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EDITORIAL

There are court decisions and court decisions. Most of them simply have an impact on a concrete case. Others, however, have a much wider impact and create what lawyers call “jurisprudence”. The Grand Chamber of the CJEU’s much-anticipated judgment on Article 17 of the DSM Directive is certainly the latter, and should inform the transposition procedure in the EU member states in a fundamental way. In a nutshell, the CJEU ruled that the safeguards contained in Article 17 DSM ensure respect for the right to freedom of expression of users, adding that Member States must transpose this article into their national law striking a fair balance between the various fundamental rights protected by the Charter.

Talking about freedom of expression, the Council of Europe has been very active in this regard recently. First of all, by publishing recommendations on principles for media and communication governance and the impacts of digital technologies on freedom of expression. These recommendations, along with a further recommendation on electoral communication, are designed to encourage the member states to introduce future-oriented governance systems that guarantee to protect freedom of expression and freedom of the media, while also respecting communication rights and the fundamental values of the Council of Europe.

And talking about values, the EU’s new strategy for a better internet for kids (BIK+), adopted on 11 May 2022, should ensure that children are protected, respected and empowered online.

This and many other interesting news items await you inside this month’s newsletter.

More than ever, stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

Table of content

INTERNATIONAL

COUNCIL OF EUROPE

Council of Europe publishes recommendation on electoral communication

Mark D. Cole
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On 6 April 2022, the Committee of Ministers of the Council of Europe adopted a recommendation to member states on electoral communication and media coverage of election campaigns. The recommendation not only lays down principles for electoral advertising, in particular online, but also updates a previous recommendation on the role of the media in election campaigns. The Council of Europe highlights, in particular, the importance of transparency in the use of communication in the run-up to elections, including regard to whether information has been paid for, and the sources and the extent of funding of electoral advertising. It urges the member states to take the principles laid down into account in their domestic legislation and to make adjustments where necessary.

The preamble to the recommendation stresses the fundamental role of political and electoral communication in ensuring a democratic debate and reaffirms that fair, free, trustworthy and reliable information is essential to guarantee the integrity of the electoral process. The recommendation, prepared by the Committee of Experts on Media Environment and Reform (MSI-REF) over a two-year period, was adopted in the context of increasing use of the Internet for communication, including electoral communication, and the dominance of a small number of platforms that are currently not subject to a specific level of regulation. The easy, constant availability of communication channels has led to permanent political communication, making it almost impossible to distinguish between electoral advertising/communication and information that is not part of an election campaign. The Internet also provides the opportunity for new forms of electoral advertising, such as personalised messages and so-called microtargeting, which are strongly linked to data collection and processing. These developments have made it necessary to adopt a new regulatory approach.

The appendix to the recommendation contains guidelines that begin by setting out the scope of the recommendation and relevant definitions. The guidelines apply very broadly to all types of political elections and votes such as referendums, and explain the differences between concepts such as “political advertising”, “political communication”, “election campaign” and “electoral communication”. The section on basic principles focuses not only on co-regulatory approaches, but also on the monitoring of compliance by relevant authorities, in

particular independent advisory bodies that support the authorities with their work. In the section on political advertising, the obligation to identify and categorise campaign leaders is emphasised. It is suggested that political parties and candidates, as well as online platforms, should be required to keep archives of all their campaign-related advertisements.

Transparency should apply as a core principle not only to electoral spending, but also to the financing of election campaigns. Member states should consider adapting current rules on spending limits for electoral advertising so they also include online communication. It is recommended that states prohibit or substantially limit foreign donations and financing of electoral advertising. The authorities should be empowered to gather and evaluate relevant information on financing, which should include technological aspects and new funding methods (e.g. cryptocurrencies). The use of algorithms, content moderation connected to political communication and the ranking of election advertising must also be transparent. The section on algorithms goes on to state that the integrity of services offered via platforms must be guaranteed by taking action against fake accounts and the use of bots, while the spread of political disinformation should be stopped. A number of regulatory options are also proposed, taking into account existing differences within the Council of Europe member states. For example, holding a day of reflection immediately before an election, during which no electoral advertising or poll results may be published, is only suggested as an option. Data protection and consent for certain types of (electoral) advertising are also covered in a separate section.

Finally, the recommendation lists the essential points that the media should take into account in their reporting of election campaigns. It reiterates the principles set out in Recommendation CM/Rec(2007)15, and proposes that, with due respect for their editorial independence, measures should also be taken to ensure that audiovisual media, in particular, cover election campaigns in a fair, balanced and impartial manner. Insofar as electoral advertising is permitted in these media, it should be made available to all parties and candidates on equal terms, while airtime should also be fairly allocated.

Along with this recommendation, the Committee of Ministers adopted two further recommendations. Together, taking into account recent developments in the online sector, they form a concise framework that the member states can use to modernise their media governance systems and extend their scope of application. Even though it is only advisory in nature, the recommendation can therefore make a valuable contribution to the standard-setting process.

Recommendation CM/Rec(2022)12 of the Committee of Ministers of the Council of Europe

https://go.coe.int/HoCBA

Council of Europe publishes recommendations on principles for media and communication governance and the impacts of digital technologies on freedom of expression

Mark D. Cole
Institute of European Media Law

On 6 April 2022, the Committee of Ministers of the Council of Europe adopted recommendations to member states on principles for media and communication governance and on the impacts of digital technologies on freedom of expression. These recommendations, along with a further recommendation on electoral communication, are designed to encourage the member states to introduce future-oriented governance systems that guarantee to protect freedom of expression and freedom of the media, while also respecting communication rights and the fundamental values of the Council of Europe. Both recommendations urge the member states to take the principles laid down into account in their domestic legislative frameworks and to make adjustments where necessary.

The recommendation on media and communication governance is designed to be a key recommendation that updates previous declarations of the Committee of Ministers and Parliamentary Assembly of the Council of Europe and promotes coherent governance, especially in the light of changes to online communication. In particular, it aims to harmonise standards and obligations that apply to traditional media actors as well as online platforms. This was the remit given to the Committee of Experts on Media Environment and Reform (MSI-REF), which spent two years preparing the draft recommendation. The recommendation lays down five procedural and ten substantive principles for national media and communication governance. It calls on the member states to review their existing legislative frameworks and adapt them where necessary in accordance with the aforementioned principles, as well as evaluate at regular intervals if they require further updating. The principles should therefore be promoted at both national and international levels, and all relevant stakeholders should be included in the process of developing and reviewing media and communication governance.

The recommendation’s scope is defined in its appendix, which points out that actors that are not responsible for editorial control over content have begun to play an essential role in public communication since the adoption of the Recommendation on a new notion of media in 2011. A differentiated approach to governance should therefore take into account the different actors and their potential influence, not only looking at state regulation and authorities, but also facilitating co- and self-regulatory models. The five procedural principles concern the transparency and accountability of governance, the need to take into account the interests of all groups in society, independence and impartiality, and agility and flexibility. The substantive principles state that applicable fundamental rights

should be at the heart of governance so that different rights and objectives can be balanced in a proportionate way. Media freedom, media pluralism and the sustainability of journalism must also be safeguarded. The principles also refer to the transparency of content production, which includes the need to ensure compliance with content obligations and professional standards. Other principles concern content dissemination, with new obligations aimed at platform providers in particular. Governance must ensure functioning markets in the online sector, which could entail the modernisation of competition law, and ensure that data is used not only in accordance with data protection rules, but also fairly. Combating the dissemination of illegal content and responding appropriately to potentially harmful content should be achieved through risk-based and human rights-compliant moderation of content disseminated via platforms and better reporting systems for users. Governance should be used to mitigate the risks posed by algorithmic curation, selection and prioritisation. The final two principles relate to the use of content and call for individuals to be guaranteed access to new forms of communication and content. Finally, through media literacy and opportunities to participate, users should be empowered to use media and platforms responsibly. Appended to the recommendation is a detailed Explanatory Memorandum, which explains each of the 15 principles in depth and provides guidance on how they should be applied to governance.

Meanwhile, the Expert Committee on Freedom of Expression and Digital Technologies (MSI-DIG) prepared a separate recommendation that was adopted by the Committee of Ministers on the same day. This recommendation is designed to ensure that the extended opportunities for freedom of expression provided through the use of digital technologies are not overshadowed by the risks and negative consequences that can result, in particular when the necessary digital infrastructures are only provided by private companies. Taking into account the rights enshrined in Article 10 of the European Convention on Human Rights, the member states and private actors, especially intermediaries, must help ensure that digital technologies serve rather than curtail freedom of expression. The appendix to the recommendation explains the conditions that should apply under Article 10 to self-regulation and state regulation governing intermediaries and online platforms. For example, processes for moderating user-generated content on such platforms should be established in advance in order to ensure that such moderation is not arbitrary, while responses to problematic content should be proportionate. Accountability rules and simple redress mechanisms are also important. Access for researchers to related data and mechanisms, and support for such research, should facilitate evidence-based rule-making in the future.

By adopting these two recommendations, as well as the recommendation on electoral communication, the Committee of Ministers has taken an important step towards the modernisation of media and communication governance in the member states, bringing it into line with the new conditions of the online world. The recommendations therefore have the potential to take similar approaches adopted at European Union level through the Digital Services Act and Digital Markets Act outside the narrower territory of the EU, and to establish a framework for future governance – both in the EU member states and in the EU itself where it has relevant jurisdiction – in compliance with fundamental rights.

Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance

https://go.coe.int/HcFzG

Explanatory Memorandum to Recommendation CM/Rec (2022)11

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a5bd7c

Recommendation CM/Rec(2022)13 of the Committee of Ministers to member States on the impacts of digital technologies on freedom of expression

https://go.coe.int/nVL0P

MOLDOVA

European Court of Human Rights (Grand Chamber): NIT S.R.L. v. the Republic of Moldova

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The Grand Chamber of the European Court of Human Rights (ECtHR) has found no violation of the right to freedom of expression and information in a case concerning the withdrawal of a television station's licence in Moldova. The licence of the television channel NIT was revoked in 2012 because of the failure to provide balanced political coverage, and in particular, for its biased support of the communist opposition party in Moldova (PCRM) and its harsh criticism of (members of) the Government and its supporting coalition, the Alliance for European Integration (AEI). The ECtHR was satisfied that the Moldovan authorities had struck a fair balance between the general interest of the community in order to protect media pluralism and the right to freedom of expression of the television station as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). Three judges dissented, arguing that the revocation decision was marred by serious procedural shortcomings, also raising substantial questions about the Moldovan media regulator's impartiality in the process.

The case concerned a media company's allegation that its television channel NIT had been shut down for being overly critical of the Government and, in particular, whether domestic law could impose an obligation of neutrality and impartiality in the news bulletins of a television station with nationwide coverage. After having imposed over a period of several years multiple sanctions against the NIT television channel, the Audiovisual Coordinating Council (ACC) decided to withdraw NIT's broadcasting licence. The ACC based its decision on a monitoring report of the news bulletins of all television channels with nationwide coverage regarding compliance with Article 7 of the Audiovisual Code 2006. This article on political and social balance and pluralism provides that when giving airtime to a political party, a broadcaster shall also give airtime to other political parties within the same type of programme and in the same time slot, without any unjustified delay and without favouring a certain party, regardless of the percentage of its parliamentary representation. It appeared from the monitoring report that most of the NIT news bulletins were devoted to political matters and that the reporting was clearly biased in favour of the activities of the PCRM and its members and supporters, without providing an opportunity to respond to criticism and attacks on the Government and its supporting coalition parties of AEI. The ACC found that this imbalance was in breach of Article 7 § 2 of the Audiovisual Code and it revoked the broadcasting licence as a justified interference after it had gradually applied all the other sanctions provided for in the Code.

NIT challenged, unsuccessfully, the decision by the ACC before the Court of Appeal and the Supreme Court. The Supreme Court emphasised that the measure of revocation of NIT's licence had been necessary in order to enforce the rules concerning pluralism of opinions and in order to enforce the rule of law. NIT subsequently lodged an application with the ECtHR, complaining that the revocation of its broadcasting licence had breached its right to freedom of expression under Article 10 ECHR.

The ECtHR adjudicated the present case from the perspective that the negative obligation of the State not to interfere with the right to freedom of expression is linked to the question of whether the State complied with its positive obligation to put in place a proper legal and administrative framework guaranteeing media pluralism. It considered that the relevant domestic law was formulated sufficiently clearly in order to fulfil the requirements of precision and foreseeability under Article 10 § 2 ECtHR, and it therefore found that the impugned interference was "prescribed by law". It also accepted that the interference corresponded to the legitimate aim of protecting the "rights of others", while the ECtHR was not persuaded by the Government's suggestion that the impugned measure had been imposed in the interests of "national security" or "public safety" or for the "prevention of disorder". With regard to the decisive question whether the revocation of NIT's licence had been necessary in a democratic society, the ECtHR reiterated that the most careful scrutiny on the part of the ECtHR is called for when the measures taken or sanctions imposed by a national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern and that there is little scope under Article 10 § 2 ECHR for restrictions on political speech or on debate on matters of public interest. The Court also reiterated that there could be no democracy without pluralism: "Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy. In order to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed". The ECtHR considered the principle of media pluralism crucial for the effective protection of media freedom. The ECtHR observed that a number of national licensing systems in Europe tended to rely on the diversity of perspectives provided by the different licensed operators, coupled with structural safeguards and general obligations of fair coverage, while other national systems required stricter content-based duties of internal pluralism. According to the ECtHR, Article 10 ECHR "does not impose a particular model in this respect". It recalled that the internal pluralism policy chosen by the Moldovan authorities and embodied in the Audiovisual Code 2006 had received a positive assessment by Council of Europe experts. While the policy chosen by the national authorities could be viewed as rather strict, the case related to a period before Moldova transitioned to terrestrial digital television, when the number of national

frequencies was very limited and when the authorities had to put in place broadcasting legislation ensuring the transmission of accurate and balanced news and information reflecting the full range of political opinions. The ECtHR also referred to its judgment of 17 September 2009 in *Manole a.o. v. Moldova* (IRIS 2009-10/1), in which it found that from February 2001 until September 2006 the Moldovan authorities had violated freedom of expression and media pluralism by not sufficiently guaranteeing the independence and pluralism of Teleradio-Moldova (TRM), the State-owned broadcasting company, which became a public broadcasting company in 2002.

With this history and context in mind, the ECtHR was satisfied that the reasons behind the decision to interfere with NIT's freedom of expression had been relevant and sufficient and that the domestic authorities had balanced the need to protect pluralism and the rights of others, on the one hand, and the need to protect the television company's right to freedom of expression on the other. The Grand Chamber's judgment developed the Court's case-law on pluralism in the media and clarified the interrelationship between the internal and external aspects of media pluralism, the scope of the margin of appreciation afforded to States, and the level of scrutiny applicable to restrictions in this area. It also outlined the factors for assessing a regulatory framework and its application. The ECtHR observed that the implementation of the requirements on internal media pluralism was monitored by the ACC, a specialist body established by law. It stressed the important role which regulatory authorities play in upholding and promoting media freedom and pluralism, and the need to ensure their independence given the delicate and complex nature of this role. The ECtHR agreed with the approach and findings by the ACC, also emphasising that it was not persuaded that NIT news reporting had contributed to political pluralism in the media in any meaningful way. The ECtHR furthermore set out why it considered the revocation of NIT's licence a proportionate measure, and why it considered the proceedings at the domestic level fair, with sufficient procedural safeguards. The ECtHR observed that the revocation of its licence did not prevent NIT from using other means, such as the Internet, to broadcast its programmes, including news bulletins, while NIT had also continued to share content through its Internet homepage and its YouTube channel. Moreover, the impugned measure did not have a permanent effect as NIT could have reapplied for a broadcasting licence one year after its licence had been revoked. The ECtHR also found that there was no concrete evidence to support the allegation that the ACC sought to hinder NIT from expressing critical views of the Government or pursued any other ulterior purpose when revoking the licence. The Grand Chamber of the ECtHR concluded that the domestic authorities had acted within their margin of appreciation and that the interference with NIT's right under Article 10 ECHR was thus "necessary in a democratic society". There had accordingly been no violation of that Article in the present case. The ECtHR also concluded that there has been no violation of NIT's property rights under Article 1 of Protocol no. 1 to the Convention. The ECtHR dismissed the complaints based on Article 6 § 1 (right to fair trial), Article 13 ECHR (right to an effective remedy) and Article 14 (prohibition of discrimination).

Three judges dissented with the Grand Chamber's majority as to the finding of no violation of Article 10 ECHR. The judges Pavli (Albania), Lemmens (Belgium) and Jelić (Montenegro) considered it highly relevant that the NIT channel appeared to be the only national operator that gave prominence to the views of the country's only opposition party at the time: "With its disappearance from the broadcasting scene, it seems obvious that there was an adverse impact on overall pluralism. This argument cannot translate into a licence for minority voices to break the law with impunity, but it is nevertheless an important consideration". The dissenters also expressed the opinion that the requirement in Article 7 § 2 of the Audiovisual Code to give equal airtime to political parties "within the same type of programme and in the same time slot", suffered from both vagueness and potential overbreadth, and that it could be quite difficult to implement that requirement in practice without significantly undermining a broadcaster's editorial independence. While the dissenting judges agreed with much of the majority analysis of the generally applicable principles and the possible grounds justifying the revocation NIT's broadcasting licence, they disagreed with the conclusion that the decisions of the national authorities were accompanied by sufficient procedural safeguards. Confirming the important role of independent regulatory authorities, the dissenters emphasised that it is essential that both the ECtHR and domestic courts scrutinised quite carefully any interferences with media freedoms by such regulatory authorities, to ensure that their decision-making is not marred by any signs of bias or lack of fair treatment. Strict scrutiny is especially important in cases of revocation of a licence as a form of prior restraint, subjecting a national broadcaster to the ultimate sanction ("the nuclear option") of delicensing for supposed failures of internal pluralism. Five factors in the present case called for strict scrutiny by the ECtHR: the presence of a strict national model of internal pluralism, based on legislative provisions that were liable to open-ended and subjective enforcement; the imposition of the ultimate sanction on the broadcaster with immediate effect; the fact that the particular operator represented the main opposition voice in the country's broadcasting scene; certain concerns about the ACC's independence; and the obvious chilling effects that a licence revocation in these circumstances would have on other broadcasters and the national political discourse generally. The dissenting opinion refers to the weak methodology used by the ACC for its monitoring of pluralism compliance, the difficulties of applying the standards of Article 7 § 2 of the Audiovisual Code to news editions and the extremely hasty manner in which the final ACC decision was taken. The latter raised serious questions about the procedural fairness and NIT's ability to present an effective defence before the ACC. All in all the dissenting opinion found that the revocation decision was marred by serious procedural shortcomings that not only undermined NIT's ability to properly defend its interests but also raised substantial questions about the ACC's impartiality in the process. As the national courts had also failed to promptly address and remedy these shortcomings, the dissenting judges concluded that there had been a violation of NIT's rights under Article 10 ECHR.

Judgment by the European Court of Human Rights, Grand Chamber, in the case of NIT S.R.L. v. the Republic of Moldova, Application no. 28470/12, 5 April 2022

https://hudoc.echr.coe.int/eng?i=001-216872

EUROPEAN UNION

Grand Chamber judgment on Article 17 of the DSM Directive

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On 26 April 2022, the Court of Justice of the European Union (CJEU) delivered its much-anticipated judgment in Case C-401/19, concerning Article 17 of the 2019 Directive on Copyright and related rights in the Digital Single Market (DSM Directive) (see IRIS 2019-4/5). The case originated in May 2019, a month after the DSM Directive was adopted, when Poland made an application to the CJEU, seeking annulment of two provisions under Article 17 DSM Directive concerning the liability of online content-sharing service providers (OCSSPs) for content uploaded by users (see IRIS 2019-9/5). In particular, Poland sought annulment of Article 17(4)(b) and (c), *in fine*, DSM Directive, which require OCSSPs to monitor the content uploaded by users, in order to prevent the uploading of protected subject matter which the rightholders do not wish to make accessible on those services. Poland argued that these provisions infringe the right to freedom of expression of users under Article 11 of the EU Charter of Fundamental Rights (EU Charter). Notably, in July 2021, Advocate General Øe delivered his opinion on the case, holding that Article 17 DSM Directive was valid, as it contained enough safeguards with regard to the rights of users, and the Court should dismiss the action brought by Poland (see IRIS 2021-8/7).

The CJEU has also now found that Poland's action should be dismissed, holding that the obligations under Article 17(4)(b) and (c) have been accompanied by appropriate safeguards "to ensure" respect for the right to freedom of expression of users, and a fair balance between freedom of expression and the right to intellectual property. First, the Court noted that Article 17 establishes the principle that OCSSPs are directly liable when protected subject matter is illegally uploaded by users of their services. However, OCSSPs may be exempted from liability, and the Court observed that in order to benefit from the exemption from liability under Article 17, OCSSPs are "de facto" required to carry out a prior review of the content that users wish to upload to their platforms, provided they have received from rightholders the relevant and necessary information. Crucially, the Court held that in order to be able to carry out such prior review, OCSSPs are, depending on the number of files uploaded and the type of protected subject matter, required to use automatic recognition and filtering tools. And as such, the Court held that the specific liability regime established under Article 17 DSM Directive entailed a limitation on the right to freedom of expression of users of OCSSPs.

Importantly, the Court then examined the proportionality of the interference with freedom of expression, and held the obligations under Article 17 “do not disproportionately restrict” the right to freedom of expression of users, for a number of reasons. These included, first, in order to “prevent the risk” which the use of automatic recognition and filtering tools entails for freedom of expression, the EU legislature laid down a “clear and precise limit”, on the measures that may be taken in implementing the obligations laid down in Article 17, by excluding, in particular, “measures which filter and block lawful content when uploading”. Second, Article 17(7) requires Member States to ensure that users are authorised to upload and make available content generated by themselves for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. Thirdly, under Article 17, the liability of OCSSPs for ensuring that certain content is unavailable can be incurred “only on condition” that the rightholders concerned provide them with the relevant and necessary information with regard to that content. Fourth, Article 17(8) stating that the application of Article 17 must not lead to any general monitoring obligation, provides an “additional safeguard” for ensuring the freedom of expression of users is observed. Finally, Article 17 includes several procedural safeguards (e.g., complaint and redress mechanisms), which protect the freedom of expression of users in cases where OCSSPs erroneously or unjustifiably block lawful content. As such, the Court concluded that the obligation under Article 17(4)(b) and (c) on OCSSPs, to review, prior to its dissemination to the public, the content that users wish to upload, was accompanied by “appropriate safeguards by the EU legislature in order to ensure respect for the right to freedom of expression and information of the users of those services”.

As a final note, the Court also added that Member States must, when transposing Article 17 into their national law, “take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter”.

Judgment of the Court of Justice of the European Union (Grand Chamber) of 26 April 2022, Case C-401/19, Republic of Poland v European Parliament and Council of the European Union

https://curia.europa.eu/juris/document/document.jsf?docid=258261&text=&dir=&doclang=EN&part=1&occ=first&mode=lst&pageIndex=0&cid=2466542

New strategy for a better internet for kids

Justine Radel-Cormann
European Audiovisual Observatory

On 11 May 2022, the European Commission published a new strategy for a better internet for kids. Announced in March 2021 as part of the European Union strategy on the rights of the child, the strategy falls under one of the priorities of Ursula von der Leyen's presidency of the Commission (2019-2024), entitled "A new push for European democracy". Although it is not legislative in nature, the Commission's communication is no less important, since it lists the different ways in which the Commission intends to better protect children and young people online by empowering them to use the Internet safely while enhancing their digital skills and competences.

After summarising the actions it has taken so far, the Commission outlines the reasons why such a strategy is needed: children use digital devices from a very young age, lead a more sedentary lifestyle and are vulnerable to the dangers of the Internet, sometimes developing attention disorders as a result. Moreover, they are often confronted with products and services designed for adults, as well as inappropriate or unsuitable marketing techniques. Although legislation on digital services partly deals with the issue by prohibiting the profiling of minors for advertising purposes, further action and protective measures are needed.

To this end, in accordance with the Commission's vision, digital services should be "age appropriate, with no one left behind and with every child in Europe protected, empowered and respected online".

Children will be better protected online (privacy, safety and security) thanks to a comprehensive EU code of conduct on age-appropriate design. This code will be facilitated by the European Commission and drafted in collaboration with the digital services at which it is aimed. Protection will also be provided through the development of certified and interoperable online age verification methods.

Digital empowerment will enable children to acquire basic digital skills from an early age. Children will be taught media literacy skills so they understand the information they see and read online and thus develop critical thinking skills and the ability to identify possible disinformation campaigns. Teachers, parents and educators will therefore need to enhance their own knowledge so they can raise children's awareness.

Finally, children will actively participate in democratic debate so they can advocate for their goals through a new EU Children's Participation Platform.

The Commission will begin to implement its strategy in 2022 and continue its efforts in 2023. In the meantime, it has invited the European Parliament and the

Council to endorse the strategy and take steps to ensure its success.

European Commission, Communication "A Digital Decade for children and youth: the new European strategy for a better internet for Kids (BIK+), COM(2022) 212 final

https://ec.europa.eu/newsroom/dae/redirection/document/86657

NATIONAL

AZERBAIJAN

[AZ] New media law regulates audiovisual sector

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On 8 February 2022, President Ilham Aliyev enacted the statute “On Media,” which replaces both the 1999 statute “On the Mass Media” (see IRIS 2000-2/25 and IRIS 2021-3/10) and the 2002 Statute "On Television and Radio Broadcasting" (see IRIS 2003-3/15). The statute was adopted by the *Milli Majlis* (national Parliament) on 30 December 2021.

This statute consists of 78 articles and determines the organisational, legal and economic bases of activity in the field of media, as well as general information on obtaining, preparation, transmission, production and dissemination of mass information.

Article 43 of the statute establishes the Council as the body that “regulates the field of audiovisual media in the Republic of Azerbaijan.” Further provisions of the statute clarify that it is financed “from the state budget and other sources not prohibited by law”. The structure and staff of the Council “shall be determined by a body (institution) designated by a relevant authority of the Executive” (that is, by the Media Development Agency). In the view of the OSCE expert Joan Barata Mir, these provisions, as well as the ones on membership of the Council and the election of its members, “are clearly insufficient to safeguard the independence of the authority.”

The OSCE Representative on Freedom of the Media (RFoM), Teresa Ribeiro, presented a legal analysis of the statute “On Media”. The analysis points, in particular, to possible excessive burdens and restrictions on the licensing of broadcasters and the lack of provisions establishing mechanisms that would guarantee the autonomy of the regulatory authorities in the field of audiovisual media.

OSCE Media Freedom Representative publishes legal analysis of Azerbaijani media law, with recommendations to authorities, Press release.

https://www.osce.org/representative-on-freedom-of-media/512941

OSCE Media Freedom Representative publishes legal analysis of Azerbaijani media law, with recommendations to authorities, Press release.

https://www.osce.org/representative-on-freedom-of-media/512941

Media haqqında Azərbaycan Respublikasının Qanunu

https://president.az/az/articles/view/55399

Law of the Republic of Azerbaijan on Media, 30 December 2021, No. 471-VIQ. Enacted by Decree of the President on 8 February 2022, No 1589

https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2022)011-e

SWITZERLAND

[CH] Swiss public vote to amend Federal Film Act

Sebastian Zeitzmann
Institute of European Media Law

With a 58.42% majority and a turnout of just over 40%, the Swiss electorate voted to amend the *Bundesgesetz über Filmproduktion und Filmkultur* (Federal Act on Film Production and Culture – FiG) in a referendum held on 15 May 2022. The amendment had previously been agreed by the Swiss legislative bodies, the *Nationalrat* (National Council) and the *Ständerat* (Council of States), in October 2021. The referendum had been instigated by opponents of the amendment, but their initiative failed when the majority of voters rejected their proposal that the amendment of the Act should be cancelled.

Under the FiG, Swiss television broadcasters are obliged to invest 4% of their turnover in Swiss film production in order to help safeguard the national film-making industry. However, there has so far been no such obligation for streaming services. According to the proposed amendment, which will go ahead following the referendum result, streaming services will also be required to invest 4% of the revenue they generate in Switzerland in Swiss film-making. They can either participate directly in Swiss film and series productions of their choice or pay a substitute levy that benefits Swiss film production. A quota rule will also be introduced, requiring streaming services to ensure that 30% of their content consists of films or series produced in Europe (but not necessarily Switzerland). The quota for streaming services will therefore be lower than that for television broadcasters, which will remain at 50%. The proposed measures are designed to reduce the unequal treatment of TV broadcasters and streaming services, strengthen Swiss film-making and contribute to the cultural diversity of digital services. Opponents of the amendment had claimed in particular that it could lead to a rise in the subscription costs for streaming services.

Although Switzerland is not a member of the European Union and therefore not required to implement the Audiovisual Media Services Directive (Directive 2010/13/EU – AVMSD), the proposed 30% quota replicates similar obligations for EU states enshrined in Article 13 AVMSD, as amended by Directive (EU) 2018/1808. The AVMSD also permits member states to require broadcasters to contribute financially to the production of European works, which is why Switzerland has created a similar rule. Most EU member states have introduced such obligations to invest in film production or pay corresponding levies in their national legislation.

Ergebnisse des Referendums vom 15. Mai 2022, Bundesrat

https://www.admin.ch/gov/de/start/dokumentation/abstimmungen/20220515/aenderung-des-filmgesetzes.html

Results of the referendum of 15 May 2022, Federal Council

GERMANY

[DE] Constitutional complaint about data reconciliation for licence fee collection unsuccessful

Christina Etteldorf
Institute of European Media Law

In a ruling of 21 January 2022, the German *Bundesverfassungsgericht* (Federal Constitutional Court –BVerfG) rejected two constitutional complaints concerning the automatic, regular transfer of personal data from the German registration authorities to the *Landesrundfunkanstalten* (state broadcasting authorities) for the purpose of collecting the broadcasting licence fee. The complainants had claimed, *inter alia*, that their right to informational self-determination had been breached, but the BVerfG rejected the complaints on admissibility grounds.

The constitutional complaints had been lodged by two licence fee payers, who questioned the constitutionality of Article 11(5) of the *Rundfunkbeitragsstaatsvertrag* (state treaty on the broadcasting licence fee – RBStV) and the corresponding legislation implemented at state level in 2019 through the *23. Rundfunkänderungsstaatsvertrag* (23rd state treaty amending the state broadcasting treaty). The article states that, every four years, starting on a specific date in 2022, each German registration authority should automatically send to the relevant state media authority a series of data concerning all adults in standardised form (surname, first names and given name, previous names, doctorate, marital status, date of birth, addresses of current and previous main and secondary residences, including all available information about their location and the date they moved in). This requirement is designed to ensure the state broadcasting authorities have the latest information they need to collect the broadcasting licence fee. As soon as the data has been reconciled and the fee-payer's account settled, the state broadcasting authority must delete the data. In order to ensure proportionality between the fairness of the licence fee system and the protection of personal data, Article 11(5) RBStV also states that the data should not be transferred if the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission for Determining the Financial Requirements of Broadcasters – KEF), in its two-yearly report on the financial situation of the state broadcasting authorities, finds that the existing database is sufficiently up to date.

The complainants argued that the article infringed their right to informational self-determination enshrined in Article 2(1) in conjunction with Article 1(1) of the *Grundgesetz* (Basic Law) (this fundamental right corresponds with the protection of privacy and personal data mentioned in other lists of fundamental rights, in a combination developed by the *Bundesverfassungsgericht*), firstly because it was disproportionate, and secondly because it was inconsistent with the distribution of legislative powers. Indeed, it was a rule that should have been enshrined in registration law, for which the federal government was responsible, rather than media law, which fell under the remit of the *Bundesländer*. They also claimed that

the principle of the clarity of legal rules had been breached because it was unclear what factors the KEF had to take into account when preparing its report.

However, the BVerfG rejected the constitutional complaints on the grounds that they were inadmissible and therefore had no chance of being upheld. Under the subsidiarity principle, before a constitutional complaint was lodged, all available procedural remedies must have been used in an effort to have the infringement corrected, or prevent a violation of fundamental rights. In the case at hand, the complainants should firstly have sought judicial protection from the administrative courts by applying for negative declaratory relief or an injunction. Such protection had already been available from the German administrative courts under the previous rules and, in the case at hand, applying for it did not seem either obviously pointless or without prospect of success. Clarification by a non-constitutional court would also – as a condition of the subsidiarity principle – have provided a more solid basis for a BVerfG decision: firstly, if such a court had established the facts (in principle, this is no longer the role of the BVerfG) concerning notification requirements and licence fee collection methods, it would have provided the basis for a decision on the alleged violation of a fundamental right, in particular with regard to proportionality. Secondly, a specialised court's interpretation of legal concepts that were open to interpretation, for example in relation to the KEF report, would have helped to establish whether the reconciliation of registration data was necessary and appropriate.

Under these circumstances, the BVerfG was not required to examine any further the formal and substantive complaints concerning Article 11(5) RBStV.

BVerfG, Beschluss der 2. Kammer des Ersten Senats - 1 BvR 1296/21

http://www.bverfg.de/e/rk20220121_1bvr129621.html

Federal Constitutional Court, decision of the 2nd chamber of the First Senate - 1 BvR 1296/21

[DE] Discussion draft on the amendment of state youth protection treaty published

Christina Etteldorf
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On 15 March 2022, the *Rundfunkkommission* (Broadcasting Commission) of the German *Bundesländer*, which acts as a joint discussion forum and decision-making body on media policy and related legal questions for the Heads of the State and Senate Chancelleries, adopted proposals to reform the *Jugendmedienschutz-Staatsvertrag* (Interstate Treaty on the Protection of Minors in the Media – JMStV). The proposals were published in the form of a discussion draft and a consultation procedure was opened.

The reforms, which focus in particular on the improvement of technical measures to protect young people in the media in Germany, aim to enhance existing youth protection systems and link them together to make them as effective as possible. This new approach is designed to protect young people across multiple devices through systems that are easy to set up and configure. It places particular emphasis on operating systems and apps, since many children and young people use these to access the media.

According to the JMStV, where telemedia (i.e. all online media that are not broadcasting or telecommunications services) are concerned, certain services (e.g. simple pornography, certain content classified under the *Jugendschutzgesetz* (Youth Protection Act) and content harmful to minors) are only admissible if the provider ensures that they are only accessible to adults. This rule on so-called 'closed user groups' is expanded under the proposals, with the result that, in the future, the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM), in consultation with certified voluntary self-regulation bodies, will define the measures that must be taken to ensure that such closed user groups are set up, while providers will be able to submit their systems to a self-monitoring body for their suitability to be checked. The same rules will be created for technical systems that display age ratings (6, 12, 16 or 18) for services that are likely to impair the development of minors. A similar system already applies in relation to the age-appropriate design of youth protection software in the JMStV. The proposals also state that risks linked to the use of media services, that are likely to impair the personal integrity of children and adolescents, should be highlighted through optical and readable labels.

The most important new provisions concern operating systems (defined in the new draft as system software that controls the basic functions of hardware or software and makes it possible to use software applications that provide access to services) and apps (defined as software-based applications that can be used to directly control telemedia programmes or content). According to the proposed new Article 12 JMStV, operating systems that are commonly used by children and young people must have a youth protection mechanism that can be easily, accessibly and safely set up, activated and deactivated. Operating systems must

inform users that the youth protection features can be switched on when they are first used, when the features are first activated, and each time the operating system or youth protection features are updated, as well as assist with the activation process. The youth protection features must include the ability to set an age rating so that (i) the safe search function of the most commonly used online search engines is activated whenever a browser is used (browsers that do not have such a function will then not be accessible), (ii) apps can only be installed through the system's own sales platform and (iii) installed apps can only be accessed in accordance with the relevant age rating. If an app does not have an age rating or is not recommended for the age category set on the device, or if external browsers or apps (from a different sales platform) are used, access should only be granted on an individual, secure basis, and it should be possible to switch them off. Here also, the KJM, in consultation with the certified voluntary self-regulation bodies, will determine the criteria that should be met by the youth protection mechanism and safe search facility.

Under a new Article 12a JMStV, providers of apps that can be downloaded from an operating system's native sales platform must provide an age rating for their apps that can be read by the operating system.

Providers of apps and operating software should only process the captured data in order to meet their obligations under the JMStV and must delete it immediately each time the software is accessed.

The public consultation on the discussion draft will close on 20 June 2022.

Diskussionsentwurf zur Novellierung des Jugendmedienschutz-Staatsvertrages (JMStV), Stand: April 2022

https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/04-22_JMStV-E_Anhoerung.pdf

Discussion draft on the amendment of the Interstate Treaty on the Protection of Minors in the Media, April 2022

[DE] Federal government evaluates the coronavirus pandemic's impact on culture and media

Christina Etteldorf
Institute of European Media Law

Responding to a question submitted by the CDU/CSU parliamentary group, the German *Bundesregierung* (federal government) gave its views on the consequences of the coronavirus pandemic in the cultural and media sector, along with a provisional evaluation of the various coronavirus grant programmes.

The question was based on the fact that the cultural, creative and events industry had been hit particularly hard by the consequences of the coronavirus pandemic because it had been placed under heavy restrictions from the outset and had drawn little benefit from temporary relaxations of the rules. It was therefore necessary, in the coming months, to take measures to enable the cultural and media sector to survive. To this end, the economic, social and financial consequences for the sector needed to be properly measured, grant programmes evaluated and adapted, and future prospects laid out.

With regard to lost turnover in 2020 and 2021, and that forecast for 2022, the government referred to a report published in January by its *Kompetenzzentrum Kultur- und Kreativwirtschaft* (Centre of Competence for the Cultural and Creative Industry). This report suggested that the cultural and creative sector had lost EUR 15.3 billion in 2020 (–8.7% compared with 2019) and EUR 11 billion in 2021 (–6.3% compared with 2019), while losses of between EUR 2.6 billion and EUR 11.4 billion were predicted for 2022. With regard to the broadcasting industry in particular, the report pointed to the pandemic's consequences for the advertising market. Broadcasters depended heavily on advertising and their growth had been restricted by a fall in regional and local advertising income. Paid audio content had also been taken over by large streaming portals. Although demand for video content had increased, unequal conditions for competition had particularly affected private broadcasters, which faced stiff competition from public service broadcasters and major online platforms. With regard to turnover, the report noted a serious decline in 2020 (–10% compared with 2019), which had not been reversed in 2021. For 2022, the report predicted that turnover would stagnate in the worst-case scenario, while a recovery of around 3% compared with 2021 was the best that could be hoped for.

The federal government's reply also mentioned that numerous grant programmes had been set up during the previous electoral term of the German *Bundestag* (parliament). These included the "NEUSTART KULTUR" programme, worth EUR 2 billion, the *Sonderfonds für Kulturveranstaltungen* (Special Fund for Cultural Events), worth EUR 2.5 billion, the recovery fund for trade fairs and exhibitions, emergency aid programmes, a voucher scheme for cancelled events, cancellation fees and temporary financial assistance such as subsidies for the self-employed and hardship funds. The reply contained a breakdown of the money that had

already been paid out by the various programmes.

As to whether the current measures were sufficient to protect the whole of the cultural and creative sector, or whether additional steps to mitigate the consequences of the pandemic were in the pipeline, the federal government responded that the “NEUSTART KULTUR” programme and the Special Fund for Cultural Events, which had been specifically created for the cultural sector, would continue to provide support throughout 2022 and beyond. At the same time, through measures enshrined in the coalition agreement, such as the adjustment of the government’s strategy for the cultural and creative industry and strengthening of social insurance for creative artists, new structures would be created to support the sector after the pandemic and give it long-term sustainability.

Deutscher Bundestag, Drucksache 20/1180

https://dserver.bundestag.de/btd/20/011/2001180.pdf

German parliament, document 20/1180

DENMARK

[DK] High Court judgment on the scheme on compensation for private copying: Finding the Danish state liable for loss due to too slow update of the rules to meet EU requirements

Terese Foged
Legal expert

On 19 May 2022, the Danish Eastern High Court delivered a much awaited judgment in a dispute between the Danish organisation that administers the funds allocated to compensation for private copying, Copydan KulturPlus, and the Danish Ministry of Culture.

The Danish levy scheme on compensation for private copying previously comprised DVDs, USBs and storage media that was detachable from devices with a digital reproduction function, but not built-in storage media such as internal memories of smartphones, tablets and computers.

In a preliminary ruling in a national case between Copydan and Nokia, the CJEU found, in 2015, that different national treatment of media that could be used for copying for private use had to be be justified, i.e. indirectly that the Danish exemption of built-in storage media was not compatible with the InfoSoc Directive and Union law.

In 2019, Copydan KulturPlus sued the Danish Ministry of Culture, i.e. the state, for damages, claiming that the Ministry had failed to ensure that the Danish scheme was in accordance with Union law.

With effect from 1 January 2022, the Danish Parliament agreed to amend the scheme to include built-in storage media that could also be used for copying.

Copydan KulturPlus argued that the update of the rules should have taken place much earlier, and claimed compensation for the period from 1 August 2014 until 31 December 2021. The amount claimed by Copydan KulturPlus was DKK 1.3 billion (EUR 175 million), namely DKK 600 million (EUR 80.5 million) with compound interest.

In its judgment of 19 May 2022, the High Court found that the Danish scheme did not in fact meet the requirements under the InfoSoc Directive regarding reasonable compensation to rights holders. Thus the Court held that even though the legislator had a wide margin of discretion in the making of a scheme for reasonable compensation, the judgment by the CJEU in 2015, another CJEU judgment in 2016, the technological development, and changes in the Danes' copying behaviour had cast so much doubt on whether the Danish compensation scheme was in accordance with Union law that the Ministry had been obliged to

investigate, as quickly as possible, the need for an adjustment of the Danish copyright rules on the compensation for private copying scheme in order to make them in line with the requirements following from Union law.

The High Court found that as the legislator had not implemented the necessary legislation with effect from 1 July 2018 at the latest, there had been a 'sufficiently qualified violation of Union law' for the Ministry of Culture to be liable for the rights holders' loss from 1 July 2018 and until 31 December 2021.

Therefore the High Court awarded Copydan KulturPlus an estimated compensation of DKK 110 million (EUR 15 million) / DKK 138 million (EUR 18.5 million) with compound interest.

Thus the judgment gave Copydan KulturPlus confirmation that the update of the Danish scheme had been too long underway, however the compensation awarded was far less than Copydan KulturPlus' claim of DKK 1.3 billion (EUR 175 million).

It is not currently known whether either of the parties will appeal the judgment.

Østre Landsret, domresumé 19. maj 2022, Staten ansvarlig for, at blankmedieordning var i strid med EU-retten

https://www.domstol.dk/oestrelandsret/aktuelt/2022/5/staten-ansvarlig-for-at-blankmedieordning-var-i-strid-med-eu-retten/

The High Court announcement about its judgment

2015 EU-Domstolens præjudicielle afgørelse i sag om kopiering til privat brug

https://curia.europa.eu/juris/document/document.jsf?docid=162691&text=&dir=&doclang=DA&part=1&occ=first&mode=DOC&pageIndex=0&cid=2054186

2015 CJEU preliminary ruling in case on copying for private use

https://curia.europa.eu/juris/document/document.jsf;jsessionid=1801C40230FF3B7957F36D5A37249836?text=&docid=162691&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=262112

SPAIN

[ES] Transposition of AVMSD one step closer

Pedro Gallo Buenaga & Mª Trinidad García Leiva
Diversidad Audiovisual / UC3M

In May 2022, almost four years after the European Parliament updated Directive 2018/18018 (AVMSD), the Spanish Congress has approved the new law transposing the AVMSD. This was not without controversy, with 130 votes in favour, 83 votes against and 131 abstentions. The law will now be sent to the Senate to complete its parliamentary processing.

This new *Ley General de Comunicación Audiovisual* (General Law on Audiovisual Communication) updates the existing framework to foster the development of the audiovisual market, establishing the same rules for different actors that compete for the same audience and reinforcing measures to promote European audiovisual production. Along these lines, the law establishes the conditions for the provision of public and private television, as well as on-demand radio and sound services, video-sharing services via platforms and non-linear media operators.

The transposition of the Directive seeks to apply principles such as human dignity, protection against content that violates the dignity of women, the obligation to transmit a respectful image of people with disabilities, the promotion of linguistic pluralism in Spain and the veracity of information. Absolute restrictions are placed on subliminal advertising, advertising for tobacco and electronic cigarettes and advertising that violates human dignity or uses the image of women in a degrading way. In addition, the accessibility of content for people with disabilities is expanded, extending obligations to players who were not covered until now. Funding mechanisms for the public service broadcaster *Corporación de Radio y Televisión Española* (RTVE) are also established, with contributions from all players in the audiovisual market. In relation to the promotion of European works, the new law contemplates both quotas and funding obligations that also apply to on-demand services (transnational players such as Netflix included).

Regarding the quotas for European works in on-demand services, the minimum established by the AVMSD is maintained: 30% of the catalogue of such services must be reserved for European works, which must be given appropriate prominence. Additionally, two linguistic sub-quotas have been set within the minimum established. On the one hand, half of the European works will be reserved for works in the official language of the State or in the language of the Autonomous Communities (Catalan, Galician and Basque). On the other hand, within this criterion, the official languages of the Autonomous Communities must represent a minimum of 40%, considering their population weight and reserving at least 10% for each of these languages. In the case of linear television, European works must represent at least 51% of the annual broadcasting time.

In relation to funding obligations, it is stipulated that providers of linear or on-demand audiovisual media services with annual revenues over EUR 50 million must earmark 5% of their revenues for the funding of European works. Such financing can take place in three different ways: through direct participation in production, through the acquisition of exploitation rights, or by contributing to the Film Protection Fund managed by the *Instituto de la Cinematografía y las Artes Audiovisuales* (Film and Audiovisual Arts Institute — ICAA). Within these obligations, a percentage is reserved for audiovisual works produced by so-called independent producers.

The redefinition of an 'independent producer' is one of the issues that generated the most controversy during the passage of the law. Independent producers are understood as those who are not linked to an audiovisual communication service provider. However, the law also considers independent producers to be those who make works available to such services. In practice, therefore, natural or legal persons who develop a project for a large provider would be considered independent producers even though they are linked to another large provider. This last-minute redefinition has raised sound complaints among different associations of the sector.

Boletín Oficial de las Cortes Generales. (27 de mayo de 2022). 121/000076 Proyecto de Ley General de Comunicación Audiovisual

https://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-77-5.PDF

Official Gazette of the Parliament. (May 27, 2022). 121/000076 Draft General Law on Audiovisual Communication

FRANCE

[FR] ARCOM orders two more pornographic websites to block access to minors

Amélie Blocman
Légipresse

In accordance with Article 23 of the Law of 30 July 2020 to protect the victims of domestic violence, “if a provider of an online public communication service is found to be allowing minors to access pornographic content in violation of Article 227-24 of the Penal Code, the ARCOM (the French broadcasting regulator) president will send it – in a manner in which the date of receipt can be proven – a formal notice ordering it to take all possible steps to prevent minors accessing the content concerned. The recipient of the injunction then has 15 days in which to present its observations. If the injunction is breached and the content remains accessible to minors after this deadline, the ARCOM president may refer the matter to the president of the Paris judicial court with the request that, ruling on the merits under the accelerated procedure, it should order [Internet access providers] to block access to the service (…)”.

Under this provision, on 13 December 2021, the *Conseil supérieur de l’audiovisuel* (the previous French audiovisual regulator – CSA), at the request of three associations, ordered the providers of the Pornhub, Tukif, Xhamster, Xnxx and Xvideos websites to comply with their obligation under Article 227-24 of the Penal Code to prevent minors accessing their content. On 8 March 2022, since the regulator’s requests had not been met by the deadline laid down, the ARCOM president announced that he had referred the matter to the president of the Paris judicial court with the request that it should order the main Internet access providers to block access to the sites in question. On the same day, ARCOM, which replaced the CSA and is also responsible for digital media, asked for the observations of the provider of the YouPorn and RedTube websites. It decided that the observations submitted did not bring into question the infringement of Article 227-24 of the Penal Code, since access to the disputed sites could be gained simply by claiming to be an adult with a single click. Therefore, on 7 April, since the provider of the RedTube and YouPorn services was making pornographic content accessible to minors in contravention of Article 227-24 of the Penal Code, ARCOM issued a formal notice ordering it to take all possible steps to comply with Article 227-24 within 15 days.

If it is also asked to rule on the Youporn and Redtube websites, the Paris judicial court will be able to prohibit access to them on French territory or via their French addresses. Internet users who try to access them will be automatically redirected to an information page explaining why the site is blocked. The ARCOM president will also be able, if necessary, to refer to the president of the Paris judicial court any case in which the blocked websites are made accessible to minors via other web addresses (“mirror sites”). He will also be able to ask the court to order

search engines and directories to delist the sites. The decision is expected within the next few weeks.

Décision n° 2022-P-11 du 7 avril 2022 mettant en demeure la société MG Freesites Ltd en ce qui concerne le service de communication au public en ligne « YouPorn »

https://www.legifrance.gouv.fr/download/pdf?id=cOdN1i2AI7uKqTG6sMXeUjcCxzdAdd0TLhVVMQEEw-Q=

Decision no. 2022-P-11 of 7 April 2022 to issue a formal notice to MG Freesites Ltd concerning the "YouPorn" online public communication service

Décision n° 2022-P-10 du 7 avril 2022 mettant en demeure la société MG Freesites Ltd en ce qui concerne le service de communication au public en ligne « RedTube »

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045669413

Decision no. 2022-P-10 of 7 April 2022 to issue a formal notice to MG Freesites Ltd concerning the "RedTube" online public communication service

[FR] Publication of decree on commercial exploitation of the image of children on the Internet

Amélie Blocman
Légipresse

Under Law no. 2020-1266 of 19 October 2020 regulating the commercial exploitation of children under 16 on Internet platforms, which entered into force on 20 April 2021, so-called “child YouTubers” now enjoy the same protection as children in the modelling and entertainment industries, as described in Articles L. 7124-1 *et seq.* of the Employment Code, as well as specific rights such as the “right to be forgotten”. Before their children are filmed or their videos are disseminated, parents must request an individual licence or approval from the authorities. Their child’s rights and the consequences of their child’s image being posted on the Internet are explained to them.

Adopted in pursuance of Article 1 of the Law, decree no. 2022-727 of 28 April 2022 sets out the details of this protection and the conditions under which people may film, produce and disseminate videos in which children under 16 play the leading roles on online video-sharing platforms for financial gain. The child’s work must be authorised in advance and medically assessed, and the money they earn must be deposited with the *Caisse des dépôts et consignations* until they reach the age of majority or emancipation.

The decree amends the Employment Code, requiring employers to submit various documents. Approval, which can only be granted if sufficient guarantees of the child’s physical and psychological health are provided, is valid for one year and is based on the opinion of a committee comprising a judge, an academic director from the national education service, the departmental director responsible for employment, labour and solidarity, a doctor and the regional director of cultural affairs.

For so-called “Internet grey areas”, i.e. when the activities of child “influencers” are not the subject of an employment relationship, protection is also provided under the Law of 19 October 2020. A declaration must be filed if they exceed certain thresholds for the length or number of videos produced or income earned from their distribution. In the absence of any authorisation, approval or declaration, the authorities can refer the case to the courts.

Video-sharing platforms are also urged, in partnership with child protection organisations, to adopt charters, in particular to make children aware of the consequences that the distribution of their image could have for their private life, as well as the associated psychological and legal risks.

Décret n° 2022-727 du 28 avril 2022 relatif à l'encadrement de l'exploitation commerciale de l'image d'enfants de moins de seize ans sur les plateformes en ligne

https://www.legifrance.gouv.fr/download/pdf?id=P5oBe7_TsrcfYF20JDXHOjImAyXlPN

b9zULelSY01V8=

Decree no. 2022-727 of 28 April 2022 on the commercial exploitation of the image of children under 16 on Internet platforms

[FR] RMC Découverte fails to meet obligation to broadcast 75% documentaries: *Conseil d'État* confirms CSA sanction

Amélie Blocman
Légipresse

The TV company RMC Découverte signed an agreement with the *Conseil supérieur de l'audiovisuel* (the French audiovisual regulator – CSA) in 2012, Article 3-1-1 of which requires it to ensure that "documentaries make up at least 75% of total airtime each year and cover a wide variety of topics." On several occasions in 2016 and 2017, the CSA found that the channel was not abiding by those provisions and issued a formal notice requiring it to meet its obligations. On 9 December 2020, the CSA fined RMC Découverte EUR 80,000 because documentaries had only made up 59.2% of its total airtime in 2017. The broadcaster referred the case to the *Conseil d'État* (Council of State), asking for the decision to be annulled.

The company argued, firstly, that the CSA had refused, on several occasions, to classify some of its programmes as documentaries, and that it had disputed these decisions with the *Conseil d'État*. However, the *Conseil d'État* noted that it had rejected these appeals on 29 October 2021. This argument was therefore dismissed.

The *Conseil d'État* also noted that, in order to determine whether the various programmes concerned could be classified as documentaries within the meaning of Article 3-1-1 of the agreement of 3 July 2012, the CSA had examined each of them individually, taking into account the existence of an author's viewpoint, the dissemination of knowledge to the viewer, the portrayal of facts or situations that had existed before the programme was made, the absence of artificially staged events and whether they had received documentary film aid from the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC). Since it had examined all these criteria, the CSA had not made any error of law. Therefore, RMC Découverte, which was merely claiming that the CSA had applied incorrect criteria, had no grounds to argue that documentaries had represented 72.45% rather than 59.2% of its total airtime. Finally, given the extent and repeated nature of the infringements, the company could not claim that the size of the fine, which was not set automatically, was disproportionate. Its requests were therefore rejected.

Conseil d'État, 22 avril 2022, Sté RMC Découverte

http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-04-22/449533

Council of State, 22 April 2022, RMC Découverte

UNITED KINGDOM

[GB] The Department for Digital, Cultural and Media & Sport publishes report on their vision of the UK broadcasting sector

Julian Wilkins
Wordley Partnership

The UK government has launched its policy paper (report) reviewing the future role and relevance of public sector broadcasting (PSB) and proposals ensuring greater regulatory uniformity between video on demand services and terrestrial television services.

According to the report, terrestrial services remain part of the broadcast ecosystem and 89% of the British public listen to the radio weekly. Current statistics show that nearly half of UK adults used online video services as their primary source for viewing TV and film. 17.3 million homes accessed digital terrestrial TV via an aerial, 8.4 million households subscribe to satellite television, and 3.9 million to cable TV subscriptions. The report identifies that technological advances were changing viewing habits and there was more intense competition from global organisations such as Netflix and Disney.

The report is supportive of PSBs but suggests providing a more flexible regulatory framework which would govern how they deliver their required remits whilst still delivering programmes relevant to audiences.

The report contains over 25 proposals. As regards the BBC, it suggests freezing the TV licence fee (a primary source of BBC revenue) at GBP 159 for two years, and then increasing it according to inflation. The report states that this should give the broadcaster sufficient funding to tackle a more competitive market yet be fair to paying households. The BBC commercial borrowing limit would increase from GBP 350 million to GBP 750 million, pending the agreement of appropriate oversight methods enabling the BBC to access greater capital investment.

The report advocates the proposed State sale of Channel 4 thus facilitating its ownership of content and allowing it to become economically stronger in order to compete internationally albeit retaining its PSB public role alongside other privately owned PSBs namely ITV, STV (Scottish TV) and Channel 5.

The report advocates the importance of programmes broadcast in the UK's indigenous regional and minority languages, such as Welsh, by including it in a new public service remit for television. This would be enhanced by updating Welsh PSB S4C's remit to include digital and online services whilst removing current geographical broadcasting restrictions. This would allow S4C greater reach by offering its content on a range of new platforms worldwide. New legislation would allow S4C and the BBC to have a less rigid framework so the BBC

would not have to provide S4C with a specific number of hours of television programming but instead allow the parties to agree more flexible content arrangements.

PSB standards are currently defined by 14 overlapping 'purposes' and 'objectives' which the report considered outdated and replaced with a shorter remit concentrating on cultural, economic and democratic values vital to the UKs character. Greater flexibility on how PSB's fulfil their remits allied to Ofcom powers ensuring these objectives are met thus making it easier to make their content available on free to air platforms. This would be enhanced by ensuring greater prominence on on-demand platforms, including regional content produced by S4C and STV. Ofcom would be given new enforcement powers. Licensing for local TV would be reformed and have the same conditions as national digital terrestrial television (DTT) multiplexes.

Independent production revenues increased by nearly 50% between 2010 and 2019, whilst new technologies are allowing new revenue sources, e.g. podcasts. The report identifies that the UK's 'terms of trade regime,' should be maintained but updated to reflect changes in technology and how viewers watch PSB content. This may include extending this regime to aspects of radio and audio producers that produce programming for the BBC.

The report advocates that larger TV-like video-on-demand providers, that are not currently regulated in the UK but who target and profit from UK audiences, should be regulated by Ofcom. Ofcom would draft and enforce a new Video-on-demand Code, similar to the Broadcasting Code thus ensuring continuity of standards, regardless of how programmes were viewed. This would help protect the public from harmful material and give them the possibility of seeking redress from Ofcom, albeit balanced against principles of free speech and proportionality. The reforms would end a loophole whereby unregulated internet-delivered services appear on UK TV, by designating additional regulated electronic programme guides. This will have the effect of bringing internet-delivered services listed on those guides within the scope of Ofcom regulation.

The Report supports the British Film Commission facilitating the growth of seven geographic production hubs including one in each nation and numerous new studio developments all across the UK.

Further, the UK's trade policy should complement and protect the UK's audiovisual public policy framework, including maintaining UK's membership of the Council of Europe's Convention on Transfrontier Television and, consequently, its European Works status.

The new Digital Markets Unit regulator within the Competition and Markets Authority will be supported by legislation to encourage a pro-competition regime in the innovative digital economy, and to work alongside existing regulators, such as Ofcom.

The Report recognises the right to freedom of expression, as well as the importance of ensuring independent and impartial news reporting. Following the

UK's implementation of the Audiovisual Media Services Directive (Directive), UK legislation references the Charter of Fundamental Rights of the European Union, in a way which, according to the Report, “may have a chilling effect on free speech”. The Report proposes that the UK Communication Act 2003 be amended to replace the existing free speech definition from the Directive with “a UK specific measure over the coming months.”

Further, the Report recognises that radio and television services increasingly rely upon online platforms for distribution of their content. In order to ensure TV and radio news published via an online platform are not caught by some of the safeguarding provisions in the Online Safety Bill, news publishers’ content will be exempt from the safety duties contained within it, as well as from the obligation to ensure that relevant platforms provide safeguards for any third party journalistic content that they distribute.

Up Next - The Government’s vision for the broadcasting sector published by the Department for Digital, Culture, Media & Sport, April 2022

https://www.gov.uk/government/publications/up-next-the-governments-vision-for-the-broadcasting-sector/up-next-the-governments-vision-for-the-broadcasting-sector

[GB] The BBC is prevented from identifying alleged MI5 informant accused of abusing former female partners

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On 7 April 2022, the High Court of Justice granted an interim injunction restraining the British Broadcasting Corporation ('BBC') from broadcasting a programme identifying 'X', an alleged MI5 covert human intelligence source ('CHIS').

The BBC programme in question included the allegations that X is a dangerous extremist and misogynist who physically and psychologically abused two former female partners; that X had told one of these women that he worked for MI5 to terrorise and control her; and that MI5 should have known about X's conduct and realised that it was inappropriate to use him as a CHIS.

The Attorney General brought a claim for an injunction to prevent the broadcast of the programme. Her stance was that she can neither confirm nor deny ('NCND') that X was or had been a CHIS. She argued that regardless of the truthfulness of the allegations, the BBC's broadcast would breach confidentiality law, it would create a real and immediate risk to X's safety and private life, and damage the public interest and national security.

Mr Justice Chamberlain said that based on the evidence he had seen, he was convinced that the injunction was necessary. The judge accepted that restraining the programme would represent "a very significant interference" with the right of the BBC to freedom of expression and the correlative right of the public to receive the information the BBC wishes to publish (para. 23), and that the BBC "comfortably" met the requirement of showing that the allegations it sought to broadcast were serious and had a credible evidential foundation (paras. 48-49).

Although an injunction restraining the BBC from identifying X would affect the appeal of the programme to the audience, it would not however prevent the broadcaster from communicating the core elements of the story, including the allegation that X abused his status, and that MI5 was at fault for continuing to use him as an intelligence source (paras. 76-80). The judge concluded that the Attorney General was more likely than not to succeed at trial in establishing that the balance of public and private interests favoured the issue of an injunction prohibiting the BBC from disclosing X's name and image or otherwise identifying him (paras. 81-83).

Mr Justice Chamberlain's decision ultimately relied on 'closed' evidence (more on this below) which established that public disclosure of X's identity would: (a) expose him to "a real and immediate risk" of death or serious injury at the hands of others (paras. 59-65); (b) require putting in place "extensive protective measures" to protect X (paras. 66-68) which (bearing in mind the Attorney General's NCND stance) would "substantially undermine" the protective effect

which disclosure of X's identity would have on women considering a relationship or liaison with X (para. 75).

The High Court decision was issued following hearings held after open court and 'closed' proceedings under the Justice and Security Act 2013, because of reliance on evidence involving national security matters. The BBC's interests in the closed material procedure were represented by security-cleared lawyers, known as Special Advocates. The Attorney General had previously unsuccessfully applied for the injunction hearing to be held wholly or substantially in private, without the press and public being present.

Responding to the judgment, the BBC emphasised in a public statement that it believed this story raised important matters of public interest, i.e., "the issues of coercive control of women, male abuse of power and the failure of state institutions to address these problems". However, the High Court decided that identifying X would present risks to his safety and national security, without the BBC fully knowing the reasons why. "This is due to the highly unusual fact that a significant proportion of the evidence in this case was heard in a closed hearing, which even the BBC as a party was not permitted to attend," the BBC stated.

Their announcement also added: "While we had Special Advocates representing our interests in those closed proceedings, we are not able to know anything about the secret hearing. The reasons the BBC is not able to identify X are largely in the closed judgment, which we cannot inspect. The secret procedures used in cases like this also constrain what the Judge is able to say about his decision in the public judgment. They are a significant departure from the principles of open and natural justice, as the Judge himself states."

The High Court will now consider further submissions on what secondary information precisely would tend to identify X, if disclosed by the BBC, before finalising the terms of the injunction order made. Once these restrictions are clarified, the BBC is expected to report the core elements of the story.

HMAG for E&W v BBC [2022] EWHC 826

https://www.judiciary.uk/wp-content/uploads/2022/04/HMAG-v-BBC-judgment-070422.pdf

BBC Statement on Att General v BBC judgment

https://www.bbc.co.uk/mediacentre/statements/bbc-statement-on-judgement-attorney-general-v-bbc

ITALY

[IT] The burden of proof in press defamation lawsuits: according to the Italian Court of Cassation, journalists shall prove (at least) the trustworthiness of the facts narrated

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Portolano Cavallo

On 26th April 2022, with decision No. 12985, the Italian Court of Cassation re-affirmed a very important principle regarding the burden of proof in press defamation claims for damage compensation.

Specifically, in the case at hand, that was brought against the editor-in-chief of a newspaper, the plaintiff asked for compensation for damages he allegedly suffered because of a defamatory news article published in the newspaper managed by the defendant. The Court of Appeal rejected plaintiff's demands as he did not prove that the facts reported in the news article were untrue. However, the Court of Cassation reversed that judgement, holding that the burden of proof, in this kind of dispute, is governed by Section 2697 of the Italian Civil Code. Under this provision, whoever wants to assert a right in court must prove the facts on which such a right is based. Conversely, whoever objects to the existence of that right, or the effectiveness of the relative facts, must prove the facts on which the objection is based.

In addition, the Court of Cassation held that journalists are not liable for defamation when they lawfully exercise their right to inform, namely by reporting true facts or facts that appeared to be true at the time they were reported. In other words, under Italian law, journalists are not punishable for defamation whenever they publish (i) true news or (ii) news that they believed true, based on the fact-checking activities they carried out before the publication.

In light of the above, the Court of Cassation affirmed that in press defamation claims for damage compensation, plaintiffs have the burden to prove that defamatory news has been published. On the other hand, to effectively object that they lawfully exercised their right to inform, journalists must at least prove the trustworthiness of the facts narrated, i.e., not necessarily their historical truth. Once such proof has been provided, it is the responsibility of plaintiffs to show that the source relied upon by the journalists could not be considered credible at the time the news was released if the journalists had put in place proper fact-checking activities.

Clarified that, the Court of Cassation overruled the decision rendered by the Court of Appeal and referred the matter back to the latter, which will have to ascertain whether the defendant proved that the facts narrated in the news article were true, or at least trustworthy, at the time the article was published, based on the

fact-checking activities he carried out.

Corte di Cassazione, 26 aprile 2022, n. 12985

http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20220426/snciv@s30@a2022@n12985@tO.clean.pdf

Court of Cassation, 26th April 2022, decision No. 12985

LUXEMBOURG

[LU] Luxembourg regulator rules on Nazi symbols in TV advertising

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On 14 March 2022, the *Autorité luxembourgeoise indépendante de l'audiovisuel* (Independent Audiovisual Authority of Luxembourg – ALIA) ruled on a complaint filed on 21 January 2021 against the Serbian version of the SportKlub 1 TV channel and issued a EUR 1 500 fine to the owner of the channel's broadcasting licence. The case concerned the broadcast of an advertising spot for an online sports betting service in which an actor wearing an SS uniform and speaking with a German accent encouraged viewers to bet on the German football Bundesliga. Although the advertisers intended the spot to be humorous, the ALIA ruled that it clearly breached moral standards and therefore contravened the conditions of the broadcaster's licence.

SportKlub1 is a subscription-based sports channel with different versions in Hungary, Romania, Poland, Serbia, Slovenia and Croatia. The Luxembourg government issued a broadcasting licence for the Serbian version to the Luxembourg-based broadcasting group United Media s.à r.l. in December 2020, which is why the case fell under the ALIA's remit. The ALIA became involved when a complaint was lodged – in accordance with Luxembourg law – by the Serbian regulator, which claimed that the spot infringed Serbian advertising law because it used Nazi insignia and linked the German Bundesliga with the Nazis. The advert showed an actor who, in the scene in question, initially wore an SS officer's uniform and cap with Nazi symbols, and then a military helmet similar to an SS steel helmet. In the script, the actor said he "has never played a German before" and then, speaking Serbian with a German accent, encouraged viewers to bet on German Bundesliga matches.

In the ALIA's opinion, United Media s.à r.l., as the licence-holder responsible for the broadcast of the advert, clearly committed a serious breach of its obligation to maintain moral standards, which was set out in its licence conditions. The regulator stressed the fundamental importance of freedom of expression, which was extensively protected, in particular where humorous content, including stylistic devices such as caricature and satire, was concerned. However, in the present context, particular attention should be paid to the fact that, under Luxembourg criminal law, it was forbidden to communicate inflammatory words to the public via the media or publicly display or wear signs or symbols that could disturb the public peace. Inciting the public to discrimination, hate or violence, especially by using such emblems, was also prohibited. According to the ALIA, the aforementioned provisions clearly demonstrated the legislator's intention to clamp down on any use of Nazi symbols, apart from in areas such as research or

education. In the case at hand, their use in commercial communication was likely to bring back extremely painful memories and, even decades after the end of the war, cause anxiety to sections of the population who had been witnesses or victims of the persecution and annihilation of millions of people, as well as other atrocities carried out under the Nazi regime. It would deeply hurt the feelings of these people and the public in general, and could even disturb the public peace. In the ALIA's opinion, de-demonising Nazi ideology by joking about such a serious subject showed a reprehensible lack of sensitivity on the part of the advert's producers. Such a depiction of the darkest moments in human history could, in particular, trivialise the Nazi symbols that had been used or even associate them with a positive image. It also conveyed a deeply offensive image of the German people. In summary, the broadcaster had failed in its duty to respect public intellectual and moral sensitivities and to maintain moral standards, which applied both in Luxembourg and in Serbia, where the channel was broadcast.

Décision de l'ALIA (DEC004/2022-P006/2021)

https://www.alia.lu/assets/upload/files/Decisions/D004-2022_P006-2021_-SK-1_BetOle_ECsite.pdf

ALIA decision (DEC004/2022-P006/2021)

NETHERLANDS

[NL] Judgment on responsibilities of YouTube channel

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On 16 March 2022, the Amsterdam Court (Rechtbank Amsterdam) delivered a notable judgment regarding a copyright infringement and an unlawful allegation in an episode published on a popular YouTube channel. The channel is described as a 'juice channel', where the creators usually discuss the latest gossip and news concerning famous Dutch people. The Court ruled that uploading the video, which contained an unreleased song as well as the discussion surrounding it regarding allegations of sexual misconduct, without the consent of the claimant, was considered unlawful, and the channel had acted unlawfully in the way the news was presented. The creators of the YouTube channel had to delete the episode and post a rectification.

The channel uploaded an episode regarding an unreleased 'diss-track' (a music track in which another artist is targeted, usually in a negative light) by Dutch singer, vlogger, and model Famke Louise. This track was, supposedly, about the (alleged) sexual misconduct by her former manager and fellow musician. The track and the YouTube episode gained attention after the former manager was named in an exposé by YouTube channel 'BOOS' on alleged sexual misconduct on the popular television show '*The Voice of Holland*'. The defendants claimed that in their episode the person(s) referred (in)directly to the claimant, insinuating that the claimant was the victim of the same sexual misconduct. The claimant has objected to these claims.

The Court first assessed the copyright infringement, first stating that even an unreleased track falls under the copyright protection of Article 12(1) Copyright Act. The defendants claimed that the communication to the public had been done prior to the episode by the claimant, arguing that even disclosure to a small group still constitutes a communication to the public. The Court held that the fact that the claimant posted a fragment of the track on her Instagram 'story' does not legitimise the communication to the public by defendants. The Court noted that the story disappears after 24 hours and that the fragment posted did not point to her former manager. The Court held that the copyright of the claimant has been infringed by the defendants.

The defendants also argued that, even if there is a copyright infringement, their right to freedom of expression should prevail over the claimant's right to privacy. Freedom of expression is protected under Article 10 of the European Convention on Human Rights (ECHR), while the right to privacy is protection under Article 8 ECHR; and both are not unlimited rights. There needs to be a balancing test between the two in case of conflict.

The existing case law of the European Court of Human Rights holds that expressions that fall under the scope of freedom of expression and that may be viewed as contributing to the public debate, enjoy a broader scope of protection. Freedom of expression also contains journalistic freedoms. It entails the underlying idea that journalists function as public watch dogs and that they offer a contribution to the public debate by reporting on (newsworthy) events. The Court acknowledged the defendants' rights to freedom of expression, but upheld that statements cannot be made without backing the story up. Factors that may be relevant are if the reporting is contributing to a debate of public interest and if there is a situation of wrongdoing. The statement, however, needs to find footing in the facts and the way it is portrayed, as well as the content, form and consequences of the publication needing to be assessed.

The Court ruled that the copyright of the claimant was infringed and by framing the statements as facts and without backing this up with evidence, the creators had no claim to the broad scope of freedom of expression offered to reporters. This case illustrates that under certain circumstances YouTube channels may also enjoy the broad scope of protection offered under Article 10 ECHR, however the same standards apply as to any news outlet reporting on events. The Court concluded that the defendants have to refrain from the repeating the allegation(s), and to post the ordered rectification for 48 hours on social media.

Rechtbank Amsterdam, 16 maart 2022, ECLI:NL:RBAMS:2022:1239

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2022:1239

Amsterdam District Court, 16 March 2022, ECLI:NL:RBAMS:2022:1239

[NL] Social media influencer entitled to protection of journalistic sources

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On 29 April 2022, the District Court of Amsterdam (*Rechtbank Amsterdam*) delivered an important judgment on whether a social media influencer is entitled to invoke the right to protection of journalistic sources. Notably, the Court held that the activities of a Dutch social media influencer, with over 400 000 followers on Instagram and YouTube, fell within the concept of "journalism", and the influencer was entitled not to reveal her sources in legal proceedings over an online video.

The case centred on the well-known Dutch influencer Yvonne Coldeweijer (the defendant), who operates an Instagram and YouTube channel, and presents gossip and news about famous Dutch figures, based on tips from anonymous sources. In March 2022, the defendant uploaded a post and video making a number of claims about a well-known Dutch singer (Samantha Steenwijk, the plaintiff), including that she had "lost 22 kilos in a short time with the help of illegal slimming pills, which are dangerous to health". Following the posts, the plaintiff initiated legal proceedings against the defendant, claiming the allegations were incorrect, offensive, misleading, and constituted a serious violation of her reputation and privacy. Notably, the plaintiff sought a court-ordered rectification, and a court order for the defendant to reveal the sources of the story. Before the Court, the defendant argued that the statements were protected under the right to freedom of expression, and the plaintiff, as a well-known figure, must accept "gossip" will be published about her. Further, the defendant argued she had two sources for the story, had conducted her own research, and invoked the right to protect her sources.

The Court first dealt with the application for the defendant to be ordered to reveal her sources. The Court stated this would be a restriction on news-gathering, while protection of journalistic sources was essential for press freedom. Crucially, relying on the EU Court of Justice judgment in *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, the Court held the activities of the defendant fall within the concept of journalism, as they were aimed at communicating information, opinions and ideas to the public. As such, the defendant had rightly invoked the right to protection of journalistic sources. Further, relying on the European Court of Human Rights judgment in *Goodwin v. United Kingdom*, the Court held there was no overriding requirement in the public interest to force the defendant to reveal her sources, and therefore, the Court rejected the application for an order to reveal the sources.

The Court then dealt with the claim for rectification. First, the Court noted that the dispute involved a balance between the defendant's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), and the plaintiff's right to private life under Article 8 ECHR. Second, the Court held

that the defendant had made “serious allegations” against the plaintiff, including the use of illegal and dangerous slimming pills. While the defendant was not required to provide “conclusive evidence” before publication, there must be a sufficient basis for such serious allegations. In this regard, the Court stated that the defendant only had two anonymous sources for the allegations, “whom she did not know”, and had claimed “they knew someone who had sold the pills” to the plaintiff. Further, the Court rejected the defendant’s claim that the statements were presented as merely “gossip”, holding that the claims were presented as fact. Taking all the factors into account, the Court held the defendant could not substantiate her allegations and were therefore unlawful. Finally, the Court ordered the defendant to post a rectification on the unlawful nature of the allegations against the plaintiff, to be displayed on the defendant’s Instagram account for 24 hours.

Rechtbank Amsterdam, ECLI:NL:RBAMS:2022:2347, 29 april 2022

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2022:2347

Amsterdam District Court, ECLI:NL:RBAMS:2022:2347, 29 April 2022

NORWAY

[NO] Norwegian operators instructed to block betting advertisements on Discovery channels targeting Norway

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In two decisions of 30 March 2022, the Norwegian Media Authority (NMA) instructed Norwegian operators of networks transmitting television in the Norwegian market, to block or hinder access to advertisements for certain betting websites from two Maltese betting companies, BLM Group Ltd and Trannel International Ltd. The order to block betting advertisements included the German Discovery channels FEM, MAX and VOX, and Eurosport Norge which is offered by the French company Eurosport S.A.S. The operators included in the decisions are the five largest operators of networks providing linear television in Norway. This includes operators of television through satellite, cable/fibre and the digital terrestrial network. OTT services and audiovisual on-demand services are not covered by the decisions.

The Norwegian gambling system is based on a statutory system of exclusive rights. Only the state-owned companies Norsk Tipping and Norsk Rikstoto, and a few other minor companies, may offer gambling services in Norway. The offering or marketing of gambling services from other Norwegian or foreign companies is strictly forbidden. The gambling monopoly aims to prevent adverse impact arising from gambling.

The legal basis for the NMA decisions is a new provision in the Broadcasting Act, which was amended from 1 January 2021. The Broadcasting Act section 4-7 states that the NMA may issue an order to prevent or hamper access to marketing in television or audiovisual on-demand services when it contravenes Section 2 of the Gaming Scheme Act, Section 11 of the Lottery Act or regulations warranted by the Totalizator Act.

Before the orders were issued, the NMA assessed whether the considerations that spoke in favour of the order were weightier than the disadvantages the order would entail. An order must not be issued when the NMA finds that it would be a disproportionate measure. The decisions from the NMA are based on the conclusion that marketing of cross-border gambling services, in breach of the Norwegian gambling legislation, causes special harm to the objective of the Norwegian gambling policy. This policy entails channelling demand for gambling services to a supervised domestic range of gambling services within the scope of high consumer protection.

When adopting the new provision in the Broadcasting Act, the Norwegian Parliament considered whether a decision instructing Norweigian operators to block betting advertisements on TV channels targeting Norway, would be in violation of the freedom of reception in Article 3 of Directive 2010/13/EU, the Audiovisual Media Service Directive (AVMS Directive).

In November 2018, the amendment of the AVMS Directive (Directive 2018/1808/EU) was approved and the possibility of interfering with the marketing of gambling through national legislation was clarified in recital 10. In the White Paper with the proposed amendment to the Broadcasting Act, the Parliament considered that it had been made clear in recital 10 of the revised AVMS Directive that gambling advertising was not intended to be harmonised by the Directive. Thus, the Directive did not affect the Member State's authority to decide upon a national approach to gambling advertising, provided that such measures were justified, proportionate in comparison to their intended objective, and necessary. On this basis, the NMA found that gambling was not a field coordinated with the AVMSD, and therefore, its decisions did not violate the freedom of reception in the Directive Article 2. The decisions do not order the operator to block the tv-channels as such, only the unlawful betting advertisements. Furthermore, the procedures laid down in Article 4 of the Directive do not apply to gambling activities.

The operators have until 15 August 2022 to fulfill the obligations set out in the decisions. The NMA may issue compulsory fines if the terms of the decisions are not met. Two of the operators have appealed the decisions to theindependent Media Appeals Board. The parties to the decisions may also take legal action against the decisions before the courts. Prior to the decisions, Discovery had taken legal action regarding the legal basis in the Broadcasting Act, arguing that the provision itself was in violation of the AVMS Directive and general EU/EEA law. The Norwegian Supreme Court dismissed the appeal on the basis that Discovery did not have a justified claim. The Court found that Discovery had to await a decision from the NMA before taking legal action.

Pressemelding om Medietilsynets vedtak med pålegg om å hindre tilgang til pengespillreklame for norske tv-distributører

https://www.medietilsynet.no/nyheter/aktuelt/medietilsynet-palegger-tv-distributorene-a-stoppe-pengespillreklame-fra-discovery/

Press release on the Norwegian Media Authority's decisions to block gambling advertisements

Lov om kringkasting og audiovisuelle bestillingstjenester av 4. desember 1992 nr. 127

https://lovdata.no/dokument/NL/lov/1992-12-04-127?q=kringkastingsloven

Act relating to broadcasting and audiovisual on-demand services

https://www.medietilsynet.no/globalassets/engelsk-dokumenter-og-rapporter/2021-unofficial-translation-act-relating-to-broadcasting-and-audiovisual-on-demand-services.pdf

Lov om pengespill mv. av 28. august 1992 nr. 103 (pengespilloven)

https://lovdata.no/dokument/NL/lov/1992-08-28-103?q=pengespill

Gaming Scheme Act

Lov om lotterier mv. av 24. februar 1995 (lotteriloven)

https://lovdata.no/dokument/NL/lov/1995-02-24-11?q=lotteriloven

Lottery Act

Lov om veddemål ved totalisator av 1. juli 1927 nr. 3 (totalisatorloven)

https://lovdata.no/dokument/NL/lov/1927-07-01-3?q=totalisatorloven

Totalizator Act

Norges Høyesteretts ankeutvalg - Kjennelse

https://lovdata.no/dokument/HRSIV/avgjorelse/hr-2022-486-u?q=HR-2022-486-U

Supreme Court decision (HR-2022-486-U)

PORTUGAL

[PT] Video-sharing platforms are not subject to state media regulation

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On 6 April 2022, the *Entidade Reguladora para a Comunicação Social* (Portuguese Regulatory Authority for the Media — ERC), issued a decision stating that although on-demand audiovisual operators and services, and video-sharing platforms were both subject to registration with the ERC, only the first were subject to its general regulation and intervention, and to the Transparency Law, as a result of their editorial responsibility.

When the Audiovisual Media Services Directive (Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU) was transposed into the Portuguese context, it amended the Law on Television and Audiovisual Services on Demand (Law no. 27/2007, of 30 July). In particular, it altered Article 19 of the Law on Television to extend the scope of operators and providers subject to registration with the ERC, thus including audiovisual services on-demand and video-sharing platforms. The necessity of harmonising registration regulations within the ERC led the Portuguese legislator to issue rules for this registration (in Regulatory Decree no. 7/2021, of 6 December) and subsequently raised the need for the ERC to issue a public decision on the matter.

As stated in Article 1, no. 2, of the Regulatory Decree no. 7/2021, this registration process aims to "prove the legal status of the media, to publicise their ownership, organisation, functioning and obligations, as well as to ensure the legal protection of press titles, the names of radio broadcasters and radio programme services, of television broadcasters and television programme services, of radio and television programme services broadcast exclusively over the Internet, of on-demand audiovisual services' operators and services, and providers of video-sharing platforms' videos and video-sharing platforms". Hence, compulsory registration with the ERC is applicable to all mentioned in that Article.

Nonetheless, given that video-sharing platform services do not have editorial responsibility, and this is a criterion for the applicability of the regulatory general framework of the ERC (the ERC's Statutes) and of the Transparency Law, they are excluded from their scope in this regard. The public decision issued by the ERC aimed to clarify that video-sharing platform services, due to the lack of editorial responsibility, do not fulfill an essential criterion to be identified in the scope of application of the ERC Statutes and, consequently, of the Transparency Law.

Lei n.º 78/2015, de 29 de Julho - Transparência da titularidade, da gestão e dos meios de financiamento - comunicação social

https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=selected&nid=2455&tabela=leis&pagina=1&ficha=1&nversao=

Law no. 78/2015, of 29 July - Transparency of media ownership, management and funding

Lei n.º 27/2007, de 30 de Julho - Lei da Televisão e dos Serviços Audiovisuais a Pedido

https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=923&tabela=leis&so_miolo

Law no. 27/2007, of 30 July - Law on Television and Audiovisual Services on Demand

Decreto Regulamentar n.º 7/2021, de 6 de dezembro - Regula o registo dos órgãos de comunicação social, operadores e fornecedores nacionais ou sujeitos à jurisdição do Estado Português

https://dre.pt/dre/detalhe/decreto-regulamentar/7-2021-175397117

Regulatory Decree No. 7/2021, of 6 December - Regulates the registration of national media, operators and suppliers or those subject to the jurisdiction of the Portuguese State

Estatutos da Entidade Reguladora para a Comunicação Social (ERC)

https://www.erc.pt/print/?info=YTozOntzOjEzOiJ0aXBvX2NvbnRldWRvIjtzOjM6ImNhbSI7czo0OiJsYW5nIjtzOjI6InB0IjtzOjExOiJpZF9jb250ZXVkbyI7czoyOiIxNCI7fQ==

Statutes of the state media regulatory body

A publication
of the European Audiovisual Observatory

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