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# EDITORIAL

On 16 September 2022, the European Commission presented the highly awaited proposal for a European Media Freedom Act (EMFA). The EMFA proposal lays down a common framework in the internal market to protect media pluralism and editorial independence and ensure a common level of safety for the media industry. This is a topic that the Observatory will be surely following in the coming months.

As highlighted by EU Commissioner Breton when announcing the EMFA proposal on Twitter, "information is not like any other good". At the same time, it should be borne in mind that the fundamental freedom of expression and information is not an absolute but rather a so-called qualified right, that is, a right that permits interference subject to various conditions. Said otherwise, while freedom of expression may be restricted, there must be good reasons for it. The restrictive measures on Russia Today and Sputnik are a good example of this, with the EU General Court confirming their validity recently. And yet, as reported in the present newsletter, a Dutch coalition of ISPs and media organisations has applied to the Court of Justice of the European Union (CJEU) seeking annulment of the same restrictive measures. Given the importance of the issue at hand, it would not be surprising if one or the other of these cases reach the doors of the European Court of Human Rights (ECtHR) in Strasbourg. While waiting to see if this materialises, two recent ECtHR judgments reported in the present newsletter prove how important and difficult its work is: one walks the line between permissible political satire and unlawful sexist hate speech, while the other one confirms, and further elaborates, the guarantees for the protection of journalistic sources.

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

Have a nice read!

Maja Cappello, editor
European Audiovisual Observatory

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# INTERNATIONAL

## COUNCIL OF EUROPE

## PORTUGAL

# European Court of Human Rights: Patrício Monteiro Telo de Abreu v. Portugal

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

A recent judgment of the European Court of Human Rights (ECtHR) walks the line between permissible political satire and unlawful sexist hate speech. The ECtHR found that the criminal conviction of a blogger for a series of cartoons that echoed sexist stereotypes amounted to a violation of the blogger's right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). The ECtHR concluded unanimously that the cartoons in essence referred to an ongoing political debate, criticizing the municipal leadership. In spite of the sexual stereotyping of one female member of the municipal board, the ECtHR found that the caricatures had remained within the limits of exaggeration and provocation that were typical of satire. It also found that the criminal sanction in the present case could have a chilling effect on satirical forms of expression concerning political issues.

The applicant in this case is Tiago Patrício Monteiro Telo de Abreu, an elected municipal councilor and a blogger. In 2008 he published three cartoons on his blog depicting a white-haired donkey dressed in a suit, next to a sow with bare breasts and blond hair wearing lace stockings, a garter belt and high heels, surrounded by pigs. The cartoons were made by a local artist and were earlier published in a local newspaper, caricaturising the members of the local municipal board. Ms E.G., one of the municipal councilors prominently figuring in the cartoons, lodged a criminal complaint against the blogger, the artist and the editor of the local newspaper alleging damage to her honour and reputation on account of the way in which she had been portrayed in the cartoons. The domestic courts convicted the blogger for defamation, as they found it established that the sow depicted in the cartoons represented Ms E.G. and that the white-haired donkey represented the local mayor, while the cartoons suggested that there was an intimate relationship between them. The courts found that by depicting the sow with lace stockings, a garter belt and high heels, the artist had sought to evoke images of a prostitute and a debauched, sexually voracious woman, thereby causing Ms E.G. anguish and anxiety, with an impact on her personal and private relations. The blogger was convicted to pay a fine, court fees and an award of damages to Ms. E.G., all together for a total amount of about EUR 5 600. Relying on Article 10 ECHR the blogger lodged an application

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with the ECtHR, alleging a breach of his right to freedom of (political) expression.

The ECtHR deemed it necessary to examine whether the national authorities had struck a fair balance between the blogger's right to freedom of expression and Ms E.G.'s right to private life, both of which deserve equal respect, and whether the reasons given for the blogger's conviction were relevant and sufficient. The ECtHR reiterated that satire is a form of artistic expression and social commentary which, through its characteristic exaggeration and distortion of reality, naturally aims to provoke and agitate (see also Tuşalp v.Turkey, IRIS 2012-4/1 and Dickinson v. Turkey, IRIS 2021-3/16). It also emphasised that political speech can count on a high level of protection by Article 10 ECHR and that politicians must accept wider limits of criticism. As the political satire at issue caricaturising local politicians contributed to a public debate, the interference with the right to freedom of expression was to be examined with particular care. The domestic courts had indeed acknowledged that the blogger was also a political opponent of Ms E.G. and that the cartoons in question had constituted political satire, but, according to the ECtHR, they had omitted to take into consideration the full context of the cartoons in question. The ECtHR referred to the fact that the cartoons had earlier been part of a series of previously published cartoons by an artist which satirised the local political life of the municipality. It held that the cartoonist had not sought to insinuate an intimate relationship between Ms E.G. and the mayor of the municipality by representing them side by side, since none of the cartoons had shown the characters kissing, touching or communicating with each other. Also the blogger's accompanying comments showed that the intention in republishing the cartoons was to highlight the political satire expressed through caricature and, indirectly, to criticise the municipal leadership, in his capacity as a political opponent and a member of the municipal assembly. Furthermore the comments had not made any specific reference to Ms E.G., her political activities or her private life, still less her sexual life, nor had they contained any insulting or degrading remarks about her. Although the cartoons echoed certain regrettable stereotypes relating to women in power, the domestic courts had excessively focused on the interference with Ms E.G.'s right to reputation, not taking sufficient account of the ongoing political debate. The ECtHR also held that the domestic courts had not given sufficient weight to the fact that all elected representatives were necessarily exposed to this type of satire and caricature and should therefore display a greater degree of tolerance in that regard. Moreover, Ms E.G. was not the only figure to have been depicted undressed, as all the pigs were portrayed in the same way and the mayor of the municipality was depicted as a donkey, a clearly pejorative image. In spite of the stereotypes used, the ECtHR found that the caricatures had remained within the limits of exaggeration and provocation that were typical of satire. According to the ECtHR the domestic courts had not taken into consideration the characteristics of political satire emerging from the Court's case-law or made any reference to the Court's case-law on freedom of expression. They had neither analysed the reach or potential impact of the cartoons, nor taken into consideration that when Ms E.G. had lodged a criminal complaint against the blogger, he had immediately removed the cartoons from his blog, suggesting that he had acted in good faith. Referring to the nature and degree of severity of the

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penalties imposed on the blogger, the ECtHR considered that the fine and the payment of damages was manifestly disproportionate, especially as Portuguese law provided for a specific remedy for the protection of a person's honour and reputation. The ECtHR concluded that the blogger's conviction had not struck a fair balance between the protection of his right to freedom of expression and Ms E.G.'s right to the protection of her reputation. Ultimately imposing criminal sanctions for conduct such as that of the blogger in the present case was liable to have a chilling effect on satirical forms of expression concerning political issues. Hence, the conviction had not been necessary in a democratic society and therefore there had been a violation of Article 10 ECHR.

Two concurring opinions expressed by three judges focused on the sexist stereotyping of the cartoons, stating that gender stereotyping usually paves the way for contempt, discrimination and violence against women, also within a political setting. The concurring judges held that the domestics courts were correct in noting the visible and denigrating gender stereotypes expressed in the cartoons at issue, and they confirmed it was relevant to include this aspect in their findings.

***Arrêt de la Cour européenne des droits de l'homme, quatrième section, rendu le 7 juin 2022 dans l'affaire Patrício Monteiro Telo de Abreu c. Portugal, requête n° 42713/15***

https://hudoc.echr.coe.int/eng?i=001-217556

*Judgment by the European Court of Human Rights, Fourth Section, in the case of Patrício Monteiro Telo de Abreu v. Portugal, Application no. 42713/15, 7 June 2022*

https://hudoc.echr.coe.int/eng?i=001-217556

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## RUSSIAN FEDERATION

# European Court of Human Rights: Sergey Sorokin v. Russia

*Dirk Voorhoof*
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The European Court of Human Rights (ECtHR) delivered a judgment on 30 August 2022 confirming, and further elaborating, the guarantees for the protection of journalistic sources under Article 10 of the European Convention on Human Rights (ECHR). The ECtHR concluded, unanimously, that the search of a journalist's flat and the seizure of his electronic devices containing his professional information amounted to a violation of Article 10 ECHR. The ECtHR emphasised the lack of assessment of the necessity and proportionality of the investigating authorities' actions. It found in particular problematic that all of the journalist's electronic devices had been seized, and that his professional information was accessed immediately, in the absence of any sifting procedure or other method which could protect the confidentiality of the journalist's sources.

The applicant in this case was Sergey Sorokin, an activist and journalist in the Republic of Komi who used to publish regional news articles on the Internet site www.zyryane.ru. In 2008 he had reported on a scandal involving the head of the Economic Crimes Department of the regional Ministry of the Interior, Lieutenant-Colonel T. ("Lt.-Col. T."), who had been arrested on suspicion of abuse of power. Lt.-Col. T. was accused of having unofficially obtained data on the telephone communications of a number of people, including of a politician. The matter had also received some national press coverage. Mr. Sorokin had published on his site an interview with a deputy head of the regional Ministry of the Interior, Mr L. According to the text of the interview, Mr L. had mentioned that Lt.-Col. T. had suspected leaks of operational information and had allegedly attempted to collect telephone communications data to find out who was responsible for those leaks. A few weeks later a criminal case was opened against Mr L. for disclosing information about operational activities which, by law, was considered a State secret. Mr. Sorokin was questioned as a witness, but refused to answer any questions to avoid self-incrimination. He was also asked to remove the interview with Mr L. from his Internet site, but had refused to comply. More than half a year later a court order, on request of an investigator of the Federal Security Service (FSB), had authorised the search of Mr. Sorokin's flat and the seizure of devices containing information relating to the interview of Mr L. The police seized the system unit of Sorokin's computer, four hard drives and an audio cassette. Sorokin's appeal against the search warrant was dismissed.

A short time later Mr. Sorokin lodged an application with the ECtHR, complaining that the search of his flat and the seizure of his electronic devices containing all of his professional information amounted to a breach of Article 10 ECHR. After

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reiterating the general principles of the Court's case law with regard the robust protection of journalistic sources (such as in Sanoma Uitgevers B.V. v. the Netherlands, IRIS 2010-10/2 and Big Brother Watch and others v. the United Kingdom, IRIS 2021-7/20), the ECtHR accepted that the search and seizure measures pursued the legitimate aim of preventing crime and had a general legal basis in domestic law. Indeed according to the Russian Code of Criminal Procedure a search may be carried out if there are sufficient grounds for believing that instruments of a crime, objects, documents or valuables of relevance to a criminal case could be found in a specific place or on a specific person (Article 182 § 1). However, the criminal procedure law did not expressly provide for any protection of confidential journalistic sources in the context of searches and seizures. Therefore the ECtHR was not convinced that the domestic legal framework at the relevant time ensured a requisite legal protection of journalistic sources from arbitrary interferences. Nevertheless, the Court left the issue open whether or not the interference with Mr Sorokin's sources was prescribed by law, because it found that the interference complained of was in any event not "necessary in a democratic society". The ECtHR was of the opinion that the court order at issue had not contained any balancing exercise, that is, an examination of the question whether the interests of an investigation to secure evidence were sufficient to override the general public interest in the protection of journalistic sources. The domestic courts had limited their review to the examination of the formal lawfulness of the search instead of assessing the necessity and proportionality of the investigating authorities' actions. Furthermore, while authorising the search and seizure measures, the domestic courts had not instructed the investigative authorities to use any sifting procedure or otherwise ensure that the unrelated personal and professional information of Mr. Sorokin was not accessed by the authorities. The investigator seized all of the journalist's electronic devices – his computer and four hard drives – which must have contained information unrelated to the criminal case. The ECtHR also noted that the entirety of that information was accessed immediately by the investigative authorities in the absence of any sifting procedure or other methods which could protect the confidentiality of the journalist's sources and of other information unrelated to the criminal case against Mr L. The ECtHR therefore concluded that the search was carried out in the absence of procedural safeguards against interference with the confidentiality of Sorokin's journalistic sources and was therefore not "necessary in a democratic society" to achieve the legitimate aim pursued. There had therefore been a violation of Article 10 ECHR.

In a concurring opinion two judges agreed with the finding of a violation of Article 10 ECHR, not only because of a lack of procedural safeguards, but on substantive grounds. According to the concurring opinion the reasons put forward by the Government and the domestic authorities to justify the search and seizure did not bear any relation to a serious crime, as the criminal investigation against L. related to a breach of confidentiality without serious consequences for public order. Therefore the interference with Sorokin's professional material could not be justified as responding to an overriding requirement in the public interest, which is the crucial condition for justifying any interference with a journalist's sources (see also Goodwin v. the United Kingdom, IRIS 1996-4/4).

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***Judgment by the European Court of Human Rights, Third Section, in the case of Sergey Sorokin v. Russia, Application no. 52808/09, 30 August 2022***

https://hudoc.echr.coe.int/eng?i=001-218918

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# EUROPEAN UNION

## European Commission: Proposal for a European Media Freedom Act (EMFA)

*Justine Radel-Cormann*
*European Audiovisual Observatory*

As announced in September 2021 by the President of the European Commission Ursula von der Leyen in her State of the Union Speech: “Media companies cannot be treated as just another business. Their independence is essential. Europe needs a law that safeguards this independence - and the Commission will deliver a Media Freedom Act in the next year”. A proposal for a Regulation establishing a common framework for media services in the internal market (Media Freedom Act — EMFA) was released by the European Commission on 16 September 2022.

The EMFA proposal lays down a common framework for the internal market to protect media pluralism and editorial independence, and ensure a common level of safety for the media industry.

The main objectives were presented at a press conference, during which EU Commissioner Jourova pointed out that the proposal is a regulation addressing threats the industry has recently experienced (i.e., journalists being tracked, spied on or put under pressure, and sometimes even being attacked or murdered while doing their job on European soil). Protecting media freedom is of utmost interest, as highlighted by EU Commissioner Breton: “*information is not like any other good*”.

The EMFA proposal, in its current wording, aims to:

- Guarantee the independence of editorial offices by i) requiring additional transparency as to the ownership of media service providers, ii) ensuring the transparent appointment of the governing boards and its head as well as ensuring a stable source of funding for public service mediums, and iii) establishing new transparency requirements for the allocation of state advertising,

- Safeguard media pluralism, ensuring that there is no large concentration in the sector,

- Ensure media diversity online: media service providers will have the possibility to discuss with very large online platforms in the case of media content removal,

- Protect the media industry as a whole, setting up safeguards against spyware uses.

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Furthermore, the current European Regulators Group for Audiovisual Media Services (ERGA) will be replaced and will become the Board for Media Services. As with the ERGA, the Board will be composed of representatives of national regulatory bodies. It will be tasked with new missions, such as supporting and advising the European Commission, giving opinions on media market concentration and ensuring a better system for cooperation among the national regulators in acting against threats and propaganda.

Together with the EMFA proposal, the European Commission adopted a recommendation - a soft law tool - encouraging internal safeguards for editorial independence. It is a self-regulatory tool for the media sector, suggesting models towards which media groups can move in order to ensure more transparency and independence in the sector.

The European Commission's proposal will be discussed by the European Parliament and the Member States under the ordinary legislative procedure. At the European Parliament, the procedure is registered under the number 2022/0277(COD). At the Council of the European Union, the Audiovisual and Media (AUDIO) Working Party has started to discuss the text.

### *European Media Freedom Act: Proposal for a Regulation and Recommendation*

https://digital-strategy.ec.europa.eu/en/library/european-media-freedom-act-proposal-regulation-and-recommendation

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## NETHERLANDS

# Dutch coalition of ISPs and media organisations initiate proceedings against EU Council over RT broadcasting ban

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On 18 July 2022, the application by a Dutch coalition of ISPs and media organisations to the Court of Justice of the European Union (CJEU) seeking annulment of the Council of the European Union's recent bans on Russia Today and Sputnik (see IRIS 2022-3/6), was published in the *Official Journal of the European Union*. The applicants in the case are three Dutch ISPs - A2B Connect, BIT, and Freedom Internet – and they are supported by the Freedom of Information Coalition, which includes the *Nederlandse Vereniging van Journalisten* (Dutch Association of Journalists) and the *Persvrijheidsfonds* (Dutch Press Freedom Fund).

The applicants seek annulment of Council Regulation (EU) 2022/350 of 1 March 2022; and Council Decision (CFSP) 2022/351 of 1 March 2022. This Regulation and Decision banned the broadcasting of Russian state-owned broadcasters Russia Today and Sputnik in the EU, prohibiting "operators to broadcast or to enable, facilitate or otherwise contribute to broadcast, any content by [Russia Today and Sputnik], including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed."

The applicants rely on three main arguments. First, the application argues that Article 29 of the Treaty on European Union (TEU) and Article 215 of the Treaty on the Functioning of the European Union (on common foreign and security policy) do not provide a lawful basis for the contested Decision and Regulation, and that the Council acted outside its competence, as enshrined in the Treaties. Second, the Regulation and Decision violate the right to freedom of expression under Article 11 of the Charter of Fundamental Rights of the European Union (Charter). And third, the Regulation and Decision violate the right to good administration under Article 41 Charter, and constitute an infringement of rules of law relating to the application of the Treaties, more specifically the general principles of good administration.

Finally, on 7 September 2022, the Freedom of Information Coalition announced that it had filed a second complaint with the CJEU, following the Council's new Decision and Regulation in June 2022, which added three further media outlets to the list of Russian media outlets prohibited in the EU (see IRIS 2022-7/7).

***Case T-307/22, A2B Connect and Others v Council, 18 July 2022***

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https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:62022TN0307

***Nederlandse Vereniging van Journalisten, Tweede klacht over blokkade Russische nieuwzenders bij Europees Hof, 7 september 2022***

https://www.nvj.nl/nieuws/tweede-klacht-over-blokkade-russische-nieuwzenders-europees-hof

*Dutch Association of Journalists, Second complaint about blocking Russian news channels at European Court, 7 September 2022*

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# NATIONAL

## BELGIUM

### [BE] Belgian news site Apache acquitted of stalking and breach of privacy in SLAPP-case Antwerp Court of Appeal condemns applicant civil party for abuse of process

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

A judgment of the Antwerp Court of Appeal of 9 June 2022 offers strong support for investigative journalism on issues of public interest, while at the same time acknowledging the detrimental impact of SLAPPs (Strategic Litigation Against Public Participation).

The case concerned a complaint by project developer Erik Van der Paal against a journalist of the news site Apache and its chief editor. The chief editor, Karl van den Broeck, and Apache journalist Stef Arends were accused of having stalked Erik Van der Paal of the NV Land Invest Group (Section 422bis Criminal Code) and of violating the Personal Data Processing Act (Privacy Act). Mr. Van der Paal also alleged a violation of his right to his own image (portrait right) and an infringement of the presumption of innocence. Mr. Van der Paal had started the criminal proceedings because Stef Arends had used a hidden camera to make images of him welcoming a number of guests to his birthday party at 't Fornuis, a well-known top restaurant in Antwerp. The images were made secretly from the public road and were published on the Apache website as an illustration of the close and friendly relationship between the building promoter and members of the Antwerp city council. After Apache's acquittal in January 2021, Mr. Van der Paal lodged an appeal. The Court of Appeal confirmed the acquittal of the Apache journalists and validated the counter claim of Apache arguing that the lodging of an appeal in the case had been an abuse of process. The court found that Mr. Van der Paal had not acted as a prudent and careful person, but had essentially had the intention of (financially) exhausting Apache and stopping the critical reporting by Apache about him.

The Court held that the (surreptitious) making of the images and their processing and integration in the reporting on Apache had been part of responsible journalistic reporting on a topic of social importance, namely the critical reporting on a series of real estate projects linked to Land Invest Group NV and its relations with the Antwerp city authorities. The judgment clarified that the peace and quiet of Mr. Van der Paal had not been seriously disturbed (no stalking) and that there was no unfair or unlawful processing of his personal data by Mr. Arends or Apache (no infringement of the Privacy Act). The violation of his portrait right and

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infringement of the presumption of innocence brought forward by Mr. Van der Paal was also rejected by the Court of Appeal. The judgment emphasised that the making and publication of the video at issue was part of Apache's journalistic activities and was justified within the limits and possibilities that the freedom of the press offers in the interest of a democratic society.

In reply to Mr. Van der Paal's appeal, the lawyers of Apache lodged an incidental appeal, as a legal remedy in a criminal case that can be used by an accused. The Apache chief editor and the journalist each demanded EUR 5,000 in damages for the abusive and reckless lodging of the appeal by Van der Paal, and they requested an increased share of court fees as (partial) compensation for the lawyers' and procedural costs. The Apache journalists argued that the lodging of the appeal was a SLAPP: after the tribunal's judgment of 20 January 2021 acquitting Apache, it was sufficiently clear that the complaint lodged by Mr. Van der Paal as a civil party against Apache's chief editor and journalist did not stand a chance and that Mr. Van der Paal was therefore abusing the appeal proceedings.

The judgment elaborated on the principles in play and ordered Mr. Van der Paal to pay damages of EUR 10,000 euros as requested by Apache, considering that a civil party's appeal against an acquittal may be of a vexatious and reckless nature if that party intends to cause prejudice to the referred party or if it exercises or continues to exercise its right to exercise this remedy without reasonable or sufficient interest or in a manner which manifestly exceeds the limits of the normal exercise of it by a prudent and careful person. The Court held that lodging an appeal in the present case had not been aimed at a final settlement of a limited (legal) dispute between the parties, as may be expected from a cautious and careful person, but rather that instituting the legal remedy had to be seen as yet another procedure against Apache and its chief editor Karl Van den Broeck, with the intention of (financially) exhausting both the news site and its chief editor to such an extent that further reporting that Erik Van der Paal considered unpleasant would be stopped.

The Court recognised that, as a result of the introduction of the appeal in the outlined circumstances, the Apache journalists had suffered material damage because of the hindrance of their professional activities, as well as moral damage because they remained uncertain about the final decision and because their professional functioning, including their good name, had been wrongfully attacked. The chief editor of Apache and the journalist were also awarded an increased compensation for legal costs of EUR 6 000 euros, with reference to Mr. Van der Paal's abusive conduct in the appeal proceedings in the case. Mr. Van der Paal has lodged an appeal against the judgment with the Supreme Court (Court of Cassation).

### *Arrest geeft flinke steun in de rug van de onderzoeksjournalistiek door Apache*

https://www.apache.be/2022/06/10/apache-opnieuw-vrijgesproken-fornuis-zaak

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*Judgment of 9 June 2022, Antwerp Court of Appeal, Chamber 7C correctional cases, no. C/820/2022, concerning Erik Van der Paal v. Karl Van den Broeck and Stef Arends*

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## GERMANY

# [DE] Berlin-Brandenburg court rules on obligation to explain broadcast time restrictions

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*Institute of European Media Law*

In a decision of 8 August 2022 (case no. OVG 11 N 64.18), the Berlin-Brandenburg *Oberverwaltungsgericht* (Higher Administrative Court – OVG) ruled that reasons must be provided for a decision restricting the time a programme could be broadcast on account of youth protection infringements. The dispute followed an objection by the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg media authority – mabb) against the television broadcaster ProSieben. ProSieben appealed to the courts against the objection and won. In the latest decision, the *OVG Berlin-Brandenburg* upheld the first-instance ruling issued in ProSieben's favour by the *VG Berlin* (Berlin Administrative Court – VG 27 K 7.15).

The case concerned an objection lodged by the mabb against ProSieben concerning the film review programme *"Steven liebt Kino"*, which had been broadcast in the morning between 2011 and 2015. In one episode, in which the new *"Lego Movie"* had been the main focus, other new releases had also been introduced. In particular, excerpts from the films *"Devil's Due"* and *"Sabotage"* had been shown. These had contained images of horror unsuitable for children. Various complaints had been received by the mabb, which had responded by filing an objection against ProSieben. It had also restricted the times at which the programme *"Steven liebt Kino"* could be broadcast, limiting it to the period between 8pm and 6am.

In the first instance, the *VG Berlin* ruled that the obligation to state reasons under Article 17(1) sentences 3 and 4 of the *Jugendmedienschutz-Staatsvertrag* (State Treaty on the Protection of Minors in the Media – JMStV) had been violated. It emphasised that the obligation to provide reasons was not merely a desirable procedure and an unnecessary formality, but also served to protect the fundamental rights of the affected broadcasters and telemedia providers. According to Article 17 JMStV, the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM) was obliged to provide reasons for its decisions, including the main factual and legal arguments. However, in the *VG Berlin's* opinion, such reasons had not been given in this case, since the KJM, acting as an organ of the mabb, had merely referred to the mabb's own assessment. It had not explained which parts of the programme had been the basis for its decision. If, as in this case, such a statement of reasons did not meet the legal requirements, this affected the legality of the state media authority's decision and was a procedural error. The existence of a statement of reasons originating from the decision-making body was "essential" for the validity of a supervisory measure issued by the respective state media authority under the JMStV.

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The *OVG Berlin-Brandenburg* rejected the mabb's application for leave to appeal, making the decision of the *VG Berlin* legally binding. It left the factual and legal findings of the *VG Berlin* unchallenged. The KJM had failed to analyse the content of the films itself and the reasons it had given had been contradictory in several places. The OVG emphasised that KJM decisions were also binding for the other bodies of the state media authority and must be used as a basis for their decisions. The state media authority's decision was therefore dependent on the KJM's decision and the reasons behind it.

### *Pressemitteilung einer beteiligten Partei zu dem Beschluss des OVG Berlin-Brandenburg*

https://www.dlapiper.com/de/austria/news/2022/09/dla-piper-represents-prosieben-before-the-higher-administrative-court-of-berlin-brandenburg/

*Press release of a party concerning the decision of the Berlin-Brandenburg Higher Administrative Court*

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# [DE] Criminal liability for distribution of Nazi videos via WhatsApp status

*Sebastian Klein*
*Institute of European Media Law*

In a ruling of 6 January 2022 (case no. 907 Ds 6111 Js 250180/19), the *Amtsgericht Frankfurt am Main* (Frankfurt am Main District Court) decided that the distribution of videos promoting Nazi ideology and images from the Nazi era via WhatsApp status constituted the punishable offence of incitement of the masses. It fined the defendant EUR 750.

In 2019, the accused uploaded to his WhatsApp status a video that could be viewed for a period of 24 hours by anyone who had saved his phone number at the time on a device suitable for installing WhatsApp and had WhatsApp installed on that device. The first 30 seconds of the video, which lasted 1 minute 20 seconds in total, showed people in various situations, such as on the beach, reading or at a wedding. This was followed by video clips from the Nazi era showing, for example, Adolf Hitler performing the so-called “Hitler salute”, soldiers marching in step, a golden swastika, further images of Adolf Hitler, an aeroplane formation in the shape of a swastika and bombs being dropped from aeroplanes. Swastika flags were also repeatedly shown. The video also contained written text including the sentence *“ICH HABE GEGEN DIE JÜDISCHE TYRANNEI GEKÄMPFT”* (I fought against Jewish tyranny) during a video clip of Adolf Hitler.

Under German law, the offence of incitement of the masses involves the "dissemination" of unlawful content. The court decided that this could be done via WhatsApp status. It ruled that "dissemination" took place if content was made accessible to a large group of people, the size of which was undetermined or at least large enough that the defendant could no longer control it. It was not necessary for the "material" to have been successfully disseminated in the sense that a large number of people had actually viewed or at least been aware of it. At the time when the crime was committed, audio and visual media, as well as data carriers, constituted "material" within the definition of the offence.

Content uploaded to a WhatsApp status would be displayed in the app’s status notifications with the option of playback for anyone who had stored the mobile phone number of the person sharing the content in a device and had WhatsApp installed on that device. If the mobile number had been shared with other people, or if third parties had obtained and stored it by other means, the content would also be accessible to these people.

In the court’s opinion, the group of at least 75 people who could potentially play the video, uploaded to the defendant’s status, on their own devices was so large that it could no longer be controlled by the defendant. It was not a closed group in the sense that its members were linked in some way, e.g. a group of friends, members of a club or work colleagues, but comprised people who had no connection with or knowledge of each other.

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Furthermore, the video in question was clearly not intended to serve as a historical record, but contained images designed to serve as a call to arms against alleged Jewish tyranny. Although the video footage itself may have been taken from historical sources without any criminal content, analysis of whether its dissemination was unlawful depended largely on the context. However, the context was clearly not one of historical reporting, but one of incitement to hatred and violence against the Jewish people. The rule that Nazi audio or video content used for reporting about historical events could be lawfully disseminated under the so-called 'social adequacy' clause of Article 86a(3) in conjunction with Article 86(3) of the *Strafgesetzbuch* (Criminal Code – StGB) therefore did not apply.

### *Urteil des Amtsgericht Frankfurt am Main vom 6. Januar 2022 im Volltext*

https://www.jurpc.de/jurpc/show?id=20220119

*Decision of the Franksfurt am Main District Court, 6 January 2022*

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# [DE] Cypriot pornographic website ban confirmed

*Sebastian Klein*
*Institute of European Media Law*

On 7 September 2022 (case nos. 13 B 1911/21, 13 B 1912/21 and 13 B 1913/21), the North-Rhine Westphalia *Oberverwaltungsgericht* (Higher Administrative Court) prohibited the distribution of pornographic content by two Cypriot website providers. It therefore confirmed first-instance rulings issued by the *Verwaltungsgericht Düsseldorf* (Düsseldorf Administrative Court) on 30 November 2021 (case no. 27 L 1414/20). The importance of protecting minors was the main factor behind the court's decision.

According to the first-instance rulings, the *Landesanstalt für Medien Nordrhein-Westfalen* (North-Rhine Westphalia media authority – LfM NRW) had correctly lodged an objection against three openly accessible pornographic websites operated by the two providers and prohibited their distribution in Germany, unless the pornographic content was removed or a closed user group was created in order to ensure that only adults could view it. The *Verwaltungsgericht Düsseldorf* therefore rejected the providers' application for interim measures. The *Oberverwaltungsgericht* has now dismissed appeals against these decisions on the grounds that German law protecting minors in the media applied even to websites operated in another European Union member state.

According to the court's provisional assessment, the ban on the distribution of pornographic content without a suitable age verification system did not raise any concerns under constitutional law, even though decisions on whether telemedia content was compatible with the *Jugendmedienschutz-Staatsvertrag* (State Treaty on the Protection of Minors in the Media – JMStV) were taken solely by the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM), which had been set up jointly by the *Länder*.

The court found that the KJM's involvement in the decision-making process did not infringe the principles of federalism or democracy. Although it was responsible for ensuring that decisions relating to youth protection in the media were consistent throughout the country, the KJM – an expert body whose members were not bound by instructions when fulfilling their tasks – acted as an organ of the individual *Landesmedienanstalt* (state media authority). The broad decision-making powers assigned to it were justified on account of the characteristics of the telemedia supervision system, which was designed to limit state interference.

The court considered that the regulation of content harmful to young people required evaluative decisions to be taken in a process that was open to political exploitation aimed at influencing free communication. The principle of separation from the state that applied to the supervision of broadcasting should therefore be extended to the telemedia sector.

The *Oberverwaltungsgericht* also dismissed the website providers' claim that the ban infringed the so-called country of origin principle, under which website

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providers based in an EU member state are only subject to the rules in their own country. The *Verwaltungsgericht* had worked on the basis that free access to pornographic websites could cause serious harm to children and adolescents. In their appeals, the providers had failed to make a serious argument against this point. Since the state media authority had sufficiently included Cyprus, an EU member state, in the measures, it did not need to wait for standardised youth protection laws to be implemented in Cyprus. If one member state chose to use different protection methods to another, this should not affect the assessment of the proportionality of their respective national provisions. Rather, interference with the Cypriot providers' freedom to provide services, protected under EU law, was less important than the need to protect young people.

***Pressemitteilung des Oberverwaltungsgericht des Landes Nordrhein-Westfalen***

https://www.ovg.nrw.de/behoerde/presse/pressemitteilungen/47_220908/index.php

*Press release of the North-Rhine Westphalia Higher Administrative Court*

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# [DE] German digital strategy adopted

*Sebastian Klein*
*Institute of European Media Law*

The German federal government adopted a new digital strategy on 31 August 2022. The strategy is designed to boost the digital transformation in Germany, where many sectors of state government and administration, civil society, industry, education and science are lagging behind with digital technology and hampered by an outdated analogue infrastructure and especially slow data transfer networks. The digital strategy therefore contains objectives and proposals for a “digital awakening” in various policy areas that are divided into three categories: (1) connected society and digital sovereignty, (2) innovative business, work, science and research, and (3) digital state. In the first of these categories, an entire chapter is devoted to culture and media.

In relation to the media ecosystem, the chapter begins by pointing out that the media sector is undergoing profound transformation processes as a result of digitisation. It needs new business ideas and models in order to achieve lasting success in an increasingly diverse and constantly changing battle for attention and advertising revenue. Fair competition, separation from the state and a functioning market (free of monopolies) are all prerequisites for its long-term survival. At the same time, the availability of high-quality media (including digital media) is indispensable for effectively combating Internet disinformation and guiding the public through the flood of information.

In the negotiations for the European Media Freedom Act, the federal government also wants to stand up for media independence and separation from the state in the context of European regulation of digital transformation processes and media market requirements. A support programme to boost news literacy will be launched by the end of 2023, helping to increase digital literacy in society, identify high-quality media and, in particular, fight disinformation on the Internet. A robust and fair competitive framework will be established by 2025, at the latest, to “facilitate the required transformation of media services and ensure the survival of diverse, independent, high-quality journalism after the digital transformation”.

In the government’s view, full participation, gender equality and digital accessibility are signs of quality for a modern country and benefit everyone. Digital innovation has enormous potential to offer guidance, transfer knowledge and make daily life easier and more sustainable, secure, accessible and social. Digitisation should particularly be designed to prevent exploitation of disadvantaged people and vulnerable groups such as children and young people, women, the elderly, disabled people, the LGBTQI+ community and people from an immigrant background. The government will therefore ensure, *inter alia*, that – with the help of the restructured *Bundeszentrale für Kinder- und Jugendmedienschutz* (Federal Office for the protection of children and young

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people in the media) – children and adolescents can participate in a safe digital environment and take advantage of the opportunities it offers. Through the "*Gutes Aufwachsen mit Medien*" (Good media upbringing) programme, digital skills will be promoted from early childhood with the help of parents and experts.

The digital strategy also contains specific ideas for a data economy that are especially relevant in the context of the proposed EU Data Act. These include creating AI service centres to strengthen AI use, including in medium-sized businesses. Digital consumer protection will also be improved, especially through the fair, neutral and user-friendly design of user interfaces and the curbing of misleading and deceptive web design. Digital services and offerings will need to be safe, user-friendly and "privacy-friendly" from the outset, making consumer rights easier to enforce.

On the whole, although the data strategy proposes a number of initiatives in various sectors of society and law, critics claim that it is too vague. The timescale for its implementation is ambitious, with most objectives to be met by 2025.

### *Digitalstrategie der deutschen Bundesregierung im Volltext*

https://www.digitalstrategie-deutschland.de/static/1a7bee26afd1570d3f0e5950b215abac/220830_Digitalstrategie_fin-barrierefrei.pdf

*Digital strategy of the German federal government*

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## ESTONIA

# [EE] Estonia: Implementation of new rules on accessibility of products and services

*Mari Anne Valberg*
*TGS Baltic*

The recently enacted Products and Services Accessibility Act (*Toodete ja teenuste ligipääsetavuse seadus* — LPS) transposes the EU Directive on that subject. The law applies to traders who manufacture, import or distribute products, and to service providers that offer services falling within the scope of the law. These products and services include, for example, e-readers, payment terminals, ticket machines, check-in machines, cash or payment machines, self-service terminals, computer hardware and operating systems, terminal equipment with interactive computing capabilities, e-commerce services, electronic communications services, e-books and the specialised software necessary for their use, financial services, elements of air, bus, rail and water passenger transport services, such as a websites or electronic ticketing services, and services providing access to an audiovisual media service.

Purpose of the new legislation

The LPS lays down the requirements necessary to enable people such as the visually impaired, the hearing impaired, wheelchair users, people with motor disabilities or any other person with reduced functional capacity, to manage independently. For example, the law requires that an ATM must be accessible to a person in a wheelchair as well as to a child, a short adult or an elderly person, amongst others.

In addition, the instructions for the use of a product, the information on the packaging and the relevant instructions on a website or other means of access must be accessible using more than one of the senses. Likewise, where a product allows for the communication, use or presentation of information, this must be feasible through the use of more than one sense. When using sound or visual aids in a product, the consumer must have the possibility to improve the clarity of the visual aid and to adjust the volume and speed of the sound. Extensive requirements are set for self-service terminals - for example, they must incorporate speech synthesis technology and, in the case of a limited response time, provide a warning to the user through the use of more than one sense. The e-reader must have a function for audio presentation of the text, and each consumer must be able to navigate the content and layout of an e-book. The complexity of the information provided in the provision of a financial service shall not exceed level B2 (upper intermediate) of the Council of Europe's European Framework of Reference for Languages.

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How to comply with new accessibility requirements

According to the LPS, a manufacturer must draw up the technical documentation in such a way as to enable the conformity of the product with the applicable accessibility requirements to be assessed and to cover, as far as relevant for such assessment, the design, manufacture and use of the product.

Where the conformity of a product or service has been assessed in compliance with harmonised standards or parts thereof covering the accessibility requirements, the product or service that complies with such standards or parts thereof shall be presumed to conform with the accessibilty requirements covered by the standard or part thereof. Where the conformity of a product or service has been assessed in compliance with the technical specifications or parts thereof covering the accessibility requirements, the product or service that complies with such technical specifications or parts thereof shall be presumed to comply with the accessibility requirements of that technical specification or part thereof.

### *Products and Services Accessibility Act*

https://www.riigiteataja.ee/en/eli/524082022008/consolide

### *Üle 150 000 inimese jaoks muutuvad tooted ja teenused paremini ligipääsetavaks*

https://www.sm.ee/uudised/ule-150-000-inimese-jaoks-muutuvad-tooted-ja-teenused-paremini-ligipaasetavaks

*Accorsing to the Ministry of Social Affairs products and services will become more accessible for over 150,000 people.*

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## FRANCE

# Temporary authorisation for televised cinema ads extended for 18 months

*Amélie Blocman*
*Légipresse*

Based on Articles 27 and 33 of the Law of 30 September 1986, the decree of 3 October 2022 extends the temporary authorisation of television advertising for the cinema sector by 18 months, postponing its expiry from 6 October 2022 to 6 April 2024 on account of the unusual nature of the period since authorisation was granted, which has rendered it impossible to fully assess the consequences of the measure. Initially introduced under the decree of 5 August 2020 (until 6 February 2022), the authorisation had already been extended through Article 10 of decree no. 2021-1922 of 30 December 2021 to take into account the closure of cinemas from the end of October 2020 during the second national lockdown. Article 3(II) of the decree of 5 August 2020 stated that "in order to decide whether to continue with this provision, the government will publish a report evaluating the impact of its implementation on the cinema sector."

Published by the Ministry of Culture in July 2022, this report stresses that the unusual nature of the period on the one hand, and a lack of data on the other, has made it impossible to fully assess the consequences of the measure. It has therefore been extended for a second time for a further 18 months. A new report will be published within the three months prior to the new deadline of 6 April 2024.

Since decree no. 2020-983 of 5 August 2020 amending television advertising rules came into force, television broadcasters have also been allowed to use targeted advertising based on different broadcast areas and certain socio-demographic viewer data. The government was also required to publish a report on the impact of these provisions. The report states that the use of targeted advertising on television remains in an embryonic stage. As a result, it is unclear whether it has taken advertising income away from other local media. Furthermore, although the market is still developing, it seems unlikely that such advertising on television will ever reach the level of targeting used by digital platforms. Consequently, the authorisation of targeted advertising will be the subject of a new impact report in 24 months' time.

***Décret n° 2022-1290 du 3 octobre 2022 prorogeant l'autorisation de la publicité télévisée en faveur du cinéma***

https://www.legifrance.gouv.fr/download/pdf?id=4LRPrGlpzHWkihWFTM0scX-9gRX-cMgK-3DaXqN0q4o=

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*Decree no. 2022-1290 of 3 October 2022 extending the authorisation of television advertising for the cinema sector*

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# [FR] Clarification on ‘political personalities’ whose speaking time in audiovisual media must be measured

*Amélie Blocman*
*Légipresse*

The Canal Plus group and the company C8 asked the *Conseil d’Etat* (Council of State) to annul the decision taken on 3 March 2021 by the *Conseil supérieur de l'audiovisuel* (French audiovisual regulatory body — CSA, replaced by the *Autorité de régulation de la communication audiovisuelle et numérique* on 1 January 2022), asking providers of audiovisual communication services to “measure all the speaking time in audiovisual media” of A... B..., Nicolas Hulot, Laurent Joffrin, Arnaud Montebourg and Manuel Valls.

The *Conseil d’Etat* pointed out that, under Articles 1, 3-1 and 13 of the Law of 30 September 1986, the regulatory body was responsible for ensuring that audiovisual media complied with the constitutional principle of pluralistic expression of schools of thought and opinion, especially political opinion. To this end, the regulator had broad discretionary powers to lay down, subject to the authority of the *Conseil d’Etat*, rules designed to ensure balanced coverage of the national political debate. As part of this, Article 13(2) of the Law of 30 September 1986 required audiovisual communication service providers to measure the speaking time of political personalities in current affairs programmes, news bulletins, magazine shows and other radio and television programmes and to submit the data to the CSA so it could assess whether political pluralism was being respected.

In a decision of 22 November 2017, the CSA set out the criteria under which, without prejudice to the rules applicable during electoral campaigns and the handling of associated news stories enshrined in Article 16 of the Law of 30 September 1986, and subject to a case-by-case examination, it intended to evaluate whether radio and television services were meeting their obligations to protect political pluralism. According to this decision, excluding speeches relevant to the national political debate made by the president of the Republic, ministers and their colleagues, who were entitled to a third of total airtime, audiovisual communication service providers should “ensure that the political parties and groups that represent the main strands of national political opinion are given a fair share of airtime in accordance with their representativeness, especially election results, the number and categories of their elected representatives, the size of their parliamentary groups, opinion polls and their contribution to the national political debate”.

In the case at hand, the CSA had examined whether A... B..., Nicolas Hulot, Laurent Joffrin, Arnaud Montebourg and Manuel Valls should be regarded as political personalities within the meaning of Article 13(2) of the Law of 30 September 1986 and whether audiovisual communication service providers were therefore required to measure their speaking time and submit the relevant data to the CSA. It had based its assessment firstly on the fact that these people belonged or had recently belonged to political parties, groups or movements and

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had recently exercised political functions or aspired to exercise such functions, and secondly on their active participation in the national political debate on the date of the contested decision. The *Conseil d'Etat* therefore considered that the regulatory body had not made a clear error of assessment and rejected the application.

***Conseil d'État, 28 septembre 2022, N° 452212, Société Groupe Canal Plus et a.***

https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2022-09-28/452212

*Council of State, 28 September 2022, no. 452212, Groupe Canal Plus et al.*

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# [FR] TF1-M6 merger abandoned

*Amélie Blocman*
*Légipresse*

On 16 September, Bouygues, RTL Group, TF1 and the M6 group announced that the proposed merger between the TF1 and M6 groups, announced on 17 May 2021, had been abandoned. The merger would have brought seven free-to-air DTT channels (TF1, M6, TMC, W9, Gulli, LCI and TF1 Séries Films) within the same group.

The decision comes after the parties were questioned by the board of the *Autorité de la concurrence* (French competition authority) on 5 and 6 September. Following an in-depth examination, the competition authority noted that television remained a very powerful medium for the French population as a whole, including people aged 25 to 49, who were the advertisers' main commercial target. Above all, it considered that the development of VOD services did not mean that this power could be called into question in the foreseeable future, insofar as VOD services, unlike the services provided by the parties, were expected to remain paid models and were primarily based on individual consumption, which was not conducive to the simultaneous transmission of advertisements to all users.

The competition authority concluded that the merger would have created major competitive risks, particularly in the television advertising market (price rises, linking of TF1 and M6 services), the market for television service distribution by multichannel package distributors, and the rights acquisition market. The risks were lower in the latter market because of French film funding obligations and media chronology. However, the authority thought the pressure of competition in the digital market would not be sufficient to overcome these risks if the merger went ahead.

Despite the additional commitments proposed (such as the separation of advertising agencies), structural changes including, as a minimum, the closure of either the TF1 or the M6 channel, would have been necessary for the merger to be authorised. The parties concluded that the plan no longer made business sense and decided to put an end to the examination procedure initiated before the competition authority.

The parties said they "regret that the competition authority failed to take into account the size and speed of change in the French audiovisual sector" and "remain convinced that the merger of the TF1 and M6 groups would have been an appropriate response to the challenges resulting from the increase in competition with international platforms".

The French audiovisual regulator, Arcom, also noted the decision. At the beginning of September, it had approved the Altice group's acquisition of the TFX and M6 Génération (6ter) channels, which the TF1 and M6 groups had wanted to sell so they could merge. This plan has also been abandoned.

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***TF1/M6 : l'Autorité de la concurrence prend acte de la décision de Bouygues de retirer son projet d'acquisition, communiqué de l'Autorité de la concurrence***

https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/tf1m6-lautorite-de-la-concurrence-prend-acte-de-la-decision-de-bouygues-de

*TF1/M6: Competition authority takes note of the decision of Bouygues to withraw its planned acquisition, French competition authority press release*

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## UNITED KINGDOM

# [GB] Sky News broadcasts about a convicted criminal did not constitute an unwarranted infringement of his privacy

*Julian Wilkins*
*Wordley Partnership*

Ofcom has held that Sky News had not undertaken an unwarranted infringement of privacy in relation to two broadcasts concerning the release of a notorious convicted conman, Mr Mark Acklom, by showing a pixelated photograph of himself with his family and another picture taken on an aircraft. Applying Ofcom rules, and having considered Article 8 of the European Convention on Human Rights, the regulator's determination balanced Mr Acklom's right to privacy against Sky's freedom of expression to report matters in the public interest, and on balance, in the particular circumstances, considered the infringement of privacy warranted.

Mr Acklom had served a five year prison sentence in the UK for fraud and was classed as '*Britain's most notorious conman'.* On 12 August 2021, Sky News broadcast two reports explaining that Mr Acklom was about to be freed from prison but would be subject to various restrictions as a consequence of a rare Serious Crime Prevention Order. The reporting indicated that the Spanish authorities wanted to have Mr Acklom extradited to serve the rest of an outstanding prison sentence in Spain.

The Sky reports speculated whether Mr Acklom would be jailed in Spain or, as his family lived there, be allowed to live under strict supervision. The report suggested that Spanish prisons were overcrowded and any prison sentence would be relatively short.

The reporting included a photograph of Mr Acklom with his two children (their faces having been pixelated), showing that when not in jail he lived a normal life. Another photograph showed Mr Acklom with an unidentified adult whose face had been blurred. A third photograph showed Mr Acklom by the side of a swimming pool with a child whose face had been blurred. The photographs had been given to Sky News by an undisclosed source and the broadcaster refused Ofcom's request to explain how they had acquired the photographs. Sky also refused to provide a non-pixelated version of the pictures.

An additional photograph showed Mr Acklom in an aircraft during his extradition back to the UK in 2019. According to Mr Acklom the airline had objected to the photograph and the aircraft's captain had ordered the photographs be deleted. Sky maintained that the reporter who had taken the photograph had politely declined the request by cabin crew to delete images, believing there was a legitimate public interest in obtaining the pictures, however Sky denied that the

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reporter had been 'ordered' to delete the photographs. No further action had been taken by the airline.

Mr Acklom considered that the various images constituted an invasion of his privacy and, where relevant, that of his family.

Sky contented that their reporting was in the public interest, depicting the original extradition to the UK prior to Mr Acklom's conviction, plus reasonable speculation on their part about a further extradition to complete his outstanding sentence in Spain and on other potential restrictions to Mr Akrom’s freedoms.

Ofcom considered the various representations and gave consideration to its Codes of Practice:

Practice 8.4 states “Broadcasters should ensure that words, images, or actions filmed or recoded in, or broadcast from, a public place, are not so private that prior consent is required before broadcast from the individual or organisation concerned, unless broadcasting without their consent is warranted.”

Whilst Practice 8.6 states: “If the broadcaster of a programme would infringe the privacy of a person or organisation, consent should be obtained before relevant material is broadcast, unless infringement of privacy is warranted.”

Ofcom acknowledged that Sky had not acquired Mr Acklom’s consent for the use of the photographs. The issue was whether he had a legitimate expectation of privacy based on the particular facts.

The regulator considered the photographs revealed little information about his family. Sky had taken steps to obscure their identity and as such, no interaction between him and family members had been shown. Ofcom recognised that the photographs used were not from when Mr Acklom had been ‘*on the run*.’

Ofcom balanced Mr Acklom’s legitimate expectation of privacy against Sky’s right to freedom of expression. On balance, Ofcom considered that his privacy had not been unwarrantably infringed. The photographs were used in the context of explaining how he had been convicted in the UK, sentenced in Spain and expected to complete that remaining sentence. Prison crowding was such in Spain that his sentence might be reduced and any imprisonment might be close to where his family lives.

***Complaint by Mr Mark Acklom about Sky News – Ofcom Broadcast and On Demand Bulletin issue 457, 30th August 2022.***

https://www.ofcom.org.uk/__data/assets/pdf_file/0015/243411/Complaint-by-Mr-Mark-Acklom-about-Sky-News-Sky-News-12-August-2021-0615-and-2230.pdf

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# ITALY

## [IT] Communications authority launches two public consultations on draft regulations, and related guidelines, concerning the Italian implementation of Articles 15 and 17 of the DSMCD

*Chiara Marchisotti & Maria Cristina Michelini*

AGCOM has launched the first public consultation in the context of the adoption of the package of regulations to implement the legislation that transposed Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSMCD). The consultation concerns the draft regulation for the identification of the reference criteria to quantify the remuneration for the online use of press publications referred to in Article 43-*bis* of Law of 22 April 1941, no. 633 (Copyright Law). Such provision transposes Article 15 DSMCD, introducing a new, related right for publishers covering the online use of their press publications.

The most innovative element of Article 43-*bis* is precisely that the rights to authorise the reproduction and communication to the public of press publications online are directly bestowed on press publishers, who shall, as a result, be entitled to receive remuneration for such use by information society service providers (ISSPs), including media monitoring and press review agencies. In this context, the Draft Regulation on Article 43-*bis* of Copyright Law governs the negotiation and determination of the remuneration due by way of consideration, to be further detailed by AGCOM, as delegated under paragraphs 8 and 12 of Article 43-*bis* Copyright Law.

In the foreword to the Draft Regulation on Article 43-*bis* of Copyright Law, AGCOM clarified that for the purposes of identifying the reference criteria for the quantification of the remuneration, the multiple interests underlying the publishing sector have been taken into account. In fact, the main objective is to protect the value of press publications and in general of intellectual works in the digital environment. Thus, the criteria identified by AGCOM aim to promote fair and proportionate remuneration for publishers, to overcome the so-called “value gap”, also with a view to preserving incentives to produce a socially adequate amount of information, given the characteristics of information as a public good.

AGCOM also launched a second public consultation, this time on the draft regulation and the related guidelines concerning the implementation of the complaint and redress mechanisms that online content-sharing service providers (OCSSPs) shall put in place under Article 102-*decies* of Copyright Law – which transposes Article 17 (7) DSMCD.

Articles 102-*sexies*-102-*decies* of Copyright Law transpose, in a divided batch of provisions, Article 17 DSMCD, making up a brand-new Title II-*quater* to the

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Copyright Law governing the use of protected content by OCSSPs. To implement para. 1-3 of Article 102-*decies* of Copyright Law, AGCOM issued its draft guidelines concerning the complaint and redress mechanism that OCSSPs are required to set up. The complaint and redress mechanism is essentially a procedure for the disabling/removal of content that OCSSPs shall make available to their users, to allow a for preliminary, non-litigation venue for dispute resolution, where users can question the disabling or removal of their allegedly infringing content. In this context, OCSSPs are required to set up a rapid and effective procedure so that users can challenge the decision taken.

As mentioned in the foreword to the Draft Guidelines on Article 102-*decies* of Copyright Law, in the light of the scope and novelty of the provisions, as well as of the relevance of the role entrusted to AGCOM, such Draft Guidelines are aimed at specifying the elements necessary to ensure compliance by OCSSPs. In fact, as reflected in Recital 70 DSMCD, the complaint and redress mechanism is seen by AGCOM as an important instrument for users to challenge the measures taken by OCSSPs in relation to the their content, particularly when it has been unjustly removed or disabled (e.g., despite the fact that the reported content does not infringe any copyright).

Finally, AGCOM has been chosen as the ADR body for the resolution of disputes in the event of a disagreement over the decision taken by an OCSSP in the context of the complaint and redress mechanism. This is without prejudice to the parties right to litigate before the judicial authority. To implement the relevant provision (paragraph 4 of Article 102-*decies* Copyright Law), AGCOM issued its draft regulation setting out the procedural rules to be followed for such ADR procedure.

During these two public consultations, stakeholders had the opportunity to submit written observations and request hearings with AGCOM. The deadlines for submissions having passed, AGCOM is now conducting hearings, at the outcome of which it will draft and publish final regulations and guidelines.

### *AGCOM Delibera n. 195/22/CONS - Consultazione pubblica sullo schema di regolamento in materia di individuazione dei criteri di riferimento per la determinazione dell'equo compenso per l'utilizzo online di pubblicazioni di carattere giornalistico di cui all'articolo 43-bis della legge 22 aprile 1941, n. 633*

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=27193607&_101_INSTANCE_FnOw5lVOIXoE_type=document

*AGCOM Resolution No. 195/22/CONS - Public consultation on the draft regulation for the identification of the reference criteria to quantify the remuneration for the online use of press publications referred to in Article 43-bis of Law of 22 April 1941, no. 633*

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***AGCOM Delibera n. 276/22/CONS - Avvio della consultazione pubblica sullo schema di linee guida concernenti i meccanismi di reclamo predisposti dai prestatori di servizi di condivisione di contenuti online e sullo schema di regolamento concernente la risoluzione delle controversie tra prestatore di servizi di condivisione di contenuti online e utenti, in attuazione dell'articolo 102-decies della Legge 22 aprile 1941, n. 633***

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=27503982&_101_INSTANCE_FnOw5lVOIXoE_type=document

*AGCOM Resolution No. 276/22/CONS - Launching of public consultation on the draft guidelines concerning complaint and redress mechanisms that online content-sharing service providers shall put in place and the draft regulations concerning resolution of disputes in the event of a disagreement over the decision taken by an OCSSP in the context of the complaint and redress mechanism, implementing Article 102-decies of Law No. 633 of April 22, 1941*

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# LATVIA

## [LV] New amendments to the Latvian Electronic Mass Media Law enter into force.

*Ieva Andersone*
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On 24 September 2022 amendments to the Electronic Mass Media Law entered into force. The purpose of the amendments is to strengthen the safety and protection of the Latvian information space and to promote greater transparency on the identity of the real beneficiaries of electronic mass media to prevent the possibility of hidden influence.

Specifically, the new amendments prohibit issuing broadcasting permits for television programmes that are excluded from the list of audio and audiovisual programmes to be rebroadcasted in Latvia on the basis that the country of jurisdiction of the programme threatens the territorial integrity, sovereignty or national independence of another country, or based on a decision made by the National Electronic Mass Media Council (NEPLP) in the past five years to prohibit rebroadcasting of a programme.The amendments also establish new requirements regarding the language for television programme distribution service providers. From now on, when distributing a programme with a language track that is not in an official language of one of the European countries or countries of the European Economic Area, providers are obliged to primarily provide this programme with a language track in the national language. This would apply to a situation where a TV distribution service provider, such as a cable operator, applies a voice-over on a programme in a non-EU language (most often in practice – Russian). Now it is mandatory to ensure that the primary language track is in Latvian.

The biggest changes introduced relate to the disclosure of the identity of the real beneficiaries. These changes are introduced mainly due to the existing geopolitical situation in which it is essential to promote the transparency of the media environment and take action to prevent any covert influence on the media environment. NEPLP now has the right to request information about the beneficial owners from electronic mass mediums that have received rebroadcasting permits and broadcasting permits, the owner (holder) of the programme, and on-demand service providers. NEPLP also has the right to exclude a programme from the list of audio and audiovisual programmes to be rebroadcast in Latvia if the information about beneficiaries is not submitted, or if it is false. According to the transition rules, the electronic media shall update the information on the real beneficiaries and provide this information to the NEPLP by 31 October 2022. Additionally, the amendments forbid the provision of an on-demand service, the content of which completely or partially duplicates the content of electronic media programmes in respect of which the NEPLP has adopted a decision on the

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prohibition of distribution in Latvia.

### *Grozījumi Elektronisko plašsaziņas līdzekļu likumā*

https://likumi.lv/ta/id/335815-grozijumi-elektronisko-plassazinas-lidzeklu-likuma

*Amendments to the Electronic Mass Media Law*

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## NETHERLANDS

# [NL] Court of Appeal acquits two rappers of incitement to violence over YouTube music video

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On 25 August 2022, the *Hof Amsterdam* (Amsterdam Court of Appeal) acquitted on appeal two "drill" rappers who had been convicted in 2021 of incitement to violence in relation to a music video. Drill - slang for "shooting music" - is a subgenre of hip-hop that originated in Chicago and is characterised by its focus on anger and violence. It was the first time in the Netherlands that rappers have been prosecuted and convicted purely for violent lyrics.

The video for a song called "Intensive Care" had been uploaded to YouTube in July 2020, two months after a five-second preview had been shared through Instagram, and flagged by the police. In the video, the two rappers talk about violence against their "*opps*" (opponents) while making suggestive gestures, such as the "time-out" and "throat-slitting" gesture, and pointing fake firearms to the camera.

The rappers were charged with (1) possession of fake firearms and (2) incitement to violence, firearms use and/or firearm possession. As to the second indictment, the accused rappers claimed that their criminal prosecution amounted to an unjustifiable interference with their artistic freedom and freedom of expression as protected by Article 10 of the European Convention on Human Rights (ECHR).

In its decision of 11 November 2021, the *Rechtbank Amsterdam* (District Court of Amsterdam) held that through the rap lyrics, considered in combination with the gestures, the use of fake firearms and the title of the video, the rappers explicitly incited viewers to commit criminal offences against other (rival) drill rap groups including abuse, manslaughter and murder. The District Court took special note of the increasing armed violence in bigger cities like Amsterdam, particularly among young people, and the risk that the sharing of videos like this via social media could normalise firearm use and encourage young people to buy firearms themselves.

In contrast to the District Court, however, the Court of Appeal held on appeal that the expressions in the music video were "insufficiently specific" to conclude that they constituted a direct incitement to commit criminal offences. According to the Court, neither the wording nor the meaning of the verses were sufficent to assume that the rappers were trying to convince other people to do something. It noted that the rappers were "rather rapping about their own experiences, feelings, wishes and fantasies". Moreover, the Court emphasised that the so-called *opps* did not seem to refer to any specific opponents or targets. Singing or saying that (unspecified) *opps* should be in intensive care did not, in the Court's view, correspond to incitement of the public to actually make that happen by

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committing crime. The fact that the lyrics contained violent elements and the rappers were waving around fake firearms did not alter that conclusion.

***Hof Amsterdam, ECLI:NL:GHAMS:2022:2482, 25 augustus 2022***

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2022:2482

*Amsterdam Court of Appeal, ECLI:NL:GHAMS:2022:2482, 25 August 2022*

***Hof Amsterdam, ECLI:GHAMS:2022:2483, 25 augustus 2022***

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2022:2483

*Amsterdam Court of Appeal, ECLI:NL:GHAMS:2022:2483, 25 August 2022*

***Rechtbank Amsterdam, ECLI:NL:RBAMS:2021:6432, 11 november 2021***

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2021:6432

*Amsterdam District Court, ECLI:NL:RBAMS:2021:6432, 11 November 2021*

***Rechtbank Amsterdam, ECLI:NL:RBAMS:2021:6433, 11 november 2021***

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2021:6433

*Amsterdam District Court, ECLI:NL:RBAMS:2021:6433, 11 November 2021*

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# [NL] Court of Appeal upholds public broadcaster's editorial freedom to criticise public figures

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On 19 July 2022, the *Gerechtshof Arnhem-Leeuwarden* (Arnhem-Leeuwarden Court of Appeal) delivered an important judgment, upholding an earlier lower-court judgment on the media standards applicable to news and opinion websites operated by public broadcasters (see IRIS 2021-10/21). Notably, the Court upheld important principles on the freedom of public broadcasters to criticise public figures, and refused to order a rectification against a public broadcaster sought by a public figure over various online articles.

The case involved a well-known Dutch activist who campaigned against Covid-19 measures implemented by the Dutch government, and is director of a high-profile campaign group ("Stichting Viruswaarheid", "Virus Truth Foundation") which sued the Dutch government on a number of occasions over its Covid-19 measures. In 2021, the activist initiated legal proceedings against the public broadcaster BNN-VARA over its news and opinion website (Joop.nl), in particular over various online publications describing the activist as a "Corona denier" ("corona-ontkenner"), "virus madman" ("viruswaanzinnige"), and "cult leader" ("sekteleider"). The activist claimed that these descriptions, contained in news items on the broadcaster's website, were unlawful and sought removal of these terms from items already published, a ban on the use of the terms in future news items, and also sought a rectification. Notably, the activist had no issue with these terms being used in "opinion pieces" or cartoons, but specifically objected to their use in "news" items.

In October 2021, the *Rechtbank Midden-Nederland* (District Court of Midden-Nederland) rejected the activist's claim, and held that the broadcaster had no obligation to publish news items objectively or without value judgments, and that the statements at issue were not unlawful (see IRIS 2021-10/20). The activist appealed against this judgment, and on 19 July 2022, the Court of Appeal rejected the appeal. At the outset, the Court of Appeal noted that the case concerned a clash between fundamental rights, namely the broadcaster's freedom of expression under Article 10 of the European Convention of Human Rights (ECHR), and the claimant's right to protection of reputation under Article 8 ECHR. The Court then proceeded to examine the statements at issue. First, the Court emphasised that the public broadcaster's freedom of expression also implies "editorial freedom", even if it concerns news, and "regardless" of whether the broadcaster is "subsidised by the government". Second, the Court held that the statements at issue were "value judgments", and would only be unlawful if lacking a "sufficient factual basis". In this regard, the Court held that in relation to (a) "virus madman", there was a sufficient factual basis, given the link to the former name of the activist's organisation ("Virus madness"); (b) "Corona denier" can be used in the media for not only people who literally deny the existence of

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the corona virus, but also for those who downplay its consequences, such as the activist; and (c) in relation to "cult leader", Joop.nl did not use the qualification as a factual statement, but as an ironically intended exaggeration and provocation. Because the activist, as he admitted, has become the face of the protests against the Covid-19 measures and was seen by some as their hero or icon, and in that sense as their leader, the Court found the qualification within the "tone" of Joop.nl "not excessive".

In conclusion, the Court of Appeal dismissed the claimant's appeal, holding the statements at issue were not unlawful, and rejected the claimant's view that the broadcaster had conducted a "smear campaign" against him.

### *Gerechtshof Arnhem-Leeuwarden, ECLI:NL:GHARL:2022:6127, 19 juli 2022*

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2022:6127

*Arnhem-Leeuwarden Court of Appeal, ECLI:NL:GHARL:2022:6127, 19 July 2022*

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## POLAND

# [PL] Recommendations of the President of UOKiK concerning the tagging, by influencers, of advertising content on social media

*Marta Botiuk-Filip*

The Office of Competition and Consumer Protection in Poland (UOKiK) has recently released the long-awaited "Recommendations of the President of UOKiK concerning the tagging, by influencers, of advertising content on social media".

The proper tagging of sponsored content on social media has raised quite a lot of questions. So far, the most difficult issues have been drawing the line between the subjective opinions of social media users and paid communications, as well as the transparent forms of tagging commercial collaborations. In order to develop clear guidelines for the correct tagging of content from December 2021 onwards, there has been extensive consultation on this subject.

The "Recommendations of the President of UOKiK on the tagging, by influencers, of advertising content on social media" is a document that has long been awaited, not only by influencers but also by advertisers, PR agencies and consumers. The document was developed following several months of joint consultations with representatives of the influencer marketing industry, as well as in the academic field.

What do we find in the recommendations?

The proposed recommendations present more than 30 pages of guidelines for marking advertising content online. The recommendations contain a number of practical examples and graphical proposals, and have been drawn up to assist online creators to correctly tag their commercial content.

In this document we find not only important definitions and legal regulations but also characteristics of individual commercial collaborations and explicitly indicated ways of tagging commercial content on social media, depending on the type of collaboration.

Additionally, the recommendations describe a specific form of commercial content, i.e. self-promotion (advertising one's own brand).

The document also specifies how to correctly tag PR packages received, with particular attention to whether the gift received is a low-value gift; whether it is the first time the influencer has received it from a brand; or whether it is another such gift that influencer intends to share with the online world.

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The recommendations also include a precise definition of what exactly the tagging of advertisements should look like, proposing two-level tagging. The UOKiK indicates that influencers should tag advertising material they publish on their social media channels in a clear, unambiguous manner that is understandable for all recipients. In addition, the document provides examples of advertising terms that are not recommended and should be avoided.

As a supplement to the recommendations, UOKiK made available, free of charge, a special tool that may be relied upon to tag advertisements, self-promoting materials or gifts on Instagram or Facebook. The tool has the special form of an AR filter and is now available on UOKiK's Instagram profile, where it can be saved and used at any time.

***Rekomendacje Prezesa UOKiK zostały opublikowane na stronie internetowej UOKiK i znajdują się pod linkiem***

https://uokik.gov.pl/aktualnosci.php?news_id=18898

*Recommendations of the President of UOKiK on the tagging, by influencers, of advertising content on social media*

https://uokik.gov.pl/news.php?news_id=18900&news_page=1

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## UKRAINE

# [UA] Concept of PSM during wartime adopted

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The Supervision Council of the joint stock company the National Public Television and Radio Broadcasting Company of Ukraine (NSTU) has approved a new edition of the broadcasting concept for regional branches of the public service broadcaster. The key revision lies in the need to take account of and adapt the broadcasting policies in response to the current full-scale war in Ukraine.

The public broadcaster was established by the Statute "On Public Television and Radio Broadcasting of Ukraine", which entered into force on 15 May 2014. Civil society representatives form the majority of the Supervision Council of the company, and its powers include the approval of its executive structures (see IRIS 2014-6/36). Currently the NSTU has 24 regional branches for all the Ukrainian provinces.

The updated concept explains the necessity of the changes as a result of the situation of public service broadcasting after the start of Russian aggression on 24 February 2022. It notes that the regional branch in Lviv became the back-office for the whole company, while the branch in Transcarpathia became the reserve broadcasting centre. The NTSU lost the possibility of broadcasting from the occupied territories of Donbas and Kherson. A number of NSTU staff members relocated to safer territories. Linear broadcasting of news, initially limited to the morning and evening hours of the regional branches' programming, has become practically round-the-clock. At the same time, the updated concept points out that with the start of the full-scale aggression the audience has largely shifted to online sources of news and information, including the online resources of the NSTU.

In order to sustain the company's activity, to decentralise it beyond Kyiv so as to prevent the disruption of PSB in case of direct attacks, to diversify its production (at risk during the war), and to preserve editorial independence, the establishment of six decentralised production hubs of the NSTU is envisaged. These hubs will enable the relocation and bringing together of staff and technical resources, establish discussion platforms for the local communities, create local narratives, and counteract stereotypes and stigmatisation, as well as Russian disinformation. Each hub will be responsible for at least four hours of TV content, mostly journalist investigations, documentaries, current affairs programmes on particular provinces and the life of their inhabitants.

The six hubs will work with local independent production companies to outsource the making of programmes through contests. Each of the regions of Ukraine will have an annual contest "Create with the PSB" to find the best projects that will be

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funded by the NSTU. “Regional digital teams” will be engaged in the production and mentoring of content for the websites of the NSTU, and its accounts on YouTube and social networks.

In view of the fact that a significant part of its traditional audience has moved abroad, the NSTU notes in the concept its responsibility to establish a platform for Ukrainians all over the world who wish to follow the Ukrainian agenda.

### *Концепція регіонального мовлення АТ «НСТУ» на 2022-2025 роки (нова редакція)*

https://corp.suspilne.media/document/1301

*Concept of Regional Broadcasting by JSC “NSTU” in 2022-2025 (new edition), approved at the meeting of the Supervision Council of JSC “NTSU” on 30 August 2022, N 72, published on the official website of the NSTU on 3 October 2022*

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