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Publisher:

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

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

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

Executive Director: Susanne Nikoltchev

Maja Cappello, Editor • Francisco Javier Cabrera Blázquez, Sophie Valais, Amélie Lacourt, Justine Radel, Deputy Editors (European Audiovisual Observatory)

Documentation/Press Contact: Alison Hindhaugh

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

E-mail: alison.hindhaugh@coe.int

Translations:

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

Corrections:

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

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Coordination: Cyril Chaboisseau, European Audiovisual Observatory
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EDITORIAL

The number three has an important place in our culture: three wishes, guesses, little pigs, musketeers, days of the Condor, and even billboards outside Ebbing, Missouri. Now, if you take a look at the present newsletter, you may also find three overarching topics popping up in different shades and forms: the protection of minors, copyright, and freedom of expression.

With regard to our younger ones, France has adopted a bill on social media age restrictions and parental control, while the CNIL welcomed the launch of trials of a system that meets its July 2022 recommendations on age checks for accessing pornographic websites. In Bulgaria, the code of conduct for the protection of children entered into force. And in the Netherlands, Dutch MPs voiced their concern about the presence on government devices of the highly popular among the youth TikTok app (although for reasons other than the protection of minors, I must say).

Concerning copyright, the European Commission referred 11 Member States to the CJEU for failing to transpose EU copyright directives, and in Italy AGCOM launched a public consultation on the draft regulation implementing provisions of the DSM Copyright Directive on the "remuneration chapter", ECL, and licensing for VOD platforms.

Last but not least, freedom of expression. The drafting of the CoE recommendation on Anti-SLAPPs continues, the 2023 report of the safety of journalists platform was published, and the ECtHR released an interesting judgment on the topic of whistle-blowers. At EU level, the European Parliament adopted amendments on the proposal for regulation on transparency and targeting of political advertising. And at national level, the Luxembourgish regulator established guidelines on the conditions of production, programming, and the dissemination of electoral messages by political parties and candidates, while the Italian AGCOM approved a regulation for the protection of fundamental human rights.

And worry not, should three not be enough, we have a number of other interesting topics in stock.

Have a nice read!

Maja Cappello, Editor

European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

SLAPPs to be addressed by the Council of Europe

Flutura Kusari
European Centre for Press and Media Freedom

In recent years, civil society organisations across Europe have been advocating before European and national authorities against the use of Strategic Lawsuit Against Public Participation (SLAPPs). SLAPPs are unfounded legal actions brought on matters of public interest that aim to prevent or restrict public participation.

The serious issue around SLAPPs and their devastating impact on media freedom and freedom of expression emerged following the brutal assassination of investigative journalist Daphne Caruana Galizia. At the time of her assassination, she was facing 47 defamation lawsuits, many of which were inherited by her family members.

In 2022, the Coalition Against SLAPPs in Europe (CASE) published a survey of SLAPP cases around Europe which included 570 cases collected over a period of ten years (2010-2021). According to the report, SLAPPs weaken democracy by preventing individuals and civil society organisations from engaging in public debate and impede the exercise of rights to free speech, assembly, and association. The report recommended a comprehensive response made of legislative and non-legislative measures.

European institutions such as the European Union, the European Parliament and the Council of Europe have all reacted with the intention of addressing SLAPPs. The Council of Europe's Committee of Ministers set up the Committee of Experts on Strategic Lawsuits Against Public Participation (MSI-SLP). The Committee consists of 13 members, comprising seven member States' representatives, designated by the Steering Committee on Media and Information Society (CDMSI), and six independent experts, appointed by the Secretary General with recognised expertise in the fields of freedom of expression, media law and civil and criminal procedure. The mandate of MSI-SLP is two years and started on 1 January 2022.

The main task of the Committee is to deliver a draft Recommendation on strategic lawsuits against public participation (SLAPPs) by 31 December 2023. The Committee has met twice, with a third meeting anticipated in April 2023. During the first meeting, experts discussed and agreed on working methods and the main issues to be addressed in the draft recommendation. They also elected the Chair and Vice-Chair and appointed drafting rapporteurs and a Gender Equality Rapporteur. In the second meeting, the experts discussed the first draft recommendation, while the discussions will continue in the third meeting.

Coalition against SLAPP (CASE)

https://www.the-case.eu/

Council of Europe, Committee of Experts on SLAPP

https://www.coe.int/en/web/freedom-expression/msi-slp

The safety of journalists platform publishes its 2023 report

Amélie Lacourt
European Audiovisual Observatory

The safety of journalists platform is an internet-based platform developed in 2015 by the Council of Europe in cooperation with partner organisations. The platform gives member states and organisations of journalists the opportunity to report and exchange on the protection of journalism and the safety of journalists. It is more particularly used to alert the Council of Europe to serious threats or attacks on media freedom (such as violence against journalists), thereby allowing it to take proper and timely action.

On 7th March 2023, the platform published its annual report written by the 15 partner organisations, composed of press freedom NGOs and journalists' associations. The 2023 report, entitled "War in Europe and the Fight for the Right to Report", takes stock of key areas of law, policy and practices affecting media freedom and safety of journalists in Europe and identifies actions required to improve effective protection of journalists.

Among the issues covered, the report examines the impact of the Russian invasion of Ukraine on press freedom. Following the invasion of Ukraine, Russia accelerated the adoption of two laws criminalising independent war reporting, and protesting the war (Federal Law No. 32-FZ and Federal Law No. 31-FZ). In September 2022, dozens of journalists were harassed by the police while reporting on protests following the announcement of a 'partial mobilisation'. In Ukraine, at least twelve media workers were killed in 2022 while covering Russia's invasion and 21 others were injured. On 29th December 2022, the Ukrainian President signed a new media bill into law.

Although Belarus was not yet covered by the platform in 2022, the report also contains a chapter on the country, given the crackdown on media freedom it is facing. As of 2023, the partner organisations will also monitor the state of press freedoms and attacks against journalists in Belarus.

The report goes into detail about attacks, harassment, and intimidation campaigns. In 2022, the platform recorded 13 journalists killed in Europe, the highest death toll among journalists on the continent since its launch in 2015. Only one of these did not occur in relation to Russia's invasion of Ukraine, but in Türkiye. Several assassination attempts of journalists were foiled and serious security threats were reported. The platform recorded 74 alerts of violent attacks at public events, especially protests and rallies. There were 18 alerts concerning assaults on journalists and other media representatives by members of the public, while nine alerts related to heavy-handed actions by security forces. Nine alerts

were also submitted to denounce actions not related to the coverage of public matters and events, resulting in serious injury. Finally, eight cases of criminal arson attacks were recorded which targeted the property of journalists and media organisations, particularly broadcast premises and offices.

As for harassment and intimidation, the highest number of cases were recorded in Russia, Serbia, Italy, Poland, Croatia and Greece. According to the report, fighting fake news is increasingly used as a pretext to initiate legal proceedings against journalists, often in the form of Strategic Lawsuits Against Public Participation (SLAPPs).

The report also looks at detention, arrests and criminal prosecution cases and indicates that, as of 31 December 2022, there were a total of 127 imprisoned journalists in Europe. In Belarus, 32 journalists and media

workers were in prison at the end of 2022.

Other concerns for media freedom addressed in the report include restrictive legislation, public service media, media capture, surveillance and spyware.

Overall, the report addresses recommendations to the Council of Europe, the member states of the Council of Europe and the institutions of the European Union.

2023 Parner's report, "War in Europe and the Fight for the Right to Report"

https://fom.coe.int/en/rapports/detail/18

CROATIA

European Court of Human Rights : Croatian Radio-Television v. Croatia

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

A recent judgment of the European Court of Human Rights (ECtHR) has confirmed and clarified under what conditions a public service broadcaster (PSB) has editorial independence and institutional autonomy, and therefore can claim locus standi before the ECtHR as a non-governmental organisation. The judgment revealed a remarkable position taken by the Croatian Government in defence of an interference with the rights of the Croatian public broadcasting organisation, the Croatian Radio-Television (CRT). The Croatian Government argued that the CRT, as a government institution, had no standing before the ECtHR.

The case concerned divergent decisions of Croatian courts in twenty sets of civil proceedings regarding unjust enrichment, which the CRT had instituted against various individuals to whom one of its employees had paid fees on its behalf for work they had never performed. The CRT lodged an application with the ECtHR, complaining that in the twenty sets of civil proceedings in question, the domestic courts had ruled against it. The ECtHR examined the complaint under Article 6 § 1 of the European Convention on Human Rights (ECHR) which entitles everyone a right of access to court and a fair hearing by a tribunal in the determination of his or her civil rights and obligations. The ECtHR however found no violation of the rights of the CRT under Article 6 § 1 ECHR.

Apart from this procedural aspect on the right to a fair trial at the domestic level, the judgment dealt in particular with the question of whether a public broadcasting institution as a legal entity has standing under Article 34 ECHR. According to Article 34 ECHR the ECtHR “may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto (..)”. According to the established case law of the ECtHR a legal entity may submit an individual application to the ECtHR, provided that it is a “non-governmental organisation”. The term “governmental organisations”, as opposed to “non-governmental organisations” includes legal entities which participate in the exercise of governmental powers or run a public service under government control. Such governmental organisations have no standing under the ECHR. The term “governmental organisations” applies not only to the central organs of the State, but also to decentralised authorities that exercise “public functions”, regardless of their autonomy vis-à-vis the central organs. In order to determine whether a legal person is a “governmental organisation” or “non-governmental organisation”, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of

the activity it carries out, the context in which it is carried out, and the degree of its independence from the political authorities. The term “governmental organisation” thus includes, inter alia, State-owned companies which do not enjoy “sufficient institutional and operational independence from the State”.

The Croatian Government argued before the ECtHR that the CRT did not enjoy sufficient institutional and operational independence from the State to be considered a non-governmental organisation within the meaning of Article 34 ECHR. Therefore the CRT, according to the Government, did not have locus standi to lodge an individual application with the ECtHR. As regards the structure of the CRT, the Government pointed out that Croatian Radio-Television was a public institution whose sole founder is the State, and that the founders’ rights were exercised by the Government of Croatia. Fourteen of the seventeen members of the Supervisory Board and the Programming Council were appointed and removed by the Croatian Parliament, which also appointed and removed the Director General. Moreover, the CRT’s operation and its general legal acts were supervised by the Ministry of Culture and the Media and by the Electronic Media Council. The main source of revenue of the CRT was not sponsored advertising, but almost exclusively State aid and State budget allocations: more than 85% of its financial resources in the past several years had come from public sources, namely from the mandatory licence fee, as a form of State aid, and direct allocations from the State budget. The Government further argued that the CRT was not only structurally and financially dependent on the State, but that this was to a large extent true also for its programming policy. The Government therefore submitted that the CRT was not sufficiently structurally, financially or in terms of the programmes it produced separate from the State to be considered a non-governmental organisation within the meaning of Article 34 ECHR. It therefore invited the ECtHR to declare the application inadmissible for lack of locus standi.

The ECtHR however dismissed this request by the Croatian Government. Indeed, the ECtHR had so far always held that public broadcasting organisations such as those in France, Switzerland, Austria and Belgium, had locus standi to lodge an individual application (see e.g. IRIS 2004-5/2; 2007-3/4; IRIS 2011-6/1; IRIS 2012-8/3; IRIS 2021-2/20 and 2023-2/17). What the ECtHR considered decisive was whether the legislature had devised a framework which was designed to guarantee the editorial independence and the institutional autonomy of the PSB. As to the CRT, the ECtHR was of the opinion that as a public-law entity it could be considered a “non-governmental organisation” as it did not exercise “governmental powers”, it was not established “for public-administration purposes” and it was independent of the State. The ECtHR noted that the electronic media in Croatia, including the CRT, was regulated by the Media Act and the Electronic Media Act, both of which contained provisions to ensure their impartiality and independence. Furthermore the Croatian Constitution and the Media Act guaranteed the freedom of the media, while the Electronic Media Act guaranteed the right to full programming freedom of the electronic media. That meant that the CRT within the bounds of the public-service requirements set out in the Croatian Radio-Television Act, did not come under the aegis of the State but enjoyed the freedom of the media and was independent in its operation. It

operated under the control of the Electronic Media Council, an independent regulatory authority responsible for monitoring the application of the Electronic Media Act, including the provisions which aimed to ensure the impartiality and independence of the electronic media. The ECtHR also referred to the fact that the CRT did not have a monopoly over television or radio broadcasting and operated in a sector open to competition. It reiterated that even where a public broadcaster was largely dependent on public resources for the financing of its activities, this was not considered to be a decisive criterion, while the fact that a public broadcaster was placed in a competitive environment was an important factor.

The ECtHR concluded that, although the CRT had been entrusted with a public-service mission, and depended to a considerable extent on the State for its financing, the Croatian legislature had devised a framework designed to guarantee its editorial independence and its institutional autonomy. Therefore, it could not be said that the CRT was under "government control". Consequently, the CRT qualified as a "non-governmental organisation" within the meaning of Article 34 ECHR and was therefore entitled to lodge an individual application with the ECtHR for alleged breach of its rights to a fair trial under Article 6 § 1.

Judgment by the European Court of Human Rights, First Section, Croatian Radio-Television v. Croatia, Applications nos. 52132/19 and 19 others, 2 March 2023

https://hudoc.echr.coe.int/eng?i=001-223302

LUXEMBOURG

European Court of Human Rights (Grand Chamber): Halet v. Luxembourg

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

On 14 February 2023, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered a judgment, highly protective of whistle-blowers claiming protection of their right to freedom of expression and information as guaranteed under Article 10 of the European Convention on Human Rights (ECHR). The Grand Chamber built on its earlier case law, integrating the developments which had occurred since the Guja judgment in 2008 (IRIS 2008-6/1), and applying the criteria for whistle-blowing protection in the light of the current European and international legal framework. The judgment refered to the place now occupied by whistle-blowers in democratic societies and the leading role they were liable to play in bringing to light information that was in the public interest. After a Chamber of the Third Section of the ECtHR had, on 11 May 2021, found no violation of the whistle-blower's rights in the case at issue (with a robust dissenting opinion by two judges), the Grand Chamber, by a majority of twelve votes to five, found a violation of the applicant's rights under Article 10 ECHR. The Grand Chamber held that the public interest in leaking the data had outweighed the detrimental effect of the leaks.

The case was about one of the whistle-blowers who had leaked confidential documents which had led to the LuxLeaks scandal. The LuxLeaks disclosures revealed extremely advantageous tax agreements between multinational companies and the Luxembourg tax authorities. Following media revelations about the practices of such advance tax rulings ("ATAs") in Luxembourg based on a large amount of documents leaked by the whistle-blower Antoine Deltour, another employee of the firm PricewaterhouseCoopers (PwC), Raphaël Halet, delivered some additional confidential documents to a journalist, giving further evidence of ATAs. Some of these leaked documents were shown on a television programme and later posted online by an association of journalists known as the International Consortium of Investigative Journalists (ICIJ). Following a complaint by his employer, Mr Halet was ordered by the Luxembourg Court of Appeal to pay a criminal fine of EUR 1,000, and to pay a symbolic sum of EUR 1 in compensation for the non-pecuniary damage sustained by his employer PwC. Mr Halet was convicted for the offences of theft, fraudulent initial or continued access to a data-processing or automated transmission system, breach of professional secrecy and laundering of the proceeds of theft from one's employer. In the meantime he was also dismissed from his job at PwC. After exhausting all national remedies, and after a Chamber of the Third Section of the ECtHR had found no breach of Halet's rights under Article 10 ECHR, the case, on the request of Mr. Halet, was referred to the Grand Chamber of the ECtHR. The judgment gave extensive reasons as to

why the interference by the Luxembourg authorities with Mr Halet's right as a whistle-blower had violated Article 10 ECHR.

The ECtHR reiterated that the protection of freedom of expression in the workplace constituted a consistent and well-established approach in its case-law, which had gradually identified a requirement of special protection that, subject to certain conditions, ought to be available to civil servants (in the public sector) and employees (in the private sector), who, in breach of the rules applicable to them, disclosed confidential information obtained in their workplace. The protection regime for the freedom of expression of whistle-blowers was likely to be applied where an employee or civil servant concerned was the only person, or part of a small category of persons, aware of what was happening at work and was thus best placed to act in the public interest by alerting their employer or the public at large. The protection enjoyed by whistle-blowers under Article 10 ECHR was based on the need to take account of characteristics specific to the existence of a work-based relationship: on the one hand, the duty of loyalty, reserve and discretion inherent in the subordinate relationship entailed by it, and, where appropriate, the obligation to comply with a statutory duty of secrecy; and, on the other, the position of economic vulnerability vis-à-vis the person, public institution or enterprise on which they depended for employment and the risk of suffering retaliation from the latter. Referring to the developments which had occurred since the Guja judgment, to the place now occupied by whistle-blowers in democratic societies and to the development of the European and international legal framework for the protection of whistle-blowers, the Grand Chamber grasped the opportunity to confirm, consolidate and refine the six criteria identified by the Guja judgment: (1) whether or not alternative channels for the disclosure had been available; (2) the authenticity of the disclosed information; (3) whether the whistle-blower had acted in good faith; (4) the public interest in the disclosed information; (5) the detriment to the employer; and (6) the severity of the sanction The ECtHR confirmed that the internal hierarchical channel was, in principle, the best means for reconciling an employees' duty of loyalty with the public interest served by disclosure. However, the order of priority between internal and external reporting channels was not absolute. Such internal mechanisms had to exist, and they had to function properly. External reporting, including disclosure to journalists or the media, was acceptable where the internal reporting channel was unreliable or ineffective, where the whistle-blower was likely to be exposed to retaliation or where the information that he or she wished to disclose pertained to the very essence of the activity of the employer concerned.

Where a whistle-blower had diligently taken steps to verify, as far as possible, the authenticity of the disclosed information, he or she could not be refused the protection granted by Article 10 ECHR on the sole ground that the information was subsequently shown to be inaccurate. Whistle-blowers who wished to be granted the protection of Article 10 ECHR were required to behave responsibly by seeking to verify, in so far as possible, that the information they sought to disclose was authentic before making it public.

With regard to the criterion of good faith, the ECtHR confirmed that in assessing an applicant's good faith, it verified whether he or she was motivated by a desire for personal advantage, held any personal grievance against his or her employer, or whether there had been any other ulterior motive for the relevant actions. Good faith could be accepted when a whistle-blower believed that the disclosed information was true and that it was in the public interest to disclose it. In contrast, when allegations were based on a mere rumour, without any supporting evidence, a whistle-blower could not be considered to have acted in good faith. The most innovative "refining" of the Guja principles was that of the criterion that the disclosure had to be of public interest. The Grand Chamber clarified that the range of information of public interest which might justify whistle-blowing covered by Article 10 ECHR, included the disclosure of unlawful acts, practices or conduct in the workplace, or of acts, practices or conduct which, although legal, were reprehensible. In addition, it could also include certain information that concerned the functioning of public authorities in a democratic society and sparked a public debate, giving rise to controversy likely to create a legitimate interest on the public's part in having knowledge of the information in order to reach an informed opinion as to whether or not it revealed harm to the public interest. And although information capable of being considered of public interest concerned, in principle, public authorities or public bodies, it could also concern the conduct of private parties, such as companies, who also inevitably and knowingly lay themselves open to close scrutiny of their acts. The ECtHR emphasised that the public interest in information could not be assessed only on a national scale, as some types of information might be of public interest at a supranational – European or international – level, or for other States and their citizens. It also pointed out that in the context of whistle-blowing, the public interest in disclosure of confidential information would decrease depending on whether the information disclosed related to unlawful acts or practices, to reprehensible acts, practices or conduct or to a matter that sparked a debate giving rise to controversy as to whether or not there had been harm to the public interest. The public interest in the disclosed information had also to be weighed up against the detriment to the employer. The ECtHR reiterated that the criterion of detriment to the employer had initially been developed with regard to public authorities or State-owned companies: the damage in question, like the interest in the disclosure of information, was then public in nature. However, when it concerned the disclosure of information obtained in the context of an employment relationship it could also affect private interests, for example by challenging a private company or employer on account of its activities and causing it, and third parties in certain cases, financial and/or reputational damage. In the ECtHR's view it was necessary to fine-tune the terms of the balancing exercise to be conducted between the competing interests at stake. Regarding the last criterion, the ECtHR reiterated that the nature and severity of the penalties, as well as the cumulative effect of the various sanctions imposed on a whistle-blower, were factors to be taken into account when assessing the proportionality of an interference with the right to freedom of expression.

In applying those principles and criteria in this case the Grand Chamber reached the conclusion that the judgment of the Luxembourg Court of Appeal in particular

had not properly balanced the public interest in the disclosed information and the detrimental effects of the disclosure. While there had been no discussion that only direct recourse to an external reporting channel was likely to be an effective means of alert available to Mr Halet, the documents he had leaked to a journalist were accurate and authentic and he had acted in good faith at the time of making the disclosures in question. The Grand Chamber found that the Luxemburg Court of Appeal had given an overly restrictive interpretation of the public interest of the disclosed information, while it had also failed to include the entirety of the detrimental effects arising from the disclosure in question on the other side of the scales, focussing solely on the harm sustained by PwC. Referring to the importance, at both national and European level, of the public debate on the tax practices of multinational companies, to which the information disclosed by Mr Halet had made an essential contribution, the ECtHR considered that the public interest in the disclosure of that information outweighed all of the detrimental effects.

Finally, the ECtHR considered the nature and severity of the sanctions imposed on Mr Halet. After having been dismissed by his employer, admittedly after having been given notice, Mr Halet was also prosecuted and sentenced, at the end of criminal proceedings which had attracted considerable media attention, to a fine of EUR 1,000. Having regard to the chilling effect of a criminal sanction on the freedom of expression of Mr Halet or any other whistle-blower, and especially bearing in mind the conclusion reached by weighing up the interests involved, the Grand Chamber considered that Mr Halet's criminal conviction could not be regarded as proportionate in the light of the legitimate aim pursued. Therefore the ECtHR concluded that the interference with Mr Halet's right to freedom of expression, in particular his freedom to impart information, had not been "necessary in a democratic society". There had accordingly been a violation of Article 10 ECHR.

Four dissenting judges argued that the domestic courts had taken into consideration all of the evidence in the case, including the factual context, the criteria laid down in the Guja case-law and that they had weighed up all of those elements. Therefore the four dissenters were of the opinion that in refusing Mr Halet the full protection of whistle-blower status, the Luxembourg courts had remained within their margin of appreciation and the interference with the rights of Mr Halet had not been in breach of Article 10 ECHR. The (former) Danish judge in a separate dissenting opinion opposed the Court's further development of the criterion regarding the public interest in the disclosed information. He disagreed, in particular, that that concept could also cover "a matter that sparks a debate giving rise to controversy as to whether or not there is harm to the public interest".

Judgment by the European Court of Human Rights, Grand Chamber, the case of Halet v. Luxembourg Application no. 21884/18, 14 February 2023

https://hudoc.echr.coe.int/eng?i=001-223259

EUROPEAN UNION

Case C-423/21 removed from CJEU register

Amélie Lacourt
European Audiovisual Observatory

By decision of 22 June 2021, the *Oberster Gerichtshof* (Austrian Supreme Court) made a reference for a preliminary ruling under Article 267 TFEU. The case arose in the context of a dispute between Grand Production - a Serbian media company producing television programmes broadcast in Serbia on the channels of PRVA Srpska Televizija - and GO4YU Beograd - an operator of a streaming platform established in Serbia broadcasting Grand Production's programmes in Serbia and Montenegro and geo-blocking access to internet users located outside these two countries. The issue, however, concerned the circumvention of such geo-blocking measures through the use of virtual private networks (VPNs) and therefore called into question the liability of streaming platforms under Directive 2001/29/EC (InfoSoc Directive). Grand Production alleged that GO4YU Beograd was aware of the possibility to circumvent geo-blocking measures by using a VPN and had made Grand Production's entertainment programmes available in Austria without restriction.

On 20 October 2022, Advocate General Szpunar delivered his Opinion in case C-423/21 and stated that “the Court of Justice of the European Union (CJEU) should hold that streaming platforms which transmit television programmes online do not infringe the exclusive right of communication to the public of works if users circumvent geo-blocking measures by means of a VPN service, unless the platform deliberately applied “ineffective” geo-blocking measures.” (IRIS 2023-2:1/8).

Following the opinion of the AG as well as the observations submitted by Grand Production, GO4YU GmbH and the European Commission, the *Oberster Gerichtshof* informed the CJEU on 9 January 2023 that it was withdrawing its reference for a preliminary ruling. Consequently, the President of the First Chamber ordered on 13 February 2023 that Case C-423/21 be removed from the Court's register.

Ordonnance du Président de la première chambre de la Cour, 13 février 2023

https://curia.europa.eu/juris/document/document.jsf?text=&docid=270946&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=933805

Order of the President of the First Chamber of the Court, 13 February 2023

European Commission refers 11 Member States to CJEU for failing to transpose EU copyright directives

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 15 February 2023, the European Commission announced it had referred 11 Member States to the Court of Justice of the European Union (CJEU) for failure to notify the Commission about the transposition of two copyright Directives, namely Directive 2019/789 on copyright and related rights applicable to certain online transmissions (SatCab II Directive) (see IRIS 2019-5/3), and Directive 2019/790 on copyright in the Digital Single Market (DSM Directive) (see IRIS 2019-4/5). In particular, the Commission referred Bulgaria, Denmark, Finland, Latvia, Poland and Portugal to the CJEU for failure to notify transposition measures for the DSM Directive; while the Commission referred Bulgaria, Finland, Latvia, Poland and Portugal to the CJEU for not notifying complete transposition of the SatCab II Directive. Notably, Member States were required to transpose both Directives into national law by 7 June 2021.

Under the EU treaties, the Commission may take legal action – an infringement procedure – against an EU member state that fails to implement EU law. This legal action involves a number of stages, including: first, sending a letter of formal notice requesting further information to the member state concerned, who must send a detailed reply; second, sending a reasoned opinion: a formal request to comply with EU law; and third, the Commission deciding to refer the matter to the EU Court of Justice.

In July 2021, the Commission announced that it had launched infringement procedures against over 20 EU member states for failing to transpose the SatCab II Directive and DSM Directive. However, numerous EU member states have now enacted national legislation implementing these Directives. The SatCab II Directive lays down rules to enhance cross-border access to more television and radio programmes, by facilitating the clearance of rights for the provision of online services that are ancillary to the broadcast of certain types of television and radio programmes, and for retransmission of television and radio programmes. While the DSM Directive lays down rules which aim to further harmonise EU law applicable to copyright and related rights, in particular digital and cross-border uses of protected content; and also lays down rules on exceptions and limitations to copyright and related rights. Notably, Article 17 DSM Directive, on the use of protected content by online content-sharing service providers (OCSSPs), has been subject to a recent high-profile EU Court of Justice judgment, which found the liability imposed on OCSSPs for content uploaded by users was consistent with freedom of expression (see IRIS 2022-6/14).

Finally, under Article 260(3) of the Treaty on the Functioning of the European Union, the Commission can call on the CJEU to impose financial sanctions on member states that failed to fulfil their obligation to notify measures transposing

a legislative directive.

European Commission, The European Commission decides to refer 11 member states to the Court of Justice of the European Union for failing to fully transpose EU copyright rules into national law, 15 February 2023

https://ec.europa.eu/commission/presscorner/detail/en/ip_23_704

Media literacy guidelines by the European Commission

Eric Munch
European Audiovisual Observatory

On 21 February 2023, the European Commission published its media literacy guidelines, pursuant to Article 33a(3) of the Audiovisual Media Services Directive on the scope of member states' reports concerning measures for the promotion and development of media literacy skills.

According to Recital 59 of the Directive, "media literacy" refers to skills, knowledge and understanding that allow people to use media effectively and safely. According to the Commission, the purpose of the guidelines – which are not binding – is to enable citizens of all ages navigate the modern news environment and to make informed decisions, as well as to help member states share best practices.

In a blogpost accompanying the release of the guidelines, Roberto Viola, Director General of DG Connect, insisted on the vital role of media literacy in a world where everyone is constantly navigating through an ocean of information. The guidelines are meant to be a base for fruitful exchanges that will allow the spread of effective measures across Europe.

The guidelines also detail the content that should be included in the reports prepared by member states and referred to in Article 33a(2) and (3): an overview of legal and policy measures; organisational measures; public funding and other media literacy financing arrangements; engagement and awareness-raising activities; and evaluation measures and methods. The guidelines also refer to the Media Literacy Toolbox developed in 2021 by the European Regulators Group for Audiovisual Media Services (ERGA) along with the European Commission, the purpose of which is to ensure the effective and practical application by video-sharing platforms of their media literacy obligations.

The period covered by the first reports spans from 19 September 2020 – the date of transposition set by Article 2 of the Directive – to October 2022. Subsequent reports will follow a three year periodicity, ending in October of the respective last year of the period.

Media Literacy Guidelines, 21 February 2023

https://digital-strategy.ec.europa.eu/en/news/commission-publishes-its-media-literacy-guidelines

Let's make Europe a stronghold for media literacy - Blogpost by Roberto Viola, Director General (DG Connect)

https://www.linkedin.com/pulse/lets-make-europe-stronghold-media-literacy-roberto-viola/

ERGA Media Literacy Report - Recommendations for key principles, best practices and a Media Literacy Toolbox for Video-sharing Platforms

https://erga-online.eu/wp-content/uploads/2021/12/ERGA-AG3-2021-Report-on-Media-Literacy.pdf

Regulation on political advertising negotiated

Andrei Richter
Comenius University (Bratislava)

On 2 February 2023, amendments were adopted by the European Parliament on the proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising (RPA). The proposal by the European Commission, first published in 2021, was adopted and the Council of the European Union agreed upon its general approach for negotiations with the European Parliament in December 2022. The text adopted by the European Parliament contains almost 300 amendments to the original text. When adopted, the RPA will become the first piece of EU legislation to directly address political advertising, which has so far been left to member states.

"Political advertising" is defined in several parts of the RPA and can be summarised as "the preparation, placement, promotion, publication, delivery or dissemination, by any means, of a message:

a) by, for or on behalf of a political actor, unless it is of a purely private or a purely commercial nature; or

b) which is liable to influence the outcome of an election or referendum, a voting behaviour or a legislative or regulatory process"; or

c) which is liable to influence the public opinion on societal or controversial issues at Union, national, regional, local or at a political party level; or

d) which contains any political views and opinions which are additionally promoted, published or disseminated by service providers.

Thus, the RPA refers to speech with *potential* influence on any possible societal issue at any possible level, which is one way or another economically supported, including in commercial advertising (if it has such a potential – see Recital 17b). In addition, even without the possibility of such influence, any non-private and non-commercial message of a political actor (an elected official) falls into the category.

"National competent authorities responsible for the auditing or supervision of political actors" shall look – separately and jointly with others – into all these issues and substantiate relevant regulatory actions. This is challenging, as these bodies will have to draw lines in the grey area of personal posts by influencers, as well as commercial and political posts with under-disclosed endorsements, risking inconsistent national judicial interpretations.

The main subjects of the RPA are:

- *Providers of political advertising services* (a controversial term as it both *includes*, in Recital 4, and *excludes*, in Article 2 – paragraph 1 – point 5, online intermediary services; and

- *Political advertising publishers* (organisations that make advertisments available through any medium).

Although political advertising is still not considered a product, the RPA aligns with the concept of (monetised) political speech as a service. The draft focuses mostly on online dissemination of political advertising, but shall also be applied to traditional television (Recital 14a).

In addition to transparency rules, providers of political advertising services "should be encouraged to establish, implement and publish tailored policies and measures to prevent the placement of political advertising together with disinformation, including by participation in wider disinformation demonetisation initiatives such as the EU Code of Practice on Disinformation" (Recital 4a). Thus, the RPA says directly that placement of political advertising that contains untrue information should be prevented and countered.

The key new obligations for providers and/or publishers of advertising services concern:

a) the publication of the declaration of political advertising services;

b) retention of information (for at least five years);

c) publication of detailed transparency notices;

d) responding to requests from national authorities (sometimes within 48 hours);

e) responding "promptly" (or within a month) to requests from interested entities;

f) a ban on the use of targeting and amplification techniques, unless elaborate consent and transparency requirements are implemented.

The future of online political advertising can only be envisaged if users are aware they are encountering it, and agree in advance to be affected by it.

Amendments adopted by the European Parliament on 2 February 2023 on the proposal for a regulation of the European Parliament and of the Council on the transparency and targeting of political advertising

https://www.europarl.europa.eu/doceo/document/TA-9-2023-0027_EN.html

NATIONAL

BELGIUM

[BE] Flemish media regulator publishes 2022 report on media concentration in Flanders

Carl Vander Maelen
Ghent University

The *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media — VRM) released its annual report on media concentration in Flanders (the Dutch-speaking area of Belgium) in November 2022.

The report first discusses the media sector generally. The most important finding regarding the television sector is that the traditional role of broadcasters as content aggregators and curators is increasingly under pressure in a modern media landscape where media is consumed both in a linear and non-linear way. It points to service distributors and international actors who act increasingly as 'referees' by determining what content is offered to consumers. An important evolution is that several Flemish corporations have cooperated to develop uniform advertising standards regarding addressable TV advertising, and that there are advertising partnerships. Regarding the written press, the report notes the continued tendency for convergence between newspaper editors and other forms of media. It also refers to the finding by the *Vlaamse Vereniging van Journalisten* (Flemish Association of Journalists — VVJ) that there is a decrease in professional journalists in Flanders and a 'structural divestment' of professional journalism. The convergence between physical and digital magazines has seen an acceleration due to the COVID-19 pandemic. Belgium has seen its place on the World Press Freedom Index decrease from the 11th to the 23rd position. In the report, special mention is also made to the so-called Content Creator Protocol. This initiative was developed by the VRM and is meant for content creators, vloggers and influencers to better understand how they can place content on social media platforms in compliance with existing regulations. New guidelines have also been published that allow the *Jury voor Ethische Praktijken inzake reclame* (JEP) (an advertising watchdog) to better check the commercial relationship between advertisers and influencers.

Second, the report discusses media groups in the Flemish media landscape. The changing, strategic alliances of the past are now replaced by integration. However, cooperative initiatives are still in vogue – particularly to deploy new media initiatives that aim to respond to international actors. Groups also try to strengthen their position by performing vertical integration, i.e. taking different positions in the value chain. Some examples are distributors such as Telenet and Proximus which are now also becoming involved in content creation and/or

aggregation.

The third aspect of the report discusses media concentration itself. It stipulates that a clear distinction between distribution and aggregation still exists in the radio sector. Nonetheless, vertical integration takes place, especially between the segments of production and aggregation. The concentration of media groups in the radio sector remains very high, especially due to the outsized strength of the public broadcaster *Vlaamse Radio- en Televisieomroeporganisatie* (VRT). The limited availability of the radio spectrum is partly to blame for this lack of competition. Digital radio does offer more opportunities for new actors and the rise in popularity of podcasts has also seen a strong performance by independent actors. In general, convergence and cross-mediality have become commonplace in the Flemish media landscape and brands are exported across different forms of media. The fact that distributors now perform content creation and aggregation – and that aggregators establish platforms to directly reach consumers – are noted as important indications for vertical and cross-medial integration. This is particularly the case for the television sector. The risk of such a strong vertical integration is that market players shield certain data and content for competitors – which can strongly impact the negotiating power of independent actors. The report also warns that editorial activities and advertising should remain separated to ensure that media concentration does not lead to self-promotion. For the aggregation of classic media, only five companies are responsible for 80-100% of the entire market.

The report ends with recommendations on how to stimulate media diversity through several policy recommendations. It acknowledges the performance of existing initiatives, but suggests several expansions thereof and some new actions. Most relevant for journalism are the suggestions to remove libel and defamation as violations in the penal code, and to adopt qualitative legislation regarding strategic lawsuits against public participation (anti-SLAPP legislation).

Flemish Regulator for the Media, 'Media concentration in Flanders: report 2022', 28 November 2022

BULGARIA

[BG] The code of conduct for the protection of children entered into force

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

On 1 February 2023, *Кодексът за поведение относно мерките за оценка, означаване и ограничаване на достъпа до предавания, които са неблагоприятни или създават опасност от увреждане на физическото, психическото, нравственото и/или социалното развитие на децата* (the Code of Conduct on Measures to Assess, Label and Restrict Access to Programmes which are Harmful or Pose a Risk to Affect Adversely the Physical, Mental, Moral and/or Social Development of Children – the Code) entered into force. The Code was adopted by CEM pursuant to Decision No. RD-05-7 dated 12 January 2023.

The Code has been prepared jointly by *Съветът за електронни медии* (the Council for Electronic Media – CEM) and the Association of Bulgarian Radio and Television Broadcasters (ABBRO), the Bulgarian National Television (BNT) and the Bulgarian National Radio (BNR) in accordance with the Radio and Television Act.

The Code is a form of co-regulation and its aim is to protect child audiences within the meaning of the Radio and Television Act and Directive 2018/1808. It does not limit the application of other legislative acts in the field of child protection (such as the Child Protection Act, for example).

The Code is binding on all media service providers – linear and non-linear, under the jurisdiction of the Republic of Bulgaria. It replaces all secondary legal acts in the field concerning child protection and adds some novelties arising from the AVMSD. Effective measures to assess, label/categorize content and restrict access of children to broadcasts and user-generated videos which may be harmful or pose risks whichadversely affect children's development are implemented in the newly-adopted Code.

All media service providers remain obliged to observe special rules concerning the participation of children in programmes (except for movies and series). There is a list of 25 points indicating what types of activities including children are restricted.

There are no significant changes for linear services within the Code – they should still categorize/place pictograms for programmes (with specific provisions stipulated in the Code), and comply with all restrictions concerning advertising, etc.

Non-linear service providers will be obliged for the first time to categorize programmes in accordance with the Code. They may adopt additional measures

for the protection of children and upon assessment may restrict access to the services to persons above the age of 18 to guarantee that only adults have access, etc.

Special provisions of the Code will also be mandatory for video-sharing platform services (VSPs) under Bulgarian jurisdiction. For example: VSPs's general terms and conditions (GTC) will be subject to pre-approval of the CEM and these GTC will have to include restrictions for users to play, upload or in any way distribute certain content (e.g. pornographic content, victims bodies, content which violates the law, content which shows violence and others). The GTC should also include an obligation for users to immediately notify the VSPs about content which is in breach of the Code and the GTC. Among other things, the GTC should also oblige users to indicate when content includes audiovisual commercial communications - e.g. product placement, sponsorship, etc.

Кодекс за поведение относно мерките за оценка, означаване и ограничаване на достъпа до предавания, които са неблагоприятни или създават опасност от увреждане на физическото, психическото, нравственото и/или социалното развитие на децата

https://cem.bg/files/1673946952_code__17a.pdf

Code of Conduct on Measures to Assess, Label and Restrict Access to Programmes which are Harmful or Pose a Risk to Affect Adversely the Physical, Mental, Moral and/or Social Development of Children – the Code of Conduct

Решение № РД-05-7 от 12 януари 2023 г. на СЕМ

https://www.cem.bg/actbg/6228

Decision No. RD-05-7 dated 12 January 2023 adopted by CEM

GERMANY

[DE] KEK publishes opinion on EMFA

Christina Etteldorf
Institute of European Media Law

On 2 March 2023, the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media – KEK) published its opinion of 14 February 2023 on the draft European Media Freedom Act (EMFA). Although it supports the objectives of the EMFA in principle, it points out that protecting pluralism is a task to be carried out at member state level, independently of state authorities. It believes this is not reflected in the current proposal.

The KEK is a joint organ of the 16 German state media authorities. It is responsible for guaranteeing plurality of opinion in relation to the organisation of television channels throughout Germany. Its activities in this regard include checking, by analysing their respective audience shares, whether companies exercise a dominant influence on public opinion by acquiring television broadcasting licences or changing their ownership structure. The media concentration provisions of Articles 20 to 22 of the EMFA are therefore relevant to the KEK's remit. In its opinion, the KEK states that, in principle, it supports the EMFA's objective of protecting and strengthening media diversity and independence in Europe. However, it believes the proposal urgently needs fundamental revision.

The KEK notes that media diversity is a core part of member states' national identity, including Germany's federal system. Therefore, the adoption of rules protecting plurality cannot simply, and "certainly not to such an absolute degree", be based on internal market competences, as the EMFA proposes. Therefore, national competences and associated measures, designed to guarantee plurality, should not be viewed as a barrier for the internal market for media services that could trigger such an internal market competence for the EU. However, the KEK also believes the proposal needs amending at a material level: the structures through which the EMFA gives the Commission the power to intervene (Articles 20(4) and 21(6) EMFA) do not take into account existing supervisory structures and responsibilities at national level or any additional national peculiarities. In Germany, for example, the principle of separation of state and media applies to broadcasters under broadcasting freedoms enshrined in the *Grundgesetz* (Basic Law). According to this principle, broadcasters must be largely free of state interference in terms of both the organisation and supervision of broadcasting. In sub-constitutional law, the principle is set out in various provisions of the German *Medienstaatsvertrag* (state media treaty) in relation to the independent structures of the *Landesmedienanstalten* (state media authorities) in the private broadcasting sector and the supervisory boards of the public service broadcasters, for example. The KEK does not believe the powers assigned to the

Commission under the EMFA guarantee adequate separation between the state and broadcasters. This particularly applies to the Commission's authority to issue guidelines on the factors to be taken into account when applying the criteria for assessing the impact of media market concentrations at national level (Article 21(3) EMFA).

Stellungnahme der KEK zur Verordnung des Europäischen Parlaments und des Rates zur Schaffung eines gemeinsamen Rahmens für Mediendienste im Binnenmarkt (Europäisches Medienfreiheitsgesetz) und zur Änderung der Richtlinie 2010/13/EU

https://www.die-medienanstalten.de/fileadmin/user_upload/KEK/Publikationen/Reden_und_sonstige_Beitraege/Stellungnahme_KEK_EMFA.pdf

KEK opinion on the Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU

[DE] VAUNET publishes 2022 media usage analysis

Christina Etteldorf
Institute of European Media Law

On 15 February 2023, the *Verband Privater Medien* (German Association of Private Media – VAUNET), the umbrella organisation of audio and audiovisual media companies in Germany, published its annual report on media consumption for 2022. The report shows that, although the use of audio and audiovisual media accounted for a slightly lower proportion of the total media time budget, of users aged 14 and over in Germany, than the previous year's record level, it remained very high at almost 90%. Average daily usage of such content was 9 hours and 43 minutes in 2022. Daily video consumption totalled 5 hours 26 minutes, of which 3 hours 33 minutes was spent watching television.

Daily video consumption among German viewers aged 14 and over grew strongly during 2020 and 2021, when pandemic-related restrictions were at their tightest. It dropped slightly in 2022 (by around 30 minutes on average), but still remained higher than in 2019 (by around 16 minutes on average). Television consumption fell in particular, while usage of online videos (free and paid video-on-demand) also dropped slightly. Germans watched an average of 3 hours 33 minutes of television per day (2021: 3 hours 52 minutes), viewed online videos for 1 hour 9 minutes per day (2021: 1 hour 12 minutes), played video games for 40 minutes per day (2021: 45 minutes), watched DVDs/Blu-rays for 4 minutes (same as 2021) and spent less than 1 minute in cinemas per day (same as 2021). Television therefore remains the most popular medium for video consumption among over-14s. In the past three decades, television's average daily reach has varied between 67% and 76% of the German population. After a pandemic-related increase, the daily reach figure for 2022 fell to 67.2%. Intensity of usage varies according to age and is consistently high among those in their 20s. Children in Germany aged between 3 and 13 only watched television for 37 minutes per day on average. The audience share of private (49.7%) and public broadcasters (50.3%) was virtually split down the middle. The most popular channels for the 14 to 49 age group were private channels RTL (9.9%) and ProSieben (8.2%) and public channels ARD Das Erste (8.0%) and ZDF (7.3%). However, the list was different among female viewers in this age category (RTL, ARD Das Erste, VOX, SAT.1). Children, on the other hand, mainly watched channels aimed at younger viewers, such as KiKa, SUPER RTL and the Disney Channel.

Audio usage in Germany was at a very similar level, averaging 4 hours 17 minutes per day and mainly comprising radio (3 hours 6 minutes) and music streaming (53 minutes).

VAUNET's media usage analysis is based on the ongoing evaluation of different third-party sources, including data provided by the *Arbeitsgemeinschaft Media-Analyse* (Media Analysis Working Group – agma), *Verbrauchs- und Medienanalyse* (Consumption and Media Analysis – VuMA), the *Arbeitsgemeinschaft Videoforschung* (Video Research Working Group – AGF) and the Media Activity

Guide (MAG) published by SevenOne Media and forsa. Since cross-media information on the duration of daily media usage is gathered from a variety of sources, the figures should be regarded as approximate values. Data on SmartTV and HbbTV usage is not included because there is no cross-market usage data available.

Mediennutzungsanalyse 2022 des VAUNET

https://vau.net/wp-content/uploads/2023/02/VAUNET-Publikation_Mediennutzungsanalyse-2022.pdf

VAUNET media usage analysis 2022

[DE] State media authorities' advertising transparency check

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

The GIM market research institute has published a study entitled "Transparenz-Check" (transparency check), commissioned by the *Direktorenkonferenz der Landesmedienanstalten* (Conference of State Media Authority Directors – DLM). Based on an online representative survey, the study investigates social media users' ability to identify commercial content and the importance of labelling commonly used on popular platforms. It clearly shows that, for half of those who responded, clear labelling is the most important factor in their ability to recognise advertising. People who are well informed about the media are also more likely to be able to recognise advertising.

Transparency is an important tool to safeguard media users' freedom to form opinions. In the fast-moving digital world in particular, a clear distinction between commercial and editorial media content can prevent users from being misled. Advertising must also be labelled on social media platforms in accordance with the advertising rules of the *Medienstaatsvertrag* (state media treaty – MStV) and *Telemediengesetz* (Telemedia Act – TMG). Instagram stories, TikTok clips and Facebook posts are increasingly influencing the formation of public opinion in Germany. Many providers of such content have become extremely influential in recent years. In order to help users distinguish between editorial content and advertising, advertisers are required to follow certain labelling rules. Through their supervisory role and their work to promote media literacy, the media authorities ensure that media usage is transparent.

Having focused in recent years on raising the awareness of influencer marketing, which is still a very recent phenomenon but one that is becoming increasingly important both economically and socially, the state media authorities are now turning their attention to the consistent enforcement of advertising rules online.

The "transparency check" on commercial advertising also examines so-called "brand stories". These advertorials resemble editorial content but are in fact advertising. Only 14% of respondents correctly recognised an example of this. Almost half (48%) thought it was journalistic information. This was mainly because it came from a well-known source, of which 61% of people said was the reason for their answer. Only a fifth of those who correctly identified the advertorial mentioned the "brand story" label, which does not meet the media authorities' guidelines. Advertorials should be labelled as "advertising" or "advertisements".

The "transparency check" on commercial advertising also shows that people who are more media-savvy can spot commercial content more easily. A post labelled as advertising was correctly identified by 90% of users with a high level of media knowledge, but only by 32% of those with low media knowledge. For the purposes

of the study, media knowledge was measured using a quiz.

Influencers and advertisers can find out when and how content should be labelled by consulting the media authorities' guidelines on labelling of advertising in online media, which are continuously updated.

Die medienanstalten, Transparenz-Check zur kommerziellen Werbung - Wirkt die Kennzeichnung von Medieninhalten?

https://www.die-medienanstalten.de/fileadmin/user_upload/die_medienanstalten/Forschung/Transparenzcheck/Chart-Report_Transparenz-Check_kommerzielle_Werbung.pdf

The media authorities, Transparency Check on commercial advertising - Does labelling of media content work?

DENMARK

[DK] On 15 February 2023 the European Commission referred Denmark, along with a handful of other member states, to the CJEU for failing to transpose the DSM Directive

Terese Foged
Lassen Ricard, law firm

The much-debated Directive on Copyright in the Digital Single Market (the DSM Directive), which impacts authors, online platforms and internet users, was due to be implemented in the EU by 7 June 2021. As a result of the COVID pandemic, which took up many resources, an election, and the long process of forming a new government (which was finally agreed in December 2022) Denmark was unable to meet this deadline.

Denmark did however transpose part of the DSM Directive in time:

The Danish Ministry of Culture had divided implementation of the DSM Directive into two parts. The first part consisted of the implementation of Articles 15 and 17. The former Danish Minister for Culture introduced the legislative proposal implementing Articles 15 and 17 on 26 March 2021. The legislation was adopted on 4 June 2021 and came into force on 7 June 2021, i.e. just in time.

Denmark has not yet however transposed the second part of the Directive. This was to be included in a subsequent legislative proposal, first planned for the summer of 2022, then by the fourth quarter of 2022, and finally for January 2023. However, now, in early March 2023, the legislative proposal has still not been sent out to be heard by the new Danish Ministry of Culture.

The process has been delayed, and there is therefore not much time left for firstly, the hearing, then the proposal before Parliament, and finally the inclusion of the proposal in subsequent legislation by 1 July 2023 (according to the latest plans), i.e. some two years late.

On 15 February 2023, the European Commission referred Denmark, together with a handful of other member states, to the CJEU for failing to transpose the entire Directive (as described, Denmark has only implemented Articles 15 and 17).

In contrast, Denmark has implemented the so-called SatCabII Directive in time. Implementation took place together with the first part of the DSM Directive. Only five member states have not yet transposed this Directive: Bulgaria, Finland, Latvia, Poland and Portugal (the same states that have not yet transposed the DSM Directive).

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

https://eur-lex.europa.eu/eli/dir/2019/790/oj

Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0789

European Commission at work, infringement decisions

https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=INFR%282021%290196&decision_date_from=&decision_date_to=&title=&submit=Search

FRANCE

Age checks for accessing pornographic websites: trial of a system that meets CNIL recommendations

Amélie Blocman
Légipresse

On 5 February 2023, the French deputy minister for digital affairs announced that France is planning to introduce an age certification system in order to prevent children accessing pornographic video platforms. However, the details of the system, which will involve a digital certification process, have not yet been finalised. The protection of personal data is a major challenge for the future system. Since the web is designed as an open network, freely accessible without the need for authentication, checking users' ages poses significant technical difficulties and is open to circumvention. It also leads to the collection of personal data and a threat to privacy.

Aware of the issues surrounding the protection of children and privacy, the *Commission Nationale de l'Informatique et des Libertés* (French data protection authority – CNIL), in partnership with Olivier Blazy, professor at the *École polytechnique*, and the *Pôle d'expertise de la régulation numérique* (Centre of expertise for digital regulation – PEReN), has designed a prototype for a system that provides effective checks, since it is based on proof of age, as well as protecting privacy. Based on this work, the CNIL recommends that age verification systems are not operated by the website providers themselves and are based on the principle that the certifier of the user's age knows who the user is but not which website they are visiting, while the website they are visiting can see they are old enough but does not know who they are.

In July 2022, after analysing existing systems, the CNIL had published its opinion on online age verification systems, especially those used on pornographic websites, where they are compulsory. Such sites are now obliged to use a system that complies with legal age verification requirements under the supervision of the *Autorité de régulation de la communication audiovisuelle et numérique* (French audiovisual regulator – ARCOM) and the relevant court (Article 23 of Act no. 2020-936 of 30 July 2020). In a recent priority preliminary ruling rejecting a challenge to the relevant legislation, the Court of Cassation held that the use of an age verification system that requires users accessing online pornographic content to do more than simply declare that they are an adult does not infringe the Constitution.

Until more efficient systems are rolled out, the CNIL considers it acceptable to use age verification systems based on payment card validation or facial analysis without facial recognition. In both cases, it recommends that these systems should not be directly implemented by the website concerned but by an independent third party.

On 21 February 2023, welcoming the launch of trials of a system that meets its July 2022 recommendations, the CNIL announced that it would be working with ARCOM and the government to ensure that future solutions comply with the General Data Protection Regulation (GDPR). If the current trials are successful and the system is made commercially available, the CNIL recommends that this type of measure is adopted by all websites that are obliged to check the age of their users.

Cnil, communiqué du 21 février 2023

https://www.cnil.fr/fr/controle-de-lage-pour-lacces-aux-sites-pornographiques

CNIL press release of 21 February 2023

[FR] Adoption of bill on social media age restrictions and parental permission

Amélie Blocman
Légipresse

Tabled by Laurent Marcangeli, an MP from the Horizons party, the bill "to establish digital majority and combat online hate" was adopted by the National Assembly at its first reading on 2 March 2023.

During the parliamentary debate, it was revealed that, while 82% of children aged between 10 and 14 regularly use the Internet without their parents, more than 50% of them are active on social media, for which they first register at the age of 8 and a half on average. Therefore, even though a minimum age is stipulated, 60% of under-13s have a social network account.

In the MPs' opinion, the best way of protecting children from growing online danger remains parental supervision.

This is the purpose of Article 2 of the bill, which tightens social networks' obligations to verify users' ages and obtain parental permission for minors under the age of 15. Service providers will be required to employ age verification systems that meet standards laid down by the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM), after consultation with the *Commission Nationale de l'Informatique et des Libertés* (the French data protection authority – CNIL), which will ensure that systems comply with the relevant rules. ARCOM will be able to monitor compliance and issue formal notices to social networks that fail to put suitable measures in place. If such a notice is ignored, ARCOM will be able to refer the matter to the president of the Paris Court, who will be asked to order the network concerned to put a suitable technical solution in place or face a fine of up to 1% of its global turnover. Article 2, which is the central provision of the bill, is therefore designed to prevent children under 15 registering for a social network unless permission is expressly given by a parent or guardian and properly checked by the network. It also entitles parents to ask for their child's account to be suspended until they reach the age of majority.

Under Article 1 of the bill, the definition of social networks that was recently adopted in the EU Digital Markets Act (DMA) is incorporated into the *Loi pour la confiance dans l'économie numérique* (Law on confidence in the digital economy – LCEN). Although the DMA is directly applicable, the MPs thought it was important to include this definition in national law "in order to increase legal certainty and ensure it is used in other fields in the future".

Meanwhile, Articles 1a and 1b, tabled in committee, extend Article 6 I 7 of the LCEN by adding to the list of offences established in the Penal Code for which social networks will be required to provide a reporting system. The networks will also be required to display harassment prevention messages.

Article 3 sets a deadline for responding to court requisitions: the first paragraph of Article 6 VI 1 of the LCEN, which sanctions online public communication service providers who fail to meet a judicial authority's request for digital evidence, states that such evidence must be submitted within 10 days or, in urgent cases, eight hours.

Under Article 4, a report on the consequences of social network use for young people's physical and mental health must be submitted to the government in order to provide an overview of the current state of knowledge on this subject. Finally, the bill asks the government to prepare a report investigating whether it makes sense to merge the two platforms used to combat harassment in schools and cyberbullying respectively.

The bill, to which the government has applied the expedited procedure, has been sent to the Senate.

Proposition de loi visant à instaurer une majorité numérique et à lutter contre la haine en ligne

https://www.assemblee-nationale.fr/dyn/16/textes/l16t0082_texte-adopte-seance

Bill to establish digital majority and combat online hate

[FR] LCI warned to meet its obligation to exercise honesty and rigour in the presentation and processing of information

Amélie Blocman
Légipresse

In a decision of 8 March 2023, the *Autorité de régulation de la communication audiovisuelle et numérique* (French audiovisual regulator – ARCOM) issued a formal notice to the company La Chaîne Info (LCI), provider of the 24/7 television news service LCI, urging it to meet its obligation to exercise honesty and rigour in the presentation and processing of information.

This decision follows two contentious news items broadcast in September 2022. The first, shown during the programme “Un œil sur le monde”, concerned disinformation in Russian media. It included a report by Russian TV channel Rossiya One about the energy crisis in Europe that mentioned protests in Paris on Saturday 3 September 2022 casting doubt on the effectiveness of the economic sanctions taken against Russia. Footage of a demonstration in Paris taken from this report was broadcast. Back in the studio, the LCI presenter said: “So there we are. There were no demonstrations... this weekend, it’s not true at all. […] This is clearly a case of .... Russian propaganda aimed at the Russian people.” These comments were corroborated by a journalist in the studio, who said: “You can clearly see how they distort the images, adding their own subtitles to make it seem like everything is happening as they say (…).”

Contrary to these claims, a demonstration against European sanctions against Russia did in fact take place in Paris on Saturday 3 September 2022. Therefore, in ARCOM’s view, the broadcaster had breached its obligation to exercise honesty and rigour in the presentation and processing of information. It had therefore infringed Article 1 of the audiovisual regulator’s decision of 18 April 2018, which was based on Article 3-1 of the Law of 30 September 1986, referred to in Article 2-3-7 of its licence agreement. Under the aforementioned decision, broadcasters “must guarantee the honesty of information and of news programmes. (…) They must exercise rigour in the presentation and processing of information”.

The second item was broadcast during the programme “24h Pujadas” on 12 September 2022. During this news bulletin, a report entitled “Anti-work benefits: the truth about the figures” was shown. The report included an infographic comparing the income of a couple with two dependent children, each earning the minimum wage, with that of an unemployed couple with the same number of children. This infographic was inaccurate because it suggested that the unemployed couple were receiving various benefits that could in fact not be combined. It therefore did not prove that the unemployed couple’s monthly income was higher than that of the working couple. ARCOM again concluded that La Chaîne Info had breached its obligation to exercise honesty and rigour in the presentation and processing of information. Sanctions may be taken against the

broadcaster if it does not comply with the formal notice.

Décision du 8 mars 2023 mettant en demeure La Chaîne Info

https://www.arcom.fr/nos-ressources/espace-juridique/decisions/decision-du-8-mars-2023-mettant-en-demeure-la-chaine-info

Decision of 8 March 2023 to issue a formal notice to La Chaîne Info

UNITED KINGDOM

[GB] Mark Steyn of GB News breaches Ofcom's Rule 2.2 by presenting official COVID vaccine data in a materially misleading way

Julian Wilkins
Wordley Partnership and Q Chambers

Ofcom has found that the Mark Steyn programme (aired on GB News), presented by Mark Steyn, breached the Regulator's rules about not materially misleading an audience when drawing conclusions based on data issued by the UK Health Security Agency (UKHSA).

GB News is a television channel that primarily broadcasts current affairs programmes. It also has hourly news bulletins and describes itself as "Britain's News Channel". Mark Steyn was a presenter for GB News, which broadcast

four days a week between 20.00 and 21.00. During the show, Mr Steyn gave his views on various news stories and discussed them with guests.

On 21 April 2022, during the Mark Steyn programme, the presenter focussed on the UK government's roll out of the COVID-19 vaccines, and particularly the third booster dose, its efficacy and associated risks. A banner was displayed during the segment saying "Mark's take on the vaccine debate".

In a monologue, he said "and there is only one conclusion from those numbers which is that the booster shot..... has failed. And in fact, exposed to significantly greater risk to infection, hospitalisation and death".

He referred to the UKHSA data showing that roughly half the population had had only up to two doses or no dose and the other half had had the third dose. Referring to the UKHSA data

he said those who had had the third dose were more likely to get the COVID infection, be hospitalised or die.

During the programme he clarified the comments were his opinion, and GB News in its submission to Ofcom said the programme had not adopted an 'anti-vax' approach.

In reaction to the show, there were some social media comments that attempted to counterbalance Steyn's comments, he answered by saying that he was using official data and there was "only one conclusion": people who had had the third dose were more vulnerable than those who had not had it. Steyn repeatedly said that the third booster dose increased chances of infection, hospitalisation or death.

During the broadcast he did not refer to the UKHSA caveat: “This raw data should not be used to estimate vaccine effectiveness”, nor, that the majority who had taken the third dose were older and statistically stood a greater chance of hospitalisation or death in any event.

Steyn had not used any analysis to explain his conclusions on the UKHSA data. Further, he had not said that the data was open to alternative interpretation.

Ofcom Rule 2.2 states: “Factual programmes or items or portrayals of factual matters must not materially mislead the audience”. The Guidance to Rule 2.2 states: “… designed to deal with content that materially misleads the audience so as to cause harm or offence” and not with “.. issues of inaccuracy in non-news programmes”.

Ofcom had also issued guidelines about reporting COVID issues: “In particular, we strongly advise you to take particular care when broadcasting, for example .. statements that seek to question or undermine the advice of public health bodies on the Coronavirus, or otherwise undermine people’s trust in the advice of mainstream sources about the diseased”.

GB News argued that the COVID guidance was too restrictive and was designed to force broadcasters to support the government’s approach. Ofcom agreed with GB News that it was right for information and policies to be challenged or interrogated, but nevertheless compliance with Rule 2.2 should be ensured.

Although there had been some opposing opinion in the broadcast, it was rebuffed by Mr Steyn saying that there was only one conclusion. GB News contended that the following week’s programme had counterbalanced Mr Steyn’s comments but Ofcom considered the two broadcasts were not “linked and timely” ’to avoid the risk of the public being misled. Ofcom rejected GB News' contention it was a minority channel and any harm it could inflict was limited. Ofcom considered that, regardless of size or number of viewers, there was a requirement to comply with Rule 2.2.

Ofcom considered a number of people had been awaiting the third dose and Mr Steyn’s comments may have dissuaded them from doing so, especially as it was likely many of his viewers would trust what he said.

Ofcom concluded that the programme, as part of a news and current affairs service, may have resulted in viewers making important decisions about their health, and as such the programme was materially misleading and in breach of the Code Rule 2.2.

Ofcom finds the Mark Steyn programme on GB News in breach of broadcasting rules

https://www.ofcom.org.uk/news-centre/2023/ofcom-finds-the-mark-steyn-programme-on-gb-news-in-breach-of-broadcasting-rules

Ofcom Broadcasting Code

https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-two-harm-offence

Ofcom Note to Broadcasters on Coronavirus

https://www.ofcom.org.uk/__data/assets/pdf_file/0033/195873/Note-to-broadcasters-Coronavirus-update.pdf

[GB] New Standards Code launched by IMPRESS with AI future-focused provisions and a revised discrimination threshold

Alexandros K. Antoniou
University of Essex

On 16 February 2023, the press regulator IMPRESS launched its new Standards Code, with key changes including guidance on AI and emerging technologies, stricter measures on tackling misinformation, stronger safeguarding guidelines, and a lower discrimination threshold.

Background

IMPRESS is the only British press regulator to have sought formal approval from the Press Recognition Panel (PRP). The Panel was established in the aftermath of the phone-hacking scandal to ensure that any future press regulator meets certain standards in compliance with the Leveson report recommendations. IMPRESS is distinct from the Independent Press Standards Organisation (IPSO), Britain's other press regulator which enforces the Editors' Code of Practice but does not comply with the majority of the Leveson report's independence requirements. IPSO regulates some of the more established UK press (e.g., the Mail newspapers, the News UK titles and their respective websites), whereas publishers regulated by IMPRESS tend to be newer and more digitally focused (e.g., Bellingcat, Gal-dem and The Canary). IMPRESS is viewed by some media campaigners (e.g., Hacked Off) as "the most popular" complaints-handling body in the country. Its membership has risen from just 26 publishers in 2017 to 113 today.

The IMPRESS Code was first published in 2017 with the aim of guiding media professionals and protecting the public from unethical news-gathering activity. It applies to all forms of news delivery, including print publications, news websites and social media, and to any individual or organisation gathering information and publishing news-related content. As the media landscape has rapidly evolved in the last few years, changes were introduced in February 2023 to help build trust and improve accountability in the industry, while covering a more diverse range of digital news creators (including publishers, editors, journalists, citizen journalists, reporters, bloggers, photojournalists, freelancers, and content creators) and their practices.

Some key changes

A major change concerned the issue of **inaccurate content** and was propelled by the challenges faced in distinguishing true information from misinformation and disinformation, including that generated by AI. To help journalists and publishers ensure that their material is supported by verifiable and legitimate sources, the Code and its associated Guidance on Clause 1 (Accuracy) and Clause

10 (Transparency) provide advice on fact checking and source verification, particularly within an online context. Specifically, the Code now requires publishers to exercise human editorial oversight to ensure the accuracy of any AI generated content, clearly label such content, and take reasonable steps to limit the potential spread of false information (deliberately or accidentally) by verifying the story with other sources and checking the information against other reliable sources.

Changes were also introduced in relation to the coverage of news stories involving **children**. They all acknowledge children's media literacy, autonomy, and protections that are necessary to develop them as people. The revised Code defines a child as anyone under the age of 18 and places an obligation on publishers to "reasonably consider" requests from children to remain anonymous during news-gathering and publication (Clause 3.3), as well as requests from those under 18 when the article was published to anonymise that news content in the present day (Clause 3.4). This is a welcome recognition of the proposition that individuals should not be adversely affected later in life because stories that concern them as children remain widely available online. Importantly, under the new Code, an appropriate adult cannot veto a child's refusal or revocation of consent (paragraph 3.1.2 of the Guidance to the Code).

Because of the internet and social media, publishers must also take extra care not to identify children indirectly through "jig-saw identification", i.e., the ability to work out someone's identity by piecing together different bits of information supplied by several features of the story or across articles or news outlets (the same can apply to adults, e.g., in cases where victims of sexual offences enjoy anonymity by law). The Code (Clause 3.2) requires publishers to consider using techniques or practices that remove identifying data (e.g., the area of a city where they live, their parents' occupations or other unusual details that could lead to a child's identification). This practice also helps publishers comply with minimum use requirements under data protection law.

Another significant change concerns the provisions on **discrimination** under Clause 4. The previous version of the Code stated that publishers would be found in breach if they *incited* hatred "against any group … [on any] characteristic that makes that group vulnerable to discrimination". This reflected the legal standard under UK law, but it was not adequately enforced, particularly online. The revised Code holds publishers to stricter standards. Clause 4.3 reads: "Publishers must not *encourage* hatred or abuse against any group" based on those characteristics (emphasis added). The new wording lowers the threshold for what IMPRESS regards as discriminatory coverage and takes into account its potential effect not just on the communities, but on the society as a whole. This change, according to IMPRESS' Deputy Chief Executive Lexie Kirkconnell-Kawana: "accounts for prejudice that could be more insidious and be more cumulative or more thematic, and not a direct call to action or violence against a group of people – because that's an incredibly high threshold, and it's not often how news is carried. You don't see headlines saying […] 'Take up arms against x group'."

Clause 7 on **privacy** highlights that, when determining the privacy status of the information, publishers must give “due consideration to online privacy settings” (Clause 7.2(b)). Public interest justifications may, however, apply. The provision challenges the widely held misconception that information found or posted online is automatically made public or free to use. The Guidance to the Code acknowledges that an individual’s expectation of privacy may be weaker where no privacy settings are in place but clarifies that the absence of privacy settings will not necessarily prevent a breach of this Clause. It does not automatically mean that an individual consents to publishers or journalists publishing their content, which may reach an entirely different - or even wider - audience than the audience usually viewing the content on that individual’s account (paragraphs 7.1.4 and 7.2.6 of the Guidance to the Code).

Editorial responsibility and accountability with an outlook to the future

The new Code is the outcome of an intensive two-year review process, which involved consultation with academics, journalists, members of the public and industry stakeholders. Richard Ayre, Chair of IMPRESS, stated: “With more news, more sources, more publishers, more opinions than ever before, the opportunities for journalism are limitless. But nothing’s easier for a journalist to lose than public trust. This new Code sets the highest ethical standards for IMPRESS publishers, large and small, and whatever their point of view, so the public can confidently engage with the news of today, and tomorrow."

Impress Standards Code

https://www.impress.press/standards/impress-standards-code/our-standards-code/

Guidance on the Standards Code (clause by clause)

https://www.impress.press/wp-content/uploads/2023/02/Impress-Standards-Code.pdf

Impress Launches New Standards Code to Tackle Challenges of Modern Journalism

https://www.impress.press/impress-launches-new-standards-code-to-tackle-challenges-of-modern-journalism/

GEORGIA

[GE] : Transparency of Foreign Influence Bill Tabled

Andrei Richter
Comenius University (Bratislava)

On 14 February 2023, the "People's Power" movement, an offshoot of the "Georgian Dream" ruling party, submitted a draft law "on the transparency of foreign influence". According to the bill, a register of foreign-influenced agents would be created by the Ministry of Justice, which would "monitor" the activity of such agents. Liability for a failure to register or present relevant declarations would entail a fine of 25,000 Lari (about EUR 8 900).

Article 2 of the draft law considered that "agents of foreign influence" included broadcasters, (co-)owners of companies hosting resources which published "mass information" in the Georgian language, and (co-)owners of the print media – if more than 20% of their gross income and material benefits in a calendar year came, directly or otherwise, from a "foreign power" or an anonymous donor. That share would not include broadcasters' legitimate income from sponsorships, commercials and teleshopping, nor commercial advertising in the press or online media.

A "foreign power" would include (Article 3): a subject that belonged to the government system of a foreign state; any individual who was not a citizen of Georgia; an entity that was not founded on the basis of Georgian law; and/or an organisation (including a foundation, association, corporation, union, organisation of another kind) or other associations of individuals, founded on the basis of the law of a foreign state and/or international law.

According to the "People's Power", the draft law included the best practices of democratic countries and had been mainly drawn up from the relevant U.S. FARA legislation. The bill received tacit support from the leader of the "Georgian Dream", who also noted that the term "agent" did not have a negative connotation in the Georgian language.

The U.S. State Department spokesperson denied similarities of the draft law with American legislation: "in fact, this draft legislation appears to be based on similar Russian and Hungarian legislation, not on FARA". He also warned that "such a law could potentially undermine Georgia's Euro-Atlantic integration."

On 7 March, the bill was adopted in its first reading by a vast majority. Following massive street protests, the second reading was postponed from 9 to 10 March, when the bill was rejected, the parliamentary majority abstaining.

Draft Law of Georgia "On the transparency of foreign influence", 14 February 2023

U.S. Department of State Press Briefing – 15 February 2023

https://www.state.gov/briefings/department-press-briefing-february-15-2023/#post-420718-georgia

ITALY

[IT] AGCOM approves the Regulation for the protection of fundamental human rights

Francesco Di Giorgi
Autorità per le garanzie nelle comunicazioni (AGCOM)

With Resolution no. 37/23/CONS of 22 February 2023, executing Article 30 of the Consolidated Law on Audiovisual Media Services (TUSMA), the Italian Communications Authority (AGCOM) unanimously approved the Regulation on the protection of fundamental human rights, respect for the principle of non-discrimination and the fight against hate speech (see IRIS 2020-4/23, 2019-4/25 and 2017-1/24).

The public consultation launched with Resolution 292/22/CONS resulted in the submission of multiple contributions from media services providers - as the main addressees of the Regulation itself - as well as from universities, and associations for human rights and dignity protection.

A material enhancement of the protection against the most serious violations of fundamental rights, such as incitement to violence, hatred or the commission of terrorist crimes has been introduced by the Regulation. In addition, with the aim of effectively preventing incitement to crimes or conduct condoning such crimes, binding criteria have been introduced to guide the programming of audiovisual media service providers subject to Italian jurisdiction. Therefore, audiovisual and radio media service providers, without prejudice to the freedom of information and the freedom of expression of every individual and the right to report, are required to ensure respect, in the context of information and entertainment programmes, of the fundamental principles established for the protection of fundamental human rights. Private audiovisual and radio media service providers are encouraged to promote initiatives for inclusion and social cohesion, as well as the fight against incitement to violence and hatred. Furthermore, in the case of a breach, the Regulation provides for fines from EUR 30 000 to EUR 600 000.

Finally, this intervention lays the foundations for the extension of the human protection framework covering video-sharing platforms, in order to implement Articles 41 and 42 of the TUSMA.

Delibera n. 37/23/CONS "Regolamento in materia di tutela dei diritti fondamentali della persona ai sensi dell'articolo 30 del Decreto Legislativo 8 novembre 2023, n. 208 (Testo Unico dei servizi di media audiovisivi)"

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_publi

sher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=29764157&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution n- 37/23/CONS "Regulation for the protection of fundamental human rights article 30 law decree november 8 2023, n. 208 of the Consolidated Law on Audiovisual Media Services)"

[IT] AGCOM approves the Regulation on the fair compensation calculation to publishers for the online use of journalistic publications by information society service providers

Francesco Di Giorgi
Autorità per le garanzie nelle comunicazioni (AGCOM)

With Resolution no. 3/23/CONS of 19 January 2023, the Italian Communications Authority (AGCOM), as a first step in protecting copyright and related rights in the digital single market envisaged by Directive 2019/790 (and in particular in Article 15), approved the Regulation on fair compensation.

A new right to fair remuneration granted to both publishers (right holders) and authors for the use online of journalistic publications by information society service providers has been introduced. In particular, in accordance with Article 43-bis of the Copyright Law (*Legge sul diritto d'autore* - LDA) AGCOM has set out the criteria to be followed during negotiations between involved parties (i.e. publishers and platforms). A procedure to facilitate the agreement has been introduced: in the case an agreement is not reached within 30 days from the request for negotiation, each party can contact AGCOM to have the fair compensation defined without prejudice to the right to appeal before the competent Court. In the 60 days that follow, and based on criteria established by the Regulation at hand, AGCOM shall select, among the submitted proposals, if any, the one which best fits the aforementioned criteria or explicitly defines the amount of the fair compensation. The Regulation defines the basis for calculation as: "the advertising revenues of the provider deriving from the online use of the publisher's publications of a journalistic nature, net of the publisher's revenues attributable to the redirect traffic generated on its website by the publications of a journalistic nature used online by the lender". As a result of the Regulation's criteria, following the negotiation, a publisher may even be assigned with shares up to 70 %. This maximum rate has been introduced with the purpose of allowing a flexible and agile procedure for the fair compensation calculation by considering different needs and different characteristics of parties involved. Following a public consultation (see IRIS 2022-9/12), AGCOM identified seven criteria for the fair compensation calculation that have to be applied cumulatively and with decreasing relevance:

(1) the number of online consultations of publications (to be calculated with the relevant reference metrics);

(2) the relevance of the publisher in the market (its online audience);

(3) the number of journalists employed pursuant to national collective agreements for the category;

(4) the proven costs incurred by the publisher for technological and infrastructural investments intended for the creation of journalistic publications disseminated

online;

(5) the proven costs incurred by the lender for technological and infrastructural investments dedicated exclusively to the reproduction and communication of journalistic publications disseminated online;

(6) adhesion and compliance, by the publisher and the lender, to self-regulatory codes (including codes of ethics for journalists) and international standards on matters of quality of information and fact-checking and, finally;

(7) the number of years of activity of the publisher in relation to the historicity of the masthead.

The Regulation also governs the determination of the fair compensation payable by media monitoring and press review companies. Due to the structural differences relating to the business models and services offered, the authority deemed it necessary to identify the criteria that responded to this specificity. The basis of the calculation was identified by the significant turnover of the companies deriving from the activities connected to those of media monitoring and press reviews. In this context, the authority preferred not to indicate a rate, suggesting, however, that consideration is given to those adopted by consolidated market practices, thus conferring the necessary flexibility to guarantee fairness and taking into account the differences existing within the publishers' audience and media monitoring companies and press reviews, as well as the different types of publications of a journalistic nature (online sources, articles with a restricted reproduction clause, freely reproducible articles).

Resolution no. 3/23/CONS "Regulation on the identification of the reference criteria for determining the fair compensation for the online use of journalistic publications pursuant to article 43-bis of the law of 22 April 1941 n.633"

[IT] AGCOM launches public consultation on draft regulation implementing provisions of DSM Copyright Directive on the "remuneration chapter", ECL, and licensing for VOD platforms

Chiara Marchisotti

On 6 March 2023, AGCOM published Resolution No. 44/23/CONS, launching a public consultation on the draft regulation on the “remuneration chapter”, extended collective licenses, and the negotiation mechanism for audiovisual works on VOD platforms. The relevant provisions of the Italian Copyright Law, as amended in the context of the transposition of Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market, granted AGCOM a wide array of regulatory, supervising, ADR (alternative dispute resolution) and sanctioning powers.

In particular, the draft regulation constitutes the final step in the transposition in Italy of Articles 18 ff. of the DSM Directive – which includes the transparency obligation (Article 19 DSM Directive, as transposed in Article 110-*quater* Copyright Law), the contract adjustment mechanism (Article 20 DSM Directive, as transposed in Article 110-*quinquies* Copyright Law), and the alternative dispute resolution procedure (Article 21 DSM Directive, as transposed in Article 110-*sexies* Copyright Law). In this context, the draft regulation also regulates the role of AGCOM with reference to its newly attributed powers in the context of pre-existing, amended provisions of the Copyright Law governing statutory remuneration rights (Articles 18-*bis*, 46-*bis*, 80, 84).

In addition, this draft regulation also includes provisions concerning collective licensing with an extended effect, also known as “ECL” (Article 12 DSM Directive, as transposed in Article 180-*ter* Copyright Law) and the negotiation mechanism for audiovisual works on video-on-demand platforms (Article 13 DSM Directive, as transposed in Article 110-*ter* Copyright Law).

Stakeholders are invited to submit their contributions to the public consultation within 60 days of the publication of the resolution and may also request a hearing to illustrate their observations, based on the written document previously submitted. The hearing must be requested by special application within 45 days from the publication of the resolution.

Delibera n. 44/23/CONS, del 22 febbraio 2023, pubblicata il 6 marzo 2023 – Consultazione pubblica sullo schema di regolamento recante attuazione degli articoli 18-bis, 46-bis, 80, 84, 110-ter, 110-quater, 110-quinquies, 110-sexies, 180-ter della legge 22 aprile 1941, n. 633 come novellata dal decreto legislativo 8 novembre 2021, n. 177

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=29783249&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution No. 44/23/CONS, dated 22 February 2023, published on 6 March 2023 – Public consultation on the draft regulation implementing Articles 18-bis, 46-bis, 80, 84, 110-ter, 110-quater, 110-quinquies, 110-sexies, 180-ter of Law No. 633 of April 22, 1941 as amended by Legislative Decree No. 177 of November 8, 2021

[IT] AGCOM launches the public consultation on dispute resolution procedures between users and video-sharing platforms

Francesco Di Giorgi
Autorità per le garanzie nelle comunicazioni (AGCOM)

With Resolution no. 22/23/CONS of 8 February 2023, the Italian Communications Authority (Agcom) launched a public consultation on the issue of resolving disputes between users and video-sharing platforms (VSPs).

In the national regulatory provision which transposes in Italy the new Article 28-b of the AVMS Directive, AGCOM has been given the task of setting up an alternative system of dispute resolution between users and VSP providers for violations of the principles established by Article 42 of the TUSMA (the consolidated Law on Audiovisual Media Services), other than the right of judicial appeal.

The public consultation concerns the measures to be taken to ensure the protection of minors and the general public towards content considered harmful. It is an intervention of a conciliatory nature, on a voluntary and non-compulsory basis. The Regulation applies to the suppliers of VSPs established or considered to be established in Italy according to the provisions of Article 41 TUSMA (based on the provisions of Article 28-a of the AVMS Directive). To these VSP providers, the consultation adds those "which are considered to operate on the national territory", pursuant to the procedure referred to in Article 5, paragraphs 2, 3 and 4 of legislative decree no. 70/2003 implementing Directive 2000/31/EC on e-commerce (E-commerce Directive).

Likewise, the consultation provides that both users who upload content on the platforms and those who use such content through platforms are entitled to activate the dispute resolution procedures against VSP providers.

With regard to the identification of the bodies responsible for managing the procedures, it is envisaged that the most appropriate solution to offer users of video-sharing services an effective and easily accessible dispute resolution system, is to allow the performance of the conciliation procedures through the ConciliaWeb platform.

The latter platform was designed by AGCOMin 2018 to manage, in a completely electronic way, the conciliation requests between users and telecommunications operators (to which, from 1 March 2023, were also added critical issues with service providers). Alternatively, the user can still contact the bodies registered in the register kept by the Ministry of Justice and in the list of Alternative Dispute Resolution bodies kept by AGCOM for the resolution of disputes.

Delibera n. 22/23/CONS "Avvio del procedimento e della consultazione pubblica inerente alla modifica del quadro regolamentare in materia di procedure di risoluzione delle controversie tra utenti e operatori di comunicazioni elettroniche o fornitori di servizi di media audiovisivi per l'attuazione dell'articolo 42, comma 9, del TUSMA con riferimento ai servizi di piattaforme di condivisione di video"

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=29754517&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution n. 22/23/CONS "Initiation of the procedure and public consultation concerning the modification of the regulatory framework on the dispute resolution procedure between users and operators of electronic communications or audiovisual media service providers for the implementation of article 42, paragraph 9, of the TUSMA with reference to video sharing platform service

LUXEMBOURG

[LU] ALIA publishes guidelines before the 11 June 2023 local elections in Luxembourg

Eric Munch
European Audiovisual Observatory

On 24 February 2023, the Autorité luxembourgeoise indépendante de l'audiovisuel (Luxembourg Independent Authority for Audiovisual MediaLuxembourgish National Media Regulator — ALIA) published guidelines for the local elections taking place on 11 June 2023. The guidelines were drafted following a consultation phase with candidates, political parties, and audiovisual media entrusted with a public service mission. Electoral campaigns by political parties and candidates on social media are not covered by these guidelines.

In accordance with Article 35, paragraph 1, m) of the modified Law of 27 July 1991 on Electronic Media, ALIA must develop guidelines regarding the conditions of production, programming, and the dissemination of electoral messages by political parties and candidates, and of programmes related to the electoral media campaign broadcast on public service media (Radio 100,7) and private media entrusted with a public service mission (such as RTL Télé Lëtzebuerg and RTL Radio Lëtzebuerg, in accordance with Articles 3 and 12 of the amended Law of 27 July 1991 on Electronic Media).

The guidelines establish that editorial offices must provide ALIA with written schemes regarding the electoral campaign, along with a list and description of all electoral campaign-related programmes that will be broadcast during the period. ALIA may suggest adjustments if the principle of equity between political parties is not respected or in order to provide relevant, diversified, complete and critical information for listeners and viewers. Potential complaints, reclamations and observations from candidates, political parties or the public are to be addressed to ALIA. In the case of an unexpected imbalance in coverage, media service providers are encouraged to rebalance the content of their programmes for the remainder of the electoral campaign.

The guidelines detail the broadcasting time required to be dedicated to political parties. Political parties – or alliances – able to present full electoral lists in municipalities totalling at least a quarter of the country's total population have nine minutes of airtime per media. Parties able to present full electoral lists in municipalities totalling less than a quarter of the country's total population will have their airtime determined in proportion of the number of inhabitants of the concerned municipalities.

Campaign spots can be produced by all political parties, in the language of their choosing (but with subtitles in French and German for accessibility), for a duration

of 10 to 45 seconds, and new spots can be introduced during the electoral campaign. Broadcasts will be accompanied by a visual and/or sound indication. ALIA will determine the broadcasting order for the spots and ensure equity in repartition. On 13 March 2023, ALIA published additional technical requirements regarding the formats of campaign spots.

Only political parties with full electoral lists in municipalities totalling at least a quarter of the country's total population are invited to participate in round table discussions. Candidates are allowed to express themselves in Luxembourgish, French or German. Open political discussions are suspended for the duration of the electoral campaign. News shows are not covered by the guidelines as long as their content is not covered by the schemes established by the editorial offices in the context of the electoral campaign.

The electoral media campaign will begin on 15 May 2023 and end on 9 June, two days before the elections.

Principes directeurs pour les élections communales du 11 Juin 2023

https://www.alia.lu/fr/news/principes-directeurs-pour-les-elections-communales-du-11-juin-2023

Guiding principles for the municipal elections of 11 June 2023

EÉlections communales: précisions techniques pour les spots électoraux

https://www.alia.lu/fr/news/elections-communales-precisions-techniques-pour-les-spots-electoraux

Communal elections: technical details for election spots

NETHERLANDS

[NL] Dutch MPs in favour of banning TikTok from government devices

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

On 15 February 2023, an important debate of the Parliamentary Standing Committee for Digital Affairs on data-ethics was held, where various Dutch MPs expressed their concerns about the use of TikTok on government mobile devices.

It was not the first time that the government use of TikTok has been a topic of discussion in Dutch politics. The Committee debate followed previous advice from the Public Information and Communications Service of the Ministry of General Affairs in September 2022 "to suspend the use of TikTok at the central government level until TikTok has adjusted its data protection policy", and the submission of written questions on the matter to the Minister of Digitalisation, a few weeks earlier, by MP Dekker-Abdulaziz (member of *Democraten 66* (*D66*), a social liberal political party in the Netherlands). In her submission, the MP emphasised the app's "potentially high safety risk" and enquired whether the Minister would support a ban.

During the debate, MPs pointed to the recent decision of the U.S. government to ban TikTok from federal government devices and wondered whether the Netherlands would be "naïve" not to do the same. The Minister of Digitalisation ensured the MPs that she understood the concerns and that her Ministry was examining TikTok's compliance with applicable laws and regulations. She also mentioned the deliberate choice of the Dutch government not to use TikTok as a medium to share official information with the public, on the grounds that it is "not sufficiently clear how the platform works and how it treats collected data". The Minister promised to soon inform the House of Representatives about the government's stance on the use of TikTok by public servants.

Importantly, on 24 February 2023, the Minister reported to the House in writing that she had taken note of the decisions of the European Commission and the EU Council on 23 February to ban the use of TikTok from staff phones, stressing that the Netherlands would seek to collaborate with the Commission and other European countries to arrive at a joint policy. However, she was not able to elaborate on the Dutch approach yet, as she was still awaiting information from the internal departments which are investigating TikTok and its potential risks.

Report of a committee debate, held on 15 February 2023, on the use of algorithms and data-ethics at the central government

Questions submitted by the Members of Parliament, i.e. by the member Dekker-Abdulaziz (D66), 2 February 2023, no. 2023Z1674

Questions submitted by the Members of Parliament, with answers from the government, 24 February 2023, no. 1704

Questions submitted by the Members of Parliament, with answers from the government, 11 November 2022, no. 693

Questions submitted by the Members of Parliament, with answers from the government, 8 November 2022, no. 638

[NL] New Advertising Code on “Sustainability” claims

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 1 February 2023, the new *Code voor Duurzaamheidsreclame* (Code for Sustainability Advertising) came into effect, having been published by the *Stichting Reclame Code* (Dutch Advertising Code Foundation — SRC), the self-regulatory body for advertising, including broadcast advertising, in the Netherlands (see IRIS 2022-2/15). The new Code replaces the *Milieu Reclame Code* (Environmental Advertising Code) which related only to environmental claims, and now applies to both environmental claims and ethical claims, such as claims related to working conditions, animal welfare or corporate social responsibility. The SRC stated that it was important consumers should be able to trust what advertising says about sustainability, and said it had seen an increase in the number of complaints about unclear or incorrect claims. As such, the new Code aimed to provide an up-to-date framework for assessing sustainability claims.

The Code begins with crucial definitions. In this regard, Article 1 of the Code defines an environmental claim as a claim that suggests, or otherwise gives the impression, that a product or activity has a positive, minor or no impact on the environment; while an ethical claim is a claim that gives the impression that the production or activity of a company has taken place according to certain ethical standards, for example with regard to general working conditions, animal welfare and/or corporate social responsibility. The Code then contains a number of important rules relating to environmental and sustainability claims in adverting, including the following. First, sustainability claims must be presented in a “clear, specific, correct and unambiguous” manner. Sustainability advertising may not contain any statements, images, logos or other design or quality marks that could “mislead the average consumer”. Second, when an advertiser communicates about its sustainability ambition, it should be made sufficiently clear that it concerns an aim and not the current situation. Such a sustainability claim should not give an “overly positive picture” of the current and future results in the field of sustainability, while it is misleading to advertise an aspiration that “cannot reasonably be expected to be achieved”. Third, all sustainability claims must be “demonstrably correct”. Crucially, the burden of proof rests on the advertiser. The more absolute sustainability claims are formulated, the more “stringent” requirements are placed on the evidence. Fourth, sustainability indications and sustainability symbols may be used, provided that the origin of the indication or symbol is clear and confusion about the meaning of the indication or symbol is excluded. Fifth, environmental claims relating to (separate) waste collection and/or waste processing are only permitted if the recommended method of collection or processing is available and can be applied in practice.

Finally, the SRC stated that because EU legislation is also being drafted for sustainability claims, the Code will be evaluated after one year and adjusted if

necessary to keep the code up-to-date and relevant.

Niederländische Werbekodex-Stiftung, Werbekodex für Behauptungen zur Nachhaltigkeit, 1. Februar 2023

Dutch Advertising Code Foundation Code for Sustainability Advertising, 1 February 2023

https://www.reclamecode.nl/english/

UKRAINE

[UA] Russian journalist sentenced for calls to genocide

Andrei Richter
Comenius University (Bratislava)

On 13 February 2023, the Shevchenkivsky district court in Kyiv sentenced Anton Krasovsky to five years' imprisonment with confiscation of property for public calls to overthrow the constitutional order of Ukraine and dissemination of such calls in the mass media (paragraph 3 of Article 109 of the Criminal Code of Ukraine), as well as for public calls to genocide and dissemination of such calls (paragraph 2, Article 442 of the Criminal Code of Ukraine), the maximum term of imprisonment envisaged by both articles – *in absentia*. It appears that this was the first verdict in Ukraine of a Russian media worker, following such grave crimes.

At the time of the crime, Mr Krasovsky was the presenter of the talk show "Antonimys Antonom Krasovskim" (Antonyms with Anton Krasovsky), as well as the director of Russian-language programming on RT (RT-Rossiya). According to the verdict of the court in Kyiv, he had disseminated on RT's YouTube channel (then accessible in Ukraine), during January to March 2022, audiovisual statements denying the existence of an independent Ukraine, such as (in Russian), "bitch! This country should not exist! And we should do everything we can so that it is no longer here." In April 2022, in comments on his personal Telegram-channel "Anton Vyacheslavovich", he made a call to kill "brothers" (Ukrainians) in response to a presumed Ukrainian attack in Belgorod.

The investigation into the case started on 16 March 2022 by the Head Investigative Department of the Security Service of Ukraine (SBU). Following the conclusions of a linguistic expert, the investigator issued a "Notice of Suspicion" on 14 June, approved by the Office of the Prosecutor General of Ukraine on the same day. This procedure formally makes the addressee a suspect in a criminal case. The "Notice of Suspicion" substantiated the accusations that were later confirmed by the Shevchenkivsky court. The court said, in particular, that the statements had been made "by a public figure, who had influence over the audience of the TV channel in question, and who clearly understood that his categorical expressions, in the material form of publications and video recordings, were made available to an unlimited number of individuals and were capable of forming a negative mass perception of Ukraine".

On 9 August 2022, the Shevchenkivsky court ordered Mr Krasovsky to be detained. On 16 August 2022, the Head Investigative Department of the Security Service of Ukraine subpoenaed – through the governmental daily *Uryadovyi kurier* – Mr Krasovsky to attend an interrogation on 17, 18 or 20 of August, to no effect. Ukraine has issued an international warrant for Mr Krasovsky.

In a parallel development, the Investigative Committee of the Russian Federation (SKRF) started, in October 2022, a criminal investigation regarding comments Mr

Krasovsky had made in “Antonimy” with calls to “drown Ukrainian children”, but in December the case was closed due to the “absence of crime”. The comments he made still caused a backlash and he was reportedly suspended from RT in October 2022.

Decision, Shevchenkivsky district court of Kyiv, case No. 761/15376/22, 9 August 2022

Повістка про виклик підозрюваного, Uryadovyi kurier, 16 СЕРПНЯ 2022 РОКУ

https://ukurier.gov.ua/media/newspaper/adv/2022-08-15/177_7298r.pdf

Subpoena to a suspect, Uryadovyi kurier, 16 August 2022, p.12

За матеріалами СБУ судитимуть директора Russia Today

https://ssu.gov.ua/novyny/za-materialamy-sbu-sudytymut-dyrektora-russia-today

Director of Russia Today will be tried with the help of SBU files). Press statement of the SBU, 29 August 2022

Following SSU’s investigation, ‘russia today’ director, who called for genocide of Ukrainians, sentenced to prison term, Press statement of the SBU, 17 February 2023

https://ssu.gov.ua/en/novyny/za-materialamy-sbu-tiuremnyi-strok-otrymav-dyrektor-russia-today-yakyi-zaklykav-do-henotsydu-ukraintsiv

Глава СК РФ Бастрыкин поручил проверить высказывания журналиста Красовского

https://rg.ru/2022/10/24/glava-sk-rf-bastrykin-poruchil-proverit-vyskazyvanie-zhurnalista-antona-krasovskogo.html

Head of SKRF, Bastrykin, assigned to assess statements by journalist Krasovsky), in Rossiyskaya gazeta, 24 October 2022

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