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EDITORIAL

2022 is coming slowly to an end, and what was supposed to be a year of celebration for us (with good reason: the European Audiovisual Observatory's 30th anniversary!) turned out to be a rather bleak one. With Europe not completely out of COVID's frying pan, our old continent fell into the fire of what we all deemed unthinkable: war. As a direct consequence, we saw Europe's most populous country cease to be a member state of both the Council of Europe and the European Audiovisual Observatory.

During this year, we have been following the many legal developments fuelled by Russia's unprovoked act of aggression. Beyond our monthly reporting, the Observatory published a note that discusses the legal and institutional framework behind the EU sanctions against the Russian state-owned channels RT and Sputnik. We are now releasing a new IRIS Extra report that provides information on legislative measures and case law that have appeared in Ukraine and elsewhere in Eastern Europe (Estonia, Latvia, Lithuania and Moldova) in respect of the audiovisual media from Russia and Belarus, beginning with the 2014 annexation of Crimea. It reports on sanctions on broadcasters as a specific instrument to cease propaganda and disinformation from Moscow and/or Minsk.

This is not, however, the only topic we have engaged with this year. Anticipating the recent EMFA proposal, we released an IRIS Plus report that looks at the various aspects of governance of public service media and its role in safeguarding their independence. Following in the steps of the amended AVMSD, in May we published an IRIS Plus on the rules concerning the financial obligations for VOD services in the EU, that we are now republishing in an updated version. We are putting the finishing touches to an IRIS Plus on users' empowerment against disinformation online and an IRIS Special on prominence of European works and of services of general interest. Last but not least, and as usual, we are rounding off the year with the present 10th issue of our legal newsletter.

On behalf of our team, let me wish you a good end to 2022 and an enjoyable read of our many reports!

Maja Cappello, Editor

European Audiovisual Observatory

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

The European Court of Human Rights (ECtHR) has found inadmissible the complaint of a Spanish rapper who had been convicted and sentenced to prison because some of his songs justified or publicly praised terrorism. The ECtHR agreed with the findings of the Spanish courts that the songs and videos available on YouTube and Facebook justified and glorified terrorism, and incited hatred and enmity on various grounds. Therefore, the ECtHR found the rapper's complaint regarding the alleged violation of his right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR) to be inadmissible.

The applicant in the case was Jorge López, a rapper in the group “la Insurgencia” (“Insurgency”), also known as “Saúl Zaitsev” or “Shahid”. The group’s songs were performed at concerts and were freely available on its YouTube channel which had more than 1 900 followers and had garnered 400 000 views. The group also had a Facebook profile with their songs and videos. Some of the songs praised the actions and members of a Spanish terrorist group GRAPO (“Antifascist Resistance Groups October First”), responsible for bombings and shootings in the period 1975-2006 that killed 84 people including police and military personnel, judges and civilians. Some songs evoked ETA, the armed Basque nationalist and separatist organisation that, between 1968 and 2010, killed about 830 people and injured thousands. ETA was classified as a terrorist organisation by Spain and by some other states, as well as by the European Union. The songs at issue, all written and published between 2014 and 2016 called for action using armed struggle against politicians, judges, security forces, rich people and the royal family, and incited an attack on parliament.

In 2017, Mr. López was convicted of public praise or justification of terrorism under Article 578 of the Spanish Criminal Code and was sentenced to two years’ imprisonment and a fine of EUR 4 800. A Court of Appeal reduced the sentence to six months’ imprisonment and a fine of EUR 1 200. The Supreme Court dismissed a cassation appeal and the Constitutional Court declared Mr. López’ appeal inadmissible. The execution of the six-month prison sentence was, however, later suspended, before Mr. López was incarcerated. In October 2021, Mr. López complained to the ECtHR that his right to freedom of expression under Article 10

ECHR had been violated because the interference with that right had not been necessary. He highlighted that the essence of rap was to provoke public opinion and that his songs were to be situated in the tradition of “protest songs”.

The ECtHR agreed that the conviction at issue clearly constituted an interference with the rapper’s right to freedom of expression as guaranteed by Article 10 § 1 ECHR, and was satisfied that the interference was prescribed by law and pursued a legitimate aim, namely the prevention of disorder and crime, within the meaning of Article 10 § 2 ECHR. The main question was therefore whether the interference had been “necessary in a democratic society”. The ECtHR refered to some of its earlier case law regarding statements that might constitute a call to violence, in which it considered the following relevant factors: (i) whether the statements were made against a tense political or social background, (ii) whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance, and (iii) the manner in which the statements were made, and their capacity – direct or indirect – to lead to harmful consequences.

The ECtHR refered to the finding by the domestic courts that the songs had openly called for violent acts. The songs had communicated to the audience the idea that recourse to violence and terrorism was justified; they approved terrorist methods and acts, and praised attacks that had claimed many lives. The ECtHR observed that those songs were easily and freely available online and had been performed at concerts, and thus had the potential to reach a large number of people, including those of a young age. Although the most recent terrorist acts of GRAPO and ETA already dated back some years, one could not ignore that both had carried out terrorist activities in Spain for decades, causing numerous deaths and injuries. These traumatic events were therefore still fresh in the country’s collective mind, justifying an enhanced degree of regulation of statements relating to them. Answering the question of whether the songs could be seen as a direct or indirect call or justification for violence, hatred or intolerance, reference was made to the content of the songs inciting violent or terrorist methods, mentioning them in a positive connotation of the use of explosives and other weapons, beating up opponents, and causing material damage such as attacking ATMs or supermarkets. The lyrics directly suggested injuring or killing politicians, judges, security forces, rich people, the royal family and those perceived as ideological opponents. To sum up, the songs communicated to listeners the general idea that recourse to violence and terrorism was justified. The ECtHR agreed with the finding by the domestic courts that these statements went far beyond what could be perceived as “protest songs”, and the acceptable limits of criticism. The ECtHR also considered the impact of the songs, being especially targeted at young people, and reaching a wide audience through a YouTube channel, a Facebook profile and in concerts. The ECtHR also found reasonable the assessment of the domestic courts of the risk of accentuation of the verbal message by the aggressive videos and use of GRAPO’s insignia. The grounds on which the rappers had been convicted was based, namely combating public praise or justification of terrorism, therefore appeared to be both “relevant” and “sufficient” to justify the interference at issue, and in that sense met a pressing

social need.

Lastly, an assessment of the nature and severity of the sanctions was carried out to ascertain whether the interference was proportionate. In the context of Article 10 ECHR, a criminal conviction constituted one of the most serious forms of interference with the right to freedom of expression. In the applicant's case, the execution of the prison sentence which had been initially imposed upon him had later been suspended and the fine reduced to EUR 1200, which meant that the sanction was at the lowest level. The ECtHR found that the criminal conviction could not be considered disproportionate to the legitimate aim pursued. In the light of the foregoing, the ECtHR considered, unanimously, that the complaint under Article 10 ECHR was manifestly ill-founded and therefore inadmissible.

Decision by the European Court of Human Rights, Third Section (sitting as a Committee), in the case of Jorge López v. Spain, Application no. 54140/21, 13 October 2022

https://hudoc.echr.coe.int/eng?i=001-220219

POLAND

European Court of Human Rights: Rabczewska v. Poland

Dirk Voorhoof
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The European Court of Human Rights (ECtHR) has confirmed the application of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) in relation to a conviction for offending the religious feelings of others through publicly insulting the Bible. As the statements expressed in an interview for a news website had not amounted to hate speech and were neither an abusive attack, nor threatening public order, the ECtHR found a violation of Article 10 ECHR.

The applicant in this case was Dorota Rabczewska, a popular pop singer known as Doda. In 2009 she gave an interview for a news website called Dziennik. Part of the interview was reprinted as an article in the tabloid Super Express, under the title: “Doda: I don’t believe in the Bible.” In the interview the pop singer expressed her view on the lack of scientific evidence of some parts of the Bible, for instance the description of the creation of the world. She stated that she was more convinced by scientific discoveries, and not by what she described as “the writings of someone wasted from drinking wine and smoking some weed”. When asked who she meant, Ms. Rabczewska replied “all those guys who wrote those incredible [biblical] stories”. A short time later two individuals complained to a public prosecutor that Ms. Rabczewska had offended the religious feelings of others by publicly insulting an object of religious worship, an offence proscribed by Article 196 of the Criminal Code. The Warsaw Regional Prosecutor issued a bill of indictment against the pop singer for offending the religious feelings of the two individuals by insulting the object of their religious worship – the Holy Bible. In 2012, Rabczewska was convicted by the Warsaw District Court as charged, and fined PLN 5,000 (approximately EUR 1160). The Court stated that the average person’s sensibility in Poland had to be taken into consideration when determining whether religious feelings were offended. It also noted that the Bible, along with the Torah, was considered in the different Christian religions and in Judaism to be inspired by God and was an object of veneration. The Court found that the statements went beyond analysis and criticism and that they had debased the Bible by suggesting that its authors had written it under the influence of alcohol and narcotics as a tool for hurting other people. As Ms. Rabczewska had expressed her views in a way that intentionally offended Christians and Jews and displayed contempt for believers, the Warsaw District Court concluded that the pop singer’s statements had been objectively insulting and could not be considered to have been made for artistic or scientific purposes. Two appeals were dismissed and the Constitutional Court finally confirmed the constitutionality and necessity in a democratic state of restricting freedom of

expression that insulted or offended the religious feelings of others. It considered that insulting an object of religious worship deliberately offended the religious feelings of other people, and thus also, like other forms of insult, harmed their personal dignity.

In its judgment of 15 September 2022, the ECtHR disagreed with the findings and the reasoning of the Polish courts, and came to the conclusion that the conviction of Ms. Rabczewska had amounted to a violation of her right to freedom of expression under Article 10 ECHR. Only the Polish judge dissented. The ECtHR first refered extensively to its case law on the balancing of freedom of expression under Article 10 ECHR and freedom of religion as protected under Article 9 ECHR (see also IRIS 2020-2/16). It reiterated that those who choose to exercise the freedom to manifest their religion under Article 9 ECHR, irrespective of whether they did so as members of a religious majority or a minority, could not expect to be exempt from criticism. They had to tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, where such expressions went beyond the limits of a critical denial of other people's religious beliefs and were likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a state might legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures. Presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which was one of the bases of a democratic society, while expressions that sought to spread, incite or justify hatred based on intolerance, including religious intolerance, did not enjoy the protection afforded by Article 10 ECHR.

Applying those principles, the ECtHR focussed on the question of whether the prosecution and conviction of Ms. Rabczewska had been necessary in a democratic society under Article 10 § 2 ECHR. The ECtHR found that the domestic courts had failed to identify and carefully weigh the competing interests at stake and had not assessed whether the impugned statements had been capable of arousing justified indignation or whether they were of a nature to incite to hatred or otherwise disturb religious peace and tolerance in Poland. The ECtHR also noted that it had never been argued that the pop singer's statements had amounted to hate speech. In particular, Article 256 of the Criminal Code which expressly prohibited hate speech had not been invoked. The ECtHR found that the domestic courts had not established that Ms. Rabczewska's actions had contained elements of violence, or elements susceptible of stirring up or justifying violence, hatred or intolerance of believers (see also IRIS 2018-8/2). Neither had the domestic courts examined whether the actions in question could have led to any harmful consequences or whether they threatened public order. In conclusion, the ECtHR found that the Polish courts had failed to comprehensively assess the wider context of Ms. Rabczewska's statements and carefully balance her right to freedom of expression with the rights of others to have their religious feelings protected and religious peace preserved in society (see IRIS 2019-1/1). It had not been demonstrated that the interference had been required, in accordance with

the State's positive obligations under Article 9 ECHR, to ensure the peaceful coexistence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance. Moreover, the ECtHR considerd that the expressions under examination had not amounted to an improper or abusive attack on an object of religious veneration, likely to incite religious intolerance or violating the spirit of tolerance, which was one of the bases of a democratic society. Therefore, the ECtHR considered that – despite the wide margin of appreciation - the domestic authorities had failed to put forward sufficient reasons capable of justifying the interference with the pop singer's freedom of speech. Accordingly, there had been a violation of Article 10 ECHR.

In a joint concurring opinion two judges emphasised that the expressions under examination had not severely disturbed public order, and far less constituted a call for public violence and that therefore the interference with the right to freedom of expression could not be justified. The two judges refered to the PACE Recommendation 1805 (2007) which states that "national law should only penalise expressions concerning religious matters which intentionally and severely disturb public order and call for public violence". The dissenting opinion by the Polish judge disagreed with the finding of a violation of Article 10 ECHR. He observed that the case law of the ECtHR might create an impression that in cases concerning Islam the ECtHR followed its established approach and sought to protect religious feelings effectively against anti-religious speech, whereas in cases involving other religions, the approach had evolved and the protection offered to believers against abusive anti-religious speech had weakened.

Judgment by the European Court of Human Rights, First Section, in the case of Rabczewska v. Poland, Application no. 8257/13, 15 September 2022

https://hudoc.echr.coe.int/eng?i=001-219102

UKRAINE

European Court of Human Rights: *Anatoliy Yeremenko v. Ukraine*

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The European Court of Human Rights (ECtHR) has delivered a judgment concerning defamation proceedings against a journalist following the publication of an article in a weekly newspaper on alleged judicial corruption. The journalist also complained about an injunction ordering to take down the article from the newspaper's website pending the examination of the defamation case. The ECtHR found that, in holding the journalist liable for defamation, the domestic courts had not performed the required balancing exercise between the conflicting interests of the right to reputation and the right to freedom of expression under Articles 8 and 10 of the European Convention on Human Rights (ECHR). The ECtHR found, however, that the interim injunction to remove the article from the newspaper's website had not constituted a disproportionate interference with the journalist's right to freedom of expression. It is this part of the judgment that is highlighted here.

The applicant in the case was a journalist, Anatoliy Yeremenko, who had published an article in the national weekly analytical newspaper Dzerkalo Tyzhnya. The article expressed criticism about the way cases were handled and decided at the Donetsk Regional Commercial Court and the Donetsk Commercial Court of Appeal. The article was also published on the newspaper's website. A few weeks later, six judges of Donetsk's courts applied to the Voroshylovsky District Court of Donetsk City (hereinafter the "District Court") for the application of preventive measures. They argued that the article had not been based on fact and breached the honour, dignity, and professional reputation of the above-mentioned courts, their management, and the judges. The claimants stated that they would lodge a defamation claim for damages against the newspaper and the journalist. They argued that their rights were being infringed while the article was still available online, and as such, they requested an order against the editorial board of the newspaper to remove the article from the newspaper's website. The following day, the District Court ordered the editorial board of Dzerkalo Tyzhnya to remove the article from the newspaper's website. In its one-and-a-half-page decision the court merely reiterated the content of the claimants' request and noted that the request for an injunction should be granted. Appeals against the injunction order were dismissed, and the impugned article was removed from the newspaper's website. The newspaper published a summary of the retraction requested by some of the judges of the Donetsk courts. However, the six judges were not satisfied with the partial retraction and lodged defamation claims against the journalist and the board of the newspaper. They claimed that their professional reputation, honour and dignity had been damaged and that some

statements in the article had undermined the authority of the judiciary. A local court allowed the judges' claim in part, finding some of the statements in the article to be defamatory. The court ordered the editorial board of Dzerkalo Tyzhnya to publish a retraction of the statements concerned. The journalist was ordered to pay EUR 331 for non-pecuniary damages, as well as legal and court fees. This judgment was upheld by a court of appeal, while the journalist's cassation appeal before the Kiev Court of Appeal was rejected. The journalist lodged an application with the ECtHR, complaining that the court decisions ordering the removal of the article from the website pending the examination of the defamation case and holding him liable for the publication of the impugned article had been in breach of Article 10 ECHR.

In its judgment, the ECtHR first refered to some general principles from its case law, in particular to its Grand Chamber judgment in Morice v. France (IRIS 2015-6/1), and reiterated that there was little scope under Article 10 § 2 ECHR for restrictions on debate on matters of public interest, including on remarks on the functioning of the judiciary. A degree of hostility and the potential seriousness of certain remarks did not obviate the right to a high level of protection of freedom of expression, given the existence of a matter of public interest.

Next, the ECtHR evaluated the order to remove the journalist's article from the newspaper's website. The journalist had, in essence, argued that the domestic courts had failed to conduct any preliminary analysis as to whether the published information was true and based on facts, or whether it had violated the rights of the judges who had requested the measure. The ECtHR found, with some hesitation, that the order to remove the article from the website found a legal basis in an article of the Code of Civil Procedure providing for the possibility for an interim injunction before the main claim was lodged. It also agreed that the aim of the injunction order had been to protect the reputation of others and most importantly the maintenance of the authority of the judiciary. With regard the necessity of the injunction, the ECtHR noted that interim injunctions, by their very nature, were temporary measures which merely aim to provide provisional protection to the party concerned pending the examination of the claim on its merits, in cases where the postponement of such measure until after a final decision on the merits would risk causing irreparable harm to the person seeking the injunction or where the judicial examination of the claim would otherwise be impeded. However, it also reiterated that while Article 10 ECHR did not prohibit interim injunctions, even where they entailed prior restraints on publication, the apparent dangers inherent in such measures called for the most careful scrutiny by the Court, which included a close examination of the procedural safeguards embedded in the system to prevent arbitrary encroachments upon the freedom of expression. The ECtHR observed that the injunction did not put an end to the dissemination of the publication in all forms and was not of a sweeping nature. Therefore the fact that the publication had not been available on the newspaper's website pending the examination of the defamation case had not totally hampered the journalist's ability to disseminate information and ideas. The interference with the journalist's freedom of expression was not therefore of a significant magnitude. Furthermore, as the article had been only removed from

the internet site after it had been available to the public for nearly a month, the ECtHR found that such removal did not undermine the very essence of the public debate, while also taking into consideration the need to protect the confidence in the judiciary against destructive attacks which were essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying. Although the ECtHR found it a matter of concern that the domestic courts had been very brief in their reasoning in respect of the injunction, which made it difficult for the ECtHR to assess whether the national authorities had duly balanced the parties' interests at stake, it was of the opinion that, by their very nature, rulings on interim measures were issued as a matter of urgency and could not always contain finely calibrated and detailed reasoning equivalent to that required in the main defamation proceedings. The ECtHR did not find it problematic that the interim injunction concerned the whole article despite the fact that the alleged damaging statements had been only in two paragraphs. In the particular circumstances of the case the ECtHR found, unanimously, that the interim injunction had been necessary and did not constitute a disproportionate interference with the journalist's right to freedom of expression. Accordingly, there had been no violation of Article 10 ECHR on account of the domestic courts' decisions in the injunction proceedings.

Finally the ECHtR evaluated the defamation proceedings in which Mr. Yeremenko was found liable for having published defamatory allegations about the claimants and the judiciary. The ECtHR found that the reasons the domestic courts had adduced to justify the interference with the journalist's rights were not "relevant and sufficient", in particular, due to their failure to address key elements of the case. It also noted that the domestic courts could not be said to have applied standards which were in conformity with the principles embodied in Article 10 ECHR or to have based themselves on an acceptable assessment of the relevant facts. In particular, the domestic courts had not provided relevant and sufficient reasoning demonstrating that the journalist had not acted with the due diligence expected of a responsible journalist reporting on a matter of public interest. Therefore the ECtHR found that the domestic courts had not performed a balancing exercise between the conflicting interests and that the interference with the journalist's right to freedom of expression was not "necessary in a democratic society". The ECtHR concluded, unanimously, that there had been a violation of Article 10 ECHR on account of the domestic courts' decisions in the defamation proceedings.

Judgment by the European Court of Human Rights, Fifth Section, in the case of Anatoliy Yeremenko v. Ukraine, Application no. 22287/08, 15 September 2022

https://hudoc.echr.coe.int/eng?i=001-219194

NATIONAL

GERMANY

Public value list published

Sebastian Klein
Institute of European Media Law

The *Landesmedienanstalten* (state media authorities) have published a so-called "public value list", ordered alphanumerically, of media (television, radio and telemedia) that, through their content, significantly contribute to the formation of public opinion. Inclusion in the public value list is meant to represent a special seal of quality for the services concerned. Public-value services were selected on the basis of the criteria set out in Article 84(5)(2) of the *Medienstaatsvertrag* (state media treaty – MStV), which the media authorities had explained in more detail in a statute based on Article 84(8) MStV. These criteria concern, for example, the amount of time spent reporting on political and historical events, the amount of time spent reporting on regional and local information, the ratio between in-house productions and programme content produced by third parties, the quota of European productions, and the quota of offers for young target groups. The criteria are strongly geared towards the television genre; it remains to be seen whether an evaluation of Article 84 MStV will lead to different criteria being applied to different media genres.

The list only contains private-sector services, since the public value of public services is directly defined in Article 84(3) and (4) MStV. On the whole, the media authorities were generous in their assessment of the 354 applications they received, rejecting only 54 of them. It can be assumed that they wanted to avoid making qualitative judgements about the suitability of broadcasters' thematic emphasis. The services listed therefore range from general interest channels such as RTL or ProSieben to specialist news channels such as BILD TV or ntv, and other special-interest services such as Sport1 and Servus TV.

In the media authorities' opinion, the listed television, radio and telemedia services make a significant contribution to the diversity of opinions. Inclusion in the public value list also provides direct benefits in terms of discoverability and can therefore help attract funding. Listed services must be easy for consumers to find on smart TVs and user interfaces. According to the state media treaty, a six-month implementation period applies in this regard (if it is technically and economically feasible).

In consultation with the public broadcasters, the state media authorities have also produced a joint list of both public and private services, which the state media treaty does not require them to do. This list is designed to provide the recommended order of channels to be used by providers of user interfaces for television, radio and telemedia services. It also takes geographical factors into

account.

The state media authorities liaise closely with user interface providers and associations of such companies with regard to the implementation of these lists.

Pressemitteilung der Medienanstalten

https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/qualitaetspraedikat-public-value

State media authorities press release

[DE] Broadcasting Commission resolution on the current state of public broadcasting

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

Following its meeting on 22 September 2022, the Broadcasting Commission of the German *Länder* published a resolution on the current state of public broadcasting in Germany. The Broadcasting Commission provides a permanent forum for the state and senate chancelleries of the *Länder* to discuss issues relating to media policy and legislation in and for Germany.

In its resolution, the Broadcasting Commission agreed that recent events within individual ARD broadcasting companies, including RBB (Rundfunk Berlin-Brandenburg) following allegations against its former director and the former chair of its board, posed a threat to public service broadcasting as a whole (i.e. the nine ARD broadcasters, ZDF and Deutschlandradio). The *Länder* demanded that these allegations be fully investigated. They believed that the broadcasting companies – "especially" their respective directors and boards, and in some cases, their staff representatives – had a duty to draw the correct conclusions from these events and to take appropriate action. Careful, responsible and transparent use of licence fee revenue was, in the opinion of the *Länder*, a prerequisite for the acceptance of public broadcasting. The broadcasters should also offer voluntary undertakings in financial matters. The resolution did not specify how such voluntary commitments should fit in with the constitutional law requirement for funding to be aligned with the broadcasters' remit.

The Broadcasting Commission urged all public broadcasters to review their internal supervisory and compliance structures. Each should report the results of this process and the measures it intended to take to the *Länder*. These reports should be submitted by all broadcasters to all *Länder* and not just to those in which the broadcaster operated.

The *Länder* thought that a common set of high standards, in relation to transparency and compliance matters, was required across the entire public broadcasting sector. They were evaluating possible amendments to legislative provisions in order to meet "best-practice" requirements. These could include general provisions of the *Medienstaatsvertrag* (state media treaty) and *ARD-Staatsvertrag* (state treaty on the ARD), or of the state treaties and laws establishing the individual broadcasting companies.

In relation to the planned third amendment of the state media treaty, the Broadcasting Commission focused in particular on the boards of the public broadcasting companies, which the *Länder* considered to be an essential pillar of an independent public broadcasting sector, anchored at the centre of society. According to the resolution, they should meet their responsibilities and be capable of doing so. Under the third amendment, the boards would, in future, draw up quality and programming guidelines for all broadcasting companies and lay down

standards for sound, rigorous financial management. The Broadcasting Commission encouraged the boards to continue the process established for this purpose in an ambitious way. The *Länder* believed that the broadcasters were therefore duty-bound to ensure that their board offices were suitably equipped, and were assessing the relevant legal framework. The resolution did not explain what "suitably equipped" meant in this context, whether it differed from one broadcaster to another, and how improvements to board offices related to the strengthening of expertise within the boards themselves.

The Broadcasting Commission will invite the directors of the ARD, ZDF and Deutschlandradio to discuss its resolution and expects the reports on supervisory and compliance structures and proposed measures in this regard to be submitted in the meantime.

Beschlussdokument der Rundfunkkommission der Länder

https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/2022-09-22_RFK-Beschluss_zum_OERR.pdf

Broadcasting Commission resolution

[DE] Constitutional Court can inform journalists in advance

Sebastian Klein
Institute of European Media Law

In a judgment of 25 August 2022 (case no. 3 K 606/21), the *Verwaltungsgericht Karlsruhe* (Karlsruhe Administrative Court) decided that the *Bundesverfassungsgericht* (Federal Constitutional Court) did not infringe third-party rights by informing journalists of its decisions before they were officially published.

The *Bundesverfassungsgericht* gives full members of the *Juristenpressekonferenz* (conference of legal journalists) access to important decisions the evening before they are officially published. The *Juristenpressekonferenz* is a private association which, according to its statutes, is made up of journalists “who continuously and predominantly report on the case law of the highest German and European courts, including the work of the federal prosecutor and legal and judicial policy issues”. In order to report accurately on the court’s decisions, its members are able to collect a paper copy of the press release concerning a judgment the evening before it is published. They promise to keep its content confidential until the decision is officially published the following morning. The court has followed this practice for some time, during which its decisions have never been leaked.

This practice was disputed by "*Alternative für Deutschland*" (AfD), a German parliamentary party that had itself been involved in a court procedure in which the judgment had been revealed to journalists the evening before it was officially published. It claimed that its right to a fair trial (Article 103 and Article 20(3) in conjunction with Article 2(1) of the *Grundgesetz* (Basic Law – GG)) and its general privacy rights (Article 2(1) in conjunction with Article 1(1) GG) had been infringed.

The court rejected the action as inadmissible. The AfD had no standing to bring proceedings because it had failed to provide sufficient evidence that its rights may have been breached. The court ruled that providing selected journalists with a press release about a judgment the evening before its publication could not be challenged. It was clear that the court had not breached the state’s duty of neutrality in commercial competition by unfairly treating a party to a case which – as a political party – was not a press outlet itself and not in commercial competition with the selected journalists.

There was also no basis for a claim that future press releases should be submitted in advance to the AfD. Although the court did not allow an appeal against the judgment, the AfD can apply for leave to appeal.

Urteil des Verwaltungsgerichts Karlsruhe

https://openjur.de/u/2450618.html

Judgment of the Karlsruhe Administrative Court

[DE] NLM complains about RTL and CHANNEL21 advertising infringements

Sebastian Klein
Institute of European Media Law

In September 2022, the *Niedersächsische Landesmedienanstalt* (Lower Saxony media authority – NLM), implementing resolutions of the *Kommission für Zulassung und Aufsicht* (Commission on Licensing and Supervision – ZAK) of the state media authorities, filed complaints concerning a total of three advertising infringements by private television broadcasters: one concerned the RTL channel operated by RTL Television GmbH and two were directed against the teleshopping channel CHANNEL21.

Firstly, the Hanover-based authority criticised a split-screen advertisement for a smartphone, broadcast on RTL on 10 December 2021. The format of this advert had infringed broadcasting law. On the one hand, according to Article 8(4)(1) of the *Medienstaatsvertrag* (state media treaty), a split-screen advertisement was only lawful if the advertising broadcast was kept optically separate from the other parts of the service and was clearly identified as such. However, this was not the case here, since programme content and advertising had been mixed together. Moreover, the split-screen advertisement had been incorrectly labelled.

Meanwhile, two further complaints were lodged concerning the teleshopping broadcaster CHANNEL21, formerly known as RTL Shop. Firstly, the broadcaster had breached the ban on misleading advertising enshrined in Article 8(1)(3) of the *Medienstaatsvertrag*. In two repeats, broadcast at around 1.20 a.m. and 3.55 a.m. on 26 April 2022, a countdown of remaining stock numbers had been displayed. The programmes had not been clearly labelled as recordings. In the NLM's opinion, viewers had therefore been unaware that the programmes were repeats and that the stock numbers might therefore have been inaccurate.

The other complaint concerning CHANNEL21 related to the programme "*Urbrunnen*", broadcast on 21 March 2022. This programme advertised a drinking water filtration system. Its presenters claimed, among other things, that the consumption of drinking water could be harmful, even if it complied with the *Trinkwasserverordnung* (drinking water ordinance). This led to viewer complaints and was also classified in the NLM's decision as misleading and confusing for viewers.

The three complaints are not yet legally binding and may be contested. The broadcasters concerned have one month to appeal to the *Verwaltungsgericht Hannover* (Hanover Administrative Court) in order to have them annulled.

Pressemitteilung der NLM

https://www.nlm.de/aktuell/pressemitteilungen/pressemeldungen/nlm-beanstandet-werbeverstoesse-bei-rtl-und-channel21-1

NLM press release

SPAIN

[ES] Provisional measures on advertising during the broadcasting in Spain of the 2022 FIFA World Cup

Pedro Gallo Buenaga
Audiovisual Diversity/ University Carlos III of Madrid

Two weeks before the start of the 2022 FIFA World Cup in Qatar, the Spanish *Comisión Nacional de los Mercados y la Competencia* (National Markets and Competition Commission — CNMC) has adopted provisional measures on the contracting of advertising for the coverage of the tournament in Spain. Until the body adopts a final resolution, the provisional measures establish that the public service broadcaster RTVE will not be able to include advertising during World Cup broadcasts with advertisers other than FIFA's sponsors.

Regarding the broadcasting rights, RTVE reached an agreement with the private media group Mediapro to allow it to broadcast the main matches of the competition in Qatar, including all those in which the Spanish national football team participates. The agreement sparked controversy over human rights violations by the World Cup host country, as well as the public broadcaster's expensive acquisition of the broadcasting rights from Mediapro. The deal means that it will be possible to follow the championship on public television for the first time in the country since 1998.

It is understood that, following the notification of the provisional measures, RTVE will not be able to broadcast sponsorship communications or general advertising other than those of the commercial partners of the organisers. This provisional decision was taken after the private broadcasters, Mediaset and the association UTECA, made two requests to the CNMC in September, in which the former accused the public corporation of distorting the functioning of the advertising market.

This advertising exception is covered by the law that regulates the financing of the public broadcaster. The recently updated General Law on Audiovisual Communication amends some parts of Article 7 of Law 8/2009 on the financing of the Spanish Radio and Television Corporation. This article authorises the broadcasting of sports and cultural programmes with sponsorship contracts or other forms of commercial communication associated with such sponsorship when these communications form an indivisible part of the acquisition of rights of the signal to be broadcast.

It is therefore to be expected that the exception will only be applicable in this case. The provisional measure has been in force since the moment of its notification, nevertheless, the CNMC will adopt a final decision once the administrative procedure has been completed and in view of the allegations made by the interested parties.

La CNMC adopta medidas provisionales sobre la contratación de publicidad por parte de la CRTVE en el Mundial de Qatar

https://www.cnmc.es/prensa/cautelares-crtve-qatar-20221104

The CNMC adopts provisional measures on the contracting of advertising by the CRTVE in the World Cup in Qatar

FRANCE

Canal+ is not required to resume broadcasting TF1 channels via TNT Sat

Amélie Blocman
Légipresse

On 5 September, Canal+, without giving any notice or warning, ceased broadcasting five channels operated by the TF1 group (TF1, TMC, TFX, TF1 Séries Films and LCI) via TNT Sat (a service that, in particular, enables households that cannot access DTT to receive television channels) following a commercial dispute over a new distribution contract between the parties.

The TF1 channels filed a summons for urgent proceedings before the Paris commercial court in order to bring an end to the unlawful disturbance resulting from what they considered a sudden termination of the commercial relationship. They asked the court to order Canal+ to resume broadcasting the channels, subject to a fine of EUR 200,000 per day, for at least four months.

The judge noted, firstly, that the French audiovisual regulator, ARCOM, had said that, since the dispute fell under private law, “the law does not give the regulator legal leverage to compel operators to rectify this harmful situation.” The law of 30 September 1986 did not oblige a satellite broadcaster to make DTT channels available to the public free of charge, but gave it the option to do so. The Canal+ group was therefore not obliged by law or regulation to distribute the TF1 channels via TNT Sat.

Concerning the commercial relationship, the judge observed that broadcasting the DTT channels formed an integral part of the overall commercial relationship between the TF1 and Canal+ groups as defined in the disputed contract, which had expired on 31 August 2022. The commercial relationship between the parties, within the meaning of Article L. 422 1 II 2 of the Commercial Code, had therefore ended on 31 August 2022 as far as the distribution of the DTT signal via TNT Sat was concerned. The TF1 group’s request that the unlawful disturbance resulting from the sudden termination of this supposed commercial relationship should be ended after 31 August 2022 was therefore rejected.

Similarly, since the alleged harm was a direct result of the non-renewal of the disputed 2018 contract, the unlawful character of which was not sufficiently proven in the urgent procedure, the court also rejected the TF1 group’s request that the imminent harm caused to it should be stopped.

On 20 October, the Paris Appeal Court confirmed all provisions of the judgment. Finally, on 4 November, the TF1 and Canal+ groups announced that they had reached an agreement under which, from 7 November 2022, Canal+ would distribute all the TF1 group’s DTT channels and catch-up services over the long term.

Tribunal de commerce de Paris (réf.), 22 septembre 2022, n° 2022042937, TF1 et a. c/ Groupe Canal Plus

https://www.doctrine.fr/d/TCOM/Paris/2022/UAB675AAC8E2AEEA0D5E2

Paris commercial court (urgent procedure), 22 September 2022, no. 2022042937, TF1 et al v Groupe Canal Plus

[FR] Broadcaster can force distributor to make viewers pay for its DTT channels

Amélie Blocman
Légipresse

In a decision of 28 September, the commercial chamber of the Court of Cassation settled a dispute between Métropole télévision and the Molotov distribution platform.

Métropole télévision, parent company of the M6 group, together with its subsidiaries EDI-TV and M6 génération, operate the television channels M6, W9 and 6TER, which they broadcast free-to-air and free of charge via digital terrestrial television (DTT) and the open Internet (OTT). They allow distributors to include their channels in their pay-TV packages, which are accessible through various distribution networks. Molotov, via an Internet-based platform, distributes television services, some under a free-to-view model and others on a paid subscription basis. In 2015, Molotov and Métropole signed an 'OTT' distribution contract covering the free-to-air broadcast of M6, W9 and 6TER and their specialist channels, as well as the catch-up services of other channels. When this contract expired, Métropole proposed new distribution conditions and, following negotiations, the parties renewed the existing agreement until 31 March 2018, when the new contract was set to enter into force.

On 5 March 2018, Métropole asked Molotov to accept new remuneration conditions, to distribute the channels M6, W9 and 6TER and associated bonus content exclusively as part of pay-TV packages, and to make its customers pay for these channels. However, the parties could not agree on distribution conditions for the free DTT channels. Molotov accused Métropole of making the conclusion of a new distribution contract conditional on it changing its business model by forcing it to offer a basic pay-TV package including the free DTT channels (M6, W9 and 6TER). It filed an action for damages on the grounds that the so-called 'paywall clause' contained in the company's general distribution conditions, a measure used by broadcasters to prevent non-subscribers accessing certain content on a website or application, was illegal and discriminatory.

Molotov claimed, firstly, that the 'paywall clause' forced it to set a minimum price, which was prohibited by Article L. 442-5 of the Commercial Code. After the appeal court had rejected all its requests, Molotov appealed to the Court of Cassation, whose economic and financial chamber pointed out that the disputed clause prevented the distributor distributing the free-to-air DTT channels free of charge via the Internet. However, since there was no evidence that Métropole was trying to set a minimum price for the Molotov pay-TV service in which it was demanding its channels be included, the Court of Cassation decided that the appeal court had been right to rule that the practice could not be deemed to be the unlawful imposition of a minimum price.

Secondly, Molotov considered that the M6 group's ownership of a neighbouring right did not give it the right to impose such obligations. However, according to the Court of Cassation, the appeal court had been right to state that, since it held a neighbouring right over its channels under Article L. 216-1 of the Intellectual Property Code, Métropole was entitled to lay down the economic conditions for their distribution, although such a right could be abused if it led to a significant imbalance. In this case, such an abuse, which Molotov would have to prove and which could not be the result of Métropole using its right to parallel self-distribution or of the alleged harm to Molotov's business model, had not been established.

Finally, the decision stated that the provisions of the law of 30 September 1986 did not oblige the private provider of the free M6 service to make its signal available to a di

stributor by any means other than terrestrial broadcasting, whether via satellite or, as in this case, over the Internet. Moreover, Molotov had failed to prove that it had been discriminated against by Métropole in its implementation of the disputed clause.

Given these findings, which suggest that M6's decision to only allow its free-to-air DTT channels to be distributed as part of a pay-TV package did not, in itself, infringe the cited provisions of the law of 30 September 1986, the Court of Cassation ruled that the appeal court, which had also found that the decision had not been incorrectly implemented, had legally justified its decision.

Cour de cassation (com.), 28 septembre 2022, n° 20-22447, Molotov c. Métropole

https://www.courdecassation.fr/decision/6333e9d1e5004d05dab7c05e

Court of Cassation (commercial chamber), 28 September 2022, no. 20-22447, Molotov v Métropole

[FR] CNC to assess impact of unlimited cinema pass extension

Amélie Blocman
Légipresse

Following an opinion issued by the French competition authority, the right of cinema operators to sell unlimited passes was extended until 31 December 2023 under decree no. 2022-1296 of 6 October 2022, in accordance with Articles L. 212-27 *et seq*. of the Cinema and Animated Image Code.

In order to offer customers an unlimited pass, cinema operators must first apply for a licence from the president of the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image, CNC) in accordance with Articles L. 212-27 *et seq*. of the Cinema and Animated Image Code. Three cinema operators (Pathé Gaumont, UGC and Le Cinéma des Cinéastes) currently hold such a licence. Licence applications and renewal requests must be accompanied by financial data in order to enable the CNC president to ensure in particular that the 'reference price', which forms the basis for the remuneration of rightsholders and distributors, is fixed in accordance with the average price of individual tickets sold by the operator, the current situation of the cinema market and the observed and expected effects of the unlimited pass.

A year ago, in view of the devastating impact of the health crisis on the cinema industry and the problems faced by cinema operators trying to provide reliable financial data to support their licence renewal applications, a 15-month extension was granted under the decree of 23 September 2021. At the same time, the CNC was required, within three months following the adoption of the draft decree, to publish an interim assessment of the impact that extending the scheme would have on other operators.

Under this extension, the licences of the three operators concerned will expire on 31 December 2022, 14 March 2023 and 30 October 2023 respectively. Requests for them to be renewed must be submitted to the CNC president no later than three months before they expire, i.e. by 30 September 2022 for Pathé Gaumont. However, the CNC president noted that, in view of the upheavals linked to the health crisis and the lack of information on the sector's current financial situation, the operators were still finding it difficult to provide sufficiently reliable financial data on the medium-term development of the market and the expected impact of the unlimited pass. The CNC would therefore be unable, within the time limits laid down, to analyse the renewal applications or verify the accuracy of the reference price proposed by each operator under the criteria set out in Article L. 212-28 of the Cinema and Animated Image Code. The CNC also mentioned the recent launch of an interministerial 'cinema and competition' task force responsible, among other things, for examining the legal framework applicable to unlimited cinema passes and whose discussions were likely to result in legislative or regulatory changes by the end of 2023. For all these reasons, the draft decree submitted for the competition authority's opinion proposed that the current

licences to issue unlimited cinema passes should be extended until 31 December 2023 for all the operators concerned.

While regretting the tight deadline it had been given to issue its opinion and the lack of adequate economic data for it to properly assess the proposed measure's impact on competition, the competition authority issued a favourable opinion on the draft decree. It considered, firstly, that the evidence that had been gathered during its investigation and discussions appeared to rule out the main risks to competition that the measure could cause, and secondly, that current holders of unlimited cinema passes could have been harmed by the non-renewal of the licences. However, alongside its positive opinion, the competition authority also asked the CNC to publish, within three months of the adoption of the draft decree, an interim assessment of the impact that extending the licences would have on the various stakeholders in the cinema sector.

Avis 22-A-07 du 03 octobre 2022 portant sur un projet de décret relatif à la prorogation des agréments des formules d'accès illimité au cinéma jusqu'au 31 décembre 2023, rendu public le 24 octobre 2022

https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2022-10/22a07.pdf

Opinion 22-A-07 of 3 October 2022 concerning a draft decree on the extension of licences to issue unlimited cinema passes until 31 December 2023, published on 24 October 2022

Décret n° 2022-1296 du 6 octobre 2022 prorogeant les agréments des formules d'accès au cinéma.

https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2022-10/22a07.pdf

Decree no. 2022-1296 of 6 October 2022 extending cinema pass licences

[FR] New ARCOM recommendation on commercial communications promoting gambling and games of chance

Amélie Blocman
Légipresse

Commercial communications promoting authorised gambling operators are permitted under certain conditions and limitations set out in Article L. 320-12 of the Internal Security Code which, as well as prohibiting such communications in services or programmes aimed at minors, requires the French audiovisual regulator (ARCOM) to set out in a resolution the conditions under which they may be broadcast.

Under ARCOM resolution no. 2022-57 of 19 October 2022, which revokes the resolution of 22 January 2013 on the conditions for the television and radio broadcasting of commercial communications promoting legally authorised operators of gambling services and games of chance, the rules governing audiovisual advertising for sports betting and other gambling services were extended to include streaming and replay platforms. The resolution covers commercial communications (advertisements, sponsorship and product placement) promoting all gambling operators authorised by the public authorities to provide services, including online services, under an exclusive right (Française des Jeux, PMU), a licence (casinos) or the approval of the *Autorité nationale des jeux* (national gambling authority).

The resolution sets out the criteria for defining television, radio and on-demand audiovisual media services aimed at minors, as well as programmes aimed at minors within the meaning of Article 15 of the law of 30 September 1986. It states that, with regard to on-demand audiovisual media services that are not specifically aimed at minors but that contain a section dedicated to them, the ban on commercial communications promoting operators of gambling services and games of chance applies to that whole section.

The resolution states that commercial communications promoting gambling should also respect the rules on televised advertising, sponsorship and product placement. They should clearly indicate that they are promoting a legally authorised gambling service and include the name of the advertiser. They must not make gambling and games of chance attractive for minors, nor feature celebrities or fictional characters who are popular with children and teenagers. Finally, in accordance with decree no. 2020-1349 of 4 November 2020, all commercial communications promoting a gambling operator must include a warning against the dangers of gambling.

According to Article L. 324-8-1 of the Internal Security Code, broadcasting, by any means, a commercial communication that violates the provisions of Article L. 320-12 is punishable by a fine of EUR 100,000. The relevant court can increase the

fine to four times the sum spent advertising the illegal operation. Failure to comply with the ARCOM's resolution after receipt of a formal notice can also result in the sanctions described in Articles 42-1, 42-4, 48-2 and 48-3 of the law of 30 September 1986.

Referring to "abusive practices", the ARCOM said it was reserving the right to "impose, in a future communication, specific rules on the volume and concentration of such commercial communications."

At the same time, the national gambling authority gathered together the gambling operators and advertising industry representatives, who signed four charters concerning television, radio, billboard and digital advertising, in which they promised to reduce the pressure exerted by gambling advertisements and promote responsible commercial communications.

Délibération du 19 octobre 2022 relative aux conditions de diffusion des communications commerciales en faveur d'un opérateur de jeux d'argent et de hasard légalement autorisé

https://www.arcom.fr/nos-ressources/espace-juridique/decisions/deliberation-du-19-octobre-2022-relative-aux-conditions-de-diffusion-des-communications-commerciales-en-faveur-dun-operateur-de-jeux-dargent-et-de-hasard-legalement-autorise

Resolution of 19 October 2022 on conditions for broadcasting commercial communications promoting legally authorised operators of gambling services and games of chance

UNITED KINGDOM

[GB] UK Coroner orders major online platform to provide to his court their proposals to provide suitable self-regulation to prevent future teenage deaths from suicide.

Julian Wilkins
Wordley Partnership

Whilst the UK Parliament's Online Harms Bill 2022 awaits further passage through both the Houses of Common and Lords, the verdict in a recent Coroner's Court decision has invited some of the leading online platforms to consider self-regulatory measures to protect children and vulnerable adults from harmful content.

The Coroner's hearing was heard in the Northern District of Greater London Coroner's Court, before H. M. Coroner and senior coroner Mr Andrew Walker, concerning the suicide of 14 years old Molly Rose Russell who died on the 21 November 2017. Despite a promising future and loving parents, Molly had become depressed, which developed into depressive illness.

It transpired that Molly had subscribed to a number of online sites. The sites were not suitable for children yet the content was easily available. She had access to images, video clips and text concerning self-harm, suicide or otherwise, which were negative or depressing in nature.

The platforms worked in such a way that algorithms would provide more content and had the effect of providing excessive material of like content whereby Molly would "binge" view the material.

The Coroner considered that the content had a negative effect on Molly. Some of the content romanticised acts of self-harm by young people on themselves. Whilst other content sought to isolate and discourage discussion with those who may have been able to help, for instance Molly's parents.

Instead, the platform encouraged Molly to approach celebrities for help with little prospect of a reply. Some of the content was graphic, tending to portray self-harm and suicide as an inevitable consequence of an irrevocable condition.

The effect of the sites was to normalise Molly's condition, focusing on a limited and irrational view without the counterbalance of normality.

The Coroner concluded in his report that it was likely that the material viewed by Molly, someone already suffering with a depressive illness and at a vulnerable age, negatively affected her mental health and contributed to her death in "a more than minimal way".

The Coroner raised six matters of concern namely (i). There was no separation between the adult and child parts of online platforms, or separate platforms for children and adults. (ii). There was no age verification when signing up to the on-line platform. (iii). That the content was not controlled so as to be age specific. (iv). Algorithms were used to provide content together with adverts. (v). Parents, guardians or carers did not have access to the material being viewed or have any control over that material. (vi). That the child's account was not capable of being separately linked to the parent, guardian or carer's account for monitoring.

The Coroner recommended that consideration is given by the Government to reviewing the provision of internet platforms to children, with reference to harmful on-line content, separate platforms for adults and children, verification of age before joining the platform, provision of age specific content, the use of algorithms to provide content, the use of advertising and parental guardian or carer control, including access to material viewed by a child, and retention of material viewed by a child.

Also, the Coroner recommended the setting up of an independent regulatory body to monitor on-line platform content taking account of his concerns. Further, the enactment of such legislation as may be necessary to ensure the protection of children from the effects of harmful on-line content and the effective regulation of harmful on-line content.

Although regulation would be a matter for Government, the Coroner saw no reason why the platforms themselves would not wish to give consideration to self-regulation to address his concerns.

The Coroner considered the platforms had the power to take suitable self-regulation to prevent future deaths.

Organisations including Meta Platforms, Snap Inc and Twitter International Company were under a duty to respond to the Coroner’s report by 8 December 2022. The Coroner ordered that the responses contained details of action taken or proposed action to be taken, including a timetable for action. In the absence of such proposals the organisations must explain why no action is proposed.

Paragraph 7, Schedule 5, of the Coroners and Justice Act 2009 and regulations 28 and 29 of the Coroners (Investigations) Regulations 2013.

https://www.judiciary.uk/wp-content/2022/10/Molly-Russell-Prevention-of-future-deaths-report-2022-0315_Published.pdf

[GB] DCMS report on influencer culture: no indication of a change of mood in the government response

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On 23 September 2022, the House of Commons Digital, Culture, Media and Sport (DCMS) Committee, which is responsible for scrutinising the work of the Department for Digital, Culture, Media and Sport and its associated public bodies (including the BBC), published the government response to its report *Influencer Culture: Lights, camera, inaction?* (previously reported on IRIS 2022-7/18).

The Committee had found low rates of compliance with advertising regulation and concluded that employment protection had failed to keep up with the growth of online influencer culture, leaving those working in the industry unsupported and child influencers at risk of exploitation. It made a range of recommendations that called on the government to strengthen both employment law and advertising regulation.

The Advertising Standards Authority (ASA), which monitors advertisements across the UK (including influencer marketing) for compliance with advertising rules, as well as the Competition and Markets Authority (CMA), which enforces competition and consumer laws and has powers to conduct investigations in suspected violations of these laws in the market, submitted separate responses to the Committee's recommendations earlier in July 2022.

Recommendations concerning the ASA and the CMA

The government welcomed the Committee's recommendations on strengthening the ASA's regulatory tools (e.g., to be given statutory powers to enforce its rules) but pointed to the work currently undertaken as part of its Online Advertising Programme, which aims to improve transparency and accountability across the online advertising supply chain. The government also agreed that the CMA should have more powers to enforce consumer protection law and stated that it will bring forward its Digital Markets, Consumer and Competition Bill (announced in the 2022 Queen's Speech) to provide for regulatory changes (including giving CMA the ability to decide for itself when consumer law has been broken and to impose monetary penalties when breaches are established).

Influencer careers and influencer harassment

The government agreed with the Committee that pursuing a career as an influencer often came with challenges, including a worrying rise in the amount of online abuse, harassment and intimidation directed towards them. Reference was made to Online Safety Bill (OSB), which will require technology companies to improve their users' safety and take action against online abuse and threats on their services. The Bill places, in particular, a statutory duty on in-scope services to operate complaints procedures that provide for "appropriate" action to be

taken by the provider in response to relevant complaints (clauses 18(2b) and 28(2b)). Services will be thus expected to consider the nuances of different types of harm and the appropriateness of their action in response to the complaints they receive. However, the progress of the Bill towards becoming law has been (at the time of writing) paused, with some of its most controversial elements being subject to government review.

Influencer code of conduct

In its response, the government expressed strong support for the Incorporated Society of British Advertisers' (ISBA) Influencer Code of Conduct, noting that the ASA had already published guidance for influencers which existed alongside the Code of Conduct for the Influencer Marketing Trade Body. The government agreed with the Committee’s proposal to develop a code of conduct which would complement ISBA’s existing work by promoting good practice in the coordination between influencers, brands as well as talent agencies. It is unclear though how the different codes of conduct and guidelines will work together effectively.

Media literacy and children influencers

Children are often unable to differentiate undisclosed advertising from other types of content they access on social media. The Committee had found in its report that both children and parents were not being adequately supported in developing media literacy skills to make informed choices online. Although the government appreciated the risk of children being exploited as consumers of influencer content, it referred to its ongoing work on the Online Media Literacy Strategy, which is designed to equip users with the knowledge and skills required to become more discerning consumers of information. The OSB is also intended to strengthen Ofcom’s (the UK’s communication regulator) media literacy functions by including media literacy within the new transparency reporting and information gathering powers.

The government also recognised the regulatory gap in relation to safeguarding children acting as “brand ambassadors” themselves. Under existing law (i.e., section 37 of the Children and Young Persons Act 1963), a licence must be obtained before a child can legally participate in certain types of performance and activities in Great Britain (including for example any live broadcast performance or any performance recorded to be used in a broadcast or a film intended for public exhibition). However, this protection does not extend to user-generated content, e.g., where young people or a family record themselves and share it on social media. The government pointed out that the Department for Education is open to exploring legislative options that may provide more effective protection to children but there was no express commitment to this.

Overall, the government welcomed the Committee’s comprehensive inquiry into influencer culture and recognised that it shed much-needed light on the influencer ecosystem and its impact on both traditional and digital media. However, the government's response provides little indication of what concrete frontline actions will be taken.

Digital, Culture, Media and Sport Committee, Influencer Culture: Lights, camera, inaction?: Government Response to the Committee's Twelfth Report of Session 2021–22

https://committees.parliament.uk/publications/28742/documents/173531/default/

Digital, Culture, Media and Sport Committee, Influencer Culture: Lights, camera, inaction?: ASA System and CMA Responses to the Committee's Twelfth Report of Session 2021-22

https://committees.parliament.uk/publications/23200/documents/169665/default/

ITALY

[IT] The Administrative Court of Lazio annuls the sanctions inflicted against Amazon and Apple by the Italian Competition Authority

Ernesto Apa & Eugenio Foco
Portolano Cavallo

Through its judgment of 3 October 2022, the Regional Administrative Court of Lazio (*Tribunale Amministrativo Regionale per il Lazio* – TAR Lazio) annulled the two administrative pecuniary sanctions imposed by the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato* – AGCM) against the Amazon and Apple Groups.

Following a complaint received in February 2018, the AGCM opened an investigation against Apple and Amazon on 21 July 2020 concerning the commercial agreement attributing the sale of Apple and Beats products on Amazon marketplace exclusively to Amazon and other Apple official re-sellers. According to the AGCM, such an agreement excluded other economic operators who lawfully sold such products.

The proceedings were closed through Resolution No. 29889 adopted by the AGCM on 16 November 2021 (the AGCM Resolution). In particular, the AGCM found that the Apple Group (Apple Inc., Apple Distribution International Ltd, Apple Italia S.r.l.) and the Amazon Group (Amazon.com Inc., Amazon Services Europe S.à rl.l, Amazon Europe Core S.à r.l., Amazon Italia Services S.rl.) had engaged in an agreement restricting competition in violation of Article 101 TFEU and consisting of agreeing and implementing contractual clauses that prevented retailers who legitimately engaged in the business of reselling Apple and Beats products from accessing the intermediation marketplace available at: Amazon.it.

In the light of the foregoing, the AGCM imposed administrative pecuniary sanctions in the amounts of EUR 134.6 million against the Apple group and EUR 68.7 million against the Amazon Group. Both sanctions were decreased slightly by the AGCM following the discovery of a material error in their original determination.

Both Groups appealed the AGCM Resolution, which was annulled on procedural grounds by the TAR Lazio following its judgment of 3 October 2022. In particular, the TAR Lazio found that the AGCM had waited too long to open the investigative phase of the proceedings contrary to the principles of good performance and efficiency of administrative action. In particular, the fact that the AGCM had waited 17 months, from the date in which it first received the complaint to the date it had decided to open the investigation, constituted a severe infringement of such principles and warranted the annulment of the AGCM Resolution.

AGCM Provvedimento n. 29889

https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/8F15D8EC00612A74C125879C0049738B/$File/p29889.pdf

AGCM Resolution No. 29889

TAR Lazio - Sentenza n. 12836 del 3 ottobre 2022

https://www.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm&nrg=202109842&nomeFile=202212836_08.html&subDir=Provvedimenti

TAR Lazio - Judgement No. 12836 of 3 October 2022

MOLDOVA

[MD] New Copyright Act adopted

Andrei Richter
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The new Law of the Republic of Moldova “On Copyright and Neighbouring Rights” was adopted by the Parliament on 28 July 2022 and entered into force on 9 October 2022. It replaces the earlier law of the same name adopted on 2 July 2010 (N. 139), which in turn replaced the law N 293-XIII of 23 November 1994. The 2022 law aims to transpose 12 EU directives in the field of copyright into national legislation (the Preamble) and generally improve the copyright protection system in the country.

It is done through standardisation and harmonisation of legal notions in the sphere of intellectual property (Article 3), as well as, for example, regulating the right of performers to obtain an additional annual payment after 50 years of the first release of the phonogram (Article 46, paragraph 5).

The new law establishes stricter accountability standards for the collective management of copyright and related rights by setting clearer mechanisms for the collection and distribution of royalties. It does so by capping the fee of the designated collective management organisations (CMOs) to 30 per cent of the amounts distributed to the rightholders (Article 97, paragraph 6), and by introducing an obligation on CMOs to draw up and publish an annual transparency report, subject to an audit, and including information on their activities, collected royalties, financial declarations and license refusals (Article 96). The CMOs’ activity is still overseen by the State Agency on Intellectual Property (Article 51).

The new law will benefit the authors and holders of copyright and related rights. It increases the remuneration they deserve, taking into account: the freedom to negotiate and set tariffs in methodologies; the clear and fair mechanism regarding compensatory remuneration; the recognition of new entitlements (eg. additional annual remuneration); the reduction of the management fee for collective management organisations; and the new ways to access to any information related to the management of entitlements (Articles 99-102).

The law also includes new provisions regarding the use of copyright-protected subject matter by online content-sharing service providers (Articles 62-66). It expressly stipulates that the provider performs an act of communication to the public or an act of making available copyright-protected works to the public when granting public access to the protected content uploaded by its users (Article 62 paragraph 1).

LEGE Nr. 230 din 28-07-2022 privind dreptul de autor și drepturile conexe

https://www.legis.md/cautare/getResults?doc_id=133204&lang=ro

Law of the Republic of Moldova on Copyright and Neighbouring Rights, Nr. 230 of 28 July 2022

NETHERLANDS

[NL] Court refuses to grant injunction against broadcaster over insufficient opportunity to respond

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On 10 October 2022, the District Court of Midden-Nederland (*Rechtbank Midden-Nederland*) published a significant judgment on the obligations of broadcasters to provide a right to respond. Notably, the Court refused to prohibit a broadcast over an alleged insufficient opportunity to respond, holding that "rebuttal is not an absolute right", and the way in which a rebuttal is processed is part of "journalistic freedom".

The case concerned an episode of *BOOS*, an investigative journalism and consumer protection programme broadcast by the Dutch public broadcaster BNN-VARA. In the episode, the programme's presenter, editor and a cameraman paid an unannounced visit to a company's office. The purpose of the visit was to confront the company director about numerous complaints that had been made against it over a festival that was cancelled twice during the Covid-19 pandemic, after which the complainants did not receive their ticket money back. The presenter confronting the company director over the complaints was recorded, and was set to be included in a broadcast of *BOOS*. However, the company initiated legal proceedings against the broadcaster, seeking an order prohibiting the broadcast unless the company was given the "opportunity to respond substantively" during the broadcast to concrete complaints or accusations of named persons, submitted in advance in writing, and that the company was given an opportunity to respond on camera, which was to be included in full and unaltered.

In its judgment of 10 October 2022, the Court stated that the case concerned a clash of fundamental rights, namely the claimant's right to reputation under Article 8 of the European Convention on Human Rights (ECHR), and BNN-VARA's right to freedom of expression under Article 10 ECHR. The answer to the question of which of these two rights was more important in the specific case was to be found by weighing up all the relevant circumstances of the case. At the outset, the Court held that the plaintiff was seeking what "actually amounts to a prior broadcasting ban", where the broadcast can only be made when it "meets the conditions set by [claimant]" However, the Court noted that a broadcast ban can only be ordered where it is shown the broadcast is "unlawful", and will lead to "irreparable damage". In this regard, the Court held that it would not grant such an order, as the claimant had not demonstrated that the damage it fears "cannot be repaired by means of compensation and/or rectification".

Second, on the right to respond, the Court emphasised that a "rebuttal is not an absolute right", and it is a "journalistic starting point", while the way in which the rebuttal is processed belongs to "journalistic freedom": there is no obligation to

include the rebuttal in full or uncritically. The Court then held that the broadcaster had given “sufficient opportunity” for a rebuttal, and that this will be incorporated in the broadcast. For example, it will be broadcast that the director promised that as far as possible everyone will be paid back by a certain date, and that the company is financially stable. In the balancing of interests, further weight was to be added to the fact that the broadcast has promised to make claimant's written responses accessible via its YouTube channel, and that a link to it would be mentioned in the broadcast. In light of the foregoing, the Court held that the rebuttal was sufficient, and it would reject the claimant’s application for an order prohibiting the broadcast or for further opportunity to respond. In this case, BNN-VARA’s right to freedom of expression outweighed the claimant’s rights, especially given the that the programme fulfils an important role in society in informing about and assisting with a social problem, namely the difficulty of receiving refunds.

Rechtbank Midden-Nederland, ECLI:NL:RBMNE:2022:2502, 10 oktober 2022

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2022:2502

District Court of Midden-Nederland, ECLI:NL:RBMNE:2022:2502, 10 October 2022

[NL] Dutch Municipality's suit against Twitter to remove conspiracy theory content

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On 4 October 2022, the District Court of The Hague (*Rechtbank Den Haag*) delivered an important judgment on whether online platforms can be ordered to remove harmful conspiracy theory content by a local government authority. Notably, the Court refused to order Twitter to remove conspiracy theory content that was "similar" to other content that had been ruled unlawful, finding that it would amount to an impermissible filtering obligation.

The case arose in early 2021, when a number of individuals spread a story through Twitter, on the "Bodegraven story", ("*het verhaal Bodegraven*"), which was a conspiracy theory about the Dutch town of Bodegraven in west Netherlands. The individuals posted content claiming that the Municipality of Bodegraven was involved in the cover-up of a pedo-Satanic network in the town, where children were alleged to have been abused and killed. The conspiracy theory spread across online platforms, and resulted in numerous people regularly gathering at a cemetery in the town where children were said to be buried, and led to "unrest". Indeed, the town's Mayor was forced to issue an emergency order, limiting admittance at the cemetery to avoid a threat to public order. In June 2021, three individuals involved in posting the conspiracy theory content were convicted by the District Court of The Hague of incitement to violence and defamation over threats and allegations made against named officials. Crucially, in July 2021, the Court issued an order against the individuals prohibiting them from publishing content (i) identifying persons as perpetrators or involved in a pedo-Satanic network; (ii) locations in the town as the location of these crimes, (iii) calling on people to visit the town, and (iv) alleging the Municipality was involved in a cover-up.

Following the judgments, the Municipality requested Twitter to remove all tweets posted by the convicted individuals that had been ruled unlawful by the Court, and also to remove all "identical information". Twitter responded by closing the individuals accounts, meaning all content from those accounts would no longer be accessible. But Twitter refused to initiate any other measures to remove "identical information", as it was "too general" and would impose an impermissible "filtering" obligation. The Municipality then initiated legal proceedings against Twitter, arguing the suspension of the accounts was insufficient.

In its judgment of 4 October 2022, the District Court first held that Twitter closing the accounts meant that all content from the accounts, and retweets, would be "permanently removed", meaning that Twitter had removed the unlawful statements. As such, the main issue for the Court was whether Twitter can be ordered to do more than it has already done, and can it be obliged to remove content "similar" to the unlawful content already removed. In this regard, the Court noted the EU Court of Justice's judgment in *Glawischnig-Piesczek v.*

Facebook, where an order may be issued in certain circumstances for a platform to remove information that is identical to information identified as unlawful (see IRIS 2019-10/3). However, this only applies where it is "limited to specific data" and where the "hosting provider was not obliged to perform an autonomous assessment, so that it could use automated techniques and investigation methods". Crucially, the District Court held that *Glawischnig-Piesczek* was not applicable to the information at issue, as the Bodegraven conspiracy theory concerns "many allegations and propositions", and "cannot be easily captured in an algorithm"; and "if an automated technique were to be used, this would result in (too) much legal content being incorrectly blocked". Further, Twitter cannot be ordered to remove tweets with "Bodegraven" and "child abuse", as not every statement in which Bodegraven is combined with child abuse can simply be regarded as unlawful. Thus, the Court refused to order that Twitter was required to remove identical information to the content ruled unlawful, and stated that the Municipality should use notice-and-takedown mechanisms to have further unlawful content removed.

Rechtbank Den Haag, ECLI:NL:RBDHA:2022:10082, 4 oktober 2022

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2022:10082

District Court of the Hague, ECLI:NL:RBDHA:2022:10082, 4 October 2022

RUSSIAN FEDERATION

[RU] “Foreign agent media” list expanded

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On 1 December 2022, a new version of the foreign agents’ law enters into force in the Russian Federation. It merges, updates and replaces the norms that have existed since 2012 in the Statute “On the Mass Media”, as well as in the federal statutes on non-commercial organisations and on public associations (see IRIS Extra 2020).

The new law, “On Control over Activity of Persons under Foreign Influence”, foresees that foreign funding and/or material assistance are no longer obligatory factors in the designation of the status “foreign agent”: a vaguely-defined “foreign influence” is sufficient. The current four lists of “foreign agents” established by the Ministry of Justice under various pieces of legislation are to be replaced by the Register of Foreign Agents and the Unified Register of Individuals Affiliated with Foreign Agents (Articles 5 and 6). Persons on the current lists will automatically be entered into the new ones. The Statute provides for 18 types of activity that are prohibited for “foreign agents” (Article 11). It also provides for obligations related to the permitted activities of “foreign agents”, a system of state control over the activity of “foreign agents”, administrative and criminal liability in case of possible violations, and the procedure for being entered and removed from the above two registers.

The speed of implementation of the Russian law on “foreign agents” has significantly increased since the preparation and start of the full-scale aggression against Ukraine on 24 February 2022. The initial list of “foreign agent media” consisting of ten outlets in 2017-2020, mostly affiliated with the Radio Free Europe/Radio Liberty and the Voice of America, had jumped to 54 by November 2022. The list of individuals with the status of "foreign agent media" increased from five in 2020, to 76 by the start of the war in February 2022, and to 135 by November 2022. In addition, some 21 journalists have been entered into a general list of "foreign agents".

Furthermore, since 2015, several comparable federal Statutes have been adopted, aimed at limiting the activities of foreign entities, including their media activities, as well as the distribution of information, both online and offline. These entities (currently 55 of them) are carrying out an “undesirable activity” from the viewpoint of the authorities. Once found “undesirable”, foreign or international non-commercial organisations have their activities suspended in Russia for an indefinite period, which also means a ban on distributing their reports online and offline.

In 2022, the European Court of Human Rights found the legal restrictions imposed by the 2012 “foreign agent” law, as amended, to be an infringement of freedom

of expression, saying the interference with the applicant organisations' rights had been neither prescribed by law, nor had the interference been "necessary in a democratic society"' (see IRIS 2022-8/29).

О контроле за деятельностью лиц, находящихся под иностранным влиянием

https://rg.ru/documents/2022/07/19/document-inoagent.html

"On Control over Activity of Persons under Foreign Influence", Federal Statute of the Russian Federation of 14 July 2022 N 255-FZ

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