IRIS newsletter

IRIS 2022-5

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Publisher:

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

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

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

Executive Director: Susanne Nikoltchev

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

EDITORIAL

Following the banning of the state-owned Russian broadcasting services RT and Sputnik by the European Council on the 1st March this year following the Russian invasion of Ukraine, EU members have implemented the Council Decision and Regulation and suspended such services. As reported in this issue, the largest Internet service providers in the Netherlands (VodafoneZiggo, T-Mobile, and KPN) have blocked the websites of the Russian state-owned media outlets RT and Sputnik. In addition, the National Audiovisual Council (CNA) in Romania has imposed fines on domestic broadcasters for failing to provide objective information to favour the free formation of opinions in relation to the coverage of the war in Ukraine. Moreover, Latvia has also banned access to 71 websites in the country that allegedly distributed Russian propaganda, also prohibiting the broadcast of 18 television programmes owned by Gazprom Media Holdings or its subsidiary Red Media. On the other hand, a Russian court found certain content on Facebook and Instagram to be “extremist” and generating disinformation about the so-called “special military operation”; as a result, the two American social networks have been banned in Russia. Moreover, the Code of the Russian Federation on Administrative Offences has been amended to prohibit the denial of the “decisive role of the Soviet people in the defeat of Nazi Germany and the humanitarian mission of the USSR in the liberation of European countries”. Our current issue also explains the legislative framework implemented by Ukraine so as to fight the information aggression and ensure "a unified information policy under martial law".

On a different topic, on 23 April a political agreement was reached between the EU institutions on the proposal on the Digital Services Act (DSA). The “trilogue” deal is now subject to formal approval by the two co-legislators. This means that a final adoption of the DSA is to be expected very soon!

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

More than ever, stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

Table of content

INTERNATIONAL

COUNCIL OF EUROPE

RUSSIAN FEDERATION

European Court of Human Rights: OOO Memo v. Russia

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

The European Court of Human Rights (ECtHR) has delivered a judgment in which, for the first time, it refers to the notion of SLAPP (Strategic Litigation Against Public Participation). In its judgment of 15 March 2022, in the case of OOO Memo v. Russia, the ECtHR expresses its concerns about the risk for democracy of court proceedings instituted with a view to limiting public participation. The case concerns a civil defamation suit brought by a Russian regional state body against a media company. The ECtHR found that allowing executive bodies to bring defamation proceedings against members of the media places an excessive and disproportionate burden on the media. This could have an inevitable chilling effect on the media in the performance of their task as purveyor of information and as public watchdog.

The applicant company, OOO Memo, is the founder of Kavkazskiy Uzel, an online media outlet registered under Russian law which is devoted to the political and human rights situation in the south of Russia, including the Volgograd Region. In 2008 Kavkazskiy Uzel published an article criticizing the executive authority of the Volgograd Region for suspending the transfer of funds, allocated as a subsidy, to the Town of Volgograd. The Volgograd Region commenced civil defamation proceedings against OOO Memo, seeking the retraction of a series of statements in the article at issue. The Ostankinskiy District Court of Moscow found that the statements were damaging for the reputation of the Administration of the Volgograd Region, as they could make numerous Internet users believe that the Administration has been involved in unclean and unethical - even if not unlawful and criminally punishable - activity condemned by society. It also found that OOO Memo had failed to provide any evidence to prove that the events referred to in the article did take place. Therefore OOO Memo was ordered to publish on the Kavkazskiy Uzel website a retraction to the effect that the statements at issue were false and tarnished the Administration of the Volgograd Region’s business reputation. The District Court also ordered OOO Memo to publish the operative part of its judgment on the website. This judgment was upheld on appeal by the Moscow City Court in 2009.

It was not in dispute before the ECtHR that the order by the domestic courts was an interference with the media company’s right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR).

The ECtHR accepted that the interference was prescribed by law, based on Article 152 of the Russian Civil Code, as in force at the material time, conferring the right to bring civil defamation proceedings, inter alia, in order to protect the business reputation of a legal person. The ECtHR reiterated that the ambit of the "protection of the reputation ... of others" clause of Article 10 § 2 is not restricted to natural persons, as it has recognised in other judgments that there can exist a legitimate "interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good". The ECtHR observed however that "these considerations are inapplicable to a body vested with executive powers and which does not engage as such in direct economic activities". But the ECtHR also reiterated that in several judgments it has earlier accepted that public bodies can also pursue a legitimate aim by seeking legal protection of their reputation by way of defamation proceedings. In such cases, the ECtHR focussed on the assessment of the proportionality of the interference as part of the test of necessity in a democratic society. Referring to a 2020 statement by the Council of Europe Commissioner for Human Rights highlighting the "growing awareness" about the dangers of SLAPPs for democracy and referring to the power imbalance between the claimant and the defendant in this case, the ECtHR found, nevertheless, it apt to establish, in this case, whether the interference complained of by OOO Memo, was in pursuance of the legitimate aim of "protection of the reputation of others" within the meaning of Article 10 § 2 ECHR.

First, the ECtHR considered that bodies of the executive vested with State powers are essentially different from legal entities, including public or State-owned corporations, engaged in competitive activities in the marketplace as the latter rely on their good reputation to attract customers with a view to making a profit and the former exist to serve the public and are funded by taxpayers. To prevent abuse of powers and corruption of public office in a democratic system, a public authority's activities of all kinds must be subject to close scrutiny, not only from the legislative and judicial authorities but also from public opinion.

The ECtHR also found that allowing executive bodies to bring defamation proceedings against members of the media "places an excessive and disproportionate burden on the media and could have an inevitable chilling effect on the media in the performance of their task as purveyor of information and as public watchdog". By virtue of its role in a democratic society, the interests of a body of the executive vested with State powers in maintaining a good reputation essentially differ from both the right to reputation of natural persons and the reputational interests of legal entities, private or public, that compete in the marketplace. Therefore, civil defamation proceedings brought, in its own name, by a legal entity that exercises public power may not, as a general rule, be regarded to be in pursuance of the legitimate aim of "the protection of the reputation ... of others" under Article 10 § 2 ECHR. This however does not exclude that individual members of a public body, who could be "easily identifiable" in view of the limited number of its members and the nature of the allegations made against them, may be entitled to bring defamation proceedings in their own individual name.

Turning to the present case, the ECtHR noted that the claimant in the domestic defamation proceedings is the highest body of the executive of the Volgograd Region, while it is hardly conceivable that it had an "interest in protecting its commercial success and viability", be it for "the benefit of shareholders and employees" or "for the wider economic good". Its members were neither "easily identifiable", and in any event, the defamation case was brought on behalf of the legal entity as such, not any of its individual members. On this basis, the ECtHR reached the conclusion that the proceedings and the consequent interference with the right to freedom of expression of the applicant media company did not meet the requirement of a "legitimate aim" under Article 10 § 2 ECHR. There has accordingly been a violation of Article 10 ECHR. Three judges concurred arguing that they are not convinced that there were good reasons for the Chamber's majority to deviate in a radical way from numerous previous judgments that had accepted the applicability of the aforementioned legitimate aim to various public entities and authorities in different countries, in both criminal and civil contexts. The concurring opinion also states that while it cannot be excluded that defamation proceedings could be intended to have a chilling effect on those who criticise the authorities' activities, "the existence of such an illegitimate aim cannot be presumed, let alone taken for granted, without tangible evidence to that effect. In any event, the determination of the limits of acceptable criticism lends itself to be assessed through the balancing exercise under the proportionality test, in line with the Court's established case-law". As the domestic authorities failed to demonstrate that there was a reasonable relationship of proportionality between the interference in question and the legitimate aim pursued, also the concurring judges agreed with the finding of a violation of Article 10 ECHR in the present case.

Judgment by the European Court of Human Rights, Third Section, in the case of OOO Memo v. Russia, Application no. 2840/10, 15 March 2022

https://hudoc.echr.coe.int/eng?i=001-216179

EUROPEAN UNION

Proposed Directive on Strategic Lawsuits Against Public Participation

Justine Radel-Cormann
European Audiovisual Observatory

On 27 April 2022, the European Commission published a new proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation", or "SLAPPs"). The proposal establishes tools for all persons engaged in issues of public interest to fight back against abusive court proceedings. It follows a public consultation (launched by the European Commission between October 2021 and January 2022) and an own-initiative report adopted by the European Parliament on 11 November 2021.

The proposed Directive would apply to civil court cases with cross-border dimensions and is complemented by a Recommendation inviting member states to extend the proposed rules to domestic cases, beyond civil matters. The safeguards would benefit journalists and people/organisations engaged in defending rights and reporting on valuable issues, against whom strategic lawsuits are brought, interfering with public debate in the European Union.

The proposal starts with a definition of a SLAPP in Article 3(3), as being a "court proceeding brought in relation to public participation that is fully or partially unfounded and has as its main purpose to prevent, restrict or penalize public participation" and develops common criteria that could demonstrate the existence of such a purpose.

Following the definition, four types of safeguards are divided into different chapters: Chapter II on procedural safeguards; Chapter III on early dismissal; Chapter IV on remedies against abusive court proceedings; and Chapter V on protection against third-country judgments.

First, the proposal ensures the possibility of dismissing unfounded proceedings and sets out that it should be left to "courts and tribunals to adopt an early decision to dismiss, in full or in part, court proceedings against public participation as manifestly unfounded". A claimant "who has brought abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings", whereas the defender (i.e., the person targeted by the SLAPP) "who has suffered from harm as a result of an abusive court proceedings against public participation is able to claim and to obtain full compensation for that harm." Most importantly, the proposed text calls for dissuasive, effective and proportionate penalties to be ordered by courts or tribunals seized of abusive court proceedings. Finally, a third-country-judgment against a person domiciled in

the European Union should be refused by member states when it “would have been considered manifestly unfounded or abusive if it had been brought before the courts or tribunals of the member state where recognition or enforcement is sought and those courts or tribunals would have applied their own law.”

The Recommendation is a bit more specific as to the protection of media freedom and pluralism and calls on member states to ensure the “existence of an open, free and plural media environment”. Furthermore, member states should encourage awareness raising campaigns and training aimed at strengthening journalists’ and media professionals’ capacity to detect SLAPPs.

While the Recommendation is directly applicable, the proposed Directive will be negotiated and adopted by the Council and the European Parliament.

European Commission, Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”), COM(2022) 177 final

https://ec.europa.eu/info/sites/default/files/4_1_188784_prop_dir_slapp_en_0.pdf

European Commission, Recommendation on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”), COM(2022) 2428 final

https://ec.europa.eu/info/sites/default/files/1_1_188781_recc_slapp_en_1.pdf

Digital Markets Act – Parliament and Council reach a political agreement

Amélie Lacourt
European Audiovisual Observatory

On 24 March 2022, a little over a year after the Commission published its proposal, the European legislators reached a provisional political agreement on the Digital Markets Act (DMA).

The DMA aims at making the online sector a fairer and more competitive one by redistributing the cards between the actors. The past few years have seen online intermediaries massively develop and several platforms now largely dominate the digital market, both economically and socially. The DMA, which applies to the largest and most powerful ones, will make the so-called "gatekeepers" abide by new obligations and prohibitions, and therefore greater accountability. As is usually the case, definitions are at center of the debate. The co-legislators have therefore agreed that companies shall qualify as gatekeepers if they have an annual turnover of at least EUR 7.5 billion within the European Union in the past three years or a market valuation of at least EUR 75 billion, and if they have at least 45 million monthly end users and at least 10 000 business users established in the EU. The said platform must also control one or more core platform services in at least three member states. And while "emerging gatekeepers" are also addressed, SMEs are, for their part, generally left aside. This exemption seeks to ensure adequate proportionality of the rules. In case a platform does not agree with its designation as a "gatekeeper"; it may challenge the designation through a specific procedure, allowing the Commission to check the validity of the arguments put forward. Gatekeepers who are correctly designed as such will therefore be bound by a set of measures, which impose a number of obligations. For instance, the interoperability between services, giving users the right to un-install applications, shall be promoted.

The new rules shall also allow business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform to access the data they generate in their use of the platform. With regards to advertising, gatekeepers will have to provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of the advertisements hosted by the gatekeeper. On the other side, gatekeepers will no longer be allowed to resort to self-preferencing - by ranking services and products they offer more favourably than other ones - or to tying and bundling practices. It is also important to stress that giant tech companies shall no longer track end users outside of the gatekeeper's core platform service for the purpose of targeted advertising without effective consent. The use of data that is not available and the aggregation of personal data from different sources shall therefore no longer be permitted. The European Commission, together with a dedicated advisory committee and high-level group, will act as an oversight and enforcement body. It will indeed be tasked with

market investigations, allowing it to qualify companies as gatekeepers, to update their obligations when necessary and to design remedies to tackle systematic infringements. It should be noted that the DMA also enforces anti-circumvention provisions to make sure gatekeepers do not undermine the rules. Where the gatekeepers do not comply with the measures provided by the DMA, they shall be fined up to 10% of their total worldwide annual turnover, or up to 20% if infringements are repeated. A periodic penalty payment of up to 5% of the average daily turnover may also be imposed. Finally, in case a gatekeeper systematically fails to comply with its obligations, additional behavioural or structural remedies may be issued.

Digital Markets Act: Commission welcomes political agreement on rules to ensure fair and open digital markets

https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1978

The European Parliament and EU member states reach an agreement on the DSA

Amélie Lacourt
European Audiovisual Observatory

Following the Commission's proposal of 15 December 2020 (see IRIS 2021-2:13), the journey towards the adoption of the DSA has taken another step forward: on 23 April 2022, the trilogues came to an end with the reach of a political agreement between representatives of the Parliament, the Council and the Commission.

uUp until now, the online sphere was regulated through a set of measures contained in the e-commerce directive and by a range of targeted and sector specific initiatives, among which the Copyright Directive, the Audiovisual Media Services Directive and the regulation on addressing the dissemination of terrorist content online. This way of operating however left important legal gaps,updated and upgraded rules more in line with today's online services were therefore sought.

The DSA and the DMA (Digital Markets Act) - which was agreed on last March (see article on this newsletter) - hence form a comprehensive package, harmonizing the rules across the single market. The new set of rules is directed towards a wide range of intermediaries: from hosting services to online platforms to very large online platforms and very large online search engines (including a.o. social media, online marketplaces, and cloud computing services).

The negotiations between the institutions started on 22 April 2022 and went on until early in the morning. All three co-legislators had at heart to find a way of better and more effectively protecting users online, with measures to empower them as well as oversight mechanisms and deterrent actions. The Commission should indeed have the possibility to impose dissuasive sanctions on very large online platforms. These penalties are expected to go up to 6% of the global turnover or to take the form of a ban on operating in the single market if repeated serious breaches are identified.

Strengthening the accountability of online intermediaries, especially regarding illegal and harmful content, goods and services is therefore one of the cornerstones of the DSA. The regulation indeed incorporates the existing e-commerce rules on liability exemptions and builds upon them to make the digital sphere a safer and more reliable place with transparency measures, traceability of business users in online marketplaces and access to key data. And the idea is the following: the bigger the platform, the greater the responsibility, which requires consideration of the role, the size, and the impact of the platform.

As Ursula von der Leyen declared, the “agreement on the Digital Services Act is historic, both in terms of speed and of substance”. Rights and responsibilities have been rebalanced to ensure that people’s fundamental rights are adequately protected, both online and offline, and that a level playing field is found for online innovation and competition.

Before being directly applicable in all member states, the agreement must still be formally approved by the Parliament and the Council. The regulation will apply fifteen months after entry into force, or from 1 January 2024, whichever is later. However, the measures applicable to very large online platforms and very large online search engines will apply sooner, i.e., four months after their designation.

Proposal for a Regulation of the European Parliament and the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN

Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment, Press release of the European Commission.

https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2545

NATIONAL

[RU] Court decision on “extremism” of Facebook and Instagram

Andrei Richter
Comenius University (Bratislava)

On 21 March 2022, the Tverskoy District Court in Moscow issued its decision on the civil lawsuit of the First Deputy Prosecutor-General of the Russian Federation to the Meta Platforms Inc. Acting in the public interests, the plaintiff requested the court to ban the activities of the “American transnational holding company” on the territory of the Russian Federation on the basis of its extremist activity, with the additional circumstance that the company’s corporate policy “is directed against the interests of the Russian Federation and its citizens, establishes a threat to public safety and to the life and health of the citizens of the Russian Federation, as well as state security.” With the participation of the representatives of the Federal Security Service (FSB) and the media regulator, Roskomnadzor, the Court reviewed the arguments of both sides. It noted the discriminatory measures taken by Meta in regards to the Russian state media, earlier decisions of the Russian courts that proclaimed particular materials in Facebook and Instagram “extremist”, earlier demands by Roskomnadzor that Meta takes down posts found illegal, various fines imposed on Meta for violations of Russian IT-Law (see IRIS Extra 2021), recent calls to violence against Russians that were permitted despite the stated community policies by Facebook, as well as dissemination of false information on the “special military operation” that Russia started on 24 February 2022 against Ukraine. The court dismissed as “declaratory” the arguments of the defendant that the case is of administrative and not civil law nature, that Meta did not discriminate Russian media but only labeled their control by the state, that Meta’s policies related to calls for violence were adjusted and then referred only to calls for violence against the Russian military.

The court said that the only aim of the defendant’s arguments was “to avoid liability for extremist activity in relation to the citizens of the Russian Federation in and beyond the territory” of Russia. The imposed fines and limitations of access to the Meta products, said the court, turned out to be insufficient and nonproportional to the gross violations of the rights of citizens and the interests of the State. Civil law permits the court to cease the violations by banning certain activities, that is placing, dissemination and flagrant non-action in regards to extremist materials – all done “under the guise of commercial activity”.

Banning of certain activities should not restrict use of Meta software by the persons who were not engaged in illegal acts.

The court supported the lawsuit by the Deputy Prosecutor-General and banned the activity of Meta and the distribution of its products, Facebook and Instagram, on Russian territory. Another product of Meta, WhatsApp, was not touched upon by the judgment, as it “lacks functions on public dissemination of information”. While the decision can, within a month, be appealed in the Moscow City Court, it enters into force immediately. Following the court decision, Roskomnadzor warned Russian media organizations to refrain from using logos of the banned social networks without referring to their extremist activities.

Решение по делу №02-2473/2022

https://nplaw.ru/upload/iblock/b5a/b5a06b9430d04a8bacbd3d3b30b6da4d.pdf

Tverskoy District Court in Moscow, Decision on the case N02-2473/2022

BULGARIA

[BG] CEM report on the presidential and legislative election campaigns

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

On 14 February 2022, *Съветът за електронни медии* (the Council for Electronic Media – CEM) published its Report on the specialized monitoring of the election campaign for the president and vice president of the Republic of Bulgaria, and for the snap elections for the 47th Parliament.

Through its monitoring, CEM establishes how media service providers reflect upon the election campaign of political parties, and to what extent media outlets comply with the requirements of *Изборен кодекс* (the Election Code) and *Закон за радиото и телевизията* (the Radio and Television Act).

Through its 418 pages, CEM presents its findings on the activity of all types of media service providers during the election campaigns, analysing more than 25 TV channels and radio stations - including national public radio and television, and the major TV channels. For the second time now, the report also includes detailed information on the performance of some non-linear media services, which included audio and audiovisual content related to the elections. The report analyses and focuses on seven of the major online platforms.

The main conclusions of CEM that deserve to be mentioned are as follows:
Journalism, in the audio and audio-visual content during the election campaign, is limited in practice by political PR and party strategies for presenting candidates. The content of some media providers is openly and completely ruled by propaganda. Several channels have used subconscious methods of suggestion as used in propaganda (such as multiple repetitions, out of context repositioning of excerpts from the program schedule, one-way messages – including merging the informational campaign with political agitation). Quality political journalism is increasingly losing ground in its mission to contribute to the public consensus between different groups and political interests. Editorial content is limited even on some of the major national channels. There is a mixture of editorial and agitation content which is due to the blurry definition of political advertising in the law. The monitoring found that journalists in radio and television studios, in polythematic programs and non-linear media services, made efforts to reach a reasonable conversation about the future governance of the country, but against the background of all the media production during the campaign, these efforts seemed to be insufficient. Yet again, the Report acknowledges the extremely low participation of political leaders in discussion formats. The one and only presidential debate did not compensate for this scarcity. Pre-election debates organized by some media providers seemed quite strange, in the opinion of CEM, considering that the invited participants have been like-minded. Hence, the media authority

considered such forms as an interview. The report also notes that men have participated much more often than women in the monitored programs and content.

Доклад за специализираното наблюдение на предизборната кампания за президент и вицепрезидент на Република България и за извънредните избори за 47-мо Народно събрание

https://www.cem.bg/controlbg/1402

Report on the specialized monitoring of the election campaigns for president and vice president of the Republic of Bulgaria and for the snap elections for 47th Parliament

GERMANY

[DE] Federal Council adopts position on proposed European Media Freedom Act

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

In a resolution adopted on 11 March 2022, concerning the European Media Freedom Act announced by the European Commission, the German *Bundesrat* (Federal Council) expressed support for sector-specific rather than fully harmonised regulation in the media sector.

The Federal Council welcomed the Commission's decision to launch a debate on how media freedom could be protected and strengthened in Europe, as well as an open public consultation on the subject. The German *Länder* believed the answer to this question was crucial for Europe's future because the EU was not only a single market for goods and services, but also an area of democracy and freedom. However, democracy could not exist without a functioning, free and pluralistic media landscape.

The Federal Council stressed that the threat to journalists from hatred, smear campaigns and physical assaults put media freedom in serious danger. It shared the European Commission's fundamental view that media independence and pluralism were extremely valuable. This particularly concerned journalistic freedoms, editorial independence, public access to media services, transparent allocation of state funding and ensuring that the governing bodies of public-service media were sufficiently independent from the state.

The *Länder* reiterated that, in a digital single market in particular, there was still a need for sector-specific media regulation governing both the media themselves and their distribution. This was especially true in the modern world, in which the Internet had become the main forum for media and communication.

In the Federal Council's opinion, (primarily) market-oriented legal acts, that were based on the internal market rules of Article 114 of the Treaty on the Functioning of the European Union (TFEU), could support the media's specific role in relation to democracy, society and opinion-forming, as well as media distribution. However, horizontal market rules such as the EU Digital Services Act (DSA), that was currently being negotiated, were not a suitable way of fully and effectively protecting media freedom and media diversity. The *Länder* therefore wanted to constructively answer the question of how legal acts based on Article 114 TFEU could take into account the media's specific role and how they could sensibly be combined with media regulatory measures. The *Länder* were keen to discuss this issue with the Commission.

The Federal Council stressed that the EU's strength lay in its cultural diversity, which was based on common rules and shared values. The resulting need for different regulatory frameworks, as well as market and supervisory structures, had therefore – including as an expression of the subsidiarity principle and the distribution of powers between the member states and the EU – never been disputed. This diversity should be protected and promoted, rather than threatened by the pursuit of harmonisation and centralisation. Measures to safeguard media freedom, independence and diversity at national level should not be questioned. A European market approach should neither narrow perspectives on the media as an economic asset, nor ignore the fact that large emerging markets could hinder the preservation of diversity, especially at a regional level.

Furthermore, the *Länder* accepted that transparency rules relating to ownership structures in the media sector were, to a certain extent, necessary. However, these should not result in a disproportionate level of bureaucracy and should only be a means of achieving overarching regulatory objectives. In addition, full harmonisation of regulations at European level was not a suitable means of adequately expressing the cultural sovereignty of individual member states.

In the Federal Council's opinion, it was essential that supervision of the media and media distribution was independent and decentralised. Apart from sensible, necessary cooperation among national regulatory bodies – including in the context of the Memorandum of Understanding of the European Regulators' Group for Audiovisual Media Services (ERGA) – there was no need to interfere with these principles and structures by creating supervisory bodies at European level, such as in the form of an EU-wide media regulation authority.

According to the *Länder,* the Federal Government should take the Federal Council's position into account under Article 23(5)(2) of the *Grundgesetz* (Basic Law – GG) and Article 5(2) of the *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* (Act on Cooperation between the Federation and the *Länder* in European Union Affairs – EUZBLG) because the proposed adoption of a European Media Freedom Act affected the legislative powers of the *Länder* in relation to the organisation of broadcasting law in and for Germany. The Federal Council also urged the Federal Government, under Article 23(6) GG and Article 6(2) EUZBLG, to delegate to the *Länder* the task of discussing the matter during the forthcoming deliberations of the Council working groups and Council of Ministers.

Entschließung des Bundesrates zum angekündigten Europäischen Rechtsakt zur Medienfreiheit

https://www.bundesrat.de/SharedDocs/drucksachen/2022/0001-0100/52-22(B).pdf?__blob=publicationFile&v=1

Federal Council resolution on the proposed European Media Freedom Act

[DE] KEK publishes 7th German media concentration report

Christina Etteldorf
Institute of European Media Law

On 15 March 2022, the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media – KEK) published its 7th concentration report, which describes the current status and development of media concentration in Germany and the measures taken to safeguard diversity of opinion in private broadcasting. This year, the report, which is published at regular intervals, focuses on the clear change in the media usage habits of younger age groups in particular, which also has an impact on the protection of media pluralism.

The KEK, which comprises six broadcasting and business law experts and six legal representatives of the German state media authorities, who are appointed in accordance with *Land* law, is the decision-making body and mediating authority for the 14 German media regulators. It is responsible for monitoring compliance with laws designed to safeguard media pluralism in national private television (e.g. provisions on third-party window programmes or dominant influences on public opinion), taking decisions on such matters and proposing unbundling measures. In order to guarantee transparency and provide a record of observations in the media concentration field, the KEK also publishes a media concentration report every three years. This year's edition, entitled "Future-oriented safeguarding of diversity across the media sector", contains facts and analysis of media markets, broadcasting groups and changes in consumer behaviour. Although the KEK's statutory remit only includes powers to prevent concentration in national private television, the report also analyses other media-relevant markets. In it, the KEK assesses a company's overall influence on public opinion, even though, under a decision of the *Bundesverwaltungsgericht* (Federal Administrative Court), its activities in the radio, print, online, rights and advertising markets are no longer relevant in regulatory practice. This situation may change if current legislative debate results in a move away from the television-centric approach to the protection of pluralism, which, in the context of media convergence, could mean that influences beyond the television market are considered relevant to the protection of pluralism in their own right.

The report concludes that concentration in the television market has changed very little since the 2018 report. Three groups of broadcasters continue to dominate the national television market: the public-service broadcasters (ARD and ZDF) and the private RTL and ProSiebenSat.1 groups. Although there is also an increasing number of other national channels, which provide greater diversity, these only represent a total audience share of around 10%. Streaming providers offer strong competition, although the established providers are also increasingly investing in the streaming sector themselves. In contrast, the radio market is not showing any signs of increasing concentration and is characterised by a diverse ownership structure and a wide range of channels, including a growing number of

additional digital audio services. Cross-media integration in terms of ownership structures is prevalent here, especially in the regional and local newspaper market. The report notes another fall in circulation figures for print media. In the online media sector – a very broad concept that covers a wide range of media genres – the report mentions a number of positive factors for media pluralism, such as the diverse ways in which media can be accessed and used, as well as multi-layered competitive conditions. However, it also lists various threats to media diversity, including the enormous competitive power of large international platform groups, the huge influence of intermediaries on public opinion, together with monopolistic tendencies, and a virtual inability to monitor compliance with media concentration law. These developments are all the more dangerous in view of the clear changes in the behaviour of media users, in particular the 14–29 age group, who are abandoning traditional media in favour of new online services.

As in previous reports, the KEK therefore renews its call for media concentration laws to be reformed, in particular through the adoption of an overall market approach (including the broadening of the KEK's own remit), (further) measures to safeguard diversity in a positive way, and new regulatory concepts for the online sector. Reforms were promised by the state legislative bodies through the entry into force of the *Staatsvertrag zur Modernisierung der Medienordnung in Deutschland* (State Treaty on the modernisation of media legislation in Germany) on 7 November 2020, in which the *Länder* expressed their support for the development of a future-oriented media concentration law in a joint declaration.

7. Konzentrationsbericht der KEK

https://www.kek-online.de/publikationen/medienkonzentrationsberichte/siebter-konzentrationsbericht-2021

7th KEK concentration report

[DE] NDR's constitutional complaint concerning Tagesschau app rejected

Sebastian Zeitzmann
Institute of European Media Law

In a ruling issued on 23 February 2022 and published on 25 March 2022, the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) rejected a constitutional complaint lodged by Norddeutscher Rundfunk (NDR) regarding the admissibility of the Tagesschau app on the grounds that the complaint was inadmissible.

The dispute dates back to 2011, when eight newspaper publishers, in coordination with the *Bundesverband Digitalpublisher und Zeitungsverleger* (Federal Association of German Newspaper Publishers – BDZV), filed a complaint against ARD and NDR with the competition chamber of the *Landgericht Köln* (Cologne District Court). The complaint concerned the amount of written text contained in the Tagesschau app, i.e. its "press-like" character. The publishers argued that the free app, which was funded by the broadcasting licence fee, distorted competition. The *Medienstaatsvertrag* (state media treaty) and its predecessor, the *Rundfunkstaatsvertrag* (state broadcasting treaty), restricted the possibility for public-service broadcasters to provide press-like services on the Internet.

The courts upheld the complaint. In September 2016, the *Oberlandesgericht Köln* (Cologne Appeal Court – OLG) declared the Tagesschau app unlawful. In particular, the version of the app available on 15 June 2011 had been too press-like. In December 2017, the *Bundesgerichtshof* (Federal Supreme Court) confirmed this decision and ruled that it could not be the subject of any further appeal. In early 2018, NDR announced that it would file a constitutional complaint against the Cologne Appeal Court's decision on the grounds that it had ignored essential aspects of broadcasting freedom.

The 2nd chamber of the First Senate of the BVerfG unanimously decided that the complaint was inadmissible because it did not meet the requirements contained in the *Gesetz über das Bundesverfassungsgericht* (Act on the Federal Constitutional Court) regarding the evidence that must be submitted following changes to the factual and legal situation after the complaint deadline. In particular, the NDR's argument that the constitutional complaint was still admissible despite the amendment of telemedia law through the *22. Rundfunkänderungsstaatsvertrag* (22nd state treaty amending the state broadcasting treaty), which entered into force on 1 May 2019, was insufficient.

The *22. Rundfunkänderungsstaatsvertrag* amended the public broadcasters' remit with regard to telemedia. For example, it relaxed the rules on the length of time for which telemedia content could be made available, and required the broadcasters to offer interactive communication and social media opportunities, as well as network the telemedia services they provided. The telemedia services provided by ARD, ZDF and Deutschlandradio must be primarily focused on moving

images and sound, and text may not be in the foreground (they must not be press-like). A joint arbitration board was set up by public broadcasters and umbrella press organisations to deal with future disputes.

Since the BVerfG's decision cannot be appealed, the Federal Supreme Court's decision is now legally valid.

Beschluss des Bundesverfassungsgerichts

https://www.bundesverfassungsgericht.de/e/rk20220223_1bvr071718.html

Decision of the Federal Constitutional Court

[DE] VG Berlin confirms mabb's RT DE broadcast ban in interim proceedings

Christina Etteldorf
Institute of European Media Law

In a ruling of 17 March 2022, the *Verwaltungsgericht Berlin* (Berlin Administrative Court – VG Berlin) provisionally upheld the decision taken by the *Medienanstalt Berlin-Brandenburg* (mabb) in early February, banning the organisation and distribution of the television channel RT DE, which was broadcast throughout Germany (see IRIS 2022-3/23). The decision had been based on the fact that the channel's Berlin-based operator, RT DE Productions GmbH, did not hold the licence it required under the German *Medienstaatsvertrag* (state media treaty) to broadcast at national level. The VG Berlin thought that the public interest in the immediate enforcement of the ban (which had been imposed in accordance with the law) outweighed the interests claimed by RT DE, and that the application in the main proceedings had no more than "an open chance of success".

In its ruling, the VG Berlin concluded that the mabb's decision to object to and ban the channel – in accordance with the summary examination conducted in the interim proceedings – was consistent with the legislative provisions of Article 109(1) in conjunction with Articles 52 *et seq*. of the *Medienstaatsvertrag* (state media treaty – MStV). The main point in dispute was whether RT DE Productions GmbH was the organiser of the channel and therefore required a licence under Article 52(1) MStV. The crucial factor when determining the status of organiser was (ultimate) responsibility for the broadcast programme, which the VG Berlin decided was held by RT DE, since the latter had not submitted any well-founded evidence to the contrary. The court rejected RT DE's claim that it should be considered a production service provider, rather than an organiser of a broadcasting service, because its entry in the trade register only mentioned the former activity: its status as an organiser was demonstrated by the activity it actually carried out. The fact that the word "Productions" appeared in its name, and its claims concerning its ownership structure and the technical role played by its grandparent company (which it considered to be the organiser) were dismissed as irrelevant. In this connection, the court also rejected RT DE's submissions that it lacked the technical capacity to broadcast via satellite and did not own the Internet domain linked to the channel, since they did not affect its status as organiser. The argument put forward by RT DE Productions GmbH that, under its service agreements with its grandparent company, it only organised a small fraction of the channel's programming and had no influence on or decision-making powers concerning the channel as a whole, was also ruled invalid. On this matter, the court noted, for example, that these agreements, signed under Russian law, were only effective *inter partes* and could not form the decisive basis for an assessment under the MStV. Complaints from RT DE about erroneous assumptions made by the mabb when calculating the number of its employees were also rejected. As a result, the VG Berlin agreed with the mabb's conclusion

that the way in which RT DE Productions GmbH portrayed itself to the public (e.g. in job advertisements and the company information displayed on its website) suggested that it was an organiser. The resulting obligation to hold a licence still applied despite the fact that the grandparent company allegedly held a Serbian licence (although no evidence of this had been submitted) and a licensing procedure was still under way in Luxembourg.

On the basis of these legal findings, the VG Berlin decided there was no reason to suspend the immediate enforcement of the decision. However, it concluded that, even though there was an open chance of success in the main proceedings, and a further weighing of the conflicting interests was necessary, including an assessment of the decision's consequences, the public interest in the immediate enforcement of the decision outweighed the interest in delaying its enforcement. The need to protect the integrity of the licensing system for private broadcasters that applied under the current law could not be overridden by the primarily commercial interests that had been asserted in this case. The VG Berlin decided that aspects linked to freedom of expression and media freedom, which were in RT DE's favour, were not decisive because the ban only concerned the distribution of broadcast content and not other methods of content distribution.

Beschluss des VG Berlin vom 17. März 2022 (VG 27 L 43/22)

https://openjur.de/u/2391607.html

Berlin Administrative Court decision of 17 March 2022 (VG 27 L 43/22)

FRANCE

[FR] Court hearings may be filmed under certain conditions

Amélie Blocman
Légipresse

Article 38b of the *Loi sur la liberté de la presse* (Press Freedom Act) of 29 July 1881 prohibits the recording of images of court proceedings, stipulating that "as soon as an administrative or judicial court hearing begins, the use of any device capable of recording or transmitting sound or images is prohibited". Under Article 1 of the *Loi pour la confiance dans l'institution judiciaire* (Law on trust in the courts) of 22 December 2021, a new Article 38c created the possibility, by way of derogation from the first paragraph of Article 38b, to record or film civil, criminal or administrative court hearings on the grounds of an "educational, informational, cultural or scientific public interest." The implementing decree of 31 March 2022 specifies how these recordings may be made, subject to authorisation.

Requests to film court proceedings must be sent to the Minister of Justice, along with an explanation of why such a recording is in the public interest and the conditions in which it will be made and broadcast. The Minister of Justice issues an opinion, which is submitted to the "decision-making body", i.e. the first president of the court of appeal for judicial courts under its jurisdiction, the first president of the Court of Cassation for proceedings held under its jurisdiction, and the president of the court for administrative proceedings.

In principle, proceedings may be recorded without the consent of the parties. However, there are some exceptions. For example, the parties' written consent is required if the hearing is not held in public, if it forms part of an ongoing investigation or if a minor is involved. The holder of the recording permit must obtain this consent before the hearing, using a form drawn up in accordance with a template laid down by decree.

The decree also describes the conditions in which the recording should be made. It should not intrude on "the smooth running of the proceedings, the dignity and serenity of the debates, and the freedom of the parties and people being filmed to exercise their rights". The presiding judge may suspend or stop the recording at any time.

Finally, anyone who is recorded, including the parties' representatives and court staff, must consent separately to their image being broadcast. If they do not, the broadcaster must conceal their image, voice, name and civil status. Images of minors and adults under special legal protection may not be broadcast.

According to the Ministry of Justice, it signed an agreement with France Télévisions on 30 March 2022 in order to "provide an insight into everyday court proceedings", with a view to broadcasting a regular programme starting in

September this year. All hearings that are broadcast will be commentated on by legal professionals and an expert journalist.

Décret n° 2022-462 du 31 mars 2022 pris pour l'application de l'article 1er de la loi n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire

https://www.legifrance.gouv.fr/download/pdf?id=J2L-amQw3p_6VHCDIBprwr5c7pYyrzbT6dnhACItDn4=

Decree no. 2022-462 of 31 March 2022 implementing Article 1 of Law no. 2021-1729 of 22 December 2021 on trust in the courts

[FR] New film exploitation regulations

Amélie Blocman
Légipresse

Under two decrees adopted on 25 February and 10 March 2022, the regulatory part of the French *Code du cinéma et de l'image animée* (Cinema and Animated Image Code) and Article 2 of Decree no. 90-66 of 17 January 1990 defining cinematographic works within the meaning of the code were amended.

The decree of 25 February 2022 modernises the work of the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC), safeguards the legal mechanism for the payment of fees for managing the *Registres du cinéma et de l'audiovisuel* (Film and audiovisual registers – RCA) and creates a more up-to-date system for submitting the relevant documentation.

The decree also brings the regulations on local film screenings into line with new cinema programming and promotes the distribution of cultural content. It clarifies the approval system for new cinemas and describes the conditions in which the CNC president can grant approval to cinemas that, on account of architectural or economic constraints, are unable to meet the technical requirements that would normally apply. It guarantees transparency of costs related to the management of the subscription scheme that gives cinema-goers unlimited access to film screenings. It also makes provision for a faster procedure for granting exemptions from the video film exploitation window. Finally, it provides some detail on the rules to protect public access to cinematographic and audiovisual works laid down in Article 30 of the Law of 25 October 2021 on the regulation and protection of access to cultural works in the digital age. Finally, the decree simplifies the working procedures of the *Commission du contrôle de la réglementation* (Regulation Control Committee).

The decree of 10 March 2022 supplements Decree no. 2022-256 of 25 February 2022, firstly by modernising the formal process for the submission of the documents required to manage the film and audiovisual registers, which can now be filed online. It enhances the quality of the information contained in the weekly income declaration provided by cinema operators by requiring details of each individual screening rather than each day. It replaces articles that had become obsolete in the regulations applicable to the classification of cinemas as art house venues. It adapts the definition of the cinema release date in relation to the exceptional screenings permitted under the decree of 25 February 2022. The decree also abolishes the deadline for submission of requests for exemption from the video film exploitation window.

Finally, the decree completes the regulatory framework for the protection of public access to cinematographic and audiovisual works by specifying the information that must be submitted to the Minister of Culture in relation to the transfer of catalogues of such works.

Décret n° 2022-256 du 25 février 2022 modifiant la partie réglementaire du Code du cinéma et de l'image animée et portant diverses mesures relatives au secteur du cinéma et de l'image animée

https://www.legifrance.gouv.fr/loda/id/JORFTEXT000045245101/

Decree no. 2022-256 of 25 February 2022 amending the regulatory part of the Cinema and Animated Image Code and concerning various measures relevant to the cinema and animated image sector

Décret n° 2022-344 du 10 mars 2022 modifiant la partie réglementaire du Code du cinéma et de l'image animée

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045339477

Decree no. 2022-344 of 10 March 2022 amending the regulatory part of the Cinema and Animated Image Code

[FR] The name “France” belongs to the French state

Amélie Blocman
Légipresse

An American company, France.com, which had registered the domain name “france.com” in 1994, discovered several years later that a Dutch company had registered various French and EU trademarks under the name “France.com” in 2009. It therefore sued the Dutch company on the grounds that it had registered the marks fraudulently, demanding that it transfer them to it and compensate it for the losses it had suffered. The French state then intervened in the proceedings and the court ruled that the marks should be declared void and the domain name transferred. The economic interest group Atout France also joined the proceedings. However, the EU and French trademarks had already been transferred to the company France.com, which had subsequently dropped its legal action. The French state therefore demanded that the registration of the French trademarks that now belonged to the company France.com be cancelled and that the latter be ordered to voluntarily give up the EU trademarks with the Office for Harmonization in the Internal Market (OHIM) - EUIPO since 2016.

The court of appeal annulled the France.com trademarks registered in France in 2009 and instructed the respondents to provide more evidence with regard to the EU marks. It held that the name “France” was part of the French state’s identity, similar to the family name of a real person. This right therefore pre-dated the registration of the French marks. The court rejected the French state’s claim that trademark laws had been violated, but upheld its request that the domain name france.com be transferred to it. The American company appealed to the Court of Cassation.

The Court of Cassation, France’s supreme court, rejected this appeal on 6 April 2022.

The Court of Cassation held that the court of appeal had correctly ruled that the French state’s prior right over the name “France” had been infringed. This name was part of the French state’s identity, since it referred to the national territory in its economic, geographical, historical, political and cultural identity, over which it held a prior right within the meaning of Article L. 711-4 of the *Code de la propriété intellectuelle* (Intellectual Property Code). The appeal court added that the suffix “.com”, which was part of an Internet domain name, was unlikely to alter the public’s perception of the mark. The public would therefore assume that the products and services made available by France.com were provided by the French state, creating a risk of confusion.

The Court of Cassation also agreed with the court of appeal’s view that the domain name “france.com” used by the company France.com infringed the French state’s rights over its name, identity and sovereignty, and that the name “France”, which was part of its identity, had been damaged, as claimed by the

French state with reference to Article 9 of the *Code civil* (Civil Code).

Finally, the judges considered that the court of appeal had been right to declare the sale of the domain name “france.com” by the American company illegal. The appellant could not claim that it held a “possession” in the sense of Article 1 of Protocol No. 1 to the European Convention on Human Rights, which protected the right to property.

They also pointed out that the registration of a domain name did not give its owner a property right within the meaning of Articles 544 and 545 of the Civil Code. The company could therefore not claim that such a right had been infringed.

Cour de cassation, chambre commerciale, 6 avril 2022, Sté France.com Inc.

https://www.courdecassation.fr/decision/624d2e1c12d01a2df91a32da

Court of Cassation, commercial chamber, 6 April 2022, France.com Inc.

UNITED KINGDOM

[GB] The Supreme Court find Bloomberg's reporting of a criminal investigation before any charge breached an individual's reasonable expectation of privacy

Julian Wilkins
Wordley Partnership

The Supreme Court has determined that Bloomberg LP (Bloomberg) misused private information when it published an article regarding ZXC, the CEO of a public international company. The article relied upon a confidential Letter of Request (LOR), concerning ZXC and his company, issued by a UK law enforcement body to another jurisdiction.

ZXC argued the use of the LOR by Bloomberg before any investigation and charge had been made constituted a breach of his reasonable expectation of privacy. The High Court agreed, considering Bloomberg had published information that should have remained private. Bloomberg unsuccessfully appealed to the Court of Appeal.

Misuse of private information is a separate tort from breach of confidentiality and defamation with its own two-stage test. The first stage is one of whether ZXC objectively had a reasonable expectation of privacy in the relevant information considering the circumstances of the case. Such circumstances include consideration of the 'Murray factors' identified in Murray v Express Newspapers plc [2008] EWCA Civ 446.

Stage-two was balancing the right for private and family life under Article 8 of the European Convention on Human Rights (ECHR) against the publisher's freedom of expression under ECHR Article 10. It is widely accepted that there is a negative effect on an innocent person's reputation in publishing that they are subject to criminal investigations before any charge has been made. Various court judgments have accepted the private nature of such information based on the potential that its publication would ordinarily cause substantial damage to the person's reputation and other damage.

Bloomberg argued that the public would on the whole regard someone innocent until proven guilty and would not discern guilt purely from being aware of a criminal investigation. The Supreme Court found that the presumption of innocent until proven guilty was applicable when someone had been charged and their innocence or otherwise would be determined at court. Whereas, the public being aware of an investigation before charge ran the risk of effecting someone's reputation regardless, impacting on their right to private life such as the right to establish and develop relationships with other people.

Further, Bloomberg argued that under defamation law the public could distinguish suspicion from guilt and people were not unduly suspicious or avid for scandal. However, the Supreme Court held that in ZXC's case there had been a misuse of private information with different constituent elements and a distinct purpose to protect an individual's private life in accordance with Article 8, regardless of the truth or falsity of published information.

Bloomberg argued that the investigation concerned ZXC's business activities, and not his private life. The Supreme Court determined that the exercise of Article 8 included professional and business activities thus prejudicing a person's right to a private life.

Bloomberg's appeal included the argument that the lower courts had failed to apply the stage-one test properly by not considering all the circumstances including the alleged corruption of ZXC's company's activities abroad. The Supreme Court held that the courts had considered that while ZXC, as CEO of a large public company, was subject to scrutiny that may be greater than for a private individual, there were, nevertheless, limits. According to the court, this factor was "not in itself determinative and should only form part of the stage one analysis".

The legitimate starting point was that a person subject to a criminal investigation prior to being charged had a reasonable expectation of privacy in respect of information relating to that investigation, and that in all the circumstances that expectation applied to ZXC.

Bloomberg's appeal to the Supreme Court included the argument that the Court of Appeal had not taken into account the fact that Bloomberg had published information originating from confidentiality law thus enabling the publisher to rely upon public interest for its disclosure. The Supreme Court felt the judge had been right to consider the LOR's confidential nature for both stage-one and stage-two. However, the lower courts had not determined the private status due the letter being classified confidential nor had the courts prevented Bloomberg relying on a public interest argument. Whilst there was a difference between private and confidential information, if information is confidential that is likely to support the reasonableness of an expectation of privacy.

Public interest arguments were justified when finding fault or inadequacy with a criminal investigation, rather than just reporting the occurrence of an investigation. Bloomberg tried to argue that the Court of Appeal had been wrong to uphold the findings of the first instance judge. However, the Supreme Court concluded that Bloomberg had failed to establish that the Court of Appeal had erred in its determination of stage one and two; as such, there were no grounds to intervene with the first judge's decision in relation to the balancing of Articles 8 and 10.

Bloomberg LP (Appellant) v ZXC (Respondent) [2022] UKSC 5 on appeal from [2020] EWCA 611 – 16 February 2022, Supreme Court of the UK

https://www.supremecourt.uk/cases/docs/uksc-2020-0122-judgment.pdf

ITALY

[IT] AGCOM establishes quality parameters for the fruition of live streaming broadcasting services of the Italian Serie A Championship on the DAZN platform

Ernesto Apa & Eugenio Foco
Portolano Cavallo

The OTT platform DAZN, operating under German authorization, has acquired the audiovisual rights on the Italian Serie A Championship, obtaining the possibility to broadcast all Serie A football matches (380 in total) for three years (2021-2024), of which 70% are on an exclusive basis.

Although AGCOM welcomed the web-broadcasting of such a major sporting event in Italy as an important leeway for the digitalization of the Country, several problems arose concerning the quality of the streaming services offered.

For this reason, through Resolution No. 334/21/CONS, AGCOM initiated a proceeding aimed at defining the quality parameters for the fruition of live streaming broadcasting services, of the Italian Serie A Championship, offered by DAZN in the Italian territory. Through this proceeding, AGCOM's goal was to define the parameters of reference to measure the quality of the live streaming services, having considered user experience and the relating thresholds, to guarantee appropriate indemnifications to those users who suffered poor quality of service.

In addition to DAZN, interested parties presented their contributions during the aforesaid proceeding, amongst which were: providers of electronic communications services (Fastweb S.p.A., Vodafone Italia S.p.A., WindTre S.p.A.) consumer associations (Adiconsum, CODACONS) and the national inter-university consortium for IT studies.

The proceeding was closed through Resolution No. 17/22/CONS by which AGCOM adopted the aforementioned parameters (included in Annex A to Resolution No. 17/22/CONS) and required DAZN to comply with the measures provided therein within three months from having received the notification of the Resolution.

Delibera N. 334/21/CONS - Ordine alla società DAZN Limited ai sensi della legge 14 novembre 1995, n. 481 e avvio di un procedimento per la definizione di parametri di qualità per la fruizione dei servizi di diffusione in live streaming delle partite di campionato di calcio

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=24949181&_1

01_INSTANCE_FnOw5lVOIXoE_type=document

Resolution No. 334/21/CONS - Order to the company DAZN Limited pursuant to Law No. 481 of 14 November 1995 and initiation of a proceeding for the definition of the quality paramaters for the fruition of live streaming broadcasting services for soccer matches

Delibera N. 17/22/CONS - Conclusione del procedimento per la definizione di parametri di qualità per la fruizione dei servizi di diffusione in live streaming delle partite di campionato di calcio di cui alla delibera n. 334/21/CONS

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=26313514&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution No. 17/22/CONS - Conclusion of the proceeding for the definition of the quality parameters for the fruition of live streaming broadcasting services for soccer matches initiated through Resolution No. 334/21/CONS

LATVIA

[LV] Restrictions on harmful or illegal content and Russian propaganda channels

Ieva Andersone & Lūcija Strauta Sorainen

As already reported, at the beginning of 2022 (Iris 2022-2/10), the National Electronic Mass Media Council of Latvia (NEPLP) banned the distribution of nine Russian television programmes in Latvia which, in NEPLP's view, disseminated content and appeals that endangered national security. Since then, Latvia has continued to restrict content endangering national security. Media monitoring by NEPLP has resulted in new bans, as well as legislative changes.

Since 24 February 2022 - the beginning of the war started by Russia in Ukraine - NEPLP has prohibited the retransmission into Latvia of many Russian-related television programmes, relying not only on national law, but also on Article 3 of the AVMSD. The latest decision, adopted on 7 March 2022, prohibits the retransmission of 18 television programmes owned by the Russian bank *Gazprombank's* media holding company *Gazprom Media Holdings* or its subsidiary *Red Media*. Among the banned programmes are *THT Comedy*, *THT4 International*, *TNT*, *TNT Music* and others.

In addition, NEPLP has restricted access to 71 websites available in Latvia. The decision, adopted on 15 March 2022, denies access to the domain names or Internet protocol addresses of these websites, as the content of those websites, according to the assessment of security institutions and NEPLP, poses a threat to national security. Namely, NEPLP observed the systematic dissemination of aggressive war propaganda and incitement to national hatred. The websites also spread misinformation about events in the world, including the war in Ukraine. The decision was based not on the media laws, but on recent amendments to the Electronic Communications Law that are directed to electronic communications merchants. Amendments to the Electronic Communications Law adopted by the *Saeima* (Parliament) on 10 March 2022 grant NEPLP the right to restrict access to Internet sites where content that endangers national security is placed. A person whose rights or legal interests are restricted as a result of the decision has the right to challenge the relevant decision before the administrative court.

Furthermore, the Saeima has amended the Protected Service Law to assign administrative liability to the end-user for the use of illegal systems to watch television, including restricted programmes. Natural persons may be fined up to EUR 700. The aim of the amendments is to bring awareness that the installation or use of illegal systems to avoid broadcasters' copyright or restrictions on harmful content for private purposes is illegal.

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

NEPLP saistībā ar apdraudējumu valsts drošībai ierobežo 71 tīmekļvietni Latvijā.

https://www.neplpadome.lv/lv/sakums/padome/padomes-sedes/sedes-sadalas/neplp-saistiba-ar-apdraudejumu-valsts-drosibai-ierobezo-71-timeklvietni-latvija.html

Press release: the NEPLP restricts 71 website in Latvia due to endangerement to public security

NEPLP aizliedz 18 Krievijas televīzijas programmu izplatīšanu.

https://www.neplpadome.lv/lv/sakums/padome/padomes-sedes/sedes-sadalas/neplp-aizliedz-18-krievijas-televizijas-programmu-izplatisanu.html

Press release: the NEPLP prohibits the distribution of 18 Russian television channels

Nacionālās elektronisko plašsaziņas līdzekļu padomes lēmums Nr. 128/1-2 „Par televīzijas programmu "NTV Serial" ("НТВ Сериал"), "NTV Stilj" ("НТВ Стиль") un "NTV Pravo" ("НТВ Право") izplatīšanas aizliegšanu Latvijas Republikas teritorijā“.

https://likumi.lv/ta/id/330746-par-televizijas-programmu-ntv-serial-ntv-stilj-un-ntv-pravo

The 10 March 2022 decision of the National Electronic Mass Media Council of Latvia No. 128/1-2

Grozījumi Elektronisko sakaru likumā

https://likumi.lv/ta/id/330742-grozijumi-elektronisko-sakaru-likuma

Amendments to the Electronic Communications Law

Nacionālās elektronisko plašsaziņas līdzekļu padomes lēmums Nr. 136/1-2 “Par piekļuves liegšanu tīmekļa vietnēm”

https://likumi.lv/ta/id/330850-par-piekluves-liegsanu-timekla-vietnem

The 15 March 2022 decision of the National Electronic Mass Media Council of Latvia No. 136/1-2

Grozījums Aizsargāta pakalpojuma likumā

https://likumi.lv/ta/id/330740-grozijums-aizsargata-pakalpojuma-likuma

Amendments to the Protected Service Law

MOLDOVA

[MD] Audiovisual Code amended to strengthen parliamentary control and change advertising rules

Andrei Richter
Comenius University (Bratislava)

Several noteworthy legal changes happened in the regulation of the audiovisual sector in Moldova at the end of 2021.

On 4 November 2021 the Code of the Audiovisual Media of the Republic of Moldova (see IRIS 2019-3/24 and IRIS 2021-3/11) was amended to introduce new levers of parliamentary control. The amendments subject the Director-General of the public service broadcaster TRM to the political choice of the Parliament, including the decisions regarding his/her appointment, performance assessment, and dismissal. This parliamentary control replaces the control over these matters previously held by TRM's Supervisory and Development Board. The amendments also introduced provisions regarding the requirements and qualifications for the appointment and possible dismissal of the members of the Audiovisual Council, the national independent media regulator. The related provisions on this are essentially identical to those applicable to the governance body of TRM. On 23 November 2021, the Constitution Court of the Republic of Moldova adopted a judgment on the constitutionality of certain provisions of the Code of the Audiovisual Media regarding advertising. In particular, it reviewed the provision of Article 66, paragraph 7, that bans "advertising and teleshopping programmes in retransmitted foreign audiovisual media services". The Constitutional Court found such an "absolute" ban contradicting freedom of expression (Article 32 of the Constitution) and Moldova's obligations, under the European Convention on Transfrontier Television (ECTT), on retransmission freedoms. The ban makes no difference between media services from the countries that ratified the ECTT and those from other countries. In the first case, retransmitted advertising and teleshopping do not specifically or systematically address a Moldovan audience or violate Moldova's national legislation. The provision was found unconstitutional. The amendments to the Code of the Audiovisual Media adopted on 25 November 2021, in their turn, banned advertising, sponsorship and product placement of gambling and sports-betting services and organizations. The OSCE Representative on Freedom of the Media (RFoM), Teresa Ribeiro, presented on 14 January 2022 a legal analysis of the amendments, adopted on 4 November 2021. She called on Moldova's authorities to revisit the legal framework related to freedom of broadcasting in order to ensure its full compliance with international human rights standards and the OSCE commitments.

Codul serviciilor media audiovizuale al republicii moldova în Republica Moldova (COD Nr. 174 din 08-11-2018)

https://www.legis.md/cautare/getResults?doc_id=129046&lang=ro

Code of the Audiovisual Media of the Republic of Moldova), N174 of 08.11.2018 (as amended)

Curtea Constituțională, Hotărâre privind excepția de neconstituționalitate a articolelor 66 alin. (7) și 84 alin. (13) din Codul serviciilor media audiovizuale (excluderea publicității și a teleshopping-ului din programele retransmise) (sesizarea nr. 25g/2021)

https://www.legis.md/cautare/getResults?doc_id=128967&lang=ro

Judgment of the Constitutional Court on an exceptional case of unconstitutionality of Art. 66 (7) and Art. 84 (13) of the Code of the Audiovisual Media (exclusion of advertising and teleshopping from retransmitted programmes) (application N25g/2021)), N36 of 23.11.2021

Lege pentru modificarea unor acte normative (Publicat: 15-12-2021 în Monitorul Oficial Nr. 308 art. 458)

https://www.legis.md/cautare/getResults?doc_id=129026&lang=ro

Law on amendments in normative acts), N195 of 25.11.2021, published on 15.12.2021 in Monitorul Oficial N. 308 art. 458

"OSCE Media Freedom Representative: "Moldovan public service broadcaster and media regulatory authorities should be free from political interference", press release

https://www.osce.org/representative-on-freedom-of-media/509924

Lege pentru modificarea Codului serviciilor media audiovizuale al Republicii Moldova nr. 174/2018

https://www.parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/5672/language/ro-RO/Default.aspx

Law on amendments of the Code of the Audiovisual Media of Republic of Moldova, N 158, 04.11.2021

MALTA

[MT] The Bolder and Better Cash Back Scheme for Audio-Visual Productions

Pierre Cassar
University of Malta

The Malta Film Commission (MFC) has recently launched a new financial scheme to assist producers in their work. Established in 2000, the MFC was tasked with assisting Maltese film producers while strengthening the film service sector. Over the years Malta has managed to attract multi-million dollar productions including blockbusters like Gladiator (2000), Munich (2005) and more recently Murder on the Orient Express (2017)

The MCF has recently launched the 40% Cash Back Scheme. Dubbed as "Bolder and Better", the scheme runs until the end of December 2023 and contemplates a cash rebate to qualifying companies of up to 40% for eligible costs incurred in Malta.

A qualifying company shall be the ultimate beneficiary and the entity responsible for all activities involved in making a qualifying production and having access to full financial information for the total production worldwide.

Audio-visual works that can be considered for such a grant include feature films of not less than 60-minutes in duration (or 45 minutes in case of IMAX), television series, creative documentaries based on an original theme and containing a certain ‘timeless’ element, reality programmes or game shows that directly or indirectly promote the Maltese islands, or short films that have an overall duration of less than 40 minutes including credits.

Applications for this grant need to be submitted to the Malta Film Commission prior to the commencement of filming or production. The scheme also caters for a special category of productions dubbed as “Difficult Audio-Visual Works” which can qualify for up to an additional 10% rebate for a total of 50%.

Further, productions need to pass a ‘Cultural Test’ to be considered for the scheme which also encourages qualifying companies to come up with policies and procedures to be "Green Champions" and reduce the carbon footprint of a production. This can be done in various ways including reduction in waste generation and endeavours recycling measures.

The scheme outlines the costs that can be reimbursed from air travel to accommodation to rental services and rentals.

Financial incentives, Malta Film Commission

https://maltafilmcommission.com/financial-incentives/

NETHERLANDS

[NL] Court of Appeal upholds ruling on investigative crime programme using hidden-camera footage

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

On 15 March 2022, the *Gerechtshof Amsterdam* (Amsterdam Court of Appeal) delivered an important judgment largely upholding an earlier District Court judgment on the lawfulness of allegations contained in an investigative crime programme using hidden-camera footage (IRIS 2020-10/10). The Court of Appeal conducted a fundamental rights balancing exercise similar to that of the District Court, with the important difference that it assessed the original TV broadcast and the modified online episode as separate communications. It ruled that because of the implementation of privacy-preserving measures, the modified episode could not be regarded as unlawful.

The case was about an episode of the investigative television programme *Moord of zelfmoord (Murder or suicide)*, involving a journalist exploring other explanations for individuals' deaths that the Dutch police had classified as suicide. The episode of 18 January 2018 revolved around the death of a 46-year-old man who had fallen from a window in unexplained circumstances. Interviews with the landlord and a witness - who the police had deemed unreliable - suggested that another person had been in the victim's home at the time of the fatal incident and that this person could have been the Respondent (Claimant in earlier proceedings). About 500,000 television viewers had been presented with blurred Facebook photographs of the Respondent's face, shots of the street sign and area where the victim and the Respondent used to live, and hidden-camera footage of the Respondent, his face lightly blurred, talking to the journalist in a park. During the conversation, the Respondent stated that he had not been in the house at the time of the fall.

Soon after the broadcast, the episode was made available on the broadcaster's website and later modified so that a bigger part of the Respondent's face and body was blurred and his name was made inaudible. Still, the Respondent considered the episode unlawful and initiated court proceedings.

In line with the District Court, the Court of Appeal determined that the broadcaster/producer's fundamental right to freedom of expression had to be weighed against the right of the accused to the protection of privacy and to be free from public allegations. Although the Court recognised that the programme aimed to report on an important societal issue, it also noted that the episode had clearly portrayed the Respondent as a potential suspect of homicide even though he had never been officially prosecuted. The Court further considered the statements on which the allegations had been based to be weak and unconvincing. Unlike the District Court, however, the Court of Appeal did not think

the use of a hidden camera and/or blurring techniques had had a "criminalising effect". On the contrary, it stated that blurring was "a generally accepted and adequate means (if applied well) to reduce people's recognisability to a minimum" and pointed to the fact that the hidden-camera footage had allowed the Respondent to tell his side of the story.

With respect to the invasion of privacy, the Court explicitly distinguished between the original episode (broadcast) and the modified episode (online). It was clear that initially, the broadcaster had done very little to conceal the Respondent's identity. The combination of footage of the street sign, the use of the Respondent's unique name, the light blurring of the face and the details about the Respondent's private life had allowed a relatively large number of people to recognise him. The wide identification had negatively impacted his mental health and relationships, which, according to the Court, could be attributed to the broadcast. Everything considered, the TV broadcast was declared unlawful. The modified online episode, however, was not. Because of the stronger blurring effects and the removal of the Respondent's name, the Court observed that only a few people could have recognised him. In those circumstances, the right to press freedom and the public interest had to take precedence over the Respondent's interests.

Gerechtshof Amsterdam, ECLI:NL:GHAMS:2022:748, 15 maart 2022

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2022:748

Amsterdam Court of Appeal, ECLI:NL:GHAMS:2022:748, 15 March 2022

[NL] Dutch ISPs block RT and Sputnik websites

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 8 March 2022, the largest Internet service providers (ISPs) in the Netherlands (VodafoneZiggo, T-Mobile and KPN) announced that the websites of the Russian state-owned media outlets Russia Today and Sputnik would be blocked in the Netherlands. This followed the adoption of a regulation by the Council of the European Union on 1 March 2022, which prohibited "operators to broadcast or to enable, facilitate or otherwise contribute to broadcast, any content by [Russia Today and 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." Further, on 4 March 2022, the Dutch Minister of Foreign Affairs published an implementing regulation for the EU Council Regulation in the *Staatscourant* (Dutch Government Gazette).

Crucially, on 8 March 2022, the *Autoriteit Consument & Markt* (Netherlands Authority for Consumers and Markets) published an important statement announcing that it had informed Dutch telecom operators that the EU Open Internet Regulation (see IRIS 2016-9/6) was "not an obstacle to the implementation of the European sanctions regarding the suspension of distribution of Russian media channels RT and Sputnik", and it meant that Dutch ISPs are "allowed to block the websites of RT and Sputnik as long as the thereto-related European sanctions are in place". The ACM then informed the ISPs that "at least the following websites fall under the scope of the sanctions", namely www.rt.com; de.rt.com; francais.rt.com; actualidad.rt.com; and sputniknews.com. Further, the ACM stated it would not take "any enforcement action as long as the European sanctions are in place". In addition, the *Openbaar Ministerie* (Public Prosecution Service) also issued a statement on its website, stating that violation of the implementing regulation was an offence, including the media prohibitions, and the Public Prosecution Service "can proceed to criminal law enforcement" for violations.

Following the statement from the ACM and Public Prosecution Service, the trade association for the Dutch broadband industry (NL Connect) issued its own statement, advising its members to block the RT and Sputnik websites. However, the association also stated that the EU Council Regulation was "extremely unclear", and was advising its members "under protest, because we are for a free and open Internet".

Joost Schellevis en Nando Kasteleijn, Sites RT en Sputnik geblokkeerd door grootste internetproviders, NOS Nieuws, 8 maart 2022

https://nos.nl/collectie/13888/artikel/2420302-sites-rt-en-sputnik-geblokkeerd-door-grootste-internetproviders

Joost Schellevis and Nando Kasteleijn, RT and Sputnik websites blocked by largest internet providers, NOS Nieuws, 8 March 2022

Authority for Consumers and Markets, Open Internet Regulation is not an obstacle to blocking RT and Sputnik because of EU sanctions, 8 March 2022

https://www.acm.nl/en/publications/open-internet-regulation-not-obstacle-blocking-rt-and-sputnik-because-eu-sanctions

NLconnect, Statement NLconnect over blokkeren Russia Today, 8 maart 2022

https://www.nlconnect.org/statement-nlconnect-over-blokkeren-russia-today/

NLconnect, Statement NLconnect on blocking Russia Today, 8 March 2022

Regeling van de Minister van Buitenlandse Zaken van 3 maart 2022, nr. Min-BuZa.2022.11520-15, tot wijziging van de Sanctieregeling territoriale integriteit Oekraïne 2014

https://zoek.officielebekendmakingen.nl/stcrt-2022-6783.html

Regulation of the Minister of Foreign Affairs of March 3, 2022, no. Min-BuZa.2022.11520-15, amending the Sanctions Regulation on Ukraine 2014

Nederlands Openbaar Ministerie, Oorlog in Oekraïne, 8 maart 2022

https://www.om.nl/onderwerpen/oorlog-oekraine

Netherlands Public Prosecution Service, War in Ukraine, 8 March 2022

NORWAY

[NO] Sanctions on RT and Sputnik not to be adopted in Norway

Audun Aagre

Freedom of expression has a high level of protection under the Norwegian Constitution. Based on a constitutional assessment, the Norwegian government has decided not to adopt sanctions on Russian state-controlled media.

In a statement presented at the Norwegian Parliament on 18 March 2022, Prime Minister Jonas Gahr Støre stressed that media literacy should, as far as possible, be the main tool to fight disinformation. The Prime Minister also expressed concerns that sanctions against the Russian controlled media outlets, Russia Today (RT) and Sputnik could be exploited by Putin's regime to legitimatise further restrictions on media freedom, and on national and international editorial media in Russia. The threshold for restricting freedom of expression is high under the Norwegian Constitution, and the Prime Minister concluded that the government would conduct thorough assessments of the legal and constitutional dilemmas before reaching a conclusion.

On 26 April 2022, Anette Trettebergstuen, Minister of Culture, announced that Norway would not implement sanctions in Norway: “The threshold to restrict freedom of expression under the Constitution's Article 100 is high, and we do not currently see that a general blocking of these actors could be legitimised by the threats imposed to basic societal functions in Norway”, she said.

The Norwegian government's decision is in line with the recommendations made by the Norwegian Media Authority (NMA). Mari Velsand, Director General of the NMA has said: “Russian aggression in Ukraine and the horror of war require a firm response from the EU and EFTA. The way Putin's regime exploits information is a risk for several of Russia's neighboring countries. However, freedom of expression is under the competency of the member state of the EEA. Our assessment is that Norwegian society and the public are able to resist manipulation attempts from Russian state-owned media”.

According to the Norwegian Constitution, several preconditions need to be met in order to restrict freedom of expression. Political content, even propaganda from hostile third countries, has particularly strong protection under the Norwegian Constitution. Legal liability needs to be regulated by law, and to be justified on the grounds of seeking the truth, the promotion of democracy or the individual’s freedom to form opinions. Prior censorship, or other preventive measures, may not be applied unless they are required to protect children and young people from harmful content. As such, prior censorship or blocking of RT and Sputnik was found to be unconstitutional. “In the Norwegian context, we see media literacy as

the best tool against Russian propaganda", said Mari Velsand. The Norwegian population has a relatively high level of media literacy, and editorial media has a prominent role in Norway. These factors enable people to resist attempts at manipulation and make the thresholds for restricting political content even higher.

Although Norway shares a border with Russia, the political context is very different to that of other neighboring countries, which were a part of the Soviet Union or have a large Russian population. "We stand with Ukraine and other countries under threat. Our constitutional assessment does not change that. However, in a time of crisis it is important to maintain important principles on jurisdiction. Hence, the war is a test for open societies in Europe. We believe that bad practices should be countered by best practices, as far as it is possible", said Mari Velsand. As the DSA is in its final stage, and the EMFA is in process, it is important to maintain core principles of openess and jurisdiction on content. "We are in the middle of a cruel war, and need to stand united and supportive of the Ukrainian people's struggle for democracy. However, we need to look beyond the conflict when processing and adopting regulations like the DSA and EMFA. War is not the right time for evaluations, but when time is ripe we will need to have a close look at the implemention of sanctions in the light of freedom of expression and jurisdiction between the EU and member state level", said Mari Velsand.

Sanction text

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R0350&from=EN

Redegjørelse av statsministeren om krigen i Ukraina

https://stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2021-2022/refs-202122-03-18?m=1

Statement by the Prime Minister on the war in Ukraine

Redegjørelse av kultur- og likestillingsministeren om ytringsfrihet og pressefrihet og om nåsituasjonen og måloppnåelsen i mediepolitikken 2022

https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2021-2022/refs-202122-04-26/?m=4

Statement by the Minister of Culture and Gender Equality on freedom of expression and freedom of the press and on the current situation and the achievement of goals in media policy 2022

ROMANIA

[RO] Sanctions in the context of the war in Ukraine

Eugen Cojocariu
Radio Romania International

The *Consiliul Naţional al Audiovizualului* (National Audiovisual Council – CNA) has issued further sanctions on media outlets which have not observed the legal framework in connection to the war in Ukraine (for previous similar decisions, see inter alia IRIS 2012-4/36, IRIS 2017-6/27, IRIS 2019-8/35). Additional radio and TV stations have also been fined or received summons for breaches of the audiovisual legislation with relation to their coverage of the war in Ukraine.

Gold FM commercial radio station was fined on three occasions with a total of RON 160 000 (EUR 32,320) for failing to provide accurate information about the war in Ukraine, for breaches of Article 3 paragraph (2) of the Audiovisual Law no. 504/2002, as well as the provisions of Article 47 paragraph (3), Article 64 paragraph (1) letters a) and b) and of Article 66 of the Audiovisual Code (Decision 220/2011 on the Audiovisual Content Regulation Code).

The commercial TV station Realitatea Plus was fined with RON 40 000 (EUR 8 080) for breaches of Article 3 paragraph (2) of the Audiovisual Law and of the provisions of Article 64 paragraph (1), letters a) and b) of the Audiovisual Code. The same stations received a public summons for breaching Article 3 paragraph (2) of the Audiovisual Law, as well as the provisions of Article 65 c) of the Audiovisual Code.

The commercial TV station News Romania was fined RON 15,000 (EUR 3,030) for violations of the provisions of Article 3 paragraph (2) of the Audiovisual Law, and of Articles 64 paragraph (1) letters a) and b), 66 and 78 paragraph (3) of the Audiovisual Code.

The local commercial TV station TELE'M of Botoșani, the public regional station TVR Cluj and the local commercial Radio Accent of Novaci, were fined RON 10 000 (EUR 2 020) each for breaches of the the Article 3 paragraph (2) of the Audiovisual Law.

The commercial TV station Nașul TV received a fine of RON 10 000 (EUR 2 020) for violating the provisions of Articles 40 paragraph (5), 47 paragraph (3) and 64 paragraph (1) a) of the Audiovisual Code. Naşul TV also received a public summons for breaches of the Article 40 paragraph (5) of the Audiovisual Code.

The Audiovisual Law provides in Article 3 (2) that "All audiovisual media service providers have the obligation to ensure objective information is provided to the public by the correct presentation of facts and events and to favour the free formation of opinions".

Article 40 (5) of the Audiovisual Code provides: “The moderators, presenters and producers of programmes have the obligation not to use, and not to allow the guests to use, insulting language or to incite violence”.

Article 47 (3) of the Audiovisual Code provides: "Generalising defamatory statements in audiovisual programmes against a group/community defined by gender, age, race, ethnicity, nationality, citizenship, religious beliefs, sexual orientation, level of education, social category, medical conditions or physical characteristics are prohibited". According to Article 64 (1) of the Audiovisual Code, "By virtue of the fundamental right of the public to information, audiovisual media service providers must comply with the following principles: a) ensure a clear distinction between facts and opinions; b) ensure that information on a subject, fact or event is correct, verified and presented impartially and in good faith."

Article 65 c) of the Audiovisual Code provides that “in news and debate broadcasts, broadcasters must follow the following rules: (…) c) the title displayed on the screen must reflect as accurately as possible the essence of the facts and data presented at that time". In the same document, Article 66 stipulates that "in news and debate programmes information on matters of public interest, of a political, economic, social or cultural nature, impartiality and balance must be ensured and the free formation of opinions must be favoured, by presenting the main points of view in opposition, at a time when issues are under public debate". Article 78 of the Code mentions that the "Replay" announcement must be displayed for the whole duration of a broadcast.

On 1 March 2022, the National Audiovisual Council issued Recommendation no. 10/2022 according to which, in the context of the war in Ukraine, information has to be used only from official sources. “Wars are not just about weapons! False information is just as dangerous! Only get information from official sources”, the CNA stated. A radio and TV spot will be circulated by the audiovisual mass-media locally, regionally and nationally for six months.

On 24 February 2022, the first day of the Russian military aggression in Ukraine, the Council issued Recommendation no. 9/2022 in which it recommends that in informative and debate programmes about the aggression of the Russian Federation against Ukraine, media service providers must ensure compliance with legal obligations regarding the provision of correct information to the public. This includes: a) dissemination of information taken from official and reliable sources, so that audiovisual media services can contribute to the fight against fake news; verification of any information related, directly or indirectly, to the aggressions of the Russian Federation against Ukraine; b) rigor and accuracy in the presentation and debate of the subject regarding the implications on Euro-Atlantic security in the context of the aggression against Ukraine; avoiding information that may create confusion or justify its military actions; c) observance of deontological rules and paying special attention to each message disseminated with decency, discernment, responsibility and avoiding the sensational, so as to do not induce panic and insecurity among citizens. In order to present such topics in an objective and balanced way, the Council appreciates the contribution of the

audiovisual media to the fight against fake news and to intensifying the editorial and editorial measures of broadcasters in order to promote information from well-documented sources and to ensure accurate public information.

In the context of Russian aggression in Ukraine, Romania has forbidden the broadcast of all Russian TV stations in the country, starting with Russia Today.

Recomandarea CNA nr. 9 din 24 februarie 2022

https://www.cna.ro/IMG/pdf/RECOMANDAREA_nr._9_din_24_februarie_2022_final.pdf

CNA recommendation no. 9 of February 24, 2022

Recomandarea CNA nr. 10 din 1 martie 2022

https://www.cna.ro/IMG/pdf/Recomandare_nr_10_01_martie_2022.pdf

CNA recommendation no. 10 of March 1, 2022

Decizia CNA nr. 149 din 08.03.2022

https://www.cna.ro/IMG/pdf/Decizia_149-RealitateaPlus-3alin2Lg_65c.pdf

CNA Decision no. 149 of 08.03.2022

Decizia CNA nr. 150 din 10.03.2022

https://www.cna.ro/IMG/pdf/Decizia_150-GOLDFM-3alin2Lg_64_66Cod.pdf

CNA Decision no. 150 of 10.03.2022

Decizia CNA nr. 195 din 17.03.2022

https://www.cna.ro/IMG/pdf/Decizia_195Realit_Plus_am_40_mii-3_2Lg_64_1ab_Cod.pdf

CNA Decision no. 195 of 17.03.2022

Comunicat de presă. Ședința publică a CNA din 17.03.2022

https://www.cna.ro/article11813,11813.html

Press release. The public meeting of the CNA from 17.03.2022

Decizia CNA nr. 201 din 22.03.2022

https://www.cna.ro/IMG/pdf/Dec201-NASUL_TV_am_10000_art_47_40_64_CA.pdf

CNA Decision no. 201 of 22.03.2022

Decizia CNA nr. 207 din 24.03.2022

https://www.cna.ro/IMG/pdf/Decizia_207-News_Romania-3alin2Lg-64ab_66_78alin3.pdf

CNA Decision no. 207 of 24.03.2022

Decizia CNA nr. 218 din 31.03.2022

https://www.cna.ro/IMG/pdf/Decizia_218-Tele_M_BT_amenda_10000_lei_art_3_LA.pdf

CNA Decision no. 218 of 31.03.2022

Decizia CNA nr. 219 din 31.03.2022

https://www.cna.ro/IMG/pdf/Decizia_219-RADIO_ACCENT-3alin2Lg.pdf

CNA Decision no. 219 of 31.03.2022

Comunicat de presă. Ședința publică a CNA din 05.04.2022

https://www.cna.ro/article11890,11890.html

Press release. The public meeting of the CNA from 05.04.2022

Comunicat de presă. Ședința publică a CNA din 07.04.2022

https://www.cna.ro/article11896,11896.html

Press release. The public meeting of the CNA from 07.04.2022

RUSSIAN FEDERATION

[RU] Liability for violation of “truth protection”

Andrei Richter
Comenius University (Bratislava)

On 24 April 2022, certain amendments to the Code of the Russian Federation on Administrative Offences that had been adopted by the State Duma on 6 April and signed into law on 16 April 2022, entered into force. They relate, in particular, to the ban on public denial (including in the media and on the Internet) of the “decisive role of the Soviet people in the defeat of Nazi Germany and the humanitarian mission of the USSR in the liberation of European countries.” Such a ban had been introduced earlier as Article 6.1 of the 1995 Federal Statute “On Perpetuating the Victory of the Soviet People in the Great Patriotic War of 1941-1945.”

The Administrative Code, in its new Article 13.48, now envisions a penalty of an administrative fine of up to RUB 50 000 or arrest of up to 15 days. A repeat offence shall be followed by an increased fine of up to RUB 100 000, an arrest of up to 15 days, a “disqualification” for managers or officials for a period of 6 to 12 months, or an administrative suspension of the legal entity’s activity for up to 90 days.

According to the Administrative Code (Art. 3.11), a “disqualification” consists, in particular, of depriving an individual of the right to hold positions in the federal, regional or municipal public services; to hold positions in the executive management body or membership of the board of directors (supervisory board) of any legal entity; or to carry out entrepreneurial activities and manage a legal entity.

О внесении изменений в Кодекс Российской Федерации об административных правонарушениях

http://publication.pravo.gov.ru/Document/View/0001202204160015?index=0&rangeSize=1

Federal Statute of 16 April 2022, No. 103-FZ “On amendments to the Code of the Russian Federation on Administrative Offences”

Федеральный закон от 1 июля 2021 г. N 278-ФЗ "О внесении изменения в Федеральный закон "Об увековечении Победы советского народа в Великой Отечественной войне 1941 - 1945 годов"

https://base.garant.ru/401415046/

Federal Statute of 1 July 2021, No. 278-FZ “On an amendment to the Federal Statute No. 80-FZ of May 19, 1995 "On Perpetuating the Victory of the Soviet People in the Great Patriotic War of 1941-1945."

UKRAINE

[UA] Efforts to counteract information aggression

Andrei Richter
Comenius University (Bratislava)

On 24 February 2022, following the imposition of martial law in Ukraine, the National Council on Television and Radio Broadcasting (see IRIS 1997-8/20) relieved broadcasters of their content obligations for its duration, to enable them to focus on war-related content. On 25 February, the Ministry of Culture and Information Policy (see IRIS 2017-4/33) announced the launch of an "information marathon" with the participation of four national channels (three more channels joined the next day). The "marathon" presents a single round-the-clock programme, co-produced by the participating broadcasters, which is broadcast simultaneously on all their channels and platforms. It is also available to other broadcasters such as local ones.

In addition, on 18 March, a Russian-language round-the-clock "information marathon" titled "FreeDom" ("dom" means "home" in both Ukrainian and Russian) was organised by several national media companies on the basis of the world service UATV.

On 19 March, following the decisions of the Council of National Security and Defence, President Zelenskyy signed two decrees. The first decree incorporates – for the period of martial law – Zeonbud, Ltd. Company (a private content provider for four national multiplexes MX-1, 2, 3 and 5, see IRIS 2011-3/32) into the state-run Concern of Radiobroadcasting, Radiocommunications and Television Broadcasting.

The second decree merged – also for the period of martial law – all general interest national television channels into one consolidated platform called "United News." The objective of the decision was to counter "active dissemination of misinformation by the aggressor state, distortion of information, as well as justifying or denying the armed aggression of the Russian Federation against Ukraine" through the means of conveying "the truth about the war" and "ensuring a unified information policy under martial law in Ukraine".

On 4 April, three general-interest national TV channels (5th Channel, Espresso, and Pryamyi) that were not part of the "information marathon" were switched off from terrestrial broadcasting by the Concern of Radiobroadcasting, Radiocommunications and Television Broadcasting, thus losing about 40 percent of their audience. Their spots on multiplexes were taken by the "United News". On 14 April, the Supreme Rada (the Parliament) of Ukraine adopted the "Statement on the Value of Free Speech, Guarantees of Journalists' and Media Activities under Martial Law", which in particular calls for a strong reaction of law-enforcement agencies to "any … cases of technical switch-off of pro-Ukrainian channels from the air". It also declares that the "Ukrainian State has no right to copy totalitarian

practices of the aggressor state" (that is, Russia).

Про рішення Ради національної безпеки і оборони України від 18 березня 2022 року 'Про нейтралізацію загроз інформаційній безпеці держави'

https://www.president.gov.ua/documents/1512022-41757

Decree of the President of Ukraine No. 151/2022 of 19 March 2022 "On the decision of the Council of National Security and Defence of Ukraine of 18 March 2022, 'On neutralisation of the threats to the information security of the State'"

Про рішення Ради національної безпеки і оборони України від 18 березня 2022 року "Щодо реалізації єдиної інформаційної політики в умовах воєнного стану"

https://www.president.gov.ua/documents/1522022-41761

Decree of the President of Ukraine No 152/2022 of 19 March 2022 "On the decision of the Council of National Security and Defence of Ukraine of 18 March 2022, 'On implementation of unified information policy under martial law'"

Про Заяву Верховної Ради України про цінність свободи слова, гарантії діяльності журналістів і засобів масової інформації під час дії воєнного стану

https://zakon.rada.gov.ua/laws/show/2190-20

Decision of the Supreme Rada of Ukraine No. 2190-IX of 14 April 2022 "On the Statement of the Supreme Rada of Ukraine on the Value of Free Speech, Guarantees of Journalists' and Media Activities under Martial Law"

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE