days and subsequently, in 2017, sentenced to a prison term of 11 months and 20 days. Delivery of the judgment was suspended for five years: if the applicant did not commit an intentional offence during that period, the conviction would be quashed and the case would be struck out of the list.

Relying on Article 10 ECHR, Mr Şorli complained before the ECtHR about his placement in pre-trial detention and the criminal proceedings brought against him. He alleged that the content he had shared on Facebook constituted critical comments on current political developments and that the interference with his right to freedom of expression was disproportionate and had a chilling effect. The ECtHR found that the interference complained of had been prescribed by law and had pursued the legitimate aim of protecting the reputation or the rights of others. The domestic courts had based their decisions on Article 299 of the Criminal Code, which afforded a higher degree of protection to the President of the Republic than to other persons – protected by the ordinary rules on defamation – with regard to the disclosure of information or opinions concerning them. Article 299 of the Criminal Code, in particular, laid down heavier penalties for persons who made defamatory statements about the President of the Republic. The ECtHR observed that affording increased protection by means of a

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special law on insult would not, as a rule, be in keeping with the spirit of the Convention or with a State's interest in protecting the reputation of its head of state. While it was entirely legitimate for persons representing the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position of those institutions required the authorities to display restraint in resorting to criminal proceedings. There had been nothing in the circumstances of the present case to justify Mr Şorli's placement in police custody, the order for his pre-trial detention or the imposition of a criminal sanction, despite the fact that delivery of the judgment imposing a prison term had been suspended. Such a sanction, by its very nature, inevitably had a chilling effect on the willingness of the person concerned to express his or her views on matters of public interest, especially in view of the effects of a criminal conviction. Likewise, the Turkish Government had not adduced any evidence to demonstrate that the criminal proceedings against Mr Şorli had been made necessary by the state of emergency that had been declared following the attempted military coup of 15 July 2016.

Accordingly, in the circumstances of the case and in view of the sanction, of a criminal character, imposed on Mr Şorli under a special provision affording increased protection to the President of the Republic against insult, which could not be considered in keeping with the spirit of the Convention, the measure complained of had not been proportionate to the legitimate aims pursued and had not been necessary in a democratic society. Therefore, the ECtHR found, unanimously, a violation of Article 10 ECHR.

Arrêt de la Cour européenne des droits de l'homme, deuxième section, rendu le 19 octobre 2021 dans l'affaire Vedat Şorli c. Turquie, requête n° 42048/19

https://hudoc.echr.coe.int/eng?i=001-212394

Judgment of the European Court of Human Rights, Second Section, delivered on 19 October 2021 in the case of Vedat Şorli v. Turkey, Application no. 42048/19

https://hudoc.echr.coe.int/eng?i=001-212394

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European Court of Human Rights: *A.M. v. Turkey*

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In a judgment of 19 October 2021, the European Court of Human Rights (ECtHR) found a violation of the right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR) in a case where disciplinary sanctions had been imposed on the applicant for a video posted on Facebook. According to the Turkish authorities the video offended the Prophet of Islam, an offence that had to be qualified as an act aimed at humiliating Turkishness.

At the time of the application, the applicant, A.M., was the president of the International Yoga Federation and a yoga trainer officially certified by *THİSF* (Turkish Federation of Sports for All — the Federation). In 2014 a video recording of A.M. was uploaded to the video-hosting website YouTube. The video showed A.M. giving a speech, to an audience, which included an extensive statement with some critical remarks about religion and the Prophet Muhammad. The Ankara public prosecutor's office lodged a bill of indictment against A.M. and he was sentenced to one year's imprisonment by the Ankara Criminal Court of General Jurisdiction for publicly degrading religious values of a section of the public, an offence under Article 216 of the Criminal Code. A.M. appealed against this conviction. In 2017, while the appeal proceedings were ongoing, disciplinary proceedings were initiated against him under section 16 § 17 (breach of national honour) and section 17 (discrimination) of the 2016 Disciplinary Regulation of the Federation in view of the criminal penalty imposed on him by the Ankara Criminal Court of General Jurisdiction. The Disciplinary Committee decided to deprive A.M. of his rights for three years pursuant to the above-mentioned sections of the Disciplinary Regulation. This decision was confirmed by the Arbitration Board, holding that offending the Prophet of Islam should be qualified as an act aimed at humiliating Turkishness falling within the scope of section 16 § 17 (violation of national honour) of the Disciplinary Regulation. It therefore found the disciplinary measure to be proportionate with regard to A.M.'s behaviour. A request for rectification of this decision was rejected by the Arbitration Board.

Before the Strasbourg Court, A.M. complained that the disciplinary sanction imposed on him on account of his statements had constituted a breach of Article 10 ECHR. He argued in essence that the 2016 Disciplinary Regulation were not in force at the time the video was posted in 2014. A.M. further submitted that the disciplinary proceedings had been initiated against him in breach of the statutory one-year time limit prescribed by the Disciplinary Regulation.

Having referred to its case-law about the condition that any inference with the right to freedom of expression needs to be "prescribed by law", the ECtHR observed that the Disciplinary Regulation had not been in force on the date the video had been uploaded. Further, there was no evidence that any previous disciplinary regulation issued by the Federation had had provisions similar to that

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of section 16 § 17 and section 17 of the 2016 Disciplinary Regulation. The Court also noted that the Arbitration Board had considered that acts against a prophet could not be subject to prescription by analogy with the section of the Criminal Code relating to genocide and crimes against humanity. In that respect, the ECtHR observed that section 30 of the Disciplinary Regulation stipulated a general one-year investigation time-limit which started to run from the day of the event. The ECtHR further observed that no exception to the provisions of section 30 was provided for in the Disciplinary Regulation. Therefore the Arbitration Board's interpretation extended the scope of section 30 beyond that which had reasonably been foreseeable in the circumstances of the case. A.M. could not, therefore, reasonably have foreseen that his statements would be considered to be within the scope of the section of the Criminal Code relating to genocide and crimes against humanity.

The ECtHR found that not only was the Disciplinary Regulation, upon which the disciplinary sanction inflicted on A.M. had been based, not in force at the time of the events, but the interpretation of the Arbitration Board extending the scope of section 30 of the Disciplinary Regulation by analogy with the Criminal Code had not been foreseeable within the meaning of Article 10 ECHR. The ECtHR considered, accordingly, that the interference at issue was not "prescribed by law" within the meaning of Article 10 § 2 ECHR. Having regard to that conclusion, it found that it was not necessary to verify whether the other conditions required by that paragraph - namely the existence of a legitimate aim and the necessity of the interference in a democratic society – were complied with in the case. Therefore the ECtHR came to the conclusion that there has been a violation of Article 10 ECHR.

European Court of Human Rights, Second Section, in the case of A.M. v. Turkey, Application no 67199/17, 19 October 2021.

https://hudoc.echr.coe.int/eng?i=001-212369

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EUROPEAN UNION

EU: EUROPEAN COMMISSION

Proposal for a regulation on the transparency and targeting of political advertising

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On 25 November 2021, the European Commission published its much-anticipated proposal for a regulation on the transparency and targeting of political advertising. The proposed regulation is part of the Commission's European Democracy Action Plan, which was published in late 2020, where the Commission recognised the need for new legislation to bring more transparency to political advertising across the EU (see IRIS 2021-2/4). The Commission stated that the regulation is planned to enter into force and be fully implemented by member states by April 2023, a year before the 2024 elections to the European Parliament.

At the outset, the main purpose of the regulation is to lay down harmonised transparency obligations for providers of political advertising, and crucially, to introduce harmonised rules on the use of targeting and amplification techniques for political advertising which involve use of personal data. This is so-called political microtargeting, where personal data is collected about individuals based on their online activity and behavioral profiling, and used for the targeting of tailored political advertising. In this regard, the regulation is comprised of five main chapters, with Chapter I setting out important definitions; Chapter II containing transparency obligations for political advertising services; Chapter III setting out rules related to targeting and amplification of political advertising; while Chapter IV and V contain provisions on supervision, enforcement and application.

First, and most notably, Article 2 sets out a wide definition of political advertising, defined as a message (a) by, for, or on behalf of a "political actor", unless it is of a purely private or a purely commercial nature; or (b) which is "liable to influence" the outcome of an election or referendum, a legislative or regulatory process, or voting behaviour. Importantly, political actor is also defined in Article 2 to include a wide range of actors, including political parties, candidates, and political campaign organisations. Of note, the regulation applies to political advertising "services", which are services "provided for remuneration".

Crucially, Chapter II then sets out important rules on transparency obligations for political advertising. These include, first, under Article 6, providers of political advertising will have a "record-keeping" obligation, being required to retain records on all political advertising services they provide, including the financial

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amounts involved for these services, and the identity of sponsors, which must be retained for five years. Notably, certain national authorities will have the power to request access (under Article 10) to this information, while other bodies, including "accredited" journalists (under Article 11), will also be able to request access. Crucially, under Article 7, all political advertising must contain (a) a statement that it is a political advertisement; (b) the identity of the sponsor of the advertisement; and (c) a "transparency notice" to enable the "wider context of the political advertisement and its aims to be understood". This transparency notice may be included as a link, and must include additional information, such as financial information on the aggregate amount spent on the advertisement and the political advertising campaign it is part of. Importantly, under Article 9, advertising publishers must put in place mechanisms to allow individuals to notify that a particular advertisement does not comply with the regulation.

Of particular note are the rules contained in Chapter III, which set out specific requirements related to targeting and amplification of political advertising. Crucially, under Article 12, when using targeting or amplification techniques for political advertising involving personal data, controllers must provide additional information with the political advertisement to allow the individual concerned to "understand the logic involved" and the "main parameters of the technique used", and the use of "third-party data and additional analytical techniques".

Finally, in relation to supervision, Chapter IV sets out that national data protection authorities will be responsible for supervising the rules on targeting under Article 12, while member states will be required to designate competent national authorities to monitor compliance with the other obligations in the regulation, which can be Digital Services Coordinators under the proposal Digital Services Act (see IRIS 2021-2/13). Notably, member states are required to lay down the rules on the sanctions to be imposed for violation of the regulation.

The proposal will now be considered by the European Parliament and the Council, and once adopted, the new regulation will be directly applicable in all member states.

Proposal for a regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM(2021) 731 final, 25 November 2021

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12826-Political-advertising-improving-transparency_en

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NATIONAL

BULGARIA

[BG] Supreme Court of Cassation's decision on the right to refuse filming by journalists in the context of right to privacy

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In a recent decision, *Върховен касационен съд* (the Supreme Court of Cassation/ the Supreme Court) ruled on the boundaries between journalists' freedom, objectivity and dissemination of information, and the right of individuals not to be filmed without their consent.

The case was formed following a claim for compensation for non-pecuniary/moral damages brought by an individual against one of the national broadcasters which owns several TV channels, websites, etc.

The reason for the claim was video material, broadcast on one of the national television channels, in which the claimant (who was accused in ongoing criminal proceedings) was filmed, despite the fact that he had expressed an explicit disagreement to being filmed. In the material, a journalist is recording the claimant while he walks through the passage of the court and the latter clearly states that he does not want to be filmed and avoids the camera.

According to the claimant, the filming violated his right to respect for his private and family life and the right to privacy (which includes, among other things, the right to the protection of personal data), so he claimed compensation for moral damages.

The courts of first and second instance rejected his claim. They found that the filming of the claimant in a court building at the time when he was attending criminal proceedings on charges against him, did not violate his rights and did not result in damages for him.

The case therefore reached the Supreme Court which had to answer whether the filming, photographing, recording or similar actions, performed by a journalist/reporter, with respect to persons who expressly disagree, would constitute unlawful conduct.

The question was raised in context of the fundamental right to privacy stipulated in Article 32, paragraph 1 of *Конституция на Република България* (Constitution of the Republic of Bulgaria – the Constitution) – the latter states that the privacy of citizens is inviolable and everyone shall have the right to defence against illegal

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invasion into his personal and family life, and against encroachment onto his honor, dignity and reputation. Furthermore, Article 32, paragraph 2 of the Constitution, states that no one shall be followed, photographed, filmed, recorded or subjected to any other similar activity, without his knowledge or in spite of his expressed disapproval, except when such actions are permitted by law.

So, the Supreme Court analysed in detail the specifics of the right to privacy and the possible derogations. It also underlined that media and journalists could generally rely on the right to freedom of expression and opinion, and the right to seek, obtain and disseminate information regarding important topics and certain individuals, but these rights are not absolute and should not violate other absolute rights (such as the right to privacy). It clarified that the latter rights extend to the limits beyond which other constitutional values would be affected (such as the right to privacy). It also concluded that media and journalists could rely on the said rights unless they are used to abuse other rights.

In the particular case, the Supreme Court found that the recording/filming of the claimant constitutes an unlawful conduct and is in violation of the right to privacy due to the following:

The recording of the video and its broadcasting was carried out before the announcement and the entrance into force of a judgement, so it was in contradiction to the general presumption of innocence; The filming of video material with the participation of the claimant by a journalist, even in a public place such as the court building, in case when disagreement to the filming is clearly expressed, is unlawful; The actions of the media exceed the limits of the right to freedom of expression and opinion, and the right to seek, obtain and disseminate information; No specific laws permit the derogation from the absolute right to privacy, so the balancing test is in favor of the claimant. The Supreme Court analysed the most the relevant laws and concluded that there were no legal grounds to justify a derogation from the principle; The actions of the journalists could also not be justified based on the fact that the claimant was a public official at the time the proceedings took place.
Based on the above arguments, the Supreme Court found that the right to privacy of the defendant was violated and awarded a compensation in an amount of approximately EUR 500.

Решение № 13 от 14.09.2021 г. по гр. д. № 4896/2019 г. на Върховен касационен съд, 4-то гр. отделение

http://www.vks.bg/pregled-akt?type=ot-delo&id=9151BA100965C9B3C225875000223405

Decision № 13 of 14.09.2021 under civil case No. 4896/2019 of the Supreme Court of Cassation, 4th Civil Department

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GERMANY

[DE] Draft second state media treaty amendment adopted

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On 22 October 2021, the heads of the governments of the German *Länder* adopted the draft *2. Medienänderungsstaatsvertrag* (second amendment to the state media treaty – 2. MÄndStV), known as the *Barrierefreiheitsstaatsvertrag* (state accessibility treaty), which transposes Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, and therefore strengthens the provisions of the *Medienstaatsvertrag* (state media treaty – MStV) to protect people with disabilities from discrimination. The federal government had already met its obligation to transpose the directive, known as the European Accessibility Act (EAA), within its area of jurisdiction, by adopting the *Barrierefreiheitsstärkungsgesetz* (Act to improve accessibility – BFSG) of 16 July 2021.

Under the state accessibility treaty, two new concepts will be defined in the state media treaty: Article 2(2)(30) of the draft MStV defines an "accessible service" as "a service that can be found, accessed and used normally by people with disabilities, using the latest technological disability aids, without any particular difficulties and without the help of others." Meanwhile, in Article 2(2)(31), a "service providing access to audiovisual media services" is defined as a telemedia service that is used "to identify, select, receive information on, and view television programmes and television-like telemedia, as well as any features provided as a result of the implementation of measures to make services accessible, as referred to in Articles 7 and 76 MStV, i.e. barrier-free, including electronic programme guides".

The requirements that such telemedia services have to meet under the EAA will be set out in an additional 5th subsection of section V, "Special provisions for individual telemedia services", which will constitute Articles 99a to 99e MStV. As a result of this change, the current Article 21 MStV, which states that "Telemedia providers should support unencumbered access to television services and television-like telemedia within the framework of their technical and financial means", will be deleted.

Accessibility requirements are set out in Article 99a of the 2. MÄndStV, which deals with the issue of disproportionate burdens. Services providing access to audiovisual media services must take various measures to offer their services barrier-free. This accessibility obligation includes the requirements set out in Annex I Sections III and IV(b) of the EAA. Such measures can include, for example, presenting information in an understandable way, such as by using a large font or

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an alternative presentation of non-textual content. Support services such as help desks are also mentioned in Annex I Section III. Websites, including the related online applications, and mobile device-based services, including mobile applications, must be made accessible in a consistent and adequate way by making them perceivable, operable, understandable and robust. According to Annex I Section IV(b), services providing access to audiovisual media services must, firstly, provide electronic programme guides (EPGs) which are perceivable, operable, understandable and robust and provide information about the availability of accessibility, and secondly, ensure that the accessibility components (access services) of the audiovisual media services, such as subtitles for the deaf and hard of hearing, audio description, spoken subtitles and sign language interpretation, are fully transmitted with adequate quality for accurate display, and synchronised with sound and video, while allowing for user control of their display and use. Article 99b of the draft amendment contains rules on assessing a service's conformity with these requirements.

These obligations do not generally apply to microenterprises as defined in Article 3(23) of Directive (EU) 2019/882, nor if they result in the imposition of a disproportionate burden on providers of services providing access to audiovisual media services, as defined in Annex VI of the directive, nor if they require a significant change in the service that results in the fundamental alteration of its basic nature. According to the draft state treaty, the service provider itself should be able to assess whether compliance with the requirements would impose such a disproportionate burden or introduce a fundamental alteration; such an assessment must be renewed at least every five years, when the service is altered, or at the request of the state media authority responsible. If a service provider receives funding from other sources than its own resources, whether public or private, for the purpose of improving accessibility, it may not rely on a disproportionate burden.

According to Article 99c of the draft MStV, providers of services providing access to audiovisual media services must, in their terms and conditions or in another clearly perceptible way, indicate to the general public in an accessible manner how they are meeting their accessibility obligations under Article 99a(1).

From a procedural point of view, these substantive provisions, compliance with which is monitored by the *Landesmedienanstalten* (state media authorities), are made more effective by consumer protection rules (including the right for associations to initiate proceedings, enshrined in Article 99d(2)): according to Article 99d(1), a consumer whose use of a service providing access to audiovisual media services is prevented or limited, as the result of a breach of Articles 99a and 99c, can ask the relevant state media authority to take measures to guarantee compliance with these provisions. Under Article 99d(2), the consumer can then appeal to an administrative court, either to contest the media authority's decision, which must be ratified by the *Kommission für Zulassung und Aufsicht* (Commission on Licensing and Supervision – ZAK), or if the media authority fails to take a decision.

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The special role played by broadcasters in breaking down discrimination will also be highlighted through the addition to the general programming principles set out in Article 3(2) MStV of the requirement that services "should not hinder the eradication of discrimination against people with disabilities". The various barriers that prevent people with different disabilities participating in the broadcasting process will also be taken into account through an addition to Article 7 MStV.

The 2. MÄndStV also contains necessary amendments to the *Jugendmedienschutz-Staatsvertrag* (state treaty on the protection of young people in the media), bringing it into line with the latest amendment of the federal *Jugendschutzgesetz* (Youth Protection Act), including changes to the indexing procedure.

The draft must be ratified by all the state parliaments in order to enter into force by 28 June 2022, the deadline for transposition of the EAA. The Minister-Presidents of the *Länder* are expected to begin signing the amended treaty on 9 December 2021.

Entwurf des zweiten Medienänderungsstaatsvertrages

https://www.land.nrw/sites/default/files/asset/document/beschluss_-_rundfunkthemen_-_zweiter_medienanderungsstaatsvertrag_-_anlage.pdf

Draft second amendment to the state media treaty

Beschluss der Ministerpräsidenten zu den Rundfunkthemen in der Jahreskonferenz vom 20. – 22. Oktober 2021

https://www.land.nrw/sites/default/files/asset/document/beschluss_-_rundfunkthemen_-_zweiter_medienanderungsstaatsvertrag.pdf

Decision taken by the Minister-Presidents concerning broadcasting matters at their annual congress held from 20 to 22 October 2021

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[DE] Federal Administrative Court: no right of access to ministries' Twitter direct messages

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In a decision of 28 October 2021, the *Bundesverwaltungsgericht* (Federal Administrative Court – BVerwG), Germany's highest administrative court, ruled that the *Informationsfreiheitsgesetz* (Freedom of Information Act – IFG) does not entitle citizens and journalists, who enjoy the same rights under the IFG, to access direct messages sent and received by federal government ministries on Twitter.

The case concerned an information request submitted by FragDenStaat, a non-profit Internet platform, through which requests can be submitted on the basis of Germany's federal and regional freedom of information laws and then stored on the website fragdenstaat.de. The request concerned the Twitter direct messages of the *Bundesministerium des Innern, für Bau und Heimat* (Federal Ministry of the Interior, Building and Community – BMI) for the years 2016 to 2018. Since Twitter direct messages, unlike public posts, are direct communications that other users cannot read, the BMI mainly used this function during the period concerned for informal communication. This included arranging meetings, thanking citizens for their queries concerning typos and broken hyperlinks, for example, or answering journalists' queries about who was responsible for a given issue. The messages were not stored by the BMI itself, but could be downloaded on request from Twitter Inc. However, the BMI refused to grant access to the messages on the grounds that they had no official relevance and therefore did not constitute official information within the meaning of the IFG. Even though the messages had been written as part of the BMI's official remit in its broadest sense, they had served only personal (private) purposes. The online platform had asked the courts to overturn this refusal, but its application was rejected.

Unlike the *VG Berlin* (Berlin Administrative Court) in the previous instance, the BVerwG supported the BMI's position. Article 1(1)(1) of the federal IFG states that everyone is entitled to official information from the authorities of the federal government in accordance with the provisions of the Act. The *VG Berlin* had adopted a broad interpretation of the concept of "official information": only information that exclusively served clearly private (personal) purposes was excluded. However, in the BVerwG's opinion, official information was information that was stored for official purposes, so there needed to be a reason for storing it. It was not only the information itself that needed to serve official purposes, but its storage also. Although this was not out of the question where Twitter direct messages were concerned, messages that had so little relevance that they did not need to be formally logged, as was the case here, served no such official purpose. The messages were stored by Twitter Inc. in accordance with its business model, but this served no official purpose for the BMI. There was also no obvious purpose in the context of the *Registraturrichtlinie* (Registry Directive) of the federal ministries and the principles of proper record-keeping.

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It is worth noting, however, that the BVerwG considers the IFG and the information rights that it creates to be applicable, in principle, if the messages themselves have an official relevance. However, in this case, it did not accept the platform's assertion that they might include communications with other authorities such as the federal police force or information leaked to journalists which, it claimed, were subject to the state's transparency obligations.

Pressemitteilung Nr. 69/2021 des BVerwG

https://www.bverwg.de/de/pm/2021/69

Federal Administrative Court press release no. 69/2021

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[DE] Federal Supreme Court rules on operating costs for broadband cable connections

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In a judgment of 18 November 2021, the 1st civil chamber of the *Bundesgerichtshof* (Federal Supreme Court – BGH), whose field of jurisdiction includes competition law, decided that residential tenancy agreements can bind a tenant to a paid broadband cable connection, provided by a landlord, for the entire duration of the agreement.

The proceedings had been instigated by the *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (Office Against Unfair Competition) against a landlord with more than 120 000 rental properties, around 108 000 of which are connected to a cable television network that carries television and radio channels as well as other services such as telephony and Internet. Under the tenancy agreements, the cost paid by the defendant to provide the radio and television service, via the cable network, is passed on to tenants in the form of operating costs. The tenants have no right to cancel the radio and television service provided to their homes during their tenancy agreement.

The plaintiff argued that an anti-competitive act had been committed in breach of Article 43b of the *Telekommunikationsgesetz* (Telecommunications Act – TKG) because the tenancy agreements did not contain any rule allowing cable subscriptions to be cancelled after a 24 month period and the defendant did not offer tenancy agreements under which the provision of cable connections was limited to a maximum of 12 months. The plaintiff called on the defendant to desist.

The court decided that the defendant had not breached Article 43b TKG by tying their tenants to the paid cable TV connection they provided. It was true that, by providing the connection, the defendant was providing a telecommunications service as defined in Article 3(24) TKG. In view of the large number of homes rented out by the defendant that were equipped with a cable TV connection, this service was also publicly available within the meaning of Article 3(17a) TKG.

However, the tenancy agreements between the defendant and their tenants did not mention a minimum term greater than 24 months (Art. 43b(1) TKG). The defendant also did not refuse to allow their tenants to sign tenancy agreements with a maximum term of 12 months (Article 43b(2) TKG). Rather, their tenancy agreements did not have a specific term and could be cancelled by tenants – in accordance with Article 573c(1)(1) of the *Bürgerliches Gesetzbuch* (Civil Code – BGB) – from the third working day of a calendar month to the end of the second month thereafter. Article 43b TKG therefore did not directly apply to the tenancy agreements used by the defendant. The application of Article 43b TKG to the defendant's relationship with their tenants was ruled out. The historical development of the relevant rules showed that the legislator had not intended for

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Article 43b TKG to apply to large housing companies that rented out homes equipped with cable TV connections and passed the cost of the connections to the tenants as operating costs. The same conclusion could be drawn from the forthcoming amendment of the TKG. According to the new Article 71(1)(1) and (3) TKG, which entered into force on 1 December 2021, consumers are allowed to cancel telecommunications services as part of a tenancy agreement after 24 months. However, under the transitional provision of Article 230(4) TKG, this rule will not be applicable until 1 July 2024 if the fee – as in the present case – is exclusively charged in the form of operating costs.

The *Telekommunikationsmodernisierungsgesetz* (Telecommunications Modernisation Act – TKModG) of 23 June 2021 (Federal Gazette I p. 1858) aims, *inter alia* (by amending the TKG and the *Betriebskostenverordnung* (Regulation on Operating Costs)), to abolish the so-called ancillary costs privilege currently enjoyed by landlords. As a result, tenants will, in future, be able to decide themselves whether and how they use a cable connection. The current practice of passing on the cost of existing cable equipment will need to end by 30 June 2024 (see Article 71(2)(1) and (3), and Article 230(4) of the amended TKG). It will not apply to any equipment installed after 1 December 2021. In contrast to the ancillary costs privilege, which still applies, the revised Article 72 TKG states that only fibre optic cable costs can be passed on to tenants – and only if a new, exclusively fibre cable infrastructure is installed and operated inside the building. These costs can also only be passed on for a maximum of five years.

Urteils des BGH (Az. I ZR 106/20)

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021215.html

Federal Supreme Court ruling (case I ZR 106/20)

Gesetz zur Umsetzung der Richtlinie (EU) 2018/1972 des Europäischen Parlaments und des Rates vom 11. Dezember 2018 über den europäischen Kodex für die elektronische Kommunikation (Neufassung) und zur Modernisierung des Telekommunikationsrechts (Telekommunikationsmodernisierungsgesetz)

https://dserver.bundestag.de/brd/2021/0325-21.pdf

Act implementing Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (recast) and modernising telecommunications law (Telecommunications Modernisation Act)

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[DE] Media and digital policy in the ‘traffic light’ coalition agreement

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The media policy section of the coalition agreement signed by Germany’s new ‘traffic light’ coalition parties, i.e. the SPD (Social Democratic Party), Bündnis 90/Die Grünen (Alliance 90/The Greens) and the FDP (Free Democratic Party), begins by highlighting the indispensability of free, independent media at public and private levels in a democracy, no doubt in response to an increase in defamatory statements linked to the refugee and coronavirus crises in Germany, as well as undesirable recent developments in EU member states, such as Poland and Hungary. This matter will be the subject of a broad social debate conducted in partnership with the *Länder*.

By adopting new legislation, the coalition intends to strengthen the coherence between European, federal and state law and, in a partnership between the federal and state governments, to revise all media-related laws. It will be able to build on the experiences of the *Bund-Länder-Kommission zur Medienkonvergenz* (Joint Committee of the Federal Government and the *Länder* on Media Convergence), whose report led to amendments of the *Jugendmedienschutz-Staatsvertrag* (state treaty on the protection of young people in the media) and the *Jugendschutzgesetz* (Youth Protection Act), and shaped the way in which media stakeholders, such as media intermediaries and media platforms, have been incorporated into the new state media treaty. It is interesting to note that the coalition wants to help meet the challenges of the digital transformation of the media landscape “through fair regulation of the platforms and intermediaries, in order to ensure equal opportunities in the field of communication”. A potential conflict of jurisdiction between the federal and state governments on the question of who has overall responsibility for these matters cannot be ruled out.

At European level, the coalition parties are committed to implementing the provisions of the Digital Services Act (DSA), Digital Markets Act (DMA) and Media Freedom Act promoting pluralism and diversity, and guaranteeing state-independent media supervision and regulation. This is expected to pose a particular challenge for the new federal government in view of the desire of the Commission and Council to strengthen the Commission’s supervisory powers in the field of digital transformation.

In a section on the “digital society”, the coalition parties also stress their intention to meet the requirements of the DSA by safeguarding communication freedoms, consumer rights, clear reporting procedures, access to the data of large platforms for research purposes, transparency of their algorithmic systems and clear rules to combat disinformation. On the basis of the European provisions, the new federal government plans to overhaul the German legal framework, including the *Telemediengesetz* (Telemedia Act – TMG) and *Netzwerkdurchsetzungsgesetz*

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(Network Enforcement Act – NetzDG). According to the coalition agreement, the governing parties wish to promote the creation of platform councils, which have been advocated in recent academic debate, although so far they have not sought to influence their organisation, composition or responsibilities. They reject the idea of general monitoring obligations, scanning of private communication and compulsory identification; they want to protect anonymity and the use of pseudonyms online. By adopting a law against digital violence, however, they hope to remove legal obstacles for victims, such as gaps in information rights. The coalition also wants to create a legal framework for electronic complaint procedures and to enable courts to order the blocking of online accounts. The establishment of a *Bundeszentrale für digitale Bildung* (Federal Office for Digital Education), which is proposed in the coalition agreement, carries the risk, from a federal perspective, of a repeat of the gradual erosion of regulatory powers for the *Länder* that was feared when the *Bundeszentrale für Kinder- und Jugendmedienschutz* (Federal Office for the Protection of Children and Young People in the Media) was created in the middle of this year.

The coalition agreement also mentions plans to verify whether, following some clearly successful initiatives in this direction, a technology-neutral, barrier-free and Europe-wide media platform is feasible.

The coalition wants to ensure that the UHF band is permanently reserved for culture and broadcasting, which is relevant in the short term with a view to Germany's positioning at the 2023 World Radiocommunication Conference (WRC 2023), as well as the organisation of 5G architecture in and for Germany.

Other media-related plans for the 'traffic light' coalition include creating a legislative basis for the right of the press to access information from federal authorities (such rights established under *Land* laws were unjustifiable, regardless of claims under the Freedom of Information Act), combating hate speech and disinformation, supporting Europe-wide measures to prevent the restriction of civil liberties, e.g. abusive actions (Strategic Lawsuits against Public Participation – SLAPP), and protecting journalists' safety.

In relation to the safeguarding of local, regional and thematic diversity, it is also significant that the coalition wishes to ensure that the entire country is served by periodical press publications, to verify what funding mechanisms are suitable to achieve this (following the failure of a funding approach adopted by the previous grand coalition), and to promote scientific journalism through an independent foundation.

According to the coalition agreement, all these individual measures form part of a commitment to develop a strong cultural scene and creative economy, as well as non-discriminatory cultural and media policies. Establishing cultural diversity as a national objective is also a target for the coalition, which can only be achieved through cooperation with the *Länder* and cross-party support within the federal constitutional state.

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Koalitionsvertrag 2021 – 2025 zwischen der Sozialdemokratischen Partei Deutschlands (SPD), BÜNDNIS 90 / DIE GRÜNEN und den Freien Demokraten (FDP)

https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf

Coalition agreement 2021–2025 between the SPD (Social Democratic Party), Bündnis 90/Die Grünen (Alliance 90/The Greens) and the FDP (Free Democratic Party)

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FRANCE

[FR] *Conseil d'État* rejects RMC Découverte appeal against CSA's refusal to classify programmes as documentaries

Amélie Blocman
Légipresse

On 3 July 2012, the company RMC Découverte, which operates the terrestrial television channel of the same name, signed an agreement with the *Conseil supérieur de l'audiovisuel* (the French audiovisual regulator – CSA), Article 3-1-1 of which requires it to ensure that "documentaries make up at least 75% of total airtime each year and cover a wide variety of topics." In decisions of 11 July 2018, 17 June 2019 and 20 May 2020, the CSA refused to classify 16, 15 and 6 programmes broadcast by the channel as "documentaries", as defined in the agreement. RMC Découverte asked the *Conseil d'État* (Council of State) to overturn these 37 refusals.

In order to determine whether the various programmes concerned could be classified as documentaries within the meaning of the aforementioned Article 3-1-1, the CSA examined each of them individually, taking into account the existence of an author's viewpoint, the dissemination of knowledge to the viewer, the portrayal of facts or situations that existed before the programme was made, the absence – apart from any reconstruction – of artificially staged events and whether they had received documentary film aid from the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC). The *Conseil d'État* decided that, based on these criteria, the CSA had not made any error of law.

The *Conseil d'État* noted that, in this case, the disputed programmes either invited viewers to follow individuals as they carried out their profession or hobby, such as repairing classic cars, building cabins or destroying pests, or showed people in situations of adventure, travel or survival. The CSA had correctly applied Article 3-1-1 by refusing to classify the programmes as documentaries on the grounds that they used narrative devices and filming techniques that were typical of entertainment programmes, they were not designed to extend viewers' knowledge because they did not provide information about their subject-matter in a substantial and continuous manner, and they depicted real-life situations in an artificial way by using dramatisation, elements of surprise and heightening of emotions. The channel therefore had no grounds to request the annulment of the contested decisions.

Conseil d'État, 5e ch. 29 octobre 2021 n° 424065 – Sté RMC Découverte

Council of State, 5th chamber, 29 October 2021, no. 424065 – RMC Découverte

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[FR] Canal Plus and French cinema industry sign media chronology agreement

Amélie Blocman
Légipresse

A key element of the current audiovisual reforms, media chronology, which determines when cinematographic works can be released via different methods of exploitation, is set out in Articles L. 231-1 *et seq*. of the *Code du cinéma et de l'image animée* (Cinema and Animated Image Code). Under the law, a professional agreement should be signed, setting out when a film can be made available by an on-demand audiovisual media service provider or when it can be broadcast on television. The current agreement, which was concluded on 6 September 2018, was extended to include all companies in the sector under a decree issued by the Minister of Culture on 25 January 2019. Under the new legal framework that resulted from the transposition of the Audiovisual Media Services Directive and the Decree of 22 June 2021, which requires foreign on-demand audiovisual media service platforms (such as Netflix, Disney +, Amazon Prime Video, etc.) to finance film production, media chronology must be adapted to changes in how these services are used. These platforms, which are now obliged to plough huge amounts of money into film production, are no longer content to wait 36 months after a film is released in cinemas before being allowed to show it themselves.

Article 28 of Ordinance no. 2020-1642 of 21 December 2020 therefore creates a framework for a new agreement to be negotiated. On 2 December, after negotiations had stalled for months, causing the Ministry of Culture to threaten regulatory intervention (as provided for in the Decree of 26 January 2021), the Canal Plus group, the primary funder and broadcaster of French films, and industry representatives (BLIC, BLOC, ARP) announced that they had reached an agreement.

Under the agreement, Canal Plus and its Ciné + channel will provide a guaranteed annual investment of EUR 190 million until 2024, in return for which the pay-TV channel will be allowed to broadcast films six rather than eight months after their cinema release, with an exclusive window of at least nine months for Canal Plus (“which can be extended to up to 16 months with the second window”).

The signatories want the agreement to enter into force as soon as possible in order to safeguard the long-term financing of the film sector. For their part, the on-demand audiovisual media service platforms must now sign an agreement with film industry representatives, which could see them permitted to show films 15 months after their cinema release. The rules for free TV channels have yet to be agreed.

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Le Groupe Canal+ et les organisations du cinéma signent un nouvel accord, L'ARP, Communiqué du 2 décembre 2021

https://larp.fr/communiques/le-groupe-canal-et-les-organisations-du-cinema-signent-un-nouvel-accord/

Canal+ Group and film organisations sign a new agreement, L'ARP, press release of 2 December 2021

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[FR] Creation of experimental fund for French works destined for non-European on-demand audiovisual media services

Amélie Blocman
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Through a decision taken on 5 November 2021 amending the General Aid Regulations, the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC) set up an experimental fund to support the independent production of French audiovisual works prefinanced exclusively by non-European on-demand audiovisual media service platforms.

The investment obligations that now apply to foreign platforms result from the transposition of the European Audiovisual Media Services Directive through an ordinance issued in December 2020. The detailed rules governing these contributions to French audiovisual and cinematographic production were set out in the Decree of 21 June 2021.

The fund, with a budget of EUR 5 million, will be open until 30 April 2022 and will enable works financed by the platforms and produced by commissioned French producers to benefit from selective grants. The temporary funding is therefore available to French production companies that are independent of the platform commissioning the work.

Works are eligible if they promote French cultural heritage and have a particular cultural, social, scientific, technical or economic value. They can be works of fiction (excluding sketches), animations, creative documentaries or audiovisual adaptations of live performances, and must be produced entirely or mainly in French or a regional language spoken in France.

In order to qualify, works must meet various criteria, including the definition of independent works contained in the Decree of 21 June 2021. They must not be financed by one or more service providers (television channels or platforms) established in France. They must therefore be financed through an initial contribution from one or more foreign-based on-demand audiovisual media service providers worth at least 25% of the French contribution. The French contribution must represent at least 30% of the final cost and production costs in France must make up at least 50% of the French contribution.

The CNC decision also sets out how the funding will be awarded and distributed.

CNC, Délibération n° 2021/CA/33 du 5 novembre 2021 modifiant le règlement général des aides financières du Centre national du cinéma et de l'image animée, JORF 21 nov. 2021

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044346628

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CNC, decision no. 2021/CA/33 of 5 November 2021 amending the general financial aid regulations of the National Centre for Cinema and the Moving Image, Official Gazette, 21 November 2021

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[FR] International on-demand audiovisual media service platforms reach agreement with CSA on their obligations towards French and European audiovisual and film production

Amélie Blocman
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Following on from the transposition of the European Audiovisual Media Services Directive through the Ordinance of 21 December 2020, the On-Demand Audiovisual Media Services Decree of 22 June 2021 obliges foreign platforms to invest in the French and European film and audiovisual sector. Previously, only French-based service providers had been required to finance the film-making industry.

The *Conseil supérieur de l'audiovisuel* (the French national audiovisual regulator, CSA, which will become the *Autorité de régulation de la communication audiovisuelle et numérique* (ARCOM) on 1 January 2022) can adapt these obligations in the relevant agreements signed with the platforms (Art. 8 of the Decree). It can also impose sanctions if they are not met (Art. 43-7 of the Law of 30 September 1986), with fines of up to double the annual sum payable, or three times in cases of recidivism.

On 9 December 2021, the CSA announced that it had signed agreements with the main on-demand AVMS providers based in other EU member states that provide film and audiovisual services in the French market, i.e. Netflix, Disney +, Amazon Prime Video for its subscription-based service, and Apple App – iTunes Store. It had also notified them in writing of their obligation to invest 20% of the turnover they generate from subscription-based services in France, with 80% of this sum going to audiovisual production and 20% to cinema production. The total expected contribution to production is expected to be between EUR 250 and 300 million per year.

"This is a huge step forward for the French and European cultural model," said the French regulator.

The new media chronology agreement, which is expected to be concluded very soon, should complete the integration of these platforms into the financing system for French and European film-making. In the meantime, the CSA explained that it had decided to notify them of their investment obligations in writing in order to leave open the possibility of signing agreements in the future. Cross-industry agreements, the provisions of which will be taken into account by the regulator, may therefore still be negotiated and signed in both the film and audiovisual sectors.

The CSA also pointed out that five other services concerned by the new regulations will need to sign agreements or be notified of their obligations in writing by the end of 2021. ARCOM will keep a close eye on the platforms' compliance with the obligations set out in the relevant agreements and

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notifications.

CSA, communiqué du 9 décembre 2021

https://www.csa.fr/Informer/Espace-presse/Communiques-de-presse/Le-regulateur-integre-les-principaux-SMAD-internationaux-au-systeme-francais-de-financement-de-la-creation

CSA, press release of 9 December 2021

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[FR] Text and data mining, out-of-commerce works, extended collective licensing: Ordinance of 24 November 2021 completes transposition of Directive 2019/790

Amélie Blocman
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After the Law of 24 July 2019 protecting the neighbouring rights of press publishers and agencies, and the Ordinance of 12 May 2021 that transposed into French law the new system of liability of content-sharing platforms and mechanisms for the fair remuneration of rightholders, the Ordinance of 24 November 2021 completed the transposition of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market, the deadline for which had been 7 June 2021.

In accordance with Articles 3 to 6 of the Directive, the Ordinance provides for and adapts exceptions to copyright and neighbouring rights in order to protect text and data mining, the use of extracts of works for the purposes of illustration for teaching and the reproduction of works in order to preserve the cultural heritage.

From 1 January 2022, the *Autorité de régulation de la communication audiovisuelle et numérique* (Regulatory Authority for Audiovisual and Digital Communication – ARCOM) will be responsible for ensuring these exceptions are granted, especially in relation to the implementation of technical protection measures.

The Ordinance also aims to broaden access to works through collective licensing. To this end, it creates a new system enabling cultural heritage institutions such as libraries, museums and archives, to digitise and disseminate, including online and outside EU borders, out-of-commerce works in their collections. Article 5 of the Ordinance defines the notion of an out-of-commerce work (Article L. 138-1 of the *Code de la propriété intellectuelle* (Intellectual Property Code) – CPI).

The Ordinance contains a specific rule on collective licensing with an extended effect. This mechanism is designed to enable a collective management organisation to negotiate an agreement for the benefit not only of its members but also of authors who are not members, provided the works concerned are sufficiently within its remit (non-members can choose to withdraw from the arrangement).

Under Article 1 of the Ordinance, such licences can be used to enable educational establishments to exploit works in a digitised format for illustrative purposes in teaching. The conclusion of extended collective licences is also provided for in Articles 4 and 6 of the Ordinance in relation to, on the one hand, the exploitation of works of visual art by content-sharing platforms and, on the other, the open publication of scientific works on the Internet.

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Finally, Article 3 of the Ordinance deals with the possibility provided by the Directive to implement collective licensing mechanisms with an extended effect in order to amend the provisions of Law 2012-287 of 1 March 2012 on the digital exploitation of out of-commerce 20th-century books in order to ensure it complies with EU law.

Ordonnance n° 2021-1518 du 24 novembre 2021 complétant la transposition de la Directive 2019/790 de 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044362034

Ordinance no. 2021-1518 of 24 November 2021 completing the transposition of Directive 2019/790 on copyright and related rights in the Digital Single Market

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UNITED KINGDOM

[GB] Digital Culture Media and Sport Committee undertake enquiry into role and impact of social media influencers and the need for further regulation

Julian Wilkins
Wordley Partnership

Currently, Digital Culture Media and Sport Committee of the UK Parliament is undertaking an enquiry, which started in June 2021, into the influencer culture, including the radicalisation by some influencers.

The enquiry is considering the power of influencers on social media, how influencer culture operates, and the absence of regulation on the promotion of products or services, aside from the existing policies of individual platforms. Research showed that more than three-quarters of influencers "buried their disclosures within their posts". Also, the enquiry will assess influencer impact on media and popular culture including their positive role, such as raising awareness for a campaign addressing vaccine hesitancy among people from ethnic minority backgrounds.

There have been four evidence hearings so far and a broad range of witnesses have been called, including Em Sheldon a content creator and influencer and Dr Francesca Sobande a lecturer, School of Journalism, Media and Culture, at Cardiff University. Whilst evidence has been taken from Amy Hart, a content creator, activist and former contestant on ITV's *Love Island*.

The evidence so far has identified different aspects of influencers and their impact. Nicole Ocran, co-founder of Creator Union, said that being an influencer was a proper job and a full-time obligation. Bloggers and influencers have set up an organisation called Creator Union to help steer influencers through the majority of issues that they confront in fulfilling that which was about encouraging a responsible community, and working to standards.

Other evidence revealed a class of influencer who used social media to influence opinion in order to have a disruptive or negative effect. Committee evidence showed that regulating political speech is very hard when simultaneously an influencer was advertising a product. Sometimes it was difficult to distinguish between a political or commercial endorsement. This raised the issue on where to draw the line between regulation and free speech for influencersand whether it is commercial or more political.

There is the problem of disinformation for hire, where influencers have been hired to spread disinformation, including about COVID-19. Another problem area was identifying the funding of political influencers who are paid or receive money from

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organisations that are totally unaccountable or impossible to scrutinise in the public debate. The issue had to be understood in the context of social media platform policies when addressing influencer marketing.

Even though social media platforms have differing methods of scrutiny to identify fake news and disinformation, some influencers have developed techniques to avoid AI (Artificial Intelligence) detection such as using deceptive hashtags, for example QAnon using numbers instead of letters.

Other identified ways to disseminate disinformation and misinformation are campaigns operating are through more covert strategies. Examples of that include asking questions: "*I am just asking a question*". The Committee heard evidence that an influencers' aim is not necessarily to persuade but to cause doubt.

Another identified strategy is to use phrases such as: *"I am sharing a personal anecdote or an anecdote about a friend"*. One example given to the Committee was the effect of Nicki Minaj, a rapper and pop singer, who on 13th September 2021 tweeted to her followers about an unidentified cousin's friend in Trinidad, who was dumped at the altar by his bride because "*the vaccine*", presumably for COVID-19, allegedly made his testicles swell. Trinidad and Tobago's health minister said two days later the claim was debunked after being invetsigated.

Another issue highlighted in the enquiry is the fact that the people targeted by certain influencers, or by features of the internet which have made it much easier for harassment to occur, are the same people who are targeted by platforms with regard to the demonetisation of content.

The last hearing of evidence was on the 25 November 2021 and further details are awaited. A previous select committee enquiry on the harm of social media gave rise to the current Social Media Bill, which intends to legislate against hate speech on social media. Whether the current committee enquiry about influencer impact will lead to further regulation remains to be determined.

Influencer culture. Inquiry. UK Parliament

https://committees.parliament.uk/work/1126/influencer-culture/

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ITALY

[IT] Italy transposes Directive (EU) 2019/790 (DSM Copyright), Directive (EU) 2019/789 (Sat Cab) and Directive (EU) 2018/1808 (Audio Visual Media Services)

Sofia D'Arena & Ernesto Apa
Portolano Cavallo

On 4 November 2021, the Italian Government approved the legislative decrees implementing, in Italy, EU Directive No. 2019/790 (“Copyright Directive”) and EU Directive No. 2019/789 (“Sat Cab Directive”), which will substantially amend the Italian Copyright Act (Law No. 633/1941). On the same day, the Italian Government also approved the new Italian Audiovisual Media Services (“AVMS”) Code, transposing into Italian law EU Directive No. 2018/1808 (which amended the AVMS Directive).

A few months ago, following the guiding principles set forth by the European Mandate law - which mandated the Italian Government to implement several EU Directives, including the Copyright Directive, the Sat Cab Directive and the AVMS Directive - the Council of Ministers preliminarily approved three draft bills implementing the above-mentioned directives.

Specifically, the draft bill implementing the Copyright Directive was approved on 5 August 2021. Thereafter, it was sent to the Italian Parliament for the required (non-binding) opinions. In October, the relevant Parliamentary Committees expressed a favorable opinion, while also making a few suggestions to the Government. Detailed comments were also delivered by the Italian Competition Authority and by the Italian Communications Authority. Of note, the most debated topics included the transposition of the provisions regarding the online use of press publications and the use of protected content by online content-sharing service providers.

Conversely, the draft bill implementing the Sat Cab Directive was preliminarily approved on 29 July 2021. It was then sent to the relevant Parliamentary Committees, which expressed a favorable (non-binding) opinion, while addressing a few remarks to the Government. The most debated topics included the application of the country-of-origin principle to ancillary online services and the transmission of programs through direct injection.

In addition, on 5 August 2021, the Council of Ministers preliminarily approved a draft AVMS Code, which was then sent to the Italian Parliament for the required (non-binding) opinions. The draft AVMS Code was also forwarded to the Unified Conference for the State and Regions, the Italian Communications Authority and the Italian Council of State, which delivered detailed comments. The most debated topics included the advertising limits for the Italian Public Service

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Broadcaster (RAI) and the investment quota obligations for on-demand audiovisual media service providers.

Pursuant to the TRIS notification procedure set forth by the EU Directive 2015/1535, on 22 October 2021, the Italian Government notified the European Commission of the draft AVMS Code, specifying that the relevant provisions for the purposes of the notification were those regulating video-sharing platforms (Articles 41 and 42) and the promotion of European works (Articles from 52 to 57). Notably, under the TRIS notification procedure, the notification of the draft starts a three-month standstill period, to allow both the European Commission and the other Member States to analyse the notified text and respond appropriately. During the standstill period, the notifying Member State cannot adopt the notified draft.

The new AVMS Code and the legislative decrees implementing the Copyright Directive and the Sat Cab Directive will enter into force 15 days after their publication in the Italian Official Journal, except for Articles 41 and 42 and for Articles from 52 to 57 of the new AVMS Code, which will enter into force on 1 March 2022, as a result of the TRIS notification procedure.

Attuazione della direttiva (UE) 2019/790 del Parlamento europeo e del Consiglio, del 17 aprile 2019, sul diritto d'autore e sui diritti connessi nel mercato unico digitale e che modifica le direttive 96/9/CE e 2001/29/CE

https://www.gazzettaufficiale.it/eli/id/2021/11/27/21G00192/sg

Transposition of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

Attuazione della direttiva (UE) 2019/789 del Parlamento europeo e del Consiglio, del 17 aprile 2019, che stabilisce norme relative all'esercizio del diritto d'autore e dei diritti connessi applicabili a talune trasmissioni online degli organismi di diffusione radiotelevisiva e ritrasmissioni di programmi televisivi e radiofonici e che modifica la direttiva 93/83/CEE del Consiglio

https://www.gazzettaufficiale.it/eli/id/2021/11/29/21G00191/sg

Transposition of Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 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 amending Council Directive 93/83/EEC

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NETHERLANDS

[NL] Judgment on use hidden-camera footage in investigative programme

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On 12 November 2021, the *Rechtbank Amsterdam* (District Court of Amsterdam – the Court) issued an important judgment on the broadcast of hidden-camera footage used during an investigative programme. The Court also laid down important principles on when a broadcast may be prohibited before it is broadcast.

The case involved the well-known Dutch television programme *Undercover in Nederland,* which is produced by Noordkaap TV productions, and broadcast by the commercial Dutch broadcaster SBS6. At issue was an upcoming broadcast of the programme, which was to feature reports of serious irregularities at a care home for the elderly. The programme included interviews with former employees of the care home, and family members of residents. Notably, the programme had sent two of its own journalists to work undercover at the care home, using fictious names, and had recorded footage from the home using hidden-cameras.The programme included serious allegations against the care home, including that there were too few personnel, with incorrect medicine dosages being administrated to residents; that the quality of care was substandard, with bedsores and poor hygiene; and that there was poor administration. Before the broadcast, the care home initiated legal proceedings against Noordkaap TV, seeking an order to have the broadcast prohibited, or as an alternative, to prohibit the broadcast of the hidden-camera footage, and identifying the care home, its employees and residents, with the care home arguing there would be a violation of privacy. Furthermore, the care home argued that the programme was “biased”, and pointed to how one of the undercover journalists, when revealing themselves to the care home manager, stated “We are going to make sure” the home “is closed”.

At the outset, the Court noted that the proceedings involved an urgent request to prohibit a planned broadcast, which could only be granted by a court in “exceptional circumstances”, as Article 7 of the Dutch Constitution prohibits “prior supervision of the content of a radio or television broadcast”. In this regard, the Court viewed the intended broadcast at the hearing, and held that it must weigh up the interests of the programme makers’ freedom of expression, especially the right to “warn about abuses that affect society”, under Article 10 of the European Convention on Human Rights (ECHR); and the care home’s interest in protecting its reputation and the privacy of its residents and employees, under Article 8 ECHR.

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Firstly, the Court noted that the programme conducted its journalistic investigation with “sufficient care”, relying on information from a family member of a resident, three former employees, and two undercover journalists that worked at the care home for a number of days, and kept diaries and recorded footage using hidden cameras. Crucially, the Court held that the use of the hidden camera was “justified”, given that a number of irregularities at the care home “would not have come to light” without such reporting. Secondly, the Court held that the programme had uncovered “sufficient factual material” to broadcast the allegations, and the Court agreed that the programme must be able to “contribute to public debate”. In this regard, the Court attached a “great deal of weight” to the programme’s freedom of expression. Notably, the Court did recognise that the programme did contain some “factual inaccuracies”, and that conditions at the home “may have improved” since the recordings. Furthermore, the Court held that the care home will “suffer reputational damage as a result of the broadcast”. However, “in view of the abuses that are (or have been)”, the home only has itself to blame to a certain extent for this damage. Furthermore, the Court noted that the “privacy interests” of employees and residents are “sufficiently met”, as the programme made their faces and voices unrecognisable.

In conclusion, the Court held that the strict requirements set for a “preventive broadcasting ban” had not been met, and the Court rejected the care home’s request for a prohibition order against the programme.

Rechtbank Amsterdam, ECLI:NL:RBAMS:2021:6086, 12 november 2021

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2021:6086

District Court of Amsterdam, ECLI:NL:RBAMS:2021:6086, 12 November 2021

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[NL] Facebook not required to reinstate posts by prominent public figure

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On 29 October 2021, the *Rechtbank Rotterdam* (District Court of Rotterdam - the Court) delivered a notable judgment on Facebook's removal of posts by a prominent activist, and whether Dutch courts may apply the right to freedom of expression under Article 10 of the European Convention on Human Rights to a platform's removal of such content.

The case involved Willem Engel, a well-known activist who campaigns against Covid-19 measures implemented by the Dutch government, and is director of a high-profile campaign group "*Stichting Viruswaarheid*" (Virus Truth Foundation). Engel maintains a Facebook account, and the case arose during May and July 2021, when Facebook removed a number of posts by Engel concerning Covid-19, for violating Facebook's terms of service on Covid-19 disinformation. The posts included the statements (a) that certain substances in the Pfizer vaccine are "very, very toxic", (b) in relation to the Ivermectin drug, "Make sure you bring it home", and (c) "I hope people read this and see that it is a nuanced story and certainly not a killer virus that threatens the population". In addition, Facebook also suspended Engel's access to his account for 30 days.

Following the removal of the posts and his account suspension, Engel initiated legal proceedings against Facebook, seeking reinstatement of the posts. Engle argued that Facebook acted "unlawfully" by violating his right to freedom of expression under Article 10 ECHR, as Facebook had a "duty of care" to protect users' freedom of expression due to its "enormous reach". At the outset, the Court first held that while Article 10 ECHR does not have a "direct horizontal effect", it does have "indirect effect" in the relationship between the parties, with the Court citing recent Dutch case law on the point (see, for example, IRIS 2021-9/28). In this regard, the Court noted that Engel's right to freedom of expression must be balanced against Facebook's right to property, which incorporates Facebook being "in principle" free to determine the rules for the use of its platform.

The Court then examined whether Facebook violated Engel's freedom of expression through the application of its Covid-19 disinformation policy. In this regard, the Court held that Facebook had legitimate reasons for restricting Engel's freedom of expression, especially as Facebook had issued its COVID-19 policies in response to a call from the European Commission and international health organisations to combat disinformation about Covid-19, with the aim of protecting the safety and public health of the public. Further, Engel's right to freedom of expression does not include a right to use the Facebook platform to express all his views on Covid-19, and the mere fact that Facebook has a "very large reach" is irrelevant. In particular, it is not the case that Engel has no other avenues to express his views on Covid-19 policy. Notably, the Court admitted that in "specific

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cases, application of the policy may lead to correct messages being deleted", but nonetheless, Facebook may "reasonably rely" on the expertise of experts from various health organisations and governments in determining its Covid-19 disinformation policy.

Finally, the Court considered whether the deleted posts had been correctly removed by Facebook under its terms of service. The Court examined the posts, and held that Facebook was entitled to consider that Engel's statements (a) about the Pfizer vaccine, violated Facebook's rules on questioning the safety of vaccines; (b) recommending Ivermectin as a remedy for Covid, violated Facebook's rules as it is not an approved remedy for Covid-19; and (c) that Covid-19 is "not a killer virus", violated Facebook's rule on downplaying the seriousness of Covid-19. Therefore, the Court concluded that Facebook had not acted unlawfully, was entitled to remove the posts, and that there had been no violation of Engel's freedom of expression.

Rechtbank Rotterdam, ECLI:NL:RBROT:2021:10459, 29 oktober 2021

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2021:10459

District Court of Rotterdam, ECLI:NL:RBROT:2021:10459, 21 October 2021

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