# IRIS newsletter

IRIS 2022-3

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**Publisher:**

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

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

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

**Executive Director:** Susanne Nikoltchev

**Editorial Board:**

Maja Cappello, Editor • Francisco Javier Cabrera Blázquez, Sophie Valais, Julio Talavera Milla, Deputy Editors (European Audiovisual Observatory)

Artemiza-Tatiana Chisca, Media Division of the Directorate of Human Rights of the Council of Europe, Strasbourg (France) • Mark D. Cole, Institute of European Media Law (EMR), Saarbrücken (Germany) • Bernhard Hofstötter, DG Connect of the European Commission, Brussels (Belgium) • Tarlach McGonagle, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) • Andrei Richter, Central European University (Hungary)

**Council to the Editorial Board:** Amélie Blocman, Legipresse

**Documentation/Press Contact:** Alison Hindhaugh

Tel.: +33 (0)3 90 21 60 10

E-mail: alison.hindhaugh@coe.int

**Translations:**

Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Paul Green • Marco Polo Sarl • Nathalie Sturlèse • Brigitte Auel • Erwin Rohwer • Sonja Schmidt • Ulrike Welsch

**Corrections:**

Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Sophie Valais, Francisco Javier Cabrera Blázquez and Julio Talavera Milla • Aurélie Courtinat • Barbara Grokenberger • Glenn Ford • Claire Windsor

**Web Design:**

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

# EDITORIAL

In April 2020, I wrote in these electronic pages about the outbreak of a pandemic that had the potential to become an economic disaster with a dramatic impact on the audiovisual sector. And yet, in those convoluted times, I would have never imagined that, almost two years later, and just when we were starting to see the light at the end of the COVID tunnel, I would have to open this newsletter with news of war in Europe. A fratricide war, like all wars in Europe end up to be. A war that, in the words of Council of Europe Secretary General Marija Pejčinović Burić, is “in flagrant violation of the Statute of Council of Europe and the European Convention on Human Rights.” A war that represents “a dark hour for Europe and everything it stands for.”

As the Kyiv TV Tower can attest, this war counts freedom of the media among its many unfortunate victims. In Russia, the regulator Roskomnadzor has released a statement requiring media outlets to cover the war in Ukraine using only official Russian sources and the Russian Parliament has introduced criminal liability for the public dissemination of false information. In Ukraine, the Parliament banned print and broadcast mass media from justifying or legitimizing the denial of the Russian Federation’s armed aggression in Ukraine and the National Council of Television and Radio Broadcasting (NCTRB) has decided to suspend retransmission of more than seventy Russian TV channels. Latvia, Lithuania, Estonia and Poland have followed NCTRB's approach in suspending retransmission of several services originating in Russia or Russian state-controlled services in their respective countries. Last but not least, in one of EU’s measures to respond to the Russian invasion of Ukraine, the EU has banned the state-owned channels Russia Today and Sputnik.

There is no way of knowing how this situation will unfold. From my very personal side, I can only express my solidarity with the victims of this unnecessary war (aren’t they all?), wishing that it ends soon and a durable, just peace ensues.

Maja Cappello, editor

European Audiovisual Observatory

# Table of content

# INTERNATIONAL

## COUNCIL OF EUROPE

## MOLDOVA

# European Court of Human Rights: Ghimpu and Others v. the Republic of Moldova

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

On 1 February 2022, the European Court of Human Rights (ECtHR) delivered a judgment in a case concerning the failure to protect two politicians' dignity and reputation from attacks in a documentary film aired by several TV channels, and which was also available on the Internet. The ECtHR found that by dismissing the complaints of the two politicians, Article 8 of the European Convention on Human Rights (ECHR) had been violated, in particular because the domestic courts had not sufficiently considered the (lack of) factual basis of some of the serious accusations against them.

In this case, two politicians, Mr Mihai Ghimpu and Mr Dorin Chirtoacă, as well as the Liberal Party (the politicians were president and vice-president of that party), claimed that their right to dignity and reputation under Article 8 ECHR had been violated by a documentary film titled "Moldova under attack".

The film analysed the events that had followed the general election held on 5 April 2009, narrowly won by the ruling Communist Party of Moldova. The days that followed saw growing discontent with the results of the election and a feeling that electoral fraud had taken place. On 7 April 2009 a demonstration which had begun peacefully ended with violent riots and in the storming of the Presidential palace and the Parliament building. Those events had been the subject of the documentary film, which started with the phrase "How it all happened". Mr. Ghimpu, Mr. Chirtoacă, and the Liberal Party lodged court actions against the Moldovan president, the General Prosecutor, the head of the security service and several TV-stations, claiming that they had defamed them and affected their honour, dignity and professional reputation by making a series of statements in the film without any factual basis. They complained that that throughout the film they had been accused of complicity in having committed particularly serious offences such as mass disorder and an attempted *coup d'état*.

The District Court, and later the Chișinău Court of Appeal, dismissed their actions. The applicants' appeal before the Supreme Court of Justice was declared inadmissible. The Moldovan courts found that the film "Moldova under attack" had been based on the events of April 2009, which were notorious facts that did not need to be proved. References were made to the ECtHR's case-law on Article 10

ECHR and the right to freedom of expression and information. It was emphasised that the information in the film dealt with a matter of public interest and contained opinions, interviews and conclusions made by officials, politicians and public officers, as well as value-judgments and demonstrated factual statements. Furthermore, it was recalled that public persons could be subject to criticism of their actions by the media and should show increased tolerance towards scrutiny by the public at large. It was also held that sanctioning the media or journalists for assisting in the dissemination of statements made by others in an interview would seriously hamper the media's contribution to discussing issues of public interest. Before the Strasbourg Court the two politicians and the Liberal Party complained that the domestic authorities had not fulfilled their positive obligation to protect their honour and reputation, in breach of Article 8 ECHR.

While the ECtHR left the issue open as to whether a political party could claim the protection of its reputation under Article 8 ECHR, it found that in this case the impugned statement related to the Liberal Party had only limited negative effects and had not crossed the threshold of seriousness for an issue to be raised under Article 8 ECHR. Accordingly, the claim of the Liberal Party was rejected as manifestly ill-founded.

Next the ECtHR reiterated that Article 8 encompassed positive obligations on the authorities to protect individuals' rights to privacy and reputation. These obligations might involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. Where a complaint was made that rights protected under Article 8 had been breached as a consequence of the exercise by others of their right to freedom of expression, due regard had to be had, when applying Article 8, to the requirements of Article 10 ECHR. In such cases, the ECtHR needed to balance the right to respect for private life against the public interest in protecting freedom of expression, bearing in mind that no hierarchical relationship existed between the rights guaranteed by the two Articles. The ECtHR referred to the relevant principles developed in its earlier case-law, and the criteria in the context of balancing the competing rights at issue, including the contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, and the content, form and consequences of the publication. Where the balancing exercise between the rights protected by Articles 8 and 10 ECHR had been undertaken by the national authorities in conformity with those criteria, the ECtHR required strong reasons to substitute its view for that of the domestic courts.

The ECtHR noted that the documentary film about the events of April 2009 had contributed to a matter of public interest and it had referred to the fact that the applicants were politicians. The film had been aired in the electoral context, and the applicants had indeed been involved in the events and had thus provoked scrutiny of their actions. However, some of the statements made in the film accused Mr. Ghimpu and Mr. Chirtoacă of specific facts or even serious crimes, such as having instigated mass disorder and a *coup d'état*, and of being "definitely" aware of a plan aimed at overthrowing the Government by force, and of organising of armed groups. The ECtHR considered that, notwithstanding the

political and electoral context in which the film had been aired and the wider limits of acceptable criticism to which politicians knowingly subjected themselves, such serious accusations could not be left without specific examination by the domestic courts. The ECtHR recalled that persons, even disputed public persons that had instigated a heated debate due to their behaviour and public comments, did not have to tolerate being publicly accused of violent criminal acts without such statements being supported by facts. The ECtHR was of the opinion that the domestic courts had not examined in detail any of the statements identified by Mr. Ghimpu and Mr. Chirtoacă as affecting their reputation. By making broad conclusions in respect of the entirety of the statements made, the courts had effectively treated on an equal footing all those statements, despite the rather diverse nature and degree of accusations made and of harm allegedly caused. In that connection, the domestic courts had failed to explain which of those expressions were considered as being statements of fact or value-judgments, with the relevant difference in the level of proof that needed to be established. The ECtHR further recalled that a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas. However, in the present case, the journalist who authored the film had not only reproduced what others had stated in interviews but had also added his own comments which went further than what those interviewed had stated. The documentary was very clear that Mr. Ghimpu and Mr. Chirtoacă had been responsible for the violence and devastation that had happened in April 2009. The ECtHR found that the balancing of the two competing rights which the domestic courts had carried out in a rather general manner had not remedied the absence of any analysis in respect of specific statements in the film, notably concerning the most serious accusations of crimes allegedly committed by the applicants. Therefore the ECtHR concluded that there had been a violation of Article 8 ECHR.

***Judgment by the European Court of Human Rights, Second Section (sitting as a Committee), in the case of Ghimpu and Others v. the Republic of Moldova, Application no. 24791/14, 1 February 2022***

https://hudoc.echr.coe.int/eng?i=001-215346

## RUSSIAN FEDERATION

# European Court of Human Rights: Kilin v. Russia

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

Since the Russian Federation ratified the European Convention on Human Rights (ECHR) in 1998, the European Court of Human Rights (ECtHR) has found 116 violations by the Russian authorities of the right to freedom of expression and information as guaranteed by Article 10 ECHR. The judgment in the case of Kilin v. Russia is one of the rare judgments in which the ECtHR has found that an admissible complaint did not lead to the finding of a violation of an applicant's right to freedom of expression by the Russian authorities. In Kilin v. Russia the ECtHR agreed with the domestic courts that the applicant's conviction for incitement to violence against non-Russian ethnicities could be considered necessary in a democratic society. The ECtHR however found a violation of Article 6 ECHR (right to a fair trial) because the exclusion of the press and public from the appeal hearing had not been justified.

The applicant in this case is Roman Kilin who was convicted in Russia for public calls to violence and ethnic discord on account of video and audio files that had been made accessible via his social-network account. Mr. Kilin had uploaded a video file onto the popular online social network VKontake (VK), entitled Russia 88 (Granny) and an audio file with a song called "Glory to Russia!". The regional office of the Federal Security Service found that the files contained images and texts inciting ethnic discrimination and violence. Criminal proceedings against Mr. Kilin were initiated, his home was searched, and his personal computer was seized. Mr. Kilin was convicted for extremist activities and sentenced to a suspended term of eighteen months' imprisonment. On appeal, the District Court emphasised that Mr. Kilin had made the impugned video and audio in his VK account accessible for an unlimited number of people and that he had acted with the intent to incite ethnic discord and to incite others to commit violations of the rights and freedoms of people of non-Russian ethnicity. The fact that Mr. Kilin was not the author of the audio and video files did not mean that the calls to extremist activities did not emanate from him. By intentionally disseminating such material, Mr. Kilin had expressed his endorsement or approval and had intended that others would be receptive to the calls contained in the impugned material. The District Court found that such an incitement amounted to a public call to carry out extremist activities which was a criminal offence under Article 280 § 1 of the Criminal Code. Before the ECtHR, Mr. Kilin complained that his criminal conviction violated his right to freedom of expression as guaranteed by Article 10 ECHR.

First the ECtHR dismissed the argument of the Russian government that Mr. Kilin could not rely on Article 10 because of the so-called abuse clause in Article 17 ECHR. The ECtHR reiterated that Article 17 was only applicable on an exceptional

basis and in extreme cases. In cases concerning Article 10 ECHR, Article 17 ECHR could only be resorted to if it was immediately clear that the impugned statements sought to deflect that Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the ECHR, or when the applicant had attempted to rely on the ECHR and his right to freedom of expression to engage in an activity or to perform acts aimed at the destruction of the rights and freedoms of others laid down in the ECHR. The ECtHR was of the opinion that this point was not immediately clear in the case and overlapped with the question of whether there had been an interference with Mr. Kilin's right to freedom of expression and whether that interference was "necessary in a democratic society".

Before the ECtHR, Mr. Kilin denied that he had been the user of the relevant VK account and alleged that the impugned video and audio had been published on it by others. The ECtHR however saw no reason to disagree with the domestic courts' finding that Mr. Kilin had used the VK account, retained exclusive access to it and had made accessible the impugned material using it. Next the ECtHR found Mr. Kilin's criminal prosecution had been prescribed by law as provided for by Article 280 § 1 of the Criminal Code read together with section 1 of the Suppression of Extremism Act, and that his conviction could be regarded as having been intended for the prevention of disorder and crime and for the protection of the rights of others within the meaning of Article 10 § 2 ECHR, specifically the dignity of people of non-Russian ethnicity, in particular Azerbaijani ethnicity. The ECtHR added that racial discrimination was a particularly invidious kind of discrimination and, in view of its perilous consequences, required from the authorities special vigilance and a vigorous reaction. It reiterated that "negative stereotyping of an ethnic group was capable, when reaching a certain level, of having an impact on the group's sense of identity and on its members' feelings of self-worth and self-confidence". Therefore incitement of discord between ethnic groups through calls to violence might be prejudicial to all the groups involved and other sectors of the population. Still, it remained to be determined whether *in casu* the criminal conviction was "necessary in a democratic society" in the pursuance of those legitimate aims. The ECtHR referred to various factors that might have been pertinent and need to be taken into account, including: the social and political background against which the statements had been made; whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call to violence or as a justification of violence, hatred or intolerance; the manner in which the statements had been made, and their capacity – direct or indirect – to lead to harmful consequences. It was the interplay between those various factors, rather than any of them taken in isolation, that determined the outcome of where the balance had to be struck between freedom of expression and the rights of others. Mr. Kilin insisted that the prosecution and conviction for a quotation from a work of art which was not banned could not be compatible with Article 10 ECHR, but that argument was not accepted. The ECtHR considered that a specific feature of "hate speech" was that it might be intended to incite, or could reasonably be expected to have the effect of inciting, others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it. The element of incitement entaild

there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular “hate speech” used. In the Court’s view, Mr. Kilin’s conviction had been based on the consideration that his actions had been intended to incite violence, while Article 280 of the Criminal Code did not appear to require any assessment of a risk of harmful consequences, it being sufficient to establish a defendant’s direct intent and his or her actual aim to incite (to call) others to carry out extremist activities, that is – in the present case – to induce ethnic discord and to violate the rights of people of non-Russian ethnicities.

The ECtHR accepted the District court’s finding that the video and audio file could be reasonably perceived as stirring up ethnic discord by calling for violence against people of Azerbaijani origin or people of non-Russian ethnic origin. At the same time the ECtHR found that there was no indication that the material posted by Mr. Kilin was liable to produce imminent unlawful actions in respect of Azerbaijanis or other ethnic groups and to expose them to a real threat of physical violence. Nevertheless, it regarded the domestic courts’ reasoning based on Mr. Kilin’s criminal intent as both relevant and sufficient in the present case to justify Mr. Kilin’s prosecution for a criminal offence for a call for ethnic discord through violence. The ECtHR also emphasised that it saw no reason to consider, that by uploading the impugned material to his VK account and making it accessible to other users Mr. Kilin had contributed or at least intended to contribute to any debate on a matter of public interest. The ECtHR saw neither a reason to consider, that Mr. Kilin’s act of sharing the impugned video was (or intended as) a means of his own artistic expression or satirical social commentary. The ECtHR did not exclude that the sharing of the content at issue within an online group (even a relatively small one) of like-minded persons might have the effect of reinforcing and radicalising their ideas without being exposed to any critical discussion or different views, although the ECtHR also observed that the domestic courts had not referred to any factors or context which would show that Mr. Kilin’s actions could have actually encouraged violence and thus put those groups, or any of its members, at risk. However, the ECtHR did not find this last element decisive in the present case. It agreed with the domestic courts’ finding that Mr. Kilin’s criminal intent was both relevant and sufficient to justify his conviction under Article 10 § 2 ECHR. The ECtHR did however find a violation of Article 6 § 1 ECHR in so far as Mr. Kilin’s right to a public hearing on appeal was concerned, and more precisely because of the non-justified exclusion of the press and public from the appeal hearing in the District Court.

***Judgment by the European Court of Human Rights, Third Section, in the case of Kilin v. Russia, Application no. 10271/12, 11 May 2021***

https://hudoc.echr.coe.int/eng?i=001-209864

# EUROPEAN UNION

## RUSSIAN FEDERATION

## European Commission: Banning of Russia Today and Sputnik

*Francisco Javier Cabrera Blázquez*
*European Audiovisual Observatory*

On 27 February 2022, the President of the European Commission, Ursula von der Leyen, released a statement outlining further measures to respond to the Russian invasion of Ukraine. Among these measures, von der Leyen announced that the EU would ban the state-owned Russia Today and Sputnik, as well as their subsidiaries. High Representative/Vice-President Josep Borrell confirmed this in a separate statement, in which he affirmed that the EU was “taking a crucial step to turn off the tab for Russia's information manipulation in Europe by banning Russia Today and Sputnik from broadcasting in the Union" and that the EU would “continue working actively in Ukraine and our neighbourhood to fight their attempts to distort reality and seed confusion and uncertainty.”

On 1 March 2022, the Council of the European Union adopted a Decision pursuant to Article 29 TEU and a Regulation pursuant to Article 215 TFEU by which it is prohibited for “operators to broadcast or to enable, facilitate or otherwise contribute to broadcast, any content by the legal persons, entities or bodies listed in Annex XV [RT- Russia Today English, RT- Russia Today UK, RT - Russia Today Germany, RT - Russia Today France, RT- Russia Today Spanish, Sputnik], including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed.” Any All broadcasting licences or authorisations, transmissions and distribution arrangements with RT and Sputnik are suspended. Furthermore, it is prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent such the prohibitions laid down in the Regulation, including by acting as a substitute for natural or legal persons, entities or bodies referred to in Article 2e(3) or Article 2f, 5, 5a, 5b, 5e, 5f or 5h, or by acting to for their benefit by using the exceptions provided for in Article 2e(4), 5(6), 5a(2), 5a(5), 5b(2), 5b(3), 5e(2) or 5f(2) of Regulation (EU) No 833/2014.

According to the Decision and the Regulation, the Russian Federation “has engaged in a systematic, international campaign of media manipulation and distortion of facts in order to enhance its strategy of destabilisation of its neighbouring countries and of the Union and its Member States.” [...] “Those propaganda actions have been channelled through a number of media outlets under the permanent direct or indirect control of the leadership of the Russian Federation. Such actions constitute a significant and direct threat to the Union’s

public order and security" and "are essential and instrumental in bringing forward and supporting the aggression against Ukraine, and for the destabilisation of its neighbouring countries." The abovementioned restrictive measures will be maintained "until the aggression against Ukraine is put to an end, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the Union and its Member States." These measures "do not prevent those media outlets and their staff from carrying out other activities in the Union than broadcasting, such as research and interviews."

With regard to the competence of the European Union to take such restrictive measures, the Regulation explains that they "fall within the scope of the Treaty and, therefore, in particular with a view to ensuring their uniform application in all Member States, regulatory action at the level of the Union is necessary."

***Statement by President von der Leyen on further measures to respond to the Russian invasion of Ukraine, 27 February 2022***

https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1441

***Further measures to respond to the Russian invasion of Ukraine: Press statement by High Representative/Vice-President Josep Borrell, 27 February 2022***

https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1463

***Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine***

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.065.01.0005.01.ENG&toc=OJ%3AL%3A2022%3A065%3ATOC

***Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine***

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.065.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A065%3ATOC

# NATIONAL

## The Russian invasion of Ukraine prompts various reactions by media regulatory authorities

*Eric Munch*
*European Audiovisual Observatory*

The invasion of Ukraine by the Russian Federation on 24 February 2022 has prompted media regulatory authorities across Europe to take various measures against several Russian state-controlled media outlets, over recurring disinformation in their coverage of the conflict. While some regulators carefully monitor the situation, others have taken steps to restrict the retransmission of certain channels on their national territory, on the grounds of threats to national security – for EU regulators this has been mostly on the basis of Article 3(3) of the Audiovisual Media Services Directive.

The European Platform of Regulatory Authorities (EPRA) has decided, after an exchange with the Ukrainian regulator, the National Council of Television and Radio Broadcasting (NCTRB), to collect data on the measures put in place by EPRA members.

Between 24-28 February, the Latvian (NEPLP), Estonian (CTRA) and Lithuanian (RTCL) regulators restricted retransmission of RTR Planeta, Rossiya 24, TVCi and Belarus 24. NEPLP and CTRA also suspended retransmission for RBK and MIR24, while RTCL and CTRA extended the suspension to NTV MIR. Access to Primais Baltijas Kanals Lietuva, in Lithuania, and RTVi in Latvia, was also suspended. On 25 February, RTCL successfully requested that YouTube remove the channels associated with the programmes and published a recommendation for telecommunications operators to provide retransmission services of several Ukrainian TV channels (1+1, 2+2, Channel Ukraine, ICTV, STB, Inter, New Channel, TET, K1 and NTN) to provide their Russian speakers with more diversity in content.

The same day, the Polish National Broadcasting Council (KRRiT) adopted a resolution on the deletion of five Russian programmes from the register of TV programmes: Russia Today (RT), RT Documentary, RTR Planeta, Soyuz TV, Rossiya 24 – rendering them inaccessible through cable networks, satellite and internet platforms.

On 1 March, the Bulgarian Council for Electronic Media took the decision to restrict retransmission of RT and Sputnik, and all their subsidiaries.

Following the adoption by the Council of the European Union, on 1 March, of a regulation and a decision restricting access of RT (including its different language versions) and Sputnik to the European media market, ERGA, the European Regulators Group for Audiovisual Media Services, announced on 2 March that it "stands united and is committed to contribute to the swift and effective implementation of the measures by all stakeholders". Several media regulators who had not yet taken measures at national level – such as the Czech regulator, RRTV – have since drawn the attention of national operators to the immediate and direct application of the Council's regulation and decision.

Media regulatory authorities outside of the European Union have also taken measures against Russian channels.

The Ukrainian regulator, NCTRB, decided on 25 February to suspend the retransmission of more than seventy Russian TV channels in connection with recurring use of violent rhetoric referring to the Ukrainian authorities, law enforcement bodies, armed forces and the Ukrainian people in general; perceived as a threat to national security in the context of the current crisis.

On 28 February, Ofcom, the UK regulator, opened 15 investigations into the due impartiality of news programmes on the RT news channel, followed by further 12 investigations on the same grounds, launched on 2 March.

On 2 March, the Committee for Extraordinary Situations of the Republic of Moldova issued a decision providing for the suspension of programmes originally produced in countries that had not ratified the European Convention on Transfrontier Television (except for EU, US and Canadian programmes, and films and entertainment programmes in general). It also temporarily grants the Audiovisual Council the power to suspend licences and retransmission.

### *NEPLP turpina ierobežot Krievijas propagandas kanālu izplatību Latvijā*

https://www.neplpadome.lv/lv/sakums/padome/padomes-sedes/sedes-sadalas/neplp-turpina-ierobezot-krievijas-propagandas-kanalu-izplatibu-latvija.html

*NEPLP continues to restrict the spread of Russian propaganda channels in Latvia*

### *TTJA otsustas keelata viie telekanali taasedastamise Eesti Vabariigi territooriumil*

*TTJA decides to ban retransmission of five TV channels on the territory of the Republic of Estonia*

### *Decision to Suspend Retransmission of 6 Russian Language TV Programmes*

https://www.rtk.lt/en/news/decision-to-suspend-retransmission-of-6-russian-language-tv-programmes

### *Russian programs removed from the registry of distributed programs*

https://www.gov.pl/web/krrit-en/russian-programs-removed-from-the-registry-of-distributed-programs

### *Tisková zpráva RRTV o sankcích Evropské unie proti aktivitám Ruské Federace v oblasti dezinformací a manipulace s informacem*

https://www.rrtv.cz/cz/files/press/TZ_sankce%20EU.pdf

*RRTV press release on European Union sanctions against the activities of the Russian Federation in the field of disinformation and manipulation of information*

### *The National Council applies to the National Regulatory Authorities of European countries*

https://www.nrada.gov.ua/en/zvernennya-natsionalnoyi-rady-yevropejskyh-mediaregulyatoriv-pro-pidtrymku-v-borotbi-z-propagandoyu-rf/

### *Ofcom launches further investigations into RT*

https://www.ofcom.org.uk/news-centre/2022/ofcom-launches-a-further-12-investigations-into-rt

### *Comisia pentru Situatii Exceptionale a Republicii Moldova DISPOZITIA nr. 5 din 2 martie 2022*

https://gov.md/sites/default/files/document/attachments/dispozitia_cse_rm_nr.5_din_02.03.2022_stampila.pdf

*Commission for Exceptional Situations of the Republic of Moldova DECISION No. 5 of 2 March 2022*

### *Прессъобщение*

https://www.cem.bg/displaynewsbg/795

*CEM press release*

# CYPRUS

## [CY] Provisions of the Directive 2018/1808/EU transposed into the law on Public Service Media

*Christophoros Christophorou*
*Council of Europe expert in Media and Elections*

In December 2021, the House of Representatives voted on a Law to incorporate the provisions of the AVMS Directive 2018/1808/EU into the Law on the Cyprus Broadcasting Corporation, Chapter 300A, and also to introduce other changes.

The main sections of the European Directive that are incorporated into the Cyprus Broadcasting Corporation's law are the following:

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

***Ο περί Ραδιοφωνικού Ιδρύματος Κύπρου (Τροποποιητικός) Νόμος του 2021, Ν. 196(Ι)/2021, Ε.Ε. Παρ Ι(Ι), σσ. 1627-1640***

http://www.cylaw.org/nomoi/arith/2021_1_196.pdf

*Law amending the Law on Cyprus Radio Corporation of 2021, L. 196(I)/2021, Official Gazette, App. I(I), pp. 1627-1640*

# [CY] Provisions of the AVMS Directive 2018/1808/EU transposed into national Law

*Christophoros Christophorou*
*Council of Europe expert in Media and Elections*

In December 2021, the House of Representatives voted on a Law amending the Law on Radio and Television Organisations N.7(I)1998 that regulates licensing and the operation of commercial audiovisual media services and which transposed the provisions of the Directive 2018/1808/EU into Cypriot Law. Cyprus was among nine European Union member states that received - in September 2021 - a reasoned opinion by the European Commission for having failed to implement the Directive within the set deadlines.

The Law incorporates the amendments of the AVMS Directive 2010/13/EU introduced with the 2018 Directive and introduces new provisions to ensure compliance of the Law with provisions of the new Directive, as well as serving other purposes. The Directive introduced new definitions as well as replacing old ones. Other changes include the following:

The Radio Television Authority is defined as the national regulatory authority; a new section explicitly provides for its independence, as a “legally distinct and operationally independent from the Government and any other private or public body”. The Authority “acts impartially and transparently” and should not seek or receive any advice from any entity. However, its supervisory authority, the Minister of the Interior, may give advice to the Authority “of [a] general nature, in relation to its competences, which are necessary to the interest of the Republic”. Procedures for the appointment and dismissal of the Authority's Chairperson and members should be transparent and the Authority should also be self-sufficient and independent in terms of human and material/financial resources.

Under the new EU legal framework for regulation of video-sharing platforms, the competences of the Authority are extended to monitoring and ensuring compliance of these platforms with the law, as well as being vested with the power to imposing sanctions for violations. The Authority may also introduce, by law, measures that give it powers to access media ownership data, provided that privacy law is respected.

In addition to transposing the provisions of the Directive relevant to jurisdiction, European works, commercial advertising, protection of minors, access for persons with disabilities, video-sharing services and other issues, the amending law also provides for the following:

The Authority is vested with the power to decide on licensing procedures and the application documents required for the granting of permanent licences. The existing ten-year validity of television licences, is cut down to five years, while for radio it is seven. A derogation in relation to the requirements (such as, share-holding, structure, management etc.) for the granting of a licence, provides that if

a service provider is linked to a legal person under public law, the Authority could disregard requirements applied for private/commercial entities. This includes for CYTA, a public law Telecommunications entity.

The section on procedures relating to the drawing up of a radio frequencies plan, was amended to refer to the provisions of the Radio Communications Law and the relevant competences of the Directorate of Radio Telecommunications. This now falls under the newly established Deputy Ministry of Research Innovation and Digital Policy.

The Council of Ministers can dismiss, with a reasoned decision, a member of the Authority for his or her inability to respect the terms related to the execution of duties that guarantee independence and transparency of the Authority's work or if he or she does not possess the qualifications required for being a member. Finally, a new section requires that the Authority publish an annual action report that should be submited to the President of the House of Representatives, who communicates it to the competent parliamentary committee.

***Ο περί Ραδιοφωνικών και Τηλεοπτικών Οργανισμών (Τροποποιητικός) (Αρ. 2) Νόμος του 2021, Ν. 197(Ι)2021, Ε.Ε. Παρ Ι(Ι), 23 Δεκεμβρίου 2021, σσ. 1641-1671***

https://www.mof.gov.cy/mof/gpo/gpo.nsf/All/B6033357C72194C7C22587B4002B6848/$file/4868%2023%2012%202021%20PARARTHMA%201o%20MEROS%20I.pdf

*Law amending the Law on Radio and Television Organisations (number 2), Law of 2021, L. 197(I)2021, Official Gazette, App. I(I), 23 December 2021, pp. 1641-1671*

# [CY] Supreme Court: The right to be heard cannot be limited to written submission of positions

*Christophoros Christophorou*
*Council of Europe expert in Media and Elections*

The Supreme Court has rejected an appeal by the Radio Television Authority ("the Authority") against a decision of the Administrative Court, ordering the cancellation of a fine against Antenna Television issued in 2012. The reason given by the Administrative Court for the cancellation of the fine, was the decision of the Authority to accept only written testimony from service providers when examining cases of violation of the law. The facts are as follows:

The Authority had been examining a case against Antenna for violating regulations related to the protection of minors, in a programme aired in 2012. The Authority invited the service provider to submit its position, in writing, within 45 days - which Antenna did, while noting that, for the sake of a fair trial, it reserved the right to be heard in person. The Authority rejected Antenna's repeated requests to be invited to present its position in person.

In 2010, the Authority had decided - based on its own interpretation of Regulation 42(6) of Regulations 10/2000 on the procedure before the Radio Television Authority - that it would only receive service providers' positions in writing, "in order to accelerate the examination process" for a large number of pending cases. According to the Regulation,

> "(6) The procedure before the Authority is as follows:
>
> A copy of the eventual violation or a complaint against the provider is sent to the provider;
>
> The provider against which the complaint was made is invited to present its views either in person or in writing [...]"

The Administrative Court found that the above provision gave the right to the service provider to choose the mode of presenting its position. It noted that even in the case that Antenna had not claimed that right, in accordance with ECHR case-law, that in itself could not be interpreted as Antenna abandoning its right. Without a positive response allowing the service provider to be heard orally, the right to a fair trial had not been respected.

Before the Supreme Court, the Authority insisted that its interpretation of the regulation was correct, while also arguing that the requirements of ECHR case-law related to procedures before the courts, and, as it was an administrative body, procedures before it had to be considered differently. It also challenged the Administrative Court's decision on other grounds.

The Supreme Court noted that the phrase “either in person or in writing” should not be read as a distinction between the two possibilities but as in conjunction “and” or, also, in disjunction between them, “and/or”.

It refered to a decision of the ECtHR, in Sigma Radio Television Ltd v. Cyprus (2011) ECHR 1179, where, in interpreting the regulation, the ECHR had noted in two cases the opportunity “to make written submissions and /or oral submissions during the hearing”.

In its verdict, the Supreme Court rejected the Authority’s appeal by concluding: “…the first instance Court made a correct, proportionally weighed and rational interpretation of the relevant provisions, guided by ensuring a just procedure before the Authority and by the protection of the rights of the appellant…”

On the basis of the above decision, which becomes case-law, manydecisions in similar cases have been issued by the Supreme Court since December 2021.

### *Έφεση κατά απόφασης Διοικητικού Δικαστηρίου, 38/19 (Υπόθ. 1873/12, Αρχή Ραδιοτηλεόρασης Κύπρου ν. Αντέννα Ltd, 30 Νοεμβρίου 2021*

http://www.cylaw.org/cgi-bin/open.pl?file=/apofaseis/aad/meros_3/2021/3-202111-38-193.htm

*Appeal against a decision by the Administrative Court, 38/19 (case 1873/12, Cyprus Radio Television Authority v. Antenna Ltd, 30 November 2021*

## GERMANY

# [DE] Commission approves German scheme to support feature films and TV series

*Sebastian Zeitzmann*
*Institute of European Media Law*

Through the German Motion Picture Fund (GMPF), the Federal Republic of Germany plans to support the production of feature films and television series from 1 January 2022 until 31 December 2023, with an estimated total budget of EUR 150 million. The support takes the form of direct grants to producers and co-producers of certain feature films and TV series. The expected scale of the GMPF meant that it required European Commission approval under EU state aid rules. On 27 October 2021, the Federal Republic therefore informed the Commission of the plan to continue with the scheme, which was first established in 2016.

The GMPF, which falls under the responsibility of the Federal Government Commissioner for Cultural and Media Affairs, supports the production of big-budget TV series and films. Funding is available to producers and co-producers, with their domicile or a registered office in Germany, who have produced at least one film or TV series in the previous five years. At least 40% of the total production costs must be spent in Germany.

On 7 January 2022, the European Commission approved the GMPF after assessing the scheme under Article 107(3)(d) of the Treaty on the Functioning of the European Union (TFEU) and the 2013 Communication from the Commission on State aid for films and other audiovisual works. According to Article 107(3)(d) TFEU, the Commission can approve aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest. The 2013 Communication sets out the compatibility requirements for aid in favour of cinematographic and audiovisual works on the basis of the aforementioned provision of the TFEU.

The Commission found that the scheme complies with the aforementioned Communication, notably as it supports cultural works only, is not channelled towards specific production costs and respects aid intensity limits, in particular the 40% rule. It also concluded that the GMPF contributes to the promotion of culture without unduly distorting competition in the Single Market.

### *Presseartikel der Europäischen Kommission*

https://germany.representation.ec.europa.eu/news/staatliche-beihilfen-kommission-genehmigt-deutsche-regelung-zur-forderung-von-spielfilmen-und-2022-01-07_de

*European Commission press article*

# [DE] German media regulator bans RT DE television channel in Germany

*Christina Etteldorf*
*Institute of European Media Law*

On 1 February 2022, the *Kommission für Zulassung und Aufsicht* (Commission on Licensing and Supervision – ZAK), a joint organ of the 14 German state media authorities, whose responsibilities include granting licences to national broadcasters in Germany and related supervisory measures, prohibited the production and distribution of the RT DE television channel in Germany because it did not have the necessary licence. In response, the Russian government took measures against the German international broadcaster Deutsche Welle, including the closure of its Moscow office, banned individuals involved in the ZAK's decision from entering the Russian Federation, and announced further substantial "countermeasures" or "retaliatory measures".

The ZAK found that the Berlin-based company RT DE Productions GmbH had been broadcasting the RT DE television channel under its own editorial responsibility since 16 December 2021. The German-language channel, which provided journalistic and editorial content focusing on news, documentaries and entertainment, was aimed at a German audience. On 17 December 2021, since the broadcaster did not hold a German licence, the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg state media authority), as the media regulator responsible, opened media law proceedings against RT DE (see Ukrow, IRIS 2022-2). As the channel is broadcast nationally, the ZAK is responsible for taking decisions in the matter. It decided that RT DE required a licence under Article 52 of the German *Medienstaatsvertrag* (state media treaty – MStV), and that such a licence had been neither requested nor granted. The ZAK therefore prohibited the further production and distribution of the TV channel via a live Internet stream, the mobile and smart TV app "RT News" and satellite. In response to RT DE's claim that it was broadcasting under a licence granted in Serbia, the ZAK noted that the channel's provider could not rely on any other legitimate authorisation granted under European law. The broadcaster had previously failed to obtain a licence in Luxembourg. The ZAK's decision was based solely on the fact that the channel did not hold a licence, which is a strict requirement for national broadcasters in Germany (Article 52(1) and 115(1)(18) MStV). It had nothing to do with programme content. RT DE has already announced that it intends to explore the possibility of appealing against the decision.

In response to this decision, the Russian government ordered the closure of the Moscow office of the German international broadcaster Deutsche Welle and revoked the press accreditations of its staff. It also announced that the transmission of Deutsche Welle via satellite, and other means of communication on Russian territory, would be terminated, effectively withdrawing its broadcasting licence. The Russian foreign ministry also announced that the relevant Russian authorities would take the necessary steps to designate Deutsche Welle a foreign media outlet performing the functions of a foreign

agent. Under the Russian Foreign Agent Act, which is relevant here, individuals and organisations that receive funding from abroad are obliged to label their publications. Finally, a “list of representatives of state and social institutions of the Federal Republic of Germany who are involved in restricting and prohibiting the transmission of RT DE or pressurising the Russian broadcaster” would be drawn up, and the individuals listed would be banned from entering the Russian Federation. According to the foreign ministry, “details of further phases of countermeasures will be published in due course”.

### *Pressemitteilung der ZAK*

https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/senden-ohne-rundfunklizenz-zak-untersagt-veranstaltung-und-verbreitung-des-fernsehprogramms-rt-de-in-deutschland

*Commission on Licensing and Supervision press release*

### *Pressemitteilung des Außenministeriums der Russischen Föderation*

https://russische-botschaft.ru/de/2022/02/03/zum-inhalt-der-gegenmassnahmen-die-infolge-der-untersagung-der-rt-de-ausstrahlung-in-deutschland-in-bezug-auf-die-deutschen-medien-in-russland-ergriffen-werden-sollen/

*Russian foreign ministry press release*

### *Mitteilung der Deutschen Welle*

https://www.dw.com/de/das-b%C3%BCro-der-deutschen-welle-in-moskau-ist-geschlossen/a-60658573

*Deutsche Welle press release*

# [DE] New German Film Support Act enters into force on 1 January 2022

*Christina Etteldorf*
*Institute of European Media Law*

A new *Filmförderungsgesetz* (Film Support Act – FFG) entered into force in Germany on 1 January 2022. The new act renews the provisions of the 2017 FFG, which was valid from 2017 until 2021, and contains a number of amendments in response to changing market conditions. Adopted in accordance with the German system of regularly reviewing the film support system, the 2022 FFG only contains minor changes compared with the 2017 version and will remain in force until 31 December 2023.

Firstly, the act broadens the scope of responsibilities of the *Filmförderungsanstalt* (Film Support Agency – FFA). In addition to its existing tasks, the FFA will be required to ensure that film industry workers are employed under conditions that are both socially responsible and fair. It must also take into account the need to promote gender equality, the requirements of people with disabilities and diversity (Article 2 FFG 2022). For example, there will need to be an equal gender balance in its executive committee and its president or a vice-president must be female (Articles 12 and 15 FFG 2022). The FFA board of directors will also be able to issue directives granting derogations from the rules on exploitation windows for the secondary and further exploitation of supported films (Articles 53 to 55 FFG 2022).

New provisions have also been introduced in response to the pandemic, including clear rules on decision-making via videoconference and the effects of a force majeure. In the future, the board will be able, in cases of a force majeure, to grant exceptions to certain requirements for receiving support and individual payment conditions, subject to the agreement of the Federal Government Commissioner for Cultural and Media Affairs (Article 17 FFG 2022). Furthermore, in such cases, a film's initial release or continued exploitation in cinemas can now be replaced with a premiere on paid video-on-demand (VOD) services if the film cannot be shown in cinemas throughout the country for a considerable period of time. The cinema industry must be heavily involved in the exploitation of the film by paid VOD services until the end of the usual exploitation window (Article 55b FFG 2022). Exhibition reference funding can be used to keep cinemas in operation and for other measures designed to protect those that face, or are in imminent danger of facing, financial hardship as a result of force majeure (Article 143 FFG 2022). Finally, the FFA board can, in certain exceptional situations, reallocate funding if it appears necessary in order to avert or reduce damage caused by force majeure to the structure of the German film industry.

The 2022 FFG also contains new measures to protect the environment: project film funding and reference film funding will, in future, only be granted if effective measures are taken to protect ecological sustainability during the production

process, the details of which will be set out in an FFA directive (Article 59a FFG 2022). Producers must also use a CO2 calculator to establish the greenhouse gas emissions caused by the production of their films (Article 67 FFG 2022).

Amendments have also been made in relation to the use of exhibition reference funding for advertising measures (Article 143 FFG 2022) and the size of the film levy imposed on pay-TV and programme marketing companies (Articles 156 and 156a FFG 2022). Funding for advertising measures will, in future, no longer be limited to films from EU member states, EER member states and Switzerland. The film levy for pay-TV providers will rise from 0.25% to 0.45% of net subscription revenue. Although the film levy for programme marketing companies in Germany, that market audiovisual content in return for a flat-rate payment, remains unchanged under a separate provision, it is increased to 2.5% of net subscription revenue if cinema films make up at least 90% of their business.

Finally, the concept of an “equal state” is introduced. According to Article 40 FFG 2022, an equal state is a non-member state that is treated the same as a member state under EU law in relation to film support. Since Switzerland, for example, as a non-EU member state, is already eligible to benefit from German film support, the new terminology does not change anything. However, this amendment creates the possibility for the United Kingdom, which has left the EU, to be treated as a member state if it signs a similar agreement.

### *Filmförderungsgesetz 2022*

https://www.ffa.de/aid=1394.html?newsdetail=20211222-1351_filmfoerderungsgesetz-20221

*2022 Film Support Act*

## SPAIN

# [ES] Audiovisual Media Services providers satisfactorily comply with quotas on cultural and linguistic diversity for 2020

*Sandra Torrillas & Mª Trinidad García Leiva*
*Audiovisual Diversity/ University Carlos III of Madrid*

Audiovisual media service providers, in order to guarantee the necessary cultural and linguistic diversity, and its reflection in audiovisual productions, must comply with the quotas established in the Law 7/2010 of 31 March 2010 on General Audiovisual Communication.The quotas are 5% of profits from the previous year for providers and operators of services of a private nature, and 6% for those of a public nature. Every year, the *Comisión Nacional de los Mercados y la Competencia* (National Markets and Competition Commission, CNMC) analyses the compliance of audiovisual media service providers with this obligation. However, the CNMC only supervises these obligations with respect to providers and operators that carry out this activity on a national basis, as those that carry out this activity on a regional basis are audited by regional entities of this nature.

In relation to the analysis carried out by this public body, with regard to compliance with the aforementioned quotas for 2020, the CNMC has issued a report comprising of the performance of 21 service providers. From their report, the CNMC states that a total of 15 service providers have complied satisfactorily with the quotas, two have registered small deficits in some of the categories (Veo TV and Atresmedia), one has requested the transfer of these obligations to the following year (Cineclick), one has not exceeded the obligations imposed (The History Channel) and, finally, two of them have not been considered as obligated service providers given that they have not broadcast audiovisual works that are less than seven years old (13TV and Ten Media). In contrast to the analysis for the previous year, none of these service providers exceeded the established quotas.

In addition, the CNMC received 74 petitions during the year in relation to parties that should be obliged to comply with the quotas established by law. The CNMC has opened proceedings against three of them who have been considered obliged parties, as well as the initiation of 10 sanctioning procedures, amongst other actions.

### *La CNMC audita el cumplimiento de la obligación de financiar películas y series europeas durante 2020*

https://www.cnmc.es/sites/default/files/editor_contenidos/Audiovisual/Proyecto%20COMUNICACION-DTSA-003-21.pdf

*Audiovisual Media Services providers satisfactorily comply with quotas on cultural and linguistic diversity for 2020, CNMC*

# [ES] A new Draft Communication on the consideration of vloggers as audiovisual media service providers is open to comments

*María T. García Leiva & Pedro Gallo Buenaga*

Streamers and content creators that offer their work in Spain using video-sharing platforms, such as YouTube or Twitch, could be considered audiovisual media service providers. In such a case, these creators, or so-called vloggers, would have to comply with the requirements set by the General Law on Audiovisual Communication (2010).

The independent state body responsible for ensuring the proper functioning of the markets in Spain, the *Comisión Nacional de los Mercados y la Competencia* (National Markets and Competition Commission — CNMC), has published a public consultation on a Draft Communication on this subject which aims to clarify the criteria according to which these agents would be subject to audiovisual rules. These criteria are open to scrutiny, and comments can be submitted until 1 March 2022.

The CNMC argues that there is confusion about the nature of the content these creators offer, which causes insecurity and unawareness of the rules

among both creators and consumers. Furthermore, vloggers are new audiovisual agents whose content has a highly significant presence in the market from the point of view of consumption and advertising investment.

The seven criteria to be met in order to be considered an audiovisual media service provider are the same as those that are set out in the General Law on Audiovisual Communication. The Draft Communication explains how these criteria are to be considered fulfilled in the case of new players offering audiovisual content on video-sharing platforms. Thus, for example, one criterion refers to the service provided involving an economic activity (or not); i.e., a service for which a compensation is received. In the case of online content creators, the specificity of their remuneration would be contemplated: payments from platforms for advertising, external commercial agreements (such as sponsorships, unboxings, or branded content), and payments derived from subscriptions and audience donations.

The remaining criteria include different factors, such as the existence of editorial responsibility on the part of the creator, the fact that the service is intended for the general public, or that the objective of the service is to distribute audiovisual content to inform, entertain or educate. In addition, due account should be taken of the fact that the service distributes audiovisual programmes and that the service is provided via electronic communications networks.

As the proposed Communication points out, Spain is in a transitional period due to the ongoing revision of the General Law on Audiovisual Communication because

of the transposition of the EU's Audiovisual Media Services Directive (2018). In the case that the above-mentioned criteria are met, vloggers would be aligned with the legislation in regulatory terms. Though this is expected to be updated in the upcoming months.

### *Consulta pública sobre la propuesta de Comunicación de la CNMC para identificar a los nuevos agentes audiovisuales o vloggers (COMUNICACION-DTSA-003-21)*

https://www.cnmc.es/sites/default/files/editor_contenidos/Audiovisual/Proyecto%20COMUNICACION-DTSA-003-21.pdf

*Public consultation on the CNMC Communication proposal to identify new audiovisual agents or vloggers (DTSA-003-21 Communication)*

# FRANCE

## [FR] Broadcast of sanitary product advertisement did not breach obligation to protect children

*Amélie Blocman*
*Légipresse*

Following the television broadcast of an advertisement for "Nana" sanitary products in September and October 2019, the Pornostop organisation, whose primary goal is to prevent minors being exposed to pornography, asked the *Conseil supérieur de l'audiovisuel* (the French audiovisual regulator – CSA) to issue a formal notice to the television companies concerned, demanding that they respect their obligations to protect children. After the CSA rejected its request, Pornostop requested the annulment of the CSA's initial decision and its subsequent rejection of an informal appeal on the grounds of misuse of powers.

The *Conseil d'État* (Council of State) pointed out that, pursuant to Articles 1 and 14 of the Law of 30 September 1986, the CSA was responsible for ensuring that the protection of children and young people covered not only programmes made available to the public by audiovisual communication services, as expressly stipulated in Articles 3-1 and 15 of the said law, but also advertising shown between or during such programmes, regardless of whether they were specifically aimed at children or young people. Moreover, Article 3 of the Decree of 27 March 1992 implementing Articles 27 and 33 of Law no. 86-1067 of 30 September 1986 and laying down general principles defining the obligations of service providers in relation to advertising, sponsorship and teleshopping, stated that "advertising must be truthful, decent and respectful of human dignity", while Article 7 stated that "advertising must not cause moral or physical harm to minors (...)".

In the case at hand, the evidence showed that the disputed 30-second advertisement was composed of a succession of images of young women and representations, suggested or metaphorical, of the female gender. Considering that the broadcast of the advertisement did not infringe the obligation to protect children, which fell under its supervisory responsibility, and bearing in mind that the images concerned, although they alluded directly to intimate parts of the female body, were linked to the sanitary products promoted by the advertisement and were not indecent or pornographic in any way, the CSA had not misused its powers to issue formal notices as described in Article 42(1) of the Law of 30 September 1986. Since the applicant had no grounds to request the annulment of the disputed decisions, the *Conseil d'Etat* rejected its request.

***Conseil d'État, 1er février 2022, N° 440154, Association Pornostop***

http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-02-01/440154

*Council of State, 1 February 2022, no. 440154, Pornostop*

# [FR] Investment obligations for foreign providers: first agreement between French film industry and Netflix

*Amélie Blocman*
*Légipresse*

On 22 February 2022, the French film organisations Blic, Bloc and ARP announced that they had signed their first agreement with a subscription-based on-demand video service, Netflix. The three-year agreement follows on from the Decree of 22 June 2021, which obliges foreign service providers to fund French and European film-making. Previously, only French providers had been under such an obligation. As part of its obligation to invest 4% of its net turnover generated in France, Netflix has agreed to contribute at least EUR 30 million per year to French-language film production. The agreement also contains a diversity clause requiring Netflix to contribute at least 17% of its funding to French-language films with a budget of EUR 4 million or less, and stipulates that it should fund at least ten films per year. In total, Netflix is expected to invest around EUR 40 million in French and European film production in 2022. In return for its investment, and pursuant to the Ordinance of 4 February 2022, Netflix will have exclusive rights to show films for seven months, starting 15 months after their release in cinemas.

On 10 February 2022, as part of France's new media chronology and agreements reached in recent months with the Canal+ and TF1 groups, the French film industry representatives also announced the signature of a new agreement with OCS (Orange Cinéma Series). Under this agreement, the Orange group will invest at least EUR 60 million in French and European film production over three years, with firm commitments in terms of both pre-financing and independent, diverse pre-purchasing and acquisitions. As far as media chronology is concerned, OCS will enjoy the same rights as Canal+, which signed a three-year, EUR 600 million deal in early December, entitling it to show pre-purchased films six months after they are released in cinemas.

***Communiqué BLIC, BLOC, Netflix du 22 février 2022***

https://twitter.com/FNEF_cinema/status/1496074154533076992/photo/1

*Media release of BLIC, BLOC and Netflix, 22 February 2022*

# [FR] New media chronology completes audiovisual reforms

*Amélie Blocman*
*Légipresse*

A key element of the latest audiovisual reforms, media chronology, which determines when cinematographic works can be released via different methods of exploitation, is set out in Articles L. 231-1 *et seq*. of the *Code du cinéma et de l'image animée* (Cinema and Animated Image Code). Under the law, a professional agreement should be signed, setting out when a film can be made available by an on-demand audiovisual media service provider or when it can be broadcast on television.

Under the new legal framework created through the transposition of the Audiovisual Media Services Directive (Article 28 of Ordinance no. 2020-1642 of 21 December 2020) and the so-called SMAD Decree of 22 June 2021, which requires foreign platforms in particular to help finance film production, media chronology in France had to be adapted to changes in how these services are used. With the conclusion on 24 January 2022 of a new agreement between professional film organisations and broadcasters' representatives following lengthy consultations supported by the Ministry of Culture and the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC), the integration of these platforms into the funding system for French and European film production was completed. The previous agreement of 6 September 2018, renewed under the decree of 25 January 2019, was therefore revoked.

Under a decree of 4 February 2022, the new agreement on the adjustment of media chronology applies to all the companies concerned. It has three main objectives: to make works as accessible to the public as possible, to ensure broadcasters contribute to film production and to develop cinematographic creativity in all its diversity. According to the Ministry of Culture, it "also constitutes the final stage in the ambitious process of transposing" the Audiovisual Media Services Directive into French law.

The agreement concerns the exploitation of cinematographic works by on-demand audiovisual media services in return for an annual investment, under the SMAD Decree, of 20% of their turnover generated in France in French and European productions, and by television broadcasters. First of all, it brings forward the exploitation window for SVoD platforms from 36 to 17 months, or 15 months for platforms that sign an agreement with the French cinema industry (e.g. Netflix). A shorter period of at least six months is possible under an agreement similar to those reached by pay-TV film channels. These channels can show films nine months after they are released in cinemas (or six months in the case of Canal +, which has signed an agreement with the industry), compared with 18 months previously.

There is no change to the 22-month window for free-to-view TV channels (France TV, TF1, M6) that commit to contribute at least 3.2% of their turnover to film production (30 months for those that do not). However, it is shortened to 19 months for works that are not acquired for pay-TV in the second exploitation window or by a subscription-based on-demand audiovisual media service. The window for free-to-view VoD is cut from 44 to 36 months, while the VoD (single purchase) window remains four months, the same as for DVD.

The agreement is valid for three years which, according to the *Société des Auteurs et Compositeurs Dramatiques* (French society of dramatic authors and composers – SACD), which refused to sign it, is "incomprehensible and unreasonable" on account of the rapid changes in the film industry. It can apply to previously agreed contracts if this is expressly stipulated or if an additional clause is included to this end. An initial review of its application will be conducted under the aegis of the CNC 12 months after its entry into force. The parties also believe it is "essential to step up the fight against piracy in all its forms through the adoption of new measures during the term of the agreement."

### *Arrêté du 4 février 2022 portant extension de l'accord pour le réaménagement de la chronologie des médias du 24 janvier 2022*

https://www.legifrance.gouv.fr/download/pdf?id=9u1gzlohKBVHlGkEzAYSJ7w3yK_PLxR0hN1ut-xPoP4=

*Decree of 4 February 2022 extending the agreement amending media chronology of 24 January 2022*

# UNITED KINGDOM

## [GB] Ofcom consults on its guidance about how on-demand programme service providers comply with new requirements about European Works

*Julian Wilkins*
*Wordley Partnership and Q Chambers*

Ofcom has issued proposed guidance about how on-demand programme service ("ODPS") providers should comply with new requirements concerning European works under Section 368CB of the Communications Act 2003 ("the Act").

The proposed guidance reflects changes to the regulatory framework, effective since 1 November 2020, and will replace Ofcom's existing guidance on European works obligations for ODPS providers. The regulatory change arises from the UK's transposition of the revised Audiovisual Media Services Directive 2018 (AVMSD) into UK law, pursuant to the terms of the EU Withdrawal Agreement.

Under section 368CB (7) of the Act:" 'European works' are defined by reference to Article 1 of the AVMSD as meaning: a) works originating in European Union Member States; b) works originating in other European States party to the European Convention on Transfrontier Television of the Council of Europe ("the ECTT"); and c) works co-produced within the framework of agreements related to the audiovisual sector, concluded between the European Union and third countries, and fulfilling the conditions defined in each of those agreements."

The Directive imposes new requirements on ODPS providers to ensure that in each year prominence is achieved with, on average, at least 30% of the programmes included in their services are European works and help facilitate access to this programming. The AVMSD provides guidance as to how to calculate the 30% minimum. European works include content originating in European Union Member States and also works originating in other European States which are party to the European Convention on Transfrontier Television of the Council of Europe ("the ECTT"). The UK remains a party to the ECTT and therefore works originating in the UK are included as European works.

A person providing an ODPS must ensure the prominence of European works in their service. In Ofcom's view, there is no one-size-fits-all solution for securing prominence of European works. The regulator recognises that there are many providers, ranging from, for example, ITV Hub to Amazon, with different expectations from their users. As part of the proposed guidelines Ofcom encourages providers to be innovative in how they comply with this requirement, and to make use of new techniques and tools as they develop.

Ofcom has the responsibility to ensure that providers comply with the new requirements, which have been incorporated into Ofcom's ODPS rules and

guidance as Rule 15. Section 368CB of the Act specifies that these requirements are to be interpreted in accordance with the European Commission guidelines on European works from July 2020. Ofcom's proposed guidance reflects those guidelines referring to them where appropriate.

Ofcom's proposed guidance is intended to assist providers understand how to meet the new requirements, including interpretation of the relevant lawful exemptions, plus explain the steps the regulator will use to ensure compliance by providers. The proposed guidance is intended to support ODPS providers to understand the application of the new quota for European works, the prominence requirement and applicable exemptions based on low audience (less than 1% of audience share), low turnover (annual income of less than GBP 1.7 million), or nature/theme of the service-for instance the European Works requirements do not apply to news, sports and teleshopping channels.

Furthermore, the draft guidance outlines Ofcom's proposed approach to securing compliance with the European works, including their suggested method of collecting data on how the requirements are being met and encouraging the exchange of best practices for making European works content prominent. Ofcom proposes to request information from providers in Spring 2023 and yearly thereafter. This information would include European works in providers catalogues; how they are making this content prominent; and, where relevant, reasons for why exemptions apply.

Ofcom is inviting all interested parties, particularly ODPS providers, the wider industry and other stakeholders, to comment on the proposed guidance. Comments about obligations relating to European works have to be submitted by 22 March 2022.

Once Ofcom has considered the responses, it plans to issue final guidance in Summer 2022. This guidance will accompany our existing guidance for ODPS providers, namely, on: the administrative rules (Rules 1- 9) and the rules regarding sponsorship and product placement (Rules 13 and 14); as well as our recently published guidance on measures to protect users from harmful material (Rules 10, 11 and 12).

Ofcom is encouraging providers to work collaboratively with them but if the regulator has a concern that a provider has contravened or is contravening their obligations, Ofcom will have investigative powers to demand information, and to issue an enforcement notification. Where appropriate Ofcom can impose a financial penalty that is proportionate to the contravention and not exceeding 5% of annual turnover or GBP 250 000 (whichever is the greater amount).

***Ofcom's On-demand programme services guidance. Consultation on guidance for ODPS providers on obligations relating to European works.***

https://www.ofcom.org.uk/consultations-and-statements/category-2/odps-obligations-european-works

# [GB] Libel trial against investigative journalist concludes before the High Court: a landmark test of the public interest defence

*Alexandros K. Antoniou*
*University of Essex*

On 14 January 2022, a high-profile libel trial began before Mrs Justice Steyn at the Royal Courts of Justice in London. The British businessman Arron Banks sued investigative journalist Carole Cadwalladr for libel. Mr. Banks is an outspoken backer of Brexit. Ms Cadwalladr is an award-winning journalist who writes for the Guardian and Observer in the United Kingdom. She is particularly known for her work in uncovering the Cambridge Analytica scandal.

The case arose out of remarks in a Ted Technology Conference titled 'Facebook's role in Brexit – and the threat to democracy' given by Ms Cadwalladr in April 2019, and a related Tweet. In the course of the Ted talk, which centred on the UK's 2016 vote to leave the European Union, she said: "And I am not even going to go into the lies that Arron Banks has told about his covert relationship with the Russian Government".

Arron Banks has always strongly denied any illegal Russian links, but he has admitted meeting Russian embassy officials on a number of occasions. Although his Leave.EU campaign was fined GBP 70,000 over multiple breaches of electoral law, the National Crime Agency's investigation found no evidence of criminal activity.

Proceedings were issued on 12 July 2019. In a preliminary ruling on the meaning of Ms Cadwalladr's words, Mr. Justice Saini held on 12 December 2019 that an average ordinary listener would have understood her words to mean: "On more than one occasion Mr. Banks told untruths about a secret relationship he had with the Russian Government in relation to acceptance of foreign funding of electoral campaigns in breach of the law on such funding."

Mr. Banks maintained in his legal claim that the threshold of 'serious harm' under section 1 of the Defamation Act 2013 had been met in terms of damage to his reputation. Ms. Cadwalladr stated that this was not the meaning she had intended and that she had always taken care to say there was no evidence to suggest Banks had accepted any money. She originally pleaded the defence of 'Truth' under section 2 of the 2013 Act but, after Mr. Justice Saini handed out his ruling on the meaning her statement bore, Ms. Cadwalladr withdrew this defence in November 2020. She is now relying on the defence of 'Publication on a matter of public interest' under section 4 of the Act.

The defence under section 4 reflects principles established by previous case- law. It consists of two elements: Section 4(1)(a) requires that the words complained of were (or formed part of) a statement on a matter of public interest, and if the

publication in question passes this test, then it also needs to meet the requirement of section 4(1)(b), which contains objective and subjective components.

The subjective component is that the defendant must believe the publication was in the public interest and the objective component is the question of whether it was reasonable for the defendant to hold that belief. Section 4(2) of the 2013 Act requires in particular that, in determining these matters, the court 'must have regard to all the circumstances of the case'.

Thus, the central issue at this trial is likely to be whether it was reasonable for Ms. Cadwalladr to believe that the publication of her statements was in the public interest. The court will also look at the content and subject of the allegations, and the way the journalist acted in researching and reporting them. If Ms. Cadwalladr loses, she faces legal costs of up to GBP 1 million on top of damages.

In a piece published by Open Democracy, Ms. Cadwalladr stated: "Right now, we can't police the money spent in our elections: this is a massive problem for our democracy. Facebook is unregulated and our electoral laws are still hopelessly unenforceable. There was (and still is) a huge public interest in journalists raising these issues – both as a warning for us here in Britain, and for countries everywhere".

An interesting aspect of this case is that Arron Banks sued neither the Guardian Media Group which published Ms. Cadwalladr's reporting for years nor TED which hosted her talk (or other large media outlets which made similar allegations). Instead, he chose to sue Cadwalladr personally. Press freedom groups have called for the case to be thrown out and described it as bearing many of the elements of a so-called SLAPP lawsuit - Strategic Litigation Against Public Participation. A key characteristic of such types of actions is the disparity of power between the claimant and the defendant.

The case has renewed calls for the UK Government to ensure that SLAPPs are not used to silence legitimate criticism and stifle any public interest reporting. Action to combat the emergence and growth of abusing litigation targeting journalists throughout the EU and ensure convergence in Member States' approaches to SLAPPs is currently being considered at the EU level.

The *Banks v Cadwalladr* trial was heard over five days and judgment was reserved. The case has been followed closely by several investigative reporters. The Reporters Without Frontiers emphasised in particular that "the ruling will have serious implications for journalism not only in the UK, but internationally, given the popularity of London courts as a jurisdiction for such suits, and highlights the need for greater protections for journalists facing legal threats".

***Banks v Cadwalladr [2019] EWHC 3451 (High Court of Justice, Queen's Bench Division, Media and Communications List)***

https://www.bailii.org/ew/cases/EWHC/QB/2019/3451.html

***Mary Fitzgerald, 'Arron Banks vs Carole Cadwalladr shows how badly UK is failing press freedom' (Open Democracy)***

https://www.opendemocracy.net/en/opendemocracyuk/arron-banks-vs-carole-cadwalladr-shows-how-weak-uk-press-freedom-is/

***'Abusive SLAPP case concludes against investigative journalist Carole Cadwalladr' (Reporters Without Frontiers)***

https://rsf.org/en/news/uk-abusive-slapp-case-concludes-against-investigative-journalist-carole-cadwalladr

***No evidence LEAVE.EU and Arron Banks broke law, says crime agency' (PA Media)***

https://www.theguardian.com/uk-news/2019/sep/24/no-evidence-leave-eu-and-arron-banks-broke-law-says-agency-brexit

***Matthew Weaver and Jim Waterson, 'Leave. EU fined £70,000 over breaches of electoral law' (London, The Guardian)***

https://www.theguardian.com/politics/2018/may/11/leaveeu-fined-70k-breaches-of-electoral-law-eu-referendum

# ITALY

## [IT] AGCOM intervenes on the reliability of DAZN's audience rating systems

*Sofia D'Arena & Ernesto Apa*
*Portolano Cavallo*

Last year the OTT platform DAZN acquired the audiovisual rights on all the matches of the Italian Serie A Championship for the three seasons 2021-2024. This caught the attention of the Italian Communications Authority (AGCOM) that, since then, has been focusing on several issues concerning DAZN.

Specifically, by means of Resolution No. 18/22/CONS, AGCOM assessed the reliability of DAZN's audience rating system. Audience ratings are not only relevant for advertising and future investmentment purposes, but also for the distribution of the revenues resulting from the commercialization of the Serie A Championship audiovisual rights.

With Resolution No. 194/21/CONS, AGCOM issued some guidelines on the audience rating measurement systems in the new digital eco-system, according to which audience rating measurements shall be accurate, transparent, verifiable, certified by independent parties and carried out by bodies that are sufficiently representative in their sector. AGCOM invited audience rating operators to adopt a JIC (Joint Industry Committee) governance. Of note, a JIC is a third entity representing all the subjects operating in the market, both on the demand and the supply side of the advertising communication (e.g., broadcasters and advertising agencies). Also, JICs release certifiable audience data, so they are capable of protecting the best interests of the companies investing in the advertising sector.

Following AGCOM, UPA, the Italian association of advertisers, released its guidelines on audience measurements, putting forward some standards that could help updating audience rating systems to the current market reality.

For the 2021/2022 football season, DAZN's audience rating system released non-certified data, that exceeded the data measured by Auditel, the main audience rating company in Italy, operating under a JIC governance, by more than 50%.,

As a result, since the data measured by DAZN's audience rating system is not certified under Italian law, AGCOM established that the audience data to be considered, for the purposes of the distribution of the revenues generated in the 2021/2022 football season, would be the data released by Auditel. In addition, for the 2022/2023 and 2023/2024 seasons, AGCOM provided that, in order to satisfy the certification requirement, audience data shall be measured by a JIC that operates on the Italian market and is able to release a "total audience data", i.e., unambiguous, transparent and certified data referring to both TV and digital

devices. However, AGCOM specified that the certification requirement could also be fulfilled by any other solution that market operators may propose to AGCOM, in compliance with the provisions set forth by Resolution No. 194/21/CONS and the UPA guidelines on audience measurement.

### *UPA guidelines on audience measurement in the current digital and cross-media landscape*

https://www.upa.it/static/upload/upa/0001/upa-guidelines-on-audience-mesaurement.pdf

### *Indirizzi in materia di sistemi di rilevazione degli indici di ascolto nel nuovo ecosistema digitale*

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=23344823&_101_INSTANCE_FnOw5lVOIXoE_type=document

*Guidelines for audience rating measurement systems in the new digital ecosystem*

### *Chiusura dell'istruttoria avviata nei confronti della società Dazn avente ad oggetto la verifica della metodologia di rilevazione degli ascolti*

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=25761751&_101_INSTANCE_FnOw5lVOIXoE_type=document

*Closure of the investigation launched against Dazn regarding the verification of the methods used to measure audience ratings*

## NETHERLANDS

# [NL] Covenant on website blocking comes into effect

*Michelle de Graef*
*Institute for Information Law (IViR), University of Amsterdam*

On 25 October 2021, an agreement was reached between copyright holders, represented by the Dutch Federation of Copyright Holders (Federatie Auteursrechtbelangen) and the BREIN Foundation, along with several Internet Access Providers (hereafter: the Parties) in the Website Blocking Covenant. The Covenant came into being with active facilitating from the Dutch Minister for Legal Protection and the Minister of Economic Affairs and Climate Policy. The question was set out to the Parties if there was a possibility to come to an agreement on website blocking, to which the Parties complied.

The Covenant fast-tracks the procedure to block a website that is hosting copyright infringing content. The main goal is to lay down arrangements between the Parties on how to shape procedures regarding blocking orders, what they can expect from each other, and what the consequences for third parties are when a blocking order is granted by a judge. The Covenant is only applicable in cases in which the BREIN Foundation is seeking legal action against Internet Access Providers with at least 100,000 subscribers. The BREIN Foundation's primary objective is combating illegal websites and services. In addition to this they initiate legal action against large uploaders to these illegal websites and services. To ensure a fair distribution, the Covenant provides a rotation list of the Internet Access Providers. When the BREIN Foundation is granted a blocking order against one of the Internet Access Providers by a judge, the other Internet Access Providers, that have signed the Covenant, have to follow the blocking order within a reasonable time frame. However, the Covenant provides an opt-out provision, giving an Internet Access Provider the ability to not comply with the Blocking Order. This leaves the possibility to seek individual legal action against the provider by theBREIN Foundation unimpaired.

Internet Access Providers offer access to the internet to their end-users and crucial to this service is that they operate on the basis of network neutrality. Network neutrality entails (in principle) the equal treatment of all forms of internet traffic. The Autoriteit Consument en Markt (The Netherlands Authority for Consumers and Markets) (hereafter: ACM) has assessed the Covenant not to be in violation with the Network Neutrality Regulation. The ACM has stated that therefore they will not be actively taking enforcement actions against said blockings.

Finally, copyright laws (together with the neighbouring rights) ensure that those entitled to copyright have the opportunity to make their protected works profitable. The Dutch government deems it necessary to uphold these rights, and according to a Letter to Parliament from the Dutch government concerning the new Covenant, online piracy undermines these rights. With the Covenant,

copyright holders and Internet Access Providers are taking steps to work together to ensure the rights granted to copyright holders are guaranteed, even in the digital age.

***Ministerie van Justitie en Veiligheid, Convenant Blokkeren Websites, 2021D41853***

https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2021Z19516&did=2021D41852

*Ministry of Justice and Security, Website Blocking Covenant, 2021D41853*

***Minister voor Rechtsbescherming, Kamerbrief over convenant bestrijding online piraterij***

https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2021Z19516&did=20

*Minister for Legal Protection, Letter to Parliament on the Covenant against online piracy*

***Stichting BREIN, Overeenstemming tussen internetaanbieders en auteursrechthebbenden over blokkeren van websites met illegale content na uitspraak van de rechter***

https://stichtingbrein.nl/overeenstemming-tussen-internetaanbieders-en-auteursrechthebbenden-over-blokkeren-van-websites-met-illegale-content-na-uitspraak-van-de-rechter/

*BREIN Foundation , Agreement between ISPs and copyright holders on blocking websites with illegal content after court ruling*

# [NL] Report for Government on the regulation of deepfake technology

*Arlette Meiring*
*Institute for Information Law (IViR), University of Amsterdam*

On 5 January 2022, the *Wetenschappelijk Onderzoek- en Documentatiecentrum* (Research and Documentation Centre), of the Dutch Ministry of Justice and Security (WODC), published an important report on the legal challenges of deepfake technology. The report was sent to Parliament on 17 January 2022, along with a letter, from the Minister for Legal Protection (male), stating that the Cabinet had commissioned the research because of concerns about the rapid development and spread of deepfake technology. The study, carried out by researchers from Tilburg University, aims to inform the Government about the risks of deepfakes, the applicable legal framework, and the measures available to mitigate the risks.

The report focuses on the creation and dissemination of deepfakes in horizontal relations, i.e., from citizen to citizen. The central question is whether the existing legal regime is capable of adequately tackling (future) unlawful or criminal expressions of deepfake technology, or whether national laws and regulations must be amended in order to address its negative effects.

According to experts interviewed for the study, the amount of manipulated audiovisual content will grow exponentially as sophisticated deepfake technology is likely to become accessible to the general public within the next two to three years. Although the technology could have positive applications for democracy, e.g., in creating satire, the report warns that deepfakes have the ability to cause major societal harms. Media and journalists could become hesitant to use video evidence if they have to check all content for authenticity; legal proceedings may require longer investigations in order to rule out fabricated evidence; elections can be disturbed by fake clips discrediting political opponents; and the growth of deepfake pornography could negatively impact the position of women in society.

The report concludes that most problematic deepfake applications are already prohibited or restricted by law. Dutch criminal law seems generally well equipped to address specific deepfakes used for identity theft, fraud, and the distribution of non-consensual pornography. Additionally, the EU General Data Protection Regulation and the European Convention on Human Rights provide general rules on data processing and respect for private life that may restrict the production and distribution of certain deepfakes, for example, those that include sensitive personal data or unjustifiably violate someone’s reputation and/or honour.

Although there is room for adjustments improving the existing substantive and procedural legal framework, a key barrier remains enforcement. As such, the report reflects on issues regarding, inter alia, time constraints, costs, scale, jurisdiction, technical means, and the role of internet intermediaries.

Based on the societal and legal analysis, the report has identified 12 regulatory options to be considered by the Dutch Government and Parliament, including amendments to ensure effective oversight and enforcement of (new) legal provisions. The Minister for Legal Protection (male) has indicated that the Government's official response, and particularly its evaluation of the recommendations, is expected in the spring of 2022.

***B. van der Sloot, Y. Wagensveld en B.J. Koops, Deepfakes: De juridische uitdagingen van een synthetische samenleving, WODC Rapport 3137 (2022), Tilburg University – Tilburg Institute for Law, Technology, and Society***

https://repository.wodc.nl/handle/20.500.12832/3134

*B. van der Sloot, Y. Wagensveld and B.J. Koops, Deepfakes: The legal challenges of a synthetic society, WODC Report 3137 (2022), Tilburg University – Tilburg Institute for Law, Technology, and Society*

***B. van der Sloot, Y. Wagensveld and B.J. Koops, Deepfakes: The legal challenges of a synthetic society (English summary) (2022)***

https://www.tilburguniversity.edu/sites/default/files/download/Deepfake%20EN.pdf

***Brief van de Minister voor Rechtsbescherming van 17 januari 2022, 3722941***

https://www.rijksoverheid.nl/documenten/rapporten/2022/01/17/tk-bijlage-deepfake-nl

*Letter of the Minister for Legal Protection of 17 January 2022, 37229141*

# [NL] National Competition Authority announces extensive investigation into merger between RTL and Talpa

*Arlette Meiring*
*Institute for Information Law (IViR), University of Amsterdam*

On 28 January 2022, the *Autoriteit Consument en Markt (*Netherlands Authority for Consumer and Markets) (ACM) announced an "extensive investigation" into the proposed merger between media companies the RTL Group – active in the Netherlands through its subsidiary RTL Nederland – and the Talpa Network. RTL Nederland is a television broadcaster, content producer, and provider of video on-demand services. Talpa Network is a radio and television broadcaster, operator of various online platforms, and publisher of magazines and games.

The intended acquisition of Talpa by RTL has been under preliminary examination since 14 October 2021, when the companies officially notified the ACM of their plans to merge. The ACM stated that the merger "may have negative effects on price, quality, and innovation". RTL and Talpa must therefore apply for a merger licence, whereafter the ACM shall start a closer investigation consisting of comprehensive data analyses and in-depth conversations with all the parties involved and affected.

Consolidation of the two largest commercial television broadcasters in the Netherlands is in accordance with the RTL Group's strategy to create "national TV champions" in Europe to compete with global platforms. It is the ACM's responsibility, however, to assess "whether the markets involved will continue to work well". The next investigation will look into the merger's expected effects on advertisers, distributors of television channels, producers of television shows, and, ultimately, on consumers. The activities of these groups are closely intertwined. For example, if RTL/Talpa were to produce more content themselves, other production agencies would be left with fewer opportunities. The ACM pointed out that this "may result in fewer investments by those producers, and [subsequently] in a reduction of the range of television shows at the expense of consumers". Additionally, the ACM stated that RTL/Talpa's dominant market position may empower them to negotiate lower prices. This "may lead to fewer investments in new productions, and result in a reduction of the quality and variety of the range of television shows".

The ACM did not indicate when it expects to complete the follow-up investigation and issue its final decision.

***ACM Publicaties, 'Diepgaand onderzoek nodig naar fusie RTL-Talpa', 28 januari 2022***

https://www.acm.nl/nl/publicaties/diepgaand-onderzoek-nodig-naar-fusie-rtl-talpa

*ACM Publications, 'Extensive investigation needed into merger between RTL-Talpa', 28 January 2022*

# RUSSIAN FEDERATION

## [RU] Criminal liability for “false reports” and “harmful calls” expanded

*Andrei Richter*
*Comenius University (Bratislava)*

On 4 March 2022, both chambers of the Russian parliament adopted and submitted, for the President’s signature, amendments to the criminal law. On the same day, the President signed the amendments into law. The Criminal Code of Russia (see IRIS 2020-6/6) now has three new articles. Article 207-3 introduces liability for “public dissemination of knowingly false information on the use of the Armed Forces of the Russian Federation in the interests of the protection of the Russian Federation and its citizens, and the sustainability of international peace and security”. The penalty ranges from a fine of RUB 700 ,000 (about EUR 6 ,000) up to an imprisonment of 3 years. A grave violation under the same act shall be punished with an imprisonment of 10 to 15 years.

Article 280-3 introduces liability for public actions aimed at “discrediting the use of the Armed Forces of the Russian Federation in the interest of the protection of interests of the Russian Federation and its citizens, and the sustainability of international peace and security, including through public calls to counteract [such a use of force]”. Following an administrative punishment for such a public misbehavior within the previous 12 months, a person shall face a fine of RUB 100, 000 or an imprisonment of up to 3 years. In a case where such actions led, in particular, to mass disorder, the penalty increases to 5 years' imprisonment.

According to a new Article 284-2, public calls, by a Russian citizen, for foreign or international sanctions against the Russian Federation, Russian legal entities or citizens, shall be punishable by a fine or imprisonment of up to 5 years.

Citing the adoption of the amendments, a number of international media outlets suspended reporting from within the Russian territory, while certain Russian media outlets stopped news reporting and erased archives related to the Russian war against Ukraine.

***Федеральный Закон "О внесении изменений в Уголовный Кодекс Российской Федерации и статьи 31 и 151 Уголовно-Процессуального Кодекса Российской Федерации"***

http://publication.pravo.gov.ru/Document/View/0001202203040007

*Federal Statute on amendments to the Criminal Code of the Russian Federation and articles 31 and 151 of the Criminal Procedure Code of the Russian Federation), adopted 4 March 2022, N 32-FZ , officially published on 4 March 2022*

# [RU] Limiting freedom of the media in times of war

*Andrei Richter*
*Comenius University (Bratislava)*

On 24 February, Russia's media watchdog, Roskomnadzor (see IRIS 2012-8/36), issued a general instruction to all media outlets, when reporting on the "special operation" in Ukraine, to use information only from official Russian sources. It reported, that “in recent hours, the number of cases of dissemination by the media and other information resources operating on the Internet of unverified and unreliable information has significantly increased.” This general warning, in particular, referred to Article 49 (“Duties of a Journalist”) of the 1991 Statute on the Mass Media, requiring checking authenticity of information prior to its dissemination.

Roskomnadzor informed media and information resources, that when preparing their materials and publications regarding the conduct of the “special operation”, they were obliged to use information and data received by them “only if it comes from official Russian sources”. "We emphasise that it is Russian official information sources that have, and disseminate, accurate and topical information," Roskomnadzor concluded. In its further statements, Roskomnadzor said that upon the requirement of the Prosecutor General's Office it had started to block Internet resources that hosted false information. These resources were blocked without specific warnings or explanations of what exactly was to be considered false. Roskomnadzor noted that the Investigative Committee of Russia would be provided with “materials on such cases” in order to determine the criminal lialibility of the owners of such media resources. The only specific example given by Roskomnadzor was the use of words “attack”, “invasion”, and/or “a declaration of war” instead of the official label of a “special operation”. Dissemination of information about the shelling of Ukrainian cities and the death of civilians in Ukraine as a result of “actions of the Russian Army”, as well as “mass losses” of the Russian military personnel was also considered illegal.

In accordance with Art. 15.3 of Federal Law No. 149-FZ "On Information, Information Technologies and Information Protection" (see IRIS Extra 2021, pp. 15-16), the online resources of Ekho Moskvy radio, InoSMI, Mediazona, New Times, TV-Dozhd, Svobodnaya Pressa, Krym.Realii, Novaya Gazeta, Journalist, Lenizdat, and other media outlets were blocked.

Roskomnadzor also launched an administrative investigation into the dissemination of unreliable, publicly significant information by the listed media. The offence is punishable with a fine of up to RUB 5 million (about EUR 62,000 at the then exchange rate) and Roskomnadzor warned that it would promptly block dissemination of such reports online.

In her public statements on these developments, the OSCE Representative on Freedom of the Media stated that the actions of Roskomnadzor amounted to the introduction of censorship. “Taken together, these measures lead to an

establishment of a state monopoly on information in the Russian Federation," she said.

***Вниманию средств массовой информации и иных информационных ресурсов***

https://rkn.gov.ru/news/rsoc/news74084.htm

*Attention of media outlets and other information resource*

***Роскомнадзор предупреждает владельцев российских интернет-ресурсов об ответственности за распространение рекламных сообщений с недостоверной информацией***

https://rkn.gov.ru/news/rsoc/news74120.htm

*Roskomnadzor warns the owners of Russian Internet resources about the responsibility for the dissemination of advertising messages with false information*

***Установлены факты распространения недостоверной информации в СМИ***

https://rkn.gov.ru/news/rsoc/news74112.htm

*Established were facts of dissemination of false information in the media*

***OSCE Media Freedom Representative: "Russian authorities should stop further jeopardizing media freedom and safety of journalists***

https://www.osce.org/representative-on-freedom-of-media/513334

***OSCE Media Freedom Representative strongly denounces Russian authorities' restriction on freedom of the media and freedom of information***

https://www.osce.org/representative-on-freedom-of-media/512950

# UKRAINE

## [UA] Limiting freedom of information in times of war

*Andrei Richter*
*Comenius University (Bratislava)*

On 3 March 2022, Ukraine's parliament, the Supreme Rada, adopted a set of 14 laws that aim to counteract Russian aggression. They include two laws that envision amendments and additions to the current legislation on information activity. The laws are currently with the President of Ukraine to be published and enforced by him.

Among the envisioned changes is the ban on print and broadcast mass media justifying or legitimising a denial of the armed aggression of the Russian Federation in Ukraine which began in 2014, in particular through its representation as "an internal conflict", "civilian conflict", or "civil war", or the denial of Russian occupation in parts of Ukraine. The ban extends to the glorification of people who have taken part in the armed aggression in particular through their representation as "insurgents", "civil militiamen", or "polite armed men," as well as of those taking part in the *de facto* administration of the occupied territories.

The Criminal Code of Ukraine now has two new articles. Article 435-1 introduces liability for threats to and insult of military servicemen and their families, as well as for the production and dissemination of relevant information materials. Article 436-2 introduces liability for the justification or denial of Russian military aggression, in particular by presenting it as a civil conflict; justification or denial of the occupation of Ukrainian territories; glorification of those who have taken part in the aggression by Russian Army personnel or irregular armed formations, and those who take part in the administration of the occupied territories. Prohibited also is the production and dissemination of relevant information materials.

The penalty for the above crimes – depending on the circumstances of the case – is an arrest for up to 6 months or imprisonment for up to 8 years.

***Закон про внесення змін до деяких законодавчих актів України (щодо заборони виготовлення та поширення інформаційної продукції, спрямованої на пропагування дій держави-агресора***

http://www.golos.com.ua/article/357226

*The Statute on amendments to certain legal acts of Ukraine – as to production and dissemination of information products that aims to promote actions of the aggressor State, bill of 18.02.2021 adopted 3 March 2022 (2109-IX)*

***Закон про внесення змін до деяких законодавчих актів України (щодо посилення кримінальної відповідальності за виготовлення та поширення забороненої інформаційної продукції***

http://www.golos.com.ua/article/357227

*The Statute on amendments to certain legal acts of Ukraine – as to strengthening criminal liability for the production and dissemination of the banned information), adopted 3 March 2022, (2110-IX)*

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE