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EDITORIAL

On 21 December 2021, the European Commission issued a call for evidence on the Commission's upcoming landmark proposal for a Media Freedom Act. This follows the announcement in September 2021 by the European Commission president, Ursula von der Leyen, that the Commission would “deliver” a Media Freedom Act in 2022, in order to safeguard the pluralism and independence of the media in the EU internal market. The purpose of the call for evidence is to invite stakeholders to express views on the Commission’s description of the Media Freedom Act initiative, why it is necessary, and what it aims to achieve. Regarding public service media, the Commission aims to reflect on how best to strengthen the governance of public media, around a common framework to better prevent the risks of politicisation and to better ensure diversity and pluralism. The Council of Europe is pursuing in parallel various initiatives to counter current trends threatening freedom of expression such as the coverage of public events or broadcasting bans in line with its traditional role of advocating freedom of expression as enshrined in Article 10 of the European Convention on Human Rights. And the European Audiovisual Observatory is preparing an IRIS Plus on the topic.

So against the background of all these European efforts, the European Audiovisual Observatory invites you to its online conference on the current status and future of PSM and will deal with the following questions: How can Europe best ensure the editorial independence of PSM? How can one guarantee adequate funding of PSM? What is the role of PSM in the online environment? And what about its future? This free public conference will take place online on Wednesday, 23 February 2022, 15.00 – 17.00 CET. You can read the agenda here and register here.

Otherwise, if you wonder about what is going on at the national level, then the Newsletter is here waiting for you.

Stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

Table of content

INTERNATIONAL

COUNCIL OF EUROPE

AUSTRIA

European Court of Human Rights: Standard Verlagsgesellschaft mbH v. Austria (no. 3)

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

While the European Court of Human Rights (ECtHR) has, in the last few years, dealt with many aspects of the right to freedom of expression in the digital environment, it has only recently delivered a judgment specifically focusing on the right of anonymity for user generated content on news portals. In *Standard Verlagsgesellschaft mbH v. Austria (no. 3)* the applicant media company complained that court orders that imposed on it an obligation to disclose data revealing the identity of users, who had posted comments on its Internet news portal, had infringed its freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). The ECtHR found a breach of Article 10 ECHR because the Austrian courts had not sufficiently considered the users' right of anonymity and the interest of the media company in protecting the users as the authors of the comments. Whilehe comments expressed on the Internet news platform had been seriously offensive, they had been expressed as part of a political debate and had not amounted to hate speech nor had they been otherwise clearly unlawful.

The applicant multi-media company in this case publishes the daily printed newspaper Der Standard, also available in digital format (as an "e-paper") and in an online version as *derStandard.at.* At the end of each online article on the news platform *derStandard.at,* readers are invited to register as users to post comments. Each user is required to submit his or her name, surname and email address to the media company. Moreover, he or she may, optionally, submit a postal address. Users are informed that their data will not be seen publicly. Under a subheading "forums' rules" the platform reminds users that they are responsible for their own comments and that they may be held liable for them. The forum rules also mention that the media company will only disclose user data if required to do so by law. The media company reserves the right to delete posts that do not comply with the community guidelines and the news platform has installed software so that all user comments are screened for problematic content before they are published on the portal. In the event that the system flags a problematic comment, the publication of that comment becomes subject to a manual ex ante review. User comments are also subject to an editorial review on a regular basis. The news platform has also implemented a "notice and take down" system by

which other users can trigger a manual editorial review of published user comments by means of a “report” button.

On two occasions the news platform had been asked by different people to delete comments which they considered defamatory, with a request also to disclose the users’ data in order to be able to institute civil and criminal proceedings against the authors of the alleged defamatory content. The news platform in each of these cases deleted the comment, but refused to disclose the relevant user data. The plaintiffs brought civil proceedings against Der Standard news platform, which resulted in court decisions ordering the news platform to disclose the identity of the particular users. The news platform maintained that it was not obliged to disclose the user data because the comments at issue were not defamatory, but rather constituted permissible valued judgments. It also invoked the right to protect journalistic sources. However, the Austrian courts found that the plaintiffs were entitled, under section 18(4) of the E-Commerce Act, to demand the disclosure of the user data.

The ECtHR first agrees with the Austrian courts that the news platform could not rely on the protection of journalistic sources or on editorial confidentiality in the instant case. The comments posted on the forum by readers of the news portal, while constituting opinions and information, were clearly addressed to the public rather than to a journalist. Therefore the comments’ authors could not be considered a source to a journalist. The ECtHR is of the opinion, however, that the media company’s overall function is to further open discussion and to disseminate ideas with regard to topics of public interest, as protected by freedom of the press. It refers to principle 7 of the Declaration on freedom of communication on the Internet, adopted on 28 May 2003 by the Committee of Ministers of the Council of Europe, which emphasises the principle of anonymity for Internet users in order to enhance the free expression of opinions, information and ideas. Although the right of anonymity is not absolute, there is no doubt that an obligation to disclose the data of authors of online comments could deter them from contributing to debate and therefore lead to a chilling effect among users posting in forums in general. That also affects, indirectly, the media company’s right as a media company to freedom of press. It invitees users to comment on its articles in order to further discussion on its journalistic work and to achieve that goal, it allows authors of comments to use usernames. Upon registration, users are informed that their data would not be seen publicly and wouldonly be disclosed if required by law. The media company hence awards its users a certain degree of anonymity not only in order to protect its freedom of the press but also to protect the users’ private sphere and freedom of expression, while this anonymity would not be effective if the media company could not defend it by its own means. The ECtHR therefore finds that the domestic courts’ orders in the two sets of proceedings to disclose the requested user data constituted an interference with the media company’s right to enjoy freedom of the press under Article 10 § 1 ECHR. The ECtHR agreed that such interference was prescribed by law, in order to achieve the legitimate aim of protecting the reputation and rights of others. It finds, however, that the impugned interference was not necessary in a democratic society, because the Austrian courts did not base their assessment on any balancing between the interests of the authors of the particular comments

and of the media company to protect those authors, respectively, on the one side, and the interests of the plaintiffs concerned on the other side. The lack of any balancing between the opposing interests overlooks the function of anonymity as a means of avoiding reprisals or unwanted attention and thus the role of anonymity in promoting the free flow of opinions, ideas and information, in particular when political speech is concerned which is not hate speech or otherwise clearly unlawful. The ECtHR finds that in the absence of any balancing of those interests the disclosure orders by the Austrian courts were not supported by relevant and sufficient reasons to justify the interference. It follows that the interference was not in fact “necessary in a democratic society”, within the meaning of Article 10 § 2 ECHR. Therefore the ECtHR finds, unanimously, that there has been a violation of Article 10 ECHR.

European Court of Human Rights, Fourth Section, in the case of Standard Verlagsgesellschaft mbH v. Austria (no. 3), Application no. 39378/15, 7 December 2021

https://hudoc.echr.coe.int/eng?i=001-213914

EUROPEAN UNION

Commission issues call for evidence on proposal for a Media Freedom Act

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 21 December 2021, the European Commission issued a call for evidence on the Commission's upcoming landmark proposal for a Media Freedom Act. This follows the announcement in September 2021 by the European Commission president, Ursula von der Leyen, that the Commission would “deliver” a Media Freedom Act in 2022, in order to safeguard the pluralism and independence of the media in the EU internal market (see also IRIS 2021-6/15). The purpose of the call for evidence is to invite stakeholders to express views on the Commission’s description of the Media Freedom Act initiative, why it is necessary, and what it aims to achieve. Crucially, the call for evidence is accompanied by an important document setting out detailed options on the Media Freedom Act initiative, which is entitled “Safeguarding media freedom and pluralism in the internal market”.

The Commission first sets out the problems the Media Freedom Act aims to tackle, namely that the internal media market in the EU is affected by (i) different national rules on media pluralism, (ii) insufficient structures for cooperation between independent media regulators; (iii) instances of public and private interference in the ownership, management or operation of media outlets, and (iv) lack of media pluralism safeguards, including online. Notably, the Commission states that “interference” in editorial and management decisions of media may lead to “biased media coverage”, and can affect investment or market entry decisions; while state resources “may be used to put pressure on media”. According to the Commission, these problems have a direct impact on the functioning of the EU single market for media, lead to regulatory fragmentation, and deprive media market players of legal and market certainty.

As such, the objective of the Media Freedom Act will be to ensure that (a) media companies can operate in the internal market subject to consistent regulatory standards, including in regard to media freedom and pluralism; (b) ensure that EU citizens have access to a wide and varied media offer both offline and online; (c) safeguard the editorial independence and independent management of the media, which is a precondition of media freedom and of the integrity of the internal market; and (d) foster undistorted competition between media companies by ensuring a transparent and fair allocation of state resources. Notably, the Media Freedom Act would build upon the revised Audiovisual Media Services Directive (see IRIS 2019-1/3), and the upcoming Digital Services Act package (see IRIS 2021-1/13).

Crucially, the Commission then sets out the policy options for the Media Freedom Act initiative. First, the "baseline scenario" would be that the Commission would not propose any changes to the current legislative framework, and would continue monitoring national developments through its annual Rule of Law Reports. Second, "policy option 1" would be a Commission recommendation addressed to EU Member States, which would encourage Member States to "implement a number of actions" in relation to national scrutiny procedures over media market operations, "restrictions to market entry and operation, media ownership transparency, protection of editorial independence and media diversity and transparent allocation of state resources. Third, and most significantly, "policy option 2" would be an EU legislative instrument, which would "establish common principles" for national scrutiny procedures of media market transactions, and other restrictions to market entry and operation of the media; and would also envisage "measures to enhance transparency of media markets". Importantly, the legislation would set out "principles" for the "protection of editorial independence of the media" and "transparent allocation of state resources in the media sector". Finally, the legislation would be underpinned by an "effective and independent monitoring mechanism" at EU level, and a "structured cooperation framework for media regulators". Notably, it could build on the "existing EU network of independent media regulators", namely the European Regulators Group for Audiovisual Media Services (ERGA), and "potentially reinforced with necessary powers and resources".

Input in response to the call for evidence can be provided until 21 March 2022, and the Commission will publish an impact assessment in the second quarter of 2022. The Commission states that the Media Freedom Act is "planned for adoption in the course of 2022".

European Commission, "European Media Freedom Act: Commission starts consultations with call for evidence", 21 December 2021

https://digital-strategy.ec.europa.eu/en/news/european-media-freedom-act-commission-starts-consultations-call-evidence

European Commission, Call for evidence for an impact assessment, Ref. Ares(2021)7899801, 21 December 2021

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13206-Safeguarding-media-freedom-in-the-EU-new-rules_en

NATIONAL

GERMANY

[DE] Court rules in ARD's favour in case against BILD LIVE concerning unlawful broadcast

Christina Etteldorf
Institute of European Media Law

On 9 December 2021 (case no. 16 O 297/21), the *Landgericht Berlin* (Berlin regional court – LG Berlin) granted an interim injunction in proceedings brought by the nine public broadcasting corporations that comprise the ARD, declaring the broadcast of certain clips from ARD programmes by a private broadcaster as illegal on account of copyright infringements.

The dispute began when private broadcaster BILD TV, recently launched by the Axel Springer media company in August 2021, showed excerpts from the public broadcasters' election programming in its own BILD LIVE programme. On the day of the German parliamentary elections, 26 September 2021, BILD TV reported on the election, build-up events and the latest projections in its programme "*Es geht um Deutschland! Wahl 2021*" ("*It's about Germany! 2021 election*"). Excerpts from the ARD programme, that was running in parallel, were broadcast for a total of around 13 minutes. Some, including initial election result projections and forecasts, were shown live by feeding the public broadcasters' TV signal into the BILD TV programme, while others were time-delayed clips. ARD graphics were shown, as well as an interview with the CDU general secretary and excerpts from the "*Berliner Runde*", a discussion programme involving party leaders and top candidates for the parliamentary parties. The ARD had not agreed to this. Claiming that their neighbouring rights had been infringed and that their protection against passing off under competition law had been partly breached, the public broadcasters therefore applied for interim measures against BILD TV. The allegations were rejected by BILD TV, which argued that the unauthorised broadcast of the clips was justified on the grounds that the parliamentary election was an important moment in contemporary history. In particular, it claimed that the "*Berliner Runde*" was a newsworthy event of great significance which, although it was centrally produced by ARD and ZDF as public broadcasters funded by the licence fee, was also relevant to people who wished to be informed by other means on election night. The broadcast of the clips, with a clear indication of their source and a discussion of what had been shown, was therefore justified under the copyright law exemption for matters of public interest.

The LG Berlin partially upheld the ARD's application. It ruled that the simultaneous broadcast of parts of the ARD programme, containing election result projections and initial forecasts in the BILD LIVE programme, infringed the original broadcaster's neighbouring rights that were protected under Article 87 of the

German *Urheberrechtsgesetz* (Copyright Act – UrhG). It could not be justified from the point of view of reporting on current events (Article 50 UrhG) or quotations that were permissible under copyright law (Article 51 UrhG) because the limits of what was allowed under these provisions had been exceeded.

As regards to the time-delayed broadcast of the interview, on the other hand, the court decided that this constituted admissible reporting on current events (Article 50 UrhG) that was justified by the purpose of the report, and therefore did not require the original broadcaster's permission.

The court also rejected the claim under competition law on the grounds that the broadcasters that formed the ARD were, in this case, not competitors of BILD TV within the meaning of competition law, so they had no standing to bring such a claim.

The detailed reasons for this decision will be published in the written grounds, which are not yet available.

Landgericht Berlin, Pressemitteilung vom 9.12.2021

https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2021/pressemitteilung.1156051.php

Berlin regional court, press release of 9 December 2021

[DE] Proceedings opened against RT for broadcasting without a licence

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

The dispute over the distribution of the RT DE television channel in Germany is threatening to become another area of conflict in what has, for many years, been an increasingly tense relationship between the Russian Federation and Germany.

On 16 December 2021, RT (previously known as Russia Today) launched RT DE, a new live German-language channel. However, it did not have a German broadcasting licence for the channel, but instead used a licence issued in Serbia. A previous attempt by the broadcaster to obtain a licence from Luxembourg had failed. However, since the broadcaster does not hold a German licence, the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg state media authority) opened proceedings against RT DE.

The channel was initially available in Germany online and via satellite. However, shortly after its launch, a new RT DE YouTube channel was closed down because the video-sharing platform had banned RT's German-language service a few weeks earlier. It was closed down after the broadcaster ignored a temporary ban, imposed after YouTube found that RT DE had broadcast Covid-related misinformation.

Satellite operator Eutelsat suspended satellite distribution of RT DE on 22 December 2021.

On the same day, the Russian ambassador in Germany, Sergey Nechaev, told journalists that he was "very concerned about reports that the satellite signal transmission of the Russian German-language TV channel RT DE, which began broadcasting on 16 December 2021, has ended at the request of the German media regulator. We state with regret that RT DE remains under constant pressure in Germany in order to prevent, or make it as difficult as possible for, RT DE to start broadcasting to a German audience. The attempts to eliminate a strong competitor in the media field and restrict access to an alternative, and at the same time extremely professional, point of view on world events are clearly discordant with statements about the inadmissibility of censorship and protection of freedom of speech, press freedoms and the right to information."

The following day, 23 December 2021, Russian foreign minister Sergey Lavrov was interviewed on the subject by the Russian RT channel and put the hostilities in a broader context: "The Foreign Ministry is keeping a close eye on the environment in which Russian journalists work abroad, since discrimination against them has been all too common. RT and Sputnik have yet to be accredited by the Elysée Palace. Just a few days ago, President Vladimir Putin talked to his French counterpart, Emmanuel Macron, on the phone, and during the conversation he pointed out this fact, expressing hope that our French colleagues

would do everything to enable the Russian media, including RT, to operate in France in the same journalist-friendly environment as French journalists enjoy in Russia. We would like the same principle to apply to RT in Germany and to any other Russian media outlet facing discrimination abroad. I believe that what happened in Germany was outrageous. From the outset, the German authorities went to great lengths to generate negative publicity about the channel, targeting the general public, as well as officials, even though some officials did try to distance themselves from what the German "regulator" was doing. It all started with attempts to block banking services, after which they refused to register the channel and prevented Luxembourg from doing so. Our colleagues in Serbia have been able to register the German-language RT channel as per the European Convention on Transfrontier Television, to which Germany is a party and must abide by its provisions. By all accounts, they will now try to shift the blame to social networks like YouTube, pretending that it was their initiative and that they are guided by their own in-house "criteria," while the German state has nothing to do with this. This is not the way things are. The German state must be involved, since Germany has undertaken to ensure freedom of information and assumed these commitments. It is not YouTube who is to blame but the state on whose territory arbitrary actions of this kind take place. We have been witnessing discrimination against the Russian media for many years now. Quite often, we have been tempted to respond in kind, in a tit-for-tat manner. However, until recently there was a prevailing belief that we did not want to go along the same path of "strangling" the press and the media, following in the footsteps of our Western partners. That said, just as with efforts to ensure Russia's security, this patience has its limits. I cannot rule out that this unacceptable situation will persist, leaving us with no other choice but to respond."

In an interview with the German Press Agency on 2 January 2022, the Russian ambassador in Germany responded to the question of whether the removal of RT DE by Eutelsat would have consequences for the German media in Russia. "There will certainly be a reaction from the Russian side," he said. "I'm not an Oracle from Delphi, but there are several possibilities. There are so many German journalists in Russia. All of these journalists feel comfortable in the Russian media market. And we don't really want a conflict. We just want our station in Germany to have the same rights and opportunities and to be able to work in peace." When asked whether Deutsche Welle, the German international broadcaster, might be affected in Russia, Nechaev replied: "There is no automatism. I don't want to anticipate anything. I still hope that there is no more pressure on RT in Germany."

In response to this interview, the *Deutsche Journalisten-Verband* (German Federation of Journalists – DJV) urged German foreign minister Annalena Baerbock to call on the Russian ambassador in Berlin to make it clear that threats against German journalists working in Russia are unacceptable. "Such a blatant threat cannot go unanswered. The foreign minister must finally send a clear message to Russia," demanded DJV president Frank Überall. Referring to a law recently adopted in Russia requiring foreign journalists to undergo medical examinations, Überall stressed that the harassment of colleagues working in Russia was increasing all the time.

Kommentar des Botschafters der Russischen Föderation in Deutschland Sergej Netschajew für die Schweriner Volkszeitung

https://russische-botschaft.ru/de/2021/12/20/kommentar-des-botschafters-der-russischen-foederation-in-deutschland-sergej-netschajew-fuer-die-schweriner-volkszeitung/

Comment of Sergey Nechaev, Russian ambassador in Germany, for the Schweriner Volkszeitung

Extract from the foreign minister Sergey Lavrov's interview with RT television channel, Moscow

https://russische-botschaft.ru/de/2021/12/23/extract-from-the-foreign-minister-sergey-lavrovs-interview-with-rt-television-channel-moscow/

Pressemitteilung des Deutschen Journalisten-Verbands, Gewerkschaft der Journalistinnen und Journalisten

https://www.djv.de/startseite/service/news-kalender/detail/news-haende-weg

Press release of the German Federation of Journalists

[DE] Remit and structure of public service broadcasting to be reformed

Christina Etteldorf
Institute of European Media Law

In November 2021, the *Rundfunkkommission* (Broadcasting Commission) of the German *Bundesländer*, which acts as a joint discussion forum and decision-making body on media policy and related legal questions for the Heads of the State and Senate Chancelleries, published a draft proposal on the remit and structural reform of public service broadcasting. If the proposal is adopted, it will be the third time that the *Medienstaatsvertrag* (state media treaty – MStV) has been reformed, the current version of which came into force in November 2020. Its main purpose is to future-proof public service broadcasting in Germany, in particular in response to the digital transformation and changing user behaviour, as well as to improve the recognition of public broadcasting as an important pillar for media diversity, pluralism and, therefore, democracy.

The reforms will mainly be achieved by redefining the public service remit (Article 26 MStV), which will be supplemented with the following addition: “The public service broadcasters have a duty to provide a comprehensive service for everyone. When designing their services, they must make use of the opportunities they are given through their licence fee income and contribute to media diversity through their own ideas and perspectives. All population groups should be able to participate in the Information Society. Due consideration must therefore be given to all age groups, especially children, teenagers and young adults, as well as to the needs of people with disabilities and families. Public broadcasting services must promote culture, education, information and advice. Entertainment, as part of a public service offer profile, is part of their remit.” Meanwhile, the addition of the following sentence is yet to be finally agreed: “The public service offering profile should be especially noticeable in the broadcaster’s own programmes and telemedia services whose audience figures are usually very high.” The draft proposal takes into account the case law of the Constitutional Court, which considers the ARD members, ZDF and Deutschlandradio, as important pillars for media diversity and, therefore, democracy in Germany. Their remit, i.e. the radio, television and the online services that they should provide, must be regularly adapted in accordance with the need to guarantee the existence and development of public service broadcasting, not least in view of the digital transformation and changing user behaviour. The draft achieves this, *inter alia*, by improving the accessibility of media services for certain groups of users and by giving broadcasters greater flexibility through an amendment of the offer profile required under their remit in relation to content and distribution methods. New provisions regarding the offer of high-quality, independent and impartial information, pluralism of content and diversity of opinion are also proposed.

The draft also provides broadcasters with greater opportunities and flexibility in decision-making insofar as only Das Erste Programm (ARD), ZDF, the Dritte Programme and the channels Arte and 3sat, which are jointly operated with

European partners, will be required to provide linear programmes in the future. The other seven public service TV channels (Tagesschau 24, One, ARD-alpha, ZDFneo, ZDFinfo, PHOENIX and Kinderkanal (KI.KA)), which until now have been under the same obligation, will in future be able to decide for themselves whether or not they want to continue providing linear services or whether they want to become online-only. The draft also seeks to create greater transparency and diversity in relation to public broadcasters' online (telemedia) services: if the broadcasters use online recommendation systems, they should facilitate an open opinion-forming process and broad debate regarding content. Broadcasters' own online services should also be explicitly offered outside their own platforms, such as their own video libraries.

With the main purpose of safeguarding public acceptance of public service broadcasting and its financing through the licence fee in the future, the draft also makes provision for stricter monitoring and control obligations, in particular for the broadcasters' governing bodies. For example, these bodies should set targets for content quality and will be more closely involved in the evaluation of budgetary and financial management. The draft also requires the broadcasters to hold continuous dialogue with the public, especially with regard to quality, performance and service development.

The broadcasting licence fee and its size are, for constitutional reasons, linked to the distinction between state treaty provisions concerning the public service remit and those governing its financing, not covered by the draft proposal for a state treaty on the remit and structural reform of public service broadcasting.

Diskussionsentwurf zu Auftrag und Strukturoptimierung des öffentlich-rechtlichen Rundfunks

https://www.rlp.de/de/regierung/staatskanzlei/medienpolitik/rundfunkkommission/reform-ard-zdf-deutschlandradio

Draft proposal on the remit and structural reform of public service broadcasting

[DE] Stuttgart regional court: state media treaty's regional TV advertising ban breaches EU law

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

In a judgment of 23 December 2021 (case no. 20 O 43/19), the 20th civil chamber of the *Landgericht Stuttgart* (Stuttgart regional court – LG Stuttgart) ruled that the ban on regional TV advertising by national TV broadcasters, enshrined in Article 8(11) of the *Medienstaatsvertrag* (state media treaty – MStV), breached EU law because it was incompatible with the freedom to provide services (Article 56 of the Treaty on the Functioning of the European Union (TFEU)) and the principle of equal treatment laid down in Article 20 of the EU Charter of Fundamental Rights.

The plaintiff is a fashion company based in Austria. The defendant is the marketing company of a large German media company with its headquarters in Unterföhring, Bavaria. The parties signed a contract under which an advertisement for the plaintiff was to be broadcast on a television channel operated by the media company. The advertisement was only to be shown in Bavaria and was not meant to be broadcast nationwide.

The defendant refused to broadcast the plaintiff's advertisement with reference to Article 8(11) MStV. Under this rule, the regional transmission of advertising by a national TV provider (as opposed to a regional TV channel) is only allowed if special permission has been granted under state law, which was not the case here.

Both parties consider that Article 8(11) MStV violates European Union law and that the ban on regional advertising by national TV broadcasters therefore does not apply. The plaintiff therefore demanded that the contract on the regional transmission of the advertisement should be fulfilled.

The LG Stuttgart had stayed its proceedings and referred various questions to the European Court of Justice regarding the interpretation of EU law. These were answered by the Court in its ruling of 3 February 2021 (case C-555/19).

The LG Stuttgart has now ordered the defendant to broadcast the advertisement. It ruled that the defendant could not argue that it would be unlawful to broadcast it on the grounds that Article 8(11) MStV prohibited the regional transmission of advertising by national TV providers. The ban, which was aimed at protecting media pluralism, was not applicable because it was incompatible with the freedom to provide services and the principle of equal treatment enshrined in EU law. The interference with the freedom to provide services resulting from the ban on the regional transmission of advertising by national TV broadcasters was unjustified. The ban was unsuitable for ensuring the attainment of its objective of protecting regional TV broadcasters, who were allowed to broadcast regional advertising. The LG Stuttgart thought that advertising services provided via online

platforms in the regional market also represented genuine competition for regional and local TV companies. Internet platforms posed as great a threat as national TV providers to the income that regional and local TV broadcasters could generate from such advertising. Internet platforms were therefore just as likely to harm the financial well-being and long-term survival of regional and local TV broadcasters. Banning the regional transmission of advertising by national TV broadcasters could therefore only protect media pluralism in a fragmented way. The restriction of the freedom to provide services that the ban created was therefore inconsistent. On account of this inconsistency, the ban was unsuitable for ensuring the attainment of its objective, i.e. protecting media pluralism.

The ban was incompatible with the equality principle enshrined in EU law because it meant national TV broadcasters were treated differently to providers of Internet-based advertising services, who were allowed to provide regional advertising. As a result, comparable situations were treated differently without any objective justification. The respective business models were comparable, since the advertising services of national TV broadcasters and Internet-based advertising were both designed to attract consumers' attention in order to generate advertising income. The target groups (consumers) of both forms of advertising were also similar. There was no justification for such unequal treatment.

The court had commissioned Prof. Dr Hinz, an expert from the Goethe University in Frankfurt am Main, to produce an economic report analysing the regional TV and Internet market and subsequently adopted his findings.

Although the ruling is not yet final, it seems highly unlikely that the defendant will appeal, since the parties in the proceedings were both clearly convinced that Article 8(11) MStV was incompatible with EU law. So far, the proceedings have exposed clear shortcomings in the cooperation between national courts and the ECJ in the context of requests for preliminary rulings when the referring court's establishment of the facts shows a tendency to be one-sided. This impression is further strengthened by the grounds for the decision, which is essentially based on a single economic report and appears to largely ignore the interests of regional media operators in the assessment of the proportionality of Article 8(11) MStV, as well as the risk that the decision could further exacerbate a lack of diversity at regional level.

Pressemitteilung des LG Stuttgart

https://landgericht-stuttgart.justiz-bw.de/pb/,Lde/Startseite/Aktuelles/Urteil+der+20_+Zivilkammer_+Regionales+TV-Werbeverbot+des+Medienstaatsvertrages+ist+europarechtswidrig/?LISTPAGE=1195716

Stuttgart regional court press release

FRANCE

[FR] New framework of obligations to contribute to cinematographic and audiovisual production

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Following the decree of 22 June 2021 concerning on-demand audiovisual media services (“SMAD decree”), the framework of obligations to contribute to cinematographic and audiovisual production was further modified with the publication of the so-called "DTT" and "Cable-Satellite" decrees on 30 December 2021. According to the Ministry of Culture, these decrees have a number of objectives. Firstly, they are designed to simplify the regulatory framework by increasing the use of the agreements concluded between service providers and the *Autorité de régulation de la communication audiovisuelle et numérique* (Regulatory Authority for Audiovisual and Digital Communication – ARCOM), and cross-industry agreements. Secondly, they rebalance the rules and guarantee fairness between linear and non-linear services on the one hand, and between domestic and international operators on the other. Finally, they give traditional broadcasters the means to better exploit the works that they finance.

Decree no. 2021-1924 supersedes decree no. 2010-416 of 27 April 2010 and lays down the rules for the contribution to the production of European or French-language cinematographic and audiovisual works by television services “distributed via networks that do not use the frequencies assigned by ARCOM”, in accordance with Articles 33 and 33-1 of the Law of 30 September 1986. It applies to all non-terrestrial networks, i.e. cable and satellite, ADSL, fibre and OTT services (over-the-top, Internet and mobile networks). Services distributed via these networks are the subject of an agreement between their provider and ARCOM, which defines their specific obligations. Service providers established in France whose net annual turnover exceeds EUR 150,000 must sign an agreement with ARCOM with a term, determined by ARCOM, of no more than ten years, defining their specific obligations. Television providers established outside France and French jurisdiction but which target a French audience may, in accordance with the Audiovisual Media Services Directive, conclude an agreement with ARCOM. If they do not, ARCOM will notify them, pursuant to the conditions laid down in part IV of Article 43-7 of the Law of 30 September 1986, of their obligation to contribute to cinematographic and audiovisual production and how they should demonstrate that they have met this obligation.

This so-called ‘Cable-Satellite’ decree contains specific investment obligations that depend on whether the service is dedicated to cinema films or not. These obligations apply to services with a net annual turnover greater than EUR 5 million and an audience share of more than 0.5% of the total audience in France for such services. Like the SMAD decree, the Cable-Satellite decree offers significant exemptions for service providers, especially those in the most

precarious situations, by setting out turnover and audience thresholds below which the obligations do not apply. These obligations may also be reduced depending on the channels' geographical reach. As is also the case for terrestrial channels, the decree also defines minimum obligations for investment in independent production under criteria linked to the work itself or the production company.

In application of Article 27 of Law no. 86-1067 of 30 September 1986 on freedom of communication, decree no. 2021-1926 lays down the rules governing the contribution to the production of European or French-language cinematographic and audiovisual works by domestic terrestrial television services ('DTT decree'). Under this decree, which replaces decree no. 2010-747 of 2 July 2010, ARCOM can adjust the parameters for service providers' contributions even if there is no cross-industry agreement in place. It also endeavours to give traditional broadcasters the means to better exploit the works that they finance, as well as extending the list of expenses that channels can declare in relation to their obligations. The proportion of contributions allocated to independent production is also reduced in the audiovisual category and the conditions for holding shares in co-productions are relaxed. The decree also gives DTT channels easier access to extended digital rights, reduces the duration of rights and broadens the rules preventing channels acquiring distribution mandates.

Décret n° 2021-1924 du 30 décembre 2021 relatif à la contribution cinématographique et audiovisuelle des éditeurs de services de télévision distribués par les réseaux n'utilisant pas des fréquences assignées par l'Autorité de régulation de la communication audiovisuelle et numérique

https://www.legifrance.gouv.fr/loda/id/JORFTEXT000044792333/

Decree no. 2021-1924 of 30 December 2021 on the contribution to cinematographic and audiovisual production of television services distributed via networks that do not use the frequencies assigned by the Regulatory Authority for Audiovisual and Digital Communication

Décret n° 2021-1926 du 30 décembre 2021 relatif à la contribution à la production d'œuvres cinématographiques et audiovisuelles des services de télévision diffusés par voie hertzienne terrestre

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044792513

Decree no. 2021-1926 of 30 December 2021 on the contribution to cinematographic and audiovisual production of terrestrial television services

[FR] Operators of online platforms with more than 10 million unique visitors per month must help fight public dissemination of hateful content

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In application of Article 42 of the *Loi confortant le respect des principes de la République* (Law no. 2021-1109 of 24 August 2021 safeguarding respect for the principles of the Republic), which amended Article 6-4 of the *Loi pour la confiance dans l'économie numérique* (Law no. 2004-575 on confidence in the digital economy – LCEN), decree no. 2022-32 of 14 January 2022 requires online platform operators that registered more than 10 million unique visitors per month on French soil in the previous calendar year to contribute to the fight against the dissemination of hateful content. These operators will be subject to specific obligations: they will need to appoint a single point of contact, set up alert mechanisms, inform the public of the measures being taken to combat the dissemination of hateful content, especially content removal procedures, and cooperate with judicial authorities (see Art. 6-4 LCEN). Compliance with these obligations will be monitored by the *Autorité de régulation de la communication audiovisuelle et numérique* (Regulatory Authority for Audiovisual and Digital Communication – ARCOM), which will be able to issue a formal notice to operators that fail to meet their legal obligations and, if appropriate, fine them up to EUR 20 million or 6% of their total global turnover from the previous financial year.

The decree also imposes additional obligations on operators with more than 15 million unique visitors per month on French soil, requiring them to evaluate the systemic risks linked to the operation of the platforms concerned, and to take “reasonable, effective and proportionate measures” to mitigate the risk of dissemination of prohibited content. Only connections to a service or a distinguishable part of a service whose main purpose is to classify, index or share content posted online by third parties, as defined in Article L. 111-7 of *Code de la consommation* (Consumer Code), are taken into account. Under the law, these obligations are valid until 31 December 2023 at the latest, which is when the Digital Services Act is expected to enter into force.

ARCOM has announced that, during the first quarter of 2022, it will lead a consultation with the platforms concerned, at the end of which the guidelines will be adopted by its collegiate body. However, according to an ARCOM press release, “since these guidelines are not normative in character, they will not be a condition of implementation, by the operators, of the provisions of Article 42 of the Law of 24 August 2021”. At the end of 2022, according to the law, the regulator will then publish the first annual report on the implementation of the platforms’ obligations in the fight against online hatred. In parallel, ARCOM will continue to play a part in negotiations for the Digital Services Act, in particular as part of the European Regulators’ Group for Audiovisual Media Services (ERGA).

Décret n° 2022-32 du 14 janvier 2022 pris pour l'application de l'article 42 de la loi n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République et relatif à la fixation d'un seuil de connexions à partir duquel les opérateurs de plateformes en ligne concourent à la lutte contre la diffusion publique des contenus illicites, publié au Journal officiel du 16 janvier 2022

https://www.legifrance.gouv.fr/download/pdf?id=Vy_1XUJ1Kf7MSjnxvF4ieGorswIll3bSm2y6Qp746Es=

Decree no. 2022-32 of 14 January 2022 applying Article 42 of Law no. 2021-1109 of 24 August 2021 safeguarding respect for the principles of the Republic and fixing a connection threshold above which online platform operators must help combat the public dissemination of illicit content, published in the Official Gazette of 16 January 2022

[FR] Procedure for provisionally suspending retransmission of certain television and on-demand audiovisual media services

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Decree no. 2021-1923 of 30 December 2021 explains how the *Autorité de régulation de la communication audiovisuelle et numérique* (Regulatory Authority for Audiovisual and Digital Communication – ARCOM), pursuant to Article 43-8 of the Law of 30 September 1986 as amended by the Law of 25 October 2021 transposing the Audiovisual Media Services Directive, can provisionally suspend the retransmission of television and on-demand audiovisual media services that fall under the jurisdiction of another EU member state. Such a sanction can be imposed if a service poses a serious risk to public safety or national security, clearly and seriously violates the ban on broadcasting a programme or commercial communication likely to harm minors or the ban on inciting racial or religious hatred, condones terrorism or poses a serious risk to public health. In urgent cases, the suspension can be enforced no earlier than 48 hours of the alleged breaches and planned measures being notified to the service provider, all its distributors and the satellite network operators concerned. The decision is also notified to the European Commission and to the member state in which the service provider is based.

The decree also describes, in accordance with Article 43-10 of the Law of 30 September 1986, the conditions under which ARCOM can decide that a television or on-demand audiovisual media service has established itself in another EU member state in order to avoid being subject to French regulations. This is the case if the service's programmes are entirely or primarily aimed at the French public, taking particular account of the origin of its advertising or subscription income or its main language. Through the government, ARCOM can submit a written request to the member state in which the service is based, with the aim of reaching an amicable resolution. It must also submit evidence proving that the service has established itself in the member state concerned in order to bypass stricter French rules. Unless an amicable resolution is reached within two months, ARCOM will notify the service concerned of the measures it intends to take in accordance with Article 43-10 of the 1986 law, on the grounds that the service is "considered subject to the rules applicable to services established in France". These measures can only be implemented once the European Commission has ruled that they are compatible with EU law.

Décret n° 2021-1923 du 30 décembre 2021 relatif à la procédure de suspension provisoire de la retransmission de certains services de télévision et de médias audiovisuels à la demande et à la procédure visant à empêcher le contournement par ces services de la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication

https://www.legifrance.gouv.fr/download/pdf?id=tuJ-YzZKSB-

nAqvlqBHixw9sdRaKAOxC0KwaEqtFOgA=

Decree no. 2021-1923 of 30 December 2021 on the procedure for provisionally suspending the retransmission of certain television and on-demand audiovisual media services and the procedure for preventing such services from bypassing the provisions of Law no. 86-1067 of 30 September 1986 on freedom of communication

[FR] Rules applicable to commercial communications provided by video-sharing platforms

Amélie Blocman
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Video-sharing platforms, which are now covered by Article 2 of the Law of 30 September 1986, are subject to certain obligations set out in Articles 59 to 61 of the Law. Decree no. 2021-1922 of 30 December 2021 explains these obligations in respect of commercial communications that are marketed, sold or organised by these platforms. Commercial communications (in particular advertising, sponsorship, teleshopping and product placement) are “images, with or without sound, designed to directly or indirectly promote products, services or the image of a natural or legal person who exercises an economic activity. These images accompany or are inserted into a programme or a video created by a user in return for payment or other consideration, for the purpose of self-promotion”. They “are easily recognisable as such”, explains the decree (Art. 3), which prohibits surreptitious advertising (Art. 4) and the use of subliminal techniques (Art. 5) in the same way that the decree of 27 March 1992 does in the field of television advertising.

In accordance with Article 9(1)(c) of the Audiovisual Media Services Directive, commercial communications provided on video-sharing platforms must comply with certain principles: they must not violate human dignity, they must respect the female image and they must not promote discrimination or encourage behaviour that is “prejudicial” to health or safety or “grossly prejudicial” to the protection of the environment. Article 7 of the decree explains that commercial communications must not be harmful to minors.

Video-sharing platform services are encouraged to draw up “codes of good conduct” under the supervision of the *Autorité de régulation de la communication audiovisuelle et numérique* (Regulatory Authority for Audiovisual and Digital Communication – ARCOM), which is responsible for publishing an annual report on their implementation. ARCOM “may also be asked to deal with any dispute between a user and a video-sharing platform provider relating to the application of Article 60” (concerning the regulation of commercial communications).

The decree also amends Article 17 of decree no. 92-280 of 27 March 1992, adding video-sharing platforms to the list of companies that are prohibited from participating in sponsorship. The ban on television programmes being sponsored by companies that manufacture or sell alcoholic beverages or tobacco products is extended to include companies that manufacture or sell vaping products. The decree also extends by eight months, until 6 October 2022, the experimental authorisation of television advertising for cinema films, which was introduced on a trial basis under the decree of 5 August 2020.

Décret n° 2021-1922 du 30 décembre 2021 pris pour l'application de l'article 60 de la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication et fixant les principes généraux applicables aux communications commerciales audiovisuelles fournies sur les plateformes de partage de vidéos

https://www.legifrance.gouv.fr/download/pdf?id=tuJ-YzZKSB-nAqvlqBHix7j5DMywCLR-G4WSSjvX7Oo=

Decree no. 2021-1922 of 30 December 2021 applying Article 60 of Law no. 86-1067 of 30 September 1986 on freedom of communication and laying down general principles applicable to audiovisual commercial communications provided on video-sharing platforms

UNITED KINGDOM

[GB] The licensee of Midland Asian Television held in breach of Ofcom rules relating to due impartiality for an edition of their Pakistan Reporter current affairs programme.

Julian Wilkins
Wordley Partnership

Midlands Asian Television (MATV) was held in breach of Rule 5.5 of the Ofcom Broadcasting Code by failing to ensure that their edition of *Pakistan Reporter* on the 8 February 2021 provided due impartiality. MATV is a satellite television service that boradcasts programming in Hindu, Urdu, English, Gujarati and Punjabi. The Licence for MATV is held by the Middlesex Broadcasting Corporation Limited.

On the 8 February 2021 an edition of *Pakistan Reporter*, a current affairs and analysis progarmme about Pakistan, was broadcasted in Urdu on the subject of the Pakistan government's treatment of the Baloch ethnic group which resides in the country's southwestern Balochistan providence. The programme included coverage of the funeral of Baloch human rights activist Karima Bunuk who was a campaigner against the Pakistani army and intelligence services' conduct in Balochistan. The report asserted that the Pakistani army had prevented Ms Bunuk's family from attending her funeral as well as the "inhumane behaviour" and "barbaric acts" of the army. Further reporting suggested that the Pakistan's President Imran Khan had ordered the bulldozing of political opponents' homes. Also, for entering into an agreement creating the China-Pakistan Economic Corridor, giving rise to the exploitation of the mineral reserves in Balochistan, with the Baloch people being treated "worse than slaves.' There were also references to Imran Khan being the "puppet" of the Pakistan Army. A separate report from a cameraman described how he had been attacked at an anti-terrorist court in Islamabad by the three accused and their lawyer. The cameraman asserted that the police failed to come to his help. A reporter suggested that the government wanted to attack media workers.

In response to the Ofcom complaint MATV said that their overall reporting was balanced and that if one watched the various editions of *Pakistan Reporter* they were at times complimentary of the Pakistan government. MATV considered the complaint had been brought by Pakistani people "just out of hatred." Rule 5.5 of the Code requires that: "due impartiality on matters or political or industrial controversy and matters relating to current public policy must be preserved on the part of the person providing the service… This may be achieved within a programme or over a series of programmes taken as a whole."

Due impartiality did not mean giving equal time to opposing views and opinions but ensure other arguments were represented. The guidance to Rule 5.5 requires that broadcasters can preserve impartiality in a number of ways and it is an editorial decision for the broadcaster as to how it ensures this. Ofcom considered the audience's expectations of the programme and broadcaster's right to freedom of expression pursuant to Article 10 of the European Convention of Human Rights.

The regulator determined that whilst a broadcaster is entitled to broadcast statements that are critical of governments and other institutions, in this programme the critical statements were about politically controversial matters. This meant the broadcaster had to preserve due impartiality, including providing alternative viewpoints. In the case of this edition of *Pakistan Reporter* there had been a failure, for instance, to seek the views of the government and army.

Ofcom differentiated from their other rules relating to due accuracy, which are applied to news, or material misleadingness, that apply to factual matters in non-news programmes. The subject matter in *Pakistan Reporter* was about political or industrial controversy and matters relating to current public policy and this required compliance with Ofcom's due impartiality rules.

MATV's licensee were held in breach of Rule 5.5 of the Code. Ofcom noted that previously MATV's licensee had been in breach of the due impartiality rules as recorded in Issues 323 and 391 of the Broadcast and On Demand Bulletin. Ofcom expressed their concern of the further breach, especially as MATV had given previous assurances to ensure compliance with the due impartiality rules. Ofcom has requested that MATV's licensee attend a meeting with them to discuss their compliance in this area. Furthermore, the regulator would undertake monitoring of the channel and placed MATV's licensee on notice that if further similar breaches occur, Ofcom would consider taking further regulatory action.

Issue 441 of Ofcom's Broadcast and On Demand Bulletin

https://www.ofcom.org.uk/__search/s/redirect?collection=global&url=https%3A%2F%2Fwww.ofcom.org.uk%2F__data%2Fassets%2Fpdf_file%2F0037%2F229789%2FPakistan-Reporter%2C-MATV%2C-08-February-2021%2C-2222.pdf&index_url=https%3A%2F%2Fwww.ofcom.org.uk%2F__data%2Fassets%2Fpdf_file%2F0037%2F229789%2FPakistan-Reporter%2C-MATV%2C-08-February-2021%2C-2222.pdf&auth=8te1vKNmxtTiKMVwYXLoQA&profile=_default&rank=1&query=pakistan+reporter

ITALY

[IT] The Italian Competition Authority launches a market test on the commitments presented by TIM and DAZN for the broadcasting of Serie A football matches

Ernesto Apa & Eugenio Foco
Portolano Cavallo

On 5 January 2022, through Resolution No. 29949, the Italian Competition Authority (AGCM) launched a market test on the commitments presented by Telecom Italia (TIM) and DAZN in the realm of investigation I857, initiated by the Authority into the agreement executed by the companies for the broadcasting of Serie A football matches.

In July 2021, AGCM launched an investigation into the partnership between TIM and DAZN for the broadcasting and technological support for the broadcasting of Serie A football matches (2021-2024). According to AGCM, the investigation highlighted that the provisions of the agreement and the implementation of the clauses contained therein could seriously harm the competition, considering the strategic nature of the audiovisual content at hand which could potentially further aggravate the restrictive effect of the agreement.

On 30 October 2021, as part of the investigation, both companies presented a list of commitments in response to the concerns highlighted by AGCM. In particular, as part of its commitments, TIM proposed modifying the marketing of its services and of DAZN's content, as well as the offer of its Multicast services. DAZN committed to modifying its back-up solutions and the offer of its Multicast services.

AGCM found the commitments not to be manifestly unacceptable and therefore decided to publish them. However, notwithstanding the above, AGCM reserved the right to carry out any further assessment regarding the sustainability of such commitments to remove competition restrictions, as well as in the light of new observations received during the market test.

Interested parties can submit their observations until 14 February 2022.

I857 – Accordo TIM-DAZN Serie A 2021/2024. Provvedimento n. 29739.

https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/D005C3457E008C8DC125871000549838/$File/p29739.pdf

I857 – TIM-DAZN Agreement Serie A 2021/2024. Resolution n. 29739.

I857 – Accordo TIM-DAZN Serie A 2021/2024. Provvedimento n. 29949.

https://www.agcm.it/dotcmsdoc/impegni/p29949.pdf

I857 – TIM-DAZN Agreement Serie A 2021/2024. Resolution n. 29949

[IT] Transposition of Copyright Directive

Chiara Marchisotti & Maria Cristina Michelini

On 8 November 2021, the Italian Government approved legislative decree no. 177/2021 ("Legislative Decree") implementing 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 ("DSM Copyright Directive"). The Legislative Decree substantially amended law no. 631/1941 (the Italian "Copyright Law").

As is customary in Italy, the European Delegation Act 2019-2020 entrusted the Government with the transposition of several EU Directives into national law, with Article 9 dictating the guiding principles to be followed in the implementation of the DSM Copyright Directive. The Government was bound to safeguard the rights of press publishers and authors without hindering the free flow of press information; set the rates of payment due to authors and publishers pursuant to Articles 15(5) and 16 of the DSM Copyright Directive, as well as the modalities of application of the mechanisms of contractual adjustment and rights revocation; and to define the level of diligence required from online content sharing service providers to satisfy the "best efforts" clause pursuant to Article 17 of the DSM Copyright Directive.

The draft bill implementing the DSM Copyright Directive was approved on 5 August 2021. Thereafter, it was submitted to Parliament for the required opinion of the competent committees of the Chamber of Deputies and of the Senate of the Republic. In October 2021, they expressed a favorable opinion, while making a few editing suggestions to the Government. Detailed comments were also delivered by the Italian Competition Authority (AGCM) and by the Italian Communications Authority (AGCOM). A revised draft, reflecting several of the suggested changes, was approved on 8 November 2021 and the resulting Legislative Decree was published in the Official Gazette on 27 November 2021, making it effective as of 12 December 2021.

The Italian transposition of the DSM Copyright Directive is, overall, consistent with the original text. However, there are a few significant differences on certain subjects. Below are some very quick insights on the most debated provisions and deviations from the DSM Copyright Directive.

Article 1 paragraph 1 (c) of the Legislative Decree transposes Article 15, introducing a new press publisher's related right by adding Article 43-bis to the Copyright Law. Publishers of press publications are granted the exclusive right to authorise the reproduction and communication to the public of press publications online by information society service providers – including media monitoring and press review agencies ("ISSPs") - with some exceptions for academic and scientific publications. For the online use of press publications, ISSPs shall grant to news publishers an "equitable remuneration". In this regard, it is worth noting that the Italian Communications Authority has been delegated to adopt a

regulation for the identification of the criteria to quantify such “equitable remuneration”. In addition to regulatory powers, AGCOM has been chosen as the impartial body before which parties may carry out an assisted negotiation procedure for the purposes of reaching an agreement on equitable remuneration. For the purposes of quantification, disclosure obligations have been introduced, backed by fines in case of non-compliance. Again, supervising and sanctioning powers have been granted to AGCOM as the competent authority of choice.

Article 1 paragraph 1 (n) of the Legislative Decree transposes Article 17 by introducing new Title II-quater to the Copyright Law, including Articles 102-sexies – 102-decies. According to the new provisions, online content-sharing providers (“OCSSPs”) shall obtain an authorisation from rightsholders when they give public access to copyright-protected works or other protected materials uploaded by their users. A possible way to obtain such authorisation is by entering a licensing agreement, directly with rightsholders or indirectly, through collective management organisations (“CMOs”) and independent management entities (“IMEs”). The latter option is one of the many examples whereby the Legislative Decree empowers CMOs and IMEs, overall broadening and strengthening their role in the Italian copyright scene. Exceptionally, OCSSPs can be exempted from liability upon meeting certain conditions, amongst which the making of their “best efforts” to obtain said authorisation from rightsholders and ensuring of specifically unauthorised works, though these efforts shall be assessed in the light of the proportionality principle.

Article 1 paragraph 1 (p) of the Legislative Decree implements Article 18 adding the principle of appropriate and proportionate remuneration to the current provision on the transferability of economic rights pursuant to the new paragraph 2 added to Article 107 of the Copyright Law. Namely, authors and performers shall enjoy the right to appropriate and proportionate remuneration, to be exercised directly or through the CMOs and IMEs to which they have given appropriate mandate. According to the Italian implementation, this remuneration shall be adequate and proportionate to the value of the rights licensed or transferred, as well as commensurate with the revenues deriving from their exploitation. The remuneration cannot be waived, as any pact or agreement contrary to Article 107 paragraph 2 of the Copyright law is expressly qualified as null and void. The transposition of the remuneration Chapter apparently provided a chance to review and amend a number of pre-existing provisions of the Copyright Law. Among other things, in the AV sector the categories of authors and performers have been broadened to include dubbers and dubbing directors.

Article 1, paragraph 1 (q) of the Legislative Decree transposes Articles 19, 20, and 21 by introducing specific provisions setting forth the transparency obligation – the subject of a detailed and far-reaching implementation, including biannual reporting, VOD-specific obligations and pecuniary sanctions in case of non-compliance – the new contract adjustment mechanism, and the ADR procedure for rightsholders and representative bodies of rightsholders to bring claims over the transparency and contract adjustment provisions. Dispute resolution powers in this respect have been attributed to the Italian Communication Authority, without prejudice to the right to go to court. Again, pacts or agreements

derogating from transparency, contract adjustment and ADR provisions cannot be enforced against authors and performers.

Lastly, the new Article 180-ter of the Copyright Law – introduced by Article 1, paragraph 1 (s) of the Legislative Decree – transposes Article 12, introducing collective licenses with an extended effect in Italy. In that system, the three most representative CMOs for each category of rightsholders (to be identified by an ad hoc regulation to be adopted by AGCOM) may enter license agreements for the exploitation of works or other materials also having an effect on rightsholders not associated with them or other CMOs in the relevant sector. These CMOs shall ensure equal treatment for all rightsholders, who on the other hand shall be able to exclude their works or other materials from the extended collective licensing mechanism at any time, in a simple and effective way.

Decreto Legislativo 8 novembre 2021, n. 177 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. (21G00192)

https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2021-11-08;177

Legislative decree no. 177/2021 ("Legislative Decree") implementing 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

[IT] Transposition of SatCab Directive

Chiara Marchisotti & Maria Cristina Michelini

On 8 November 2021, the Italian Government approved legislative decree no. 181/2021 (“Legislative Decree”) implementing 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 programs and amending Council Directive 93/83/EEC (“SatCab Directive”). The Legislative Decree substantially amended law no. 631/1941 (the Italian “Copyright Law”).

The development of digital technologies and the Internet has transformed the distribution of, and access to, TV and radio programmes. The SatCab Directive is aimed at contributing to the proper functioning of the internal market, by allowing wider dissemination of television and radio programmes that originate in one Member State throughout other Member States, for the benefit of users across the EU. To do so, the SatCab Directive facilitates the licensing of copyright and related rights in works and other protected subject matter contained in broadcasts of certain types of television and radio programmes.

Article 8 of the European Delegation Act 2019-2020 sets forth the guiding criteria to be followed by the Government in the implementing activity - namely:

restrictively define “own-production programmes that are financed entirely by the broadcasting organisation”, in particular by bringing the concept of “own production” in line with the notion of “in-house production”; take into consideration the requirements established by Article 8 of Legislative Decree no. 35/2017 (implementing Directive 2014/26/EU, so-called “CRM Directive”) on collective management of copyright when identifying the collective managements organisations (“CMOs”) authorised to issue compulsory licenses.
The draft bill implementing the SatCab Directive was preliminarily approved on 29 July 2021. It was then sent to the competent Parliamentary Committees, which expressed a favorable opinion, while addressing a few remarks to the Government. The final text was approved on 8 November 2021 and the resulting Legislative Decree was published in the Official Gazette on 29 November 2021. The Legislative Decree entered into force on 14 December 2021.

The most debated topics included the application of the country-of-origin principle to ancillary online services and the transmission of programmes through direct injection.

The Legislative Decree transposed the SatCab Directive mostly verbatim. The Legislative Decree unified the two disciplines concerning cable and non-cable retransmission, opting for the deletion of the reference to “cable distribution” from the Copyright Law (thus amending Articles 16, 16-bis, 79, 85-bis as well as repealing Article 180-bis Copyright Law).

Article 1, paragraph 1 (c) of the Legislative Decree introduces new Articles, from 16-ter to 16-quinquies, into the Copyright Law. Article 16-ter transposes Article 4 of the SatCab Directive concerning the exercise of retransmission rights by rightsholders other than broadcasters. Among other things, Article 16-ter provides that rightsholders may only grant or refuse authorisation for a retransmission through a CMO that – as further clarified by paragraph 4 of Article 16-ter - meets the requirements set out in Legislative Decree no. 35/2017. In addition, where rightsholders have not transferred the management of the right to authorise acts of retransmission of radio and TV programmes to a CMO, it shall be managed by the CMO that manages rights of that category, and in the event there is more than one CMO it shall be by the "most representative three". The provision thus introduces licenses with extended effects, with one exception: This ECL (extended colective licensing) mechanism does not apply if the rightholder is a broadcasting organisation.

Article 16-quater transposes Article 3 of the SatCab Directive. It concerns the ancillary online services of broadcasting organisations, and it applies the country-of-origin principle to them. The aim is to avoid a scenario where broadcasters - that make available online, in linear or non-linear mode, programmes which are subordinate or ancillary to their broadcasts - have to obtain a license in each Member State. The rational is that otherwise, the making available of such content would be burdensome to implement, and the absence of license(s) could lead to a fragmentation of the EU audiovisual area. To protect the interests of the AV industry, this provision stipulates that the country-of-origin principle shall apply only to (i) radio and TV news and current affairs programs, and (ii) self-produced programs entirely created, financed and realised by a radio or TV broadcasting organisation using its own resources.

Finally, Article 110-bis implements Article 6 of the SatCab Directive on mediation by setting forth that in the event of failure to obtain authorisation for the retransmission of a broadcast, the parties concerned may have recourse to a third party, chosen by common consent, for the formulation of a contractual proposal. If they fail to reach an agreement, the choice shall be made by the president of the court where one of the parties concerned has its residence or headquarters. The proposal of the third party shall be deemed to have been accepted if none of the parties concerned oppose it within ninety days of notification.

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. (21G00191)

https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2021-11-29&atto.codiceRedazionale=21G00191&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=a6488ea5-df1b-4ec5-a3a2-b85c339f313c&tabID=0.1166621176836069&title=lbl.dettaglioAtto

Legislative decree no. 181/2021 ("Legislative Decree") implementing 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 organizations and retransmissions of television and radio programs and amending Council Directive 93/83/EEC

[IT] Transposition of the revised AVMSD

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Portolano Cavallo

On 4 November 2021, the Italian Government approved Legislative Decree no. 208/2021 ("New AVMS Code") implementing Directive (EU) 2018/1808 of the European Parliament and of the Council that amended Directive 2010/13/EU ("AVMS Directive"). Legislative Decree no. 208/2021 has repealed and substituted Legislative Decree No. 177/2005 ("Previous AVMS Code").

As is customary in Italy, the European Delegation Act 2019-2020 entrusted the Government with the transposition of several EU Directives into national law, with Article 3 dictating the guiding principles to be followed in the implementation of the AVMS Directive. The Government was bound, among other things, to repeal and substitute the provisions laid down in the Previous AVMS Code through the approval of a new AVMS Code; to provide specific measures aimed at ensuring an adequate level of protection for minors in relation to audiovisual content, including user-generated content and commercial communications displayed by video-sharing platforms; and to provide specific measures on the promotion of European works, also vis-à-vis on-demand audiovisual media services.

The draft bill implementing the AVMS Directive was preliminarily approved by the Italian Council of Ministers on 5 August 2021. Thereafter, it was submitted to Parliament for the required (non-binding) opinion of the competent committees of the Chamber of Deputies and the Senate of the Republic. The draft of the New AVMS Code was also forwarded to the Unified Conference for the State and Regions, the Italian Communications Authority ("AGCOM") and the Italian Council of State, all of which delivered detailed comments. The New AVMS Code was published in the Official Gazette on 10 December 2021, making it effective on 25 December 2021. In addition, 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 New 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. Article 71, paragraph 4, of the New AVMS Code has expressly provided that the provisions laid down in Articles 41 and 42 (video-sharing platforms), and Articles 52-57 (promotion of EU and Italian works) will be applicable from 1 March 2022, whereas the remaining provisions contained in the New AVMS Code are already applicable (albeit, with few exceptions which, however, are not related to the TRIS notification procedure).

The Italian transposition of the AVMS Directive is intricate and presents several novelties compared to the Previous AVMS Code. Below are some very quick

insights on the most relevant provisions of the New AVMS Code.

1. Protection of Minors (Articles 37-38 of the New AVMS Code)

The New AVMS Code includes provisions for the protection of minors - namely Articles 37 and 38 - which have respectively replaced Articles 34 and 35 of the Previous AVMS Code.

Article 37 of the New AVMS Code, which transposes Article 6a of the AVMS Directive, lays down a general prohibition on linear providers to broadcast programmes that might seriously impair the physical, mental or moral development of minors (such as adult movies - for the age of 18 years or older -, and programmes involving gratuitous, repeated or brutal violence or programmes involving pornography). Whereas, pursuant to paragraph 2, linear providers may broadcast programmes that are likely to impair the physical, mental or moral development of minors or movies for 14 years or older only, provided that they:

broadcast the programme, alternatively: (a) during the night, between 11:00 p.m. and 7:00 a.m., or (b) adopt technical measures to ensure that minors will not normally watch such a programme; and identify the programme by a visual symbol throughout its entire duration which makes clear to the viewers that the programme is not suitable for children.
Conversely, pursuant to Article 37, paragraph 3, on-demand providers are allowed to make available to the public programmes that might seriously impair the physical, mental or moral development of minors, as long as they adopt appropriate measures to prevent minors from watching or listening to such programmes, including personal identification numbers, filtering, age verification or identification systems. The implementing provisions of such measures must be adopted by AGCOM and the Ministry of Economic Development (“MISE”), upon the opinion of the Authority for Childhood and Adolescence and the Media and Minors Committee.

Of relevance, Article 37 of the New AVMS Code specifically provides that minors’ personal data collected by providers of audiovisual media services may not be processed for commercial purposes and, in particular, for direct marketing, profiling and targeted advertising purposes.

In addition, pursuant to Article 38, paragraph 2, of the New AVMS Code, failure to comply with the provisions set forth under Article 37, can be sanctioned with a fine ranging from EUR 30 000 to EUR 600 000. In the most serious cases, AGCOM may also suspend providers’ authorisation for a period not less than 7 days nor exceeding 180 days. In addition, in the event on-demand providers violate the rules on programmes that might seriously impair the physical, mental or moral development of minors, AGCOM may order the disabling of their transmission system.

2. Video-Sharing Platforms (Articles 41-42 of the New AVMS Code)

The provisions laid down in Articles 41 and 42 of the New AVMS Code are aimed at transposing Articles 28a and 28b of the AVMS Directive. To recall, the scope of application of the AVMS Directive was extended to encompass video-sharing platforms.

Article 41 of the New AVMS Code lays down the criteria to determine whether a video-sharing platform provider can be deemed established in Italy and, therefore, subject to Italian jurisdiction. Of relevance, paragraph 7 states that the free circulation of programmes, user-generated videos and audiovisual commercial communications conveyed by a video sharing platform provider established in another EU Member States and directed to the Italian public can be limited for the following purposes: (i) the protection of minors from content that may harm their physical, mental or moral development; (ii) the fight against incitement to racial, sexual, religious or ethnic hatred, as well as the violation of human dignity; (iii) the protection of consumers, including investors.

Article 42 of the New AVMS Code lays down the safeguarding provisions applicable to video-sharing platforms under the Italian jurisdiction. Such provisions do not deviate from those laid down under Article 28b, paragraph 1, (a) – (c) of the AVMS Directive.

Of relevance, AGCOM, along with the Media and Minors Committee, shall promote forms of co- and self-regulation through codes of conducts and, along with the Authority for Childhood and Adolescence and the Media and Minors Committee, shall adopt appropriate guidelines for the codes of conduct. In addition, video sharing platforms are required to adopt specific safeguards towards users (e.g. by including specific requirements in the terms and conditions of video sharing platform services, etc.).

Failure to comply with the provisions set forth under Articles 41 and 42 of the New AVMS Code is sanctioned with a fine ranging from EUR 30,000 to EUR 600,000 (or up to 1% of the annual turnover in certain circumstances).

3. Advertising Limitations (Article 45 of the New AVMS Code)

Article 45 of the New AVMS Code implements the provisions laid down under Article 23 of the AVMS Directive and introduces significant changes to the limits previously imposed on advertising concentrations for linear AVMS providers under the Previous AVMS Code.

In particular, the Public Service Broadcaster (RAI)’s broadcasting of advertising for each channel cannot exceed: (i) 7% (and 6% from January 1, 2023) between 6am and 6pm as well as between 6pm and 12am, and (ii) 12% per hour (any overflow, in any case not exceeding 1% per hour, must be recovered in the preceding or following hour). The Previous AVMS Code provided that RAI’s advertising could not exceed 4% of the weekly broadcasting time and the calculation was based on average on RAI’s three main channels.

In addition, pursuant to Article 45 of the New AVMS Code the broadcasting of free linear AVMS providers' advertising, telepromotion and teleshopping for each channel cannot exceed 20% between 6am and 6pm and between 6pm and 12am. As to Pay TVs, advertising cannot exceed 15% between 6am and 6pm as well as between 6pm and 12am. Whereas, the Previous AVMS Code provided an 18% hourly limit and a 15% daily limit applied to free-to-air TV channels, while a 12% hourly limit applied to Pay-TV channels.

Of relevance, however, pursuant to paragraph 5, the abovementioned limits do not apply to self-promotion announcements, to sponsorship announcements and product placement, to neutral frames between editorial content and television advertising or teleshopping spots, and between individual spots.

4. Promotion of European Works (Articles 52–57 of the New AVMS Code)

The provisions relating to the promotion of European works are provided in Articles 52 – 57 of the New AVMS Code.

Article 53 of the New AVMS Code, which lays down the programming quotas applicable to linear providers, is not significantly different from the Previous AVMS Code. In particular, it requires linear providers to reserve:

More than 50% of the eligible hours to European works. 1/3 sub-quota to audiovisual works of Italian original expression produced anywhere.
A particular novelty is represented by Article 54 of the New AVMS Code which has expressly extended the scope of application of the investment obligations set forth therein to linear providers who, although established in another EU Member State, target an Italian audience. In particular, Article 54 of the New AVMS Code prescribes that linear providers must reserve:

12.5% of their net annual revenue to the pre-acquisition, acquisition and production of European works produced by independent producers; 50% of the main EU quota to works of Italian original expression, produced anywhere by independent producers in the last five years; 3.5% of their annual net revenue to cinematographic works of Italian original expression, produced anywhere by independent producers; 75% of the cinematographic sub-quota to works of Italian original expression, produced anywhere by independent producers in the last five years.
However, it should be noted that the last two sub-quotas do not apply to companies broadcasting cinematographic works in a non-significant and residual manner (according to annual thresholds established by AGCOM).

In relation to on-demand providers, the catalogue and investment quotas are provided for under Article 55 of the New AVMS Code.

In particular, Article 55 prescribes that on-demand providers subject to Italian jurisdiction must comply with the following catalogue quotas:

30% of their catalogue to European works produced within the last five years, to be calculated on the number of titles. The same obligation applies also to transactional

video on-demand providers (TVOD), but in this case the works are not required to have been made in the last five years; 50% of the main EU quota to works of Italian original expression, produced anywhere, in the last five years, by independent producers.

Whereas, Article 55 of the New AVMS Code requires on-demand providers to invest:

a quota of their annual net revenue in the production, purchase or pre-purchase of the rights to European works produced by independent producers. This quota amounts to: from 1 March 2022 until December 31, 2022: 17% of the annual net revenue in Italy; from 1 January 2023: 18% of the annual net revenue in Italy; from 1 January 2024: 20% of the annual net revenue in Italy; 50% of the main EU quota in works of Italian original expression, produced anywhere, in the last five years, by independent producers; 20% of the Italian sub-quota on works of Italian original expression in cinematographic works of Italian original expression, produced anywhere, in the last five years, by independent producers.
Of absolute relevance, it should be noted that the scope of application of the investment quotas under Article 55 of the New AVMS Code applies to both on-demand providers subject to Italian jurisdiction and on-demand providers established in another EU Member State who operate services aimed at Italian consumers. Whereas, the catalogue quotas apply only to on-demand providers subject to Italian jurisdiction.

Article 55 of the New AVMS Code provides for a specific exemption from the investment quotas for providers with a low audience or low turnover established abroad and for providers who, in the light of their nature and scope, cannot comply with the quota obligations. Ad hoc derogations may be granted by AGCOM under certain circumstances. In addition, providers who earn at least 80% of their net annual revenues from linear broadcasting and provide on-demand services, are required to comply only with the programming and investment quotas established for linear providers and, therefore, are not required to comply with the quotas laid down in Article 55 of the New AVMS Code for on-demand providers.

Failure to comply with the abovementioned quota obligations may still be sanctioned by AGCOM with a fine with a fine ranging from EUR 100 000 to EUR 5 000 000 or up to 1% of the annual revenues in the event such percentage exceeds EUR 5 000 000 and with a suspension of the activity in case the infringement is particularly serious or repeated.

Decreto Legislativo 8 novembre 2021, n. 208 Attuazione della direttiva (UE) 2018/1808 del Parlamento europeo e del Consiglio, del 14 novembre 2018, recante modifica della direttiva 2010/13/UE, relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri, concernente il testo unico per la fornitura di servizi di media audiovisivi in considerazione dell'evoluzione delle realta' del mercato. (21G00231)

https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:DECRETO.LEGISLATIVO:2021-11-08;208!vig=

Legislative Decree no. 208/2021 ("New AVMS Code") implementing Directive (EU) 2018/1808 of the European Parliament and of the Council that amended Directive 2010/13/EU ("AVMS Directive"). Legislative Decree no. 208/2021 has repealed and substituted Legislative Decree No. 177/2005

LATVIA

[LV] Media regulator takes active enforcement measures against providers of on-demand audiovisual media services

Ieva Andersone & Sabīne Stirniņa Sorainén

Recently the Latvian media regulator, the National Electronic Mass Media Council (NEPLP) has taken a more active enforcement stance against unregistered on-demand audiovisual media services, as well as promoting compliance with the relevant rules, by issuing guidelines.

On 2 December 2021, the NEPLP announced that it has decided to penalise natural persons involved in the unlawful provision of an on-demand audiovisual media service – Brīvvalsts TV. According to the announcement, the NEPLP carried out a thorough examination of their website to assess its conformity with the features of an audiovisual on-demand service and discovered that the service corresponded to all essential features. The providers of Brīvvalsts TV had not applied to the Council for registration as a service provider before commencing, thus violating the legal requirements. As the service was not registered in accordance with Section 22 of the Electronic Mass Media Law, the NEPLP decided to apply two EUR 700 fines and a EUR 500 fine on individuals for violating the Electronic Mass Media Law.

According to the NEPLP, the violation should be considered as significant as the on-demand service has been provided illegally for a long time, misleading the public and creating an unequal situation in the sector, where other on-demand service providers offer the service complying with industry regulations and obligations specified in regulatory enactments.

The applied penalty reflects the increasing activity of the NEPLP to promote the compliance of the on-demand audiovisual media service providers. After identifying more potential on-demand audiovisual service providers, who should register with the NEPLP and become electronic mass mediums, the NEPLP announced on 15 December 2021 that it has prepared new guidelines on identifying on-demand audiovisual electronic media services. The new guidelines were developed based on the Audiovisual Media Services Directive and its amendments, the Electronic Mass Media Law, and international practice.

The guidelines are designed for the NEPLP employees to carry out inspections of audiovisual media service providers. However, the guidelines are also intended to be used by audiovisual media service providers in determining whether their service meets the characteristics of an on-demand audiovisual media service, and thus whether the provider is obliged to submit a notification to the NEPLP.

The first part of the guidelines explains the terms used. The second section of the guidelines identifies seven characteristics that must be cumulative for a service to be considered as an on-demand audiovisual media service.

Firstly, the provider must offer an audiovisual media service with the aim to provide such a service for remuneration. The guidelines however indicate an exception where the requirements for an on-demand audiovisual media service do not apply – for instance, in the case of services whose operation is not mainly related to economic activity in the broadest sense.

Secondly, the primary purpose of the service provider is to offer (produce or distribute) television-like audiovisual programs via public electronic communication networks, including websites.

Thirdly, audiovisual media services are available to the public via public electronic communication networks, whether for a fee or free of charge, with or without registration, including Internet websites.

Furthermore, the service provider organises a catalogue within the service in which the audiovisual programs are placed. The catalogue is a systematic and organised list (for example, programs, films, etc.) according to a particular principle (for example, by theme, genre, country of origin).

An on-demand audiovisual media service is designed and made available to the broadest possible audience, and as a result, may have a significant impact on it. The guidelines define the term “intended for the general public” as a service that is meant for a large part of the public rather than for individual users or groups of like-minded people.

The purpose of the on-demand audiovisual media service is to “inform, educate or entertain” the general public. Services whose primary objective instead is to offer a variety of goods, and the audiovisual content merely visualises the offer, are not considered on-demand services.

Finally, the audiovisual media service provider has editorial responsibility (“effective control”), or the right and ability to decide, which programs will be broadcast on the audiovisual service in question.

Overall, given the rapid development of on-demand electronic media audiovisual services in recent years and the expected growth and use of these services, the guidelines developed by the NEPLP will promote a common understanding of the characteristics of on-demand services and their content, facilitating easier identification of such services.

NEPLP soda tīmekļa vietnes Brīvvalsts TV raidījumu nodrošinātājus par pretlikumīgu audiovizuāla pakalpojuma pēc pieprasījuma sniegšanu.

https://www.neplpadome.lv/lv/sakums/padome/padomes-sedes/sedes-sadalas/ar-

pretlikumigu-audiovizuala-pakalpojuma-pec-pieprasijuma-sniegsanu.html

NEPLP penalises Brīvvalsts TV broadcasters for providing illegal on-demand audiovisual services

NEPLP izstrādātā instrukcija palīdzēs identificēt audiovizuālus pakalpojumus pēc pieprasījuma

https://www.neplpadome.lv/lv/sakums/padome/padomes-sedes/sedes-sadalas/neplp-izstradata-instrukcija-palidzes-identificet-audiovizualus-pakalpojumus-pec-pieprasijuma.html

The guidelines developed by NEPLP will help identify on-demand audiovisual services

Instrukcija audiovizuālo elektronisko plašsaziņas līdzekļu pakalpojumu pēc pieprasījuma identificēšana

https://www.neplpadome.lv/lv/assets/documents/PPT/PPP_Instrukcija_25.11.2021..pdf

Guidelines to identify on-demand audiovisal electronic media services

NETHERLANDS

[NL] New Online Gambling Advertising Code comes into effect

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On 15 December 2021, the new Online Gambling Advertising Code 2021 (*Reclamecode voor Online Kansspelen*) was published by the Dutch Advertising Code Foundation (*Stichting Reclame Code*) (SCC), which is the self-regulatory body for advertising, including broadcast advertising, in the Netherlands. The Code builds upon the new rules contained in the recently-enacted Online Gambling Act 2021, which introduced new provisions on online gambling advertising, and included amendments to the Dutch Media Act (*Mediawet*) (see IRIS 2021-1/24). Importantly, the new Code has a number of notable provisions applicable to broadcasters under the Media Act.

The Code begins with general provisions on rules for online gambling advertising, including rules on unfair gambling advertising; rules on gambling advertising not encouraging risky gambling behaviour; and rules prohibiting the targeting of vulnerable groups of persons (which are defined as minors, young adults, persons with intellectual disabilities, gambling addicts and persons displaying characteristics of risky gambling behaviour).

Notably, Article 8(1) of the Code contains specific rules for broadcasters on advertising limits, and states that broadcasters must ensure that a maximum of three advertisements, of a maximum of 30 seconds each, for online gambling are broadcast together. Furthermore, the use of “tag-ons” for online gambling advertising, which are very short reminder advertisements broadcast before or after the main advertising spot, are prohibited during an advertising break. Notably, the Code states that in case of violations of Article 8, “in principle”, both advertisers and broadcasters will be in violation.

Furthermore, Article 9 of the Code contains additional rules on the broadcasting of online gambling advertising. First, Article 9(1) states that online gambling advertisements via broadcasting services are prohibited between 6 a.m. and 09 p.m. Second, under Article 9(3), online gambling advertising is prohibited on television channels of which, according to annual averages for the period between 9 p.m. and 6 a.m., more than 25% of the total viewing audience consists of minors and young adults combined. Furthermore, it is also prohibited to broadcast online gambling advertising immediately before or immediately following programmes that, according to generally accepted viewing figures, are viewed by more than 25% minors and young adults combined, based on an average period. Third, under Article 9(7), online gambling advertising targeting “vulnerable groups of persons” is also prohibited through all media (including non-linear television services, print media, websites and social media).

Finally, in terms of the content of online gambling advertising, Article 6 prohibits use of (a) brands, logos, or products which are specifically aimed at minors and young adults; (b) persons under the age of 25 age or who appear to be under the age of 25; (c) fictional characters which are primarily appealing to minors or young adults; and (d) “role models” with a “substantial reach among minors and/or young adults”. There is “substantial reach” among minors and/or young adults if more than 25% of the audience of a role model consists of minors and young adults.

The Code came into effect on 15 December 2021; and it will be evaluated by October 2022, with the media and consumer organisation involved in the evaluation.

Stichting Reclame Code, Nieuwe Reclamecode Online Kansspelen, 15 december 2021

https://www.reclamecode.nl/news/nieuwe-reclamecode-online-kansspelen/

Dutch Advertising Code Foundation, New Online Gambling Advertising Code, 15 December 2021

Stichting Reclame Code, Reclamecode Online Kansspelen (ROK) 2021

https://www.reclamecode.nl/nrc/reclamecode-online-kansspelen-rok-2021/

Dutch Advertising Code Foundation, Online Gambling Advertising Code 2021

[NL] Court orders politician to remove social media posts comparing COVID-19 measures to the Holocaust

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On 15 December 2021, the *Rechtbank Amsterdam* (District Court of Amsterdam) delivered a significant judgment on the issue of a politician's right to freedom of expression set against the right to a private life of the victims and survivors of the Holocaust. The Court ordered the removal of four messages from Instagram, Facebook, and Twitter, as well as prohibitions on reposting the messages and posting Holocaust imagery in the context of the debate on COVID-19 measures.

The case involved Mr. Thierry Baudet, leader of the political party *Forum voor Democratie*, who had written several messages on social media comparing the impact of the Dutch government's COVID-19 measures to the (developments leading up to the) Holocaust. The posts included statements such as "the unvaccinated *are* ("*zijn*") the new Jews, the exclusionists who look the other way *are* ("*zijn*") the new Nazis and NSB'ers [members of the Dutch Nazi Party]." In another message, Baudet had placed a photo depicting a child behind a fence wearing a Star of David next to a photo of a child, also behind a fence, watching the arrival of 'Sinterklaas' (Saint Nicholas). The accompanying text read: "Ask yourself, is this really the country you want to live in? In which children who are "unvaccinated" are not allowed to attend the Sinterklaas parade?"

Two Jewish interest groups and four individuals initiated legal proceedings against the politician to seek removal of the social media posts. They claimed the posts infringed upon the private life of Holocaust victims, survivors, and their relatives as protected by Article 8 of the European Convention on Human Rights (ECHR). Baudet argued that any forced removal of the posts would violate his right to freedom of expression under Article 10 ECHR.

The Court first observed that Article 17 ECHR (prohibition of abuse of rights) did not apply to the case, as Baudet's expressions did not directly downplay or minimise the Holocaust. It further considered that Article 10 ECHR protects expressions that "offend, shock or disturb" certain groups in society. Moreover, criticism regarding a vital societal issue deserves a high degree of protection, especially when communicated by elected representatives. However, the Court stressed that freedom of expression is not without limits and is shaped by duties and responsibilities. These include the duty to avoid as far as possible expressions that go beyond what is necessary for a robust public debate and are gratuitously offensive to others and thus an infringement of their rights.

The Court ruled that the comparison drawn by Baudet had gone "beyond what can be justified by a robust public debate." First, it noted that the (effects of the) current COVID-19 measures "in no way correspond to the hate and discrimination towards Jewish people in the 1930s and 1940s that eventually led to deportation

and genocide in which more than 6 million European Jews were killed." Second, the Court considered the comparison inherently flawed, not only because Jews were denied access to public spaces on the basis of their identity – without a choice of getting tested or vaccinated – but also because the measures were implemented by a totalitarian regime rather than a democratically elected legislature. As a result of the large non-equivalence between the situations, the injustice and suffering caused by the Holocaust was "implicitly downplayed." The Court deemed it irrelevant Baudet had later nuanced his expressions and clarified his intentions since "it is the actual content of the messages that matters." It was also highlighted that due to the chosen medium, especially Twitter, the messages had had a wide reach and profound impact. In sum, the Court concluded the politician had "instrumentalised" the suffering of Jewish people, and therefore acted unlawfully against Holocaust survivors, victims, and their relatives.

Finally, the Court held that the order to remove the social media posts was proportionate as it was limited to four messages only. The prohibition on the use of Holocaust images in the debate on COVID-19 measures was considered necessary to protect the rights and interests of others and to protect public debate itself.

Rechtbank Amsterdam, ECLI:NL:RBAMS:2021:7392, 15 december 2021

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2021:7392

District Court of Amsterdam, ECLI:NL:RBAMS:2021:7392, 15 December 2021

ROMANIA

[RO] Modification of the audiovisual and cinematography legislation

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The Chamber of Deputies (lower chamber of the Romanian Parliament) adopted on 7 December 2021 the Draft Law for the amendment and completion of the Audiovisual Law no. 504/2002, and the amendment and completion of the Government Ordinance no. 39/2005 on cinematography (see inter alia IRIS 2013-6/28, IRIS 2017-1/30, IRIS 2017-2/27, IRIS 2017-7/28, IRIS 2018-6/30, IRIS 2018-8/36, IRIS 2018-10/22, IRIS 2018-10/23, IRIS 2019-1/31, IRIS 2019-2/21, IRIS 2019-4/29, and IRIS 2019-5/22).

The Draft law was sent to the Senate (upper chamber) whose decision will be final. The project aims at transposing Directive no. 1808, of 14 November 2018, amending Directive 2010/13 /EU on the coordination of certain provisions established by laws, regulations or administrative provisions in the member states on the provision of audiovisual media services (Audiovisual Media Services Directive), taking into account the evolution of market realities. The European Commission decided on 12 November 2021 to send reasoned opinions calling on Romania and France to complete the transposition of the Audiovisual Media Services Directive into national law.

The project proposes to redefine the notions of audiovisual media services, program, retransmission, commercial communication, sponsorship, product placement, audiovisual license, and coding, while introducing some new definitions for the notions of sharing platform services, user-generated video material, editorial decision, platform providers for sharing and authorizing audiovisual media services upon request.

The project introduces new competencies for the National Audiovisual Council (CNA), regarding its communication, information and reporting activity to the European Commission, as well as new responsibilities related to the management of the audiovisual field, new skills related to communication, cooperation and exchange of experience with other bodies with similar functions in the Member States.

The project reformulates the general framework that audiovisual media services need to observe in order to ensure the protection of minors, as well as to ensure the defense of morality, public health and public safety. In this regard, a mechanism has been provided through which CNA may restrict an audiovisual media service if it incites hatredor violence, instigates terrorism, or poses a risk to public health or safety. In this regard, a number of restrictions and prohibitions on

content are introduced in order to limit, eliminate or reduce the exposure of minors to programs that may affect their moral, their physical or their mental development.

The draft introduces provisions designed to encourage self-regulation in the audiovisual field, giving the possibility to elaborate codes of conduct, imposing at the same time a set of requirements to ensure their effectiveness, in particular with regard to the protection of minors, in the case of commercial communications regarding alcohol or tobacco products, or against products, beverages or substances with a negative nutritional effect. Regulations have also been introduced to facilitate access for people with disabilities to audiovisual media services.

The project complements the regulations on sponsorship and product placement in audiovisual programs, which are prohibited if they are made for electronic cigarettes or refill bottles. For commercial communications and product placements, new rules are introduced on their content and broadcast mode. The draft regulates some aspects regarding the way of establishing the jurisdiction of video sharing platform providers.

The project completes and clarifies the procedure for dismissing the CNA leadership, in order to ensure that the provisions of Law no. 504/2002 meet the conditions of transparency, independence and non-discrimination considered in Article 30 paragraph (5) of the Directive 2010/13/EU, as amended by Directive 1808/2018.

The project modifies and completes Article 13 and Article 16 of the Government Ordinance no. 39/2005 on cinematography, in the sense of inclusion in the payment (by the providers of audiovisual media services on demand) of a 3% quota from the price of audiovisual works downloaded for a fee through services of data transmission, including via the Internet or telephony, through on-demand audiovisual media service providers, and to complete the list of contributions with a contribution of 4% of the revenues obtained through unique transactions or from subscription, for viewing audiovisual works through data transmission services via the Internet or telephony.

These changes keep in mind that the principles of the AVMS directive,as approved in 2010, are also based on the promotion of European audiovisual works through the broadcasting programs, but also through the possibility of inclusion of the of broadcasters' contribution in the production of national audiovisual works. In Romania, financing the production of films is made on the basis of Government Ordinance no. 39/2005 regarding cinematography, whose Article 13 provides for the various contributions to the Film Fund of the audiovisual actors. In the context of declining revenues at the Film Fund due to restrictions to prevent the spread of the new coronavirus SARS-COV2 (closure of movie theaters and the decline of the advertising market, leading to a 35% decrease in the Fund's revenue) urgent action is needed, including in the legislative field, consider the initiators.

Draft Law for the amendment and completion of the Audiovisual Law no. 504/2002, as well as for the amendment and completion of the Government Ordinance no. 39/2005 on cinematography - Reasoning

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

https://193.226.121.238/pls/proiecte/docs/2021/cd430_21.pdf

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

SLOVENIA

[SI] Slovenia transposes the AVMSD without the introduction of obligations to invest in European works and the planned European Audiovisual Production fund

Deirdre Kevin
COMMSOL

On 15 December 2021, the Slovenian Parliament passed the Law amending the Law on Audiovisual Media Services. The draft proposal for amending the Law on Audiovisual Media Services was unanimously endorsed by the Cultural Committee of the Parliament in June 2021. However, there has been an ongoing debate regarding the proposal in the law to introduce a new fund to finance European audiovisual production, and the introduction of obligations for audiovisual media service providers to invest in European audiovisual works. The draft law had introduced a new Article 16a of the Act, which required the payment of an annual contribution for the development of European audiovisual works for the amount of 6% of the gross annual revenue generated in the Republic of Slovenia by a service.

In July 2021, the National Council of Slovenia, via its Commission for Culture, Science, Education and Sport imposed a suspensive veto on the law (The National Council of Slovenia is a representative body formed under the Constitution and constitutes the upper chamber of the Slovenian Parliament whose members represent local and functional interests. Among others, the National Council has the power to exercise the right of a suspensive veto regarding the adoption of a law).

According to the available official texts, in the opinion of the Commission for Culture, Science, Education and Sport, such obligations to invest in European Audiovisual works should only be applied to on-demand service providers. They argued that the obligations on the Slovenian broadcasters would be unfairly disadvantaged in particular as they already produce European content. They quoted the preamble (paragraph 37) of the AVMSD where it states that broadcasters currently invest more in European audiovisual works than audiovisual media providers on-demand service, and the fact that the amended Directive only introduced new programming obligations on on-demand audiovisual media services. From this, they concluded that any additional obligations could only be imposed on on-demand services. They also noted that an earlier version of the draft law considered all of the following to be equivalent to investment: direct investment in script development and filming; direct investment in renovation and restoration of older European audiovisual works; and the purchase of licensing rights for European audiovisual works.

In response, the Ministry of Culture argued (among others) in September 2021, that the Directive allowed for the placing of obligations on all audiovisual media

service providers, and that financial contributions may be introduced for foreign media service providers only on the condition that such financial contributions are also provided for domestic media service providers. They also stated that placing obligations on foreign on-demand services targeting the country without obligations on foreign linear (broadcasting) services targeting the country would also amount to discriminatory measures.

As no agreement or mutual understanding on the issue was reached, on 15 December 2021, the Slovenian Parliament passed the Law amending the Law on Audiovisual Media Services without the clauses relating to the introduction of obligations to invest in European Works and establishment of a European Audiovisual Production fund.

Changes to audiovisual media services act backed at committee, Demoktacija

https://demokracija.eu/slovenia/changes-to-audiovisual-media-services-act-backed-at-committee

Predlog odložilnega veta Komisije za kulturo, znanost, šolstvo in šport , Državni svet

http://www.ds-rs.si/sites/default/files/dokumenti/1._tocka_predl._odl._veta_kom._za_kult._znan._solstvo_in_sport_zavms-b_epa_1725-viii.lekt_.pdf

Proposal for a deferral veto by the Committee on Culture, Science, Education and Sport, National Council

263. dopisna seja Vlade Republike Slovenija, Vlada Republike Slovenije

https://www.gov.si/novice/2021-09-08-263-dopisna-seja-vlade-republike-slovenije/

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