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EDITORIAL

It turned colder, that's where it ends ..." Thus, sang Olivia Newton John of her summer lovin’ with John Travolta in Grease. Indeed, the dog days are over and the weather is cooling down (climate change permitting), but that’s not where our reporting ends– quite the opposite! We come back to the office with our batteries recharged and a wealth of information in this newsletter. And we have something for everyone.

On the anti-piracy front, in the UK, Sky has won a new High Court order to block illegal streaming. In Italy, there is a new law to combat copyright infringement on electronic communications networks, and the European Commission has issued a recommendation to help combat online piracy of sports and other live events.

Regarding VSPs, in the UK, research by Ofcom found that people need advanced reading skills to understand the terms and conditions of VSPs. In France, a new law has introduced a digital majority at 15 and strengthened the fight against online hate speech. In Italy, AGCOM launched a public consultation on influencers.

On electoral issues, in Spain the Central Electoral Commission urged public-service RTVE to be extremely rigorous in its coverage during election periods; in Germany, the Berlin-Brandenburg Higher Administrative Court ruled on the obligations of public service broadcasters in election coverage, while in Moldova the Central Election Commission now vets public advertising before elections.

And if you are interested in European matters, the Commission published its 2023 Rule of Law Report, and theCULT MEPs of the European Parliament adopted their draft position on the EMFA.

But, oh those summer nights… □□

Enjoy the read!

Maja Cappello, Editor

European Audiovisual Observatory

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COUNCIL OF EUROPE

BELGIUM

European Court of Human Rights (Grand Chamber) : Hurbain v. Belgium

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

On 4 July 2023 the Grand Chamber of the European Court of Human Rights (ECtHR) confirmed the conclusion of its Chamber judgment of 22 June 2021 in the case of *Hurbain v. Belgium* (IRIS 2021-8/27). The ECtHR found that a court order to anonymise an article in a newspaper's electronic archive did not violate the publisher's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The judgment holds an application of the "right to be forgotten" as part of the right of privacy under Article 8 ECHR, in particular in respect of online media archives (see also IRIS 2013-9/1 and IRIS 2018-8/1). In essence the judgment confirms that the right to be forgotten in certain circumstances can prevail over the integrity of online news archives and the right to freedom of expression and information. As this is the first time that the ECtHR upholds a measure of altering information published lawfully for journalistic purposes and archived on a website of a news outlet, IRIS publishes an extended summary of this Grand Chamber's judgment.

The facts of the case, the domestic proceedings and the chamber judgment

The applicant in this case is the publisher of the Belgian daily newspaper *Le Soir*. He was ordered by a civil judgment in 2013 to render anonymous the digital version of an article published in the newspaper in 1994, and added to the online archive in 2008, in order to respect an individual's claim on the right to be forgotten. The original article mentioned the full name of the individual, Doctor G., who had caused a fatal road-traffic accident. The court order to anonymise the online article was confirmed by the court of appeal in 2014 and upheld by the Supreme Court (Cour de Cassation) in 2016. *Le Soir's* publisher, Mr Hurbain lodged an application with the ECtHR complaining that the order for anonymisation was a breach of Article 10 ECHR. The Belgian government defended the decision of the domestic courts, while Doctor G. intervened in the proceedings before the Strasbourg Court, claiming protection under Article 8 ECHR and his right to be forgotten.

The Chamber judgment of 22 June 2021 found no violation of Article 10 ECHR (IRIS 2021-8/27). The ECtHR confirmed that the most effective way to ensure

respect for Doctor G's private life, without disproportionately affecting the newspaper's freedom of expression, was to anonymise the article on the newspaper's website by replacing the individual's full name with the letter X. A dissenting opinion of judge Pavli argued that the Court's judgment went against an emerging but clear European consensus that the right to be forgotten claims in the online realm can, and should, be effectively addressed through de-indexation of search engine results, and not by altering the content of online news archives.

On request of Mr. Hurbain, the case was referred to the Grand Chamber in application of Article 43 ECHR. The freedom of expression NGO Article 19, together with 15 other organisations and entities as third-party intervenes (TPI) submitted a joint opinion before the ECtHR. They argued that while there was a balance to be struck between the rights at stake, the permanent removal of information from a digital media archive was not a proportionate restriction on freedom of expression and would have a deleterious impact on the integrity of that archive, which was an essential component of newsgathering and reporting.

The Grand Chamber's approach on the principles

The Court's finding starts with the observation that this case is solely about the continued availability of the information on the Internet, rather than its original publication *per se* and that the original article was published in a lawful and non-defamatory manner. The judgment in its preliminary observations also emphasises that it concerns a news report that was published and subsequently archived on the website of a news outlet for the purposes of journalism, a matter which goes to the heart of freedom of expression as protected by Article 10 ECHR. The ECtHR also reiterates its basic principle that the press does not only have the task of imparting information and ideas, but that the public also has a right to receive them, if not the press would be unable to play its vital role of public watchdog. Therefore particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive. Furthermore, Internet archives make a substantial contribution to preserving and making available news and information and digital archives constitute an important source for education and historical research. The importance of online news archives is stressed and their role in enabling the public to learn about contemporary history and allowing the press, by the same means, to carry out its task of helping to shape democratic opinion. And since the role of archives is to ensure the continued availability of information that was published lawfully at a certain point in time, online archives must, as a general rule, remain authentic, reliable and complete. Accordingly, the integrity of digital press archives should be the guiding principle underlying the examination of any request for the removal or alteration of all or part of an archived article which contributes to the preservation of memory, especially if, as in the present case, the lawfulness of the article has never been called into question.

On the other hand, the ECtHR refers to the development of technology and communication tools and the growing number of cases in which persons have sought to protect their interests under what is known as the "right to be

forgotten", as part of their right to privacy and protection of their reputation as guaranteed by Article 8 ECHR. An individual can indeed have a legitimate interest in obtaining the erasure or alteration of, or the limitation of access to, past information that affects the way in which he or she is currently perceived, in a variety of contexts such as, for instance, job-seeking and business relations. It is clear that personal information that is published and has been available on the Internet for some time may have a far-reaching negative impact on how the person concerned is perceived by public opinion, while there is also a risk of other harmful effects. As a concrete example the Court refers to its findings in *Biancardi v. Italy* (IRIS 2022-1/15) in which it found that not only Internet search engine providers, but also the administrators of newspaper or journalistic archives accessible through the Internet, could be required to de-index documents, applying a right to be forgotten. It however also clarifies that a claim of entitlement to be forgotten does not amount to a self-standing right protected by the ECHR and, to the extent that it is covered by Article 8, can concern only certain situations and items of information. Furthermore, in order for Article 8 ECHR to come into play, an attack on a person's reputation must attain a certain level of seriousness. The Court emphasises that in any event it has not hitherto upheld any measure removing or altering information published lawfully for journalistic purposes and archived on the website of a news outlet.

The ECtHR further explains that the term "delisting" refers to measures taken by search engine operators, and the term "de-indexing" denotes measures put in place by the news publisher responsible for the website on which the article in question is archived. The measures taken against online content can include removal, alteration or anonymisation or limitations on the accessibility of the information. Furthermore, data subjects are not obliged to contact the original website, either beforehand or simultaneously, in order to exercise their rights *vis-à-vis* search engines, as these are two different forms of processing, each with its own grounds of legitimacy and with different impacts on the individual's rights and interests. Likewise, the examination of an action against a publisher of a news website cannot be made contingent on a prior request for delisting.

The Grand Chamber also refers to its general approach according to which the ECHR is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the ECtHR to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.

The Grand Chamber's criteria and findings Next, the ECtHR's task is to determine whether the anonymisation order against the article in the news archive of *Le Soir* was based on relevant and sufficient reasons in the specific circumstances of the present case and, in particular, whether it was proportionate to the legitimate aim pursued. To make this assessment and in particular considering the need to preserve the integrity of press archives, the ECtHR takes into account the following criteria: (i) the nature of the archived information; (ii) the time that has elapsed since the events and since the initial and online publication; (iii) the contemporary interest of the information; (iv) whether the

person claiming entitlement to be forgotten is well known and his or her conduct since the events; (v) the negative repercussions of the continued availability of the information online; (vi) the degree of accessibility of the information in the digital archives; and (vii) the impact of the measure on freedom of expression and more specifically on freedom of the press.

Before applying these criteria the ECtHR expresses its awareness of the possible chilling effect on freedom of the press stemming from the obligation for a publisher to anonymise an article that was initially published in a lawful manner, as such an obligation entails a risk that the press may refrain in the future from keeping reports in its online archives, or that it will omit individualised elements in articles that are likely to be the subject of such a request. The ECtHR, nevertheless, also emphasises that the content providers are required to assess and weigh up the interests in terms of freedom of expression and respect for private life only where the person concerned makes an express request to that effect.

After applying and assessing each of the seven criteria it has put forward, the Grand Chamber of the Court reaches the conclusion that the Belgian courts took account in a coherent manner of the nature and seriousness of the judicial facts reported on in the article in question, the fact that the article had no topical, historical or scientific interest, and the fact that Doctor G. was not well known. In addition, the Belgian courts attached importance to the serious harm suffered by Doctor G. as a result of the continued online availability of the article with unrestricted access, which was apt to create a “virtual criminal record”, especially in view of the length of time that had elapsed since the original publication of the article. Furthermore, after reviewing the measures that might be considered, in order to balance the rights at stake, the Belgian courts held that the anonymisation of the article did not impose an excessive and impracticable burden on the applicant, while constituting the most effective means of protecting Doctor G.’s privacy. Therefore the ECtHR reaches the final conclusion that the interference with the right guaranteed by Article 10 ECHR, on account of the anonymisation of the electronic version of the article on the website of the newspaper *Le Soir*, was limited to what was strictly necessary and can thus, in the circumstances of the case, be regarded as necessary in a democratic society and proportionate. It therefore sees no strong reasons to substitute its own view for that of the domestic courts and to disregard the outcome of the balancing exercise carried out by them. Accordingly, there has been no violation of Article 10 ECHR.

The Grand Chamber however reached no unanimity for this finding: 5 of 17 judges argue in a dissenting opinion why the harm invoked by the person named in the litigious lawful article was not serious enough to justify the alteration of the online version of the newspaper article. The dissenters express in particular that the alteration of the online version was disproportionate, as the delisting of the article from the results of search engines was to be considered a less restrictive interference with the right to freedom of expression and information as guaranteed by Article 10 ECHR. The dissenters also invoked the juxtaposition between ‘the right to be forgotten’ and ‘the right to remember’.

Judgment by the European Court of Human Rights, Grand Chamber, in the case of Hurbain v. Belgium, Application no. 57292/16, 4 July 2023

https://hudoc.echr.coe.int/eng?i=001-225814

EUROPEAN UNION

EMFA: CULT MEPs adopt their draft position

Justine Radel-Cormann
European Audiovisual Observatory

One year after the European Commission's proposal (for the past legislative process, see IRIS 2023-5:1/7), CULT MEPs adopted MEP Verheyen's draft report on the European Media Freedom Act on 7 September 2023. The EMFA was first presented by the European Commission in September 2022 to establish a common framework in the EU to protect media pluralism, editorial independence and a common level of safety for the media industry (see IRIS 2022-9:1/3). CULT MEPs would like to see parts of the Commission's proposal amended in the following way:

- The Commission's proposed Art.6, paragraph 1, requires providers of news and current affairs content to publicly disclose some information as to their contact details, owners and beneficial owners. CULT MEPs would like these transparency requirements extended to all media providers.

- The Commission's proposed Art. 4, paragraph 2, forbids states, and their regulatory authorities to detain, sanction, intercept, subject to surveillance media service providers (or their family members, employees, corporate and private premises) on the grounds they refuse to disclose information on their sources. CULT MEPs would like to see this ban extended to all forms of interference and pressure on the media.

- The Commission's proposed Art. 17, paragraph 2, requires VLOPs, when suspending their online intermediary services to a recognized media provider who has editorial responsibility for the choice of its content, to communicate a statement of reasons to the provider. The latter should be able to enter into discussion with the VLOP to find an amicable solution to terminate the suspension the media provider deems unjustified. CULT MEPs wish to safeguard independent media providers with editorial responsibility by accompanying this provision with a 24-hour negotiation window involving national regulators, before a VLOP may suspend content.

- The Commission's proposed Section 2 on the European Board for Media Services suggests that the Board is provided with a Secretariat by the European Commission. Besides, the Board should act upon the request of the European Commission. According to CULT MEPs, the Board should be legally and functionally independent from the Commission and able to act on its own.

This CULT report will be submitted to a plenary vote in October 2023. Depending on the plenary vote outcome, interinstitutional negotiations could start in October/November 2023.

EC Proposal for a Regulation establishing a common framework for media services in the internal market (EMFA)

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A0457%3AFIN

[CULT] Report 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

https://www.europarl.europa.eu/doceo/document/A-9-2023-0264_EN.html

European Commission publishes Key Performance Indicators to monitor and assess the effects of its Recommendation on online piracy of sports and other live events

Eric Munch
European Audiovisual Observatory

Following the adoption on 4 May 2023 of the Recommendation regarding online piracy of sports and other live events, the European Commission published, on 31 July 2023, Key Performance Indicators (KPIs) to monitor and assess the effects of the Recommendation. The European Observatory on Infringement of Intellectual Property Rights, hosted by the European Union Intellectual Property Office (EUIPO Observatory) will support the European Commission in that monitoring and assessment.

The Recommendation is to encourage member states, national authorities, holders of rights and providers of intermediary services to take "effective, appropriate, and proportionate measures to combat unauthorised retransmissions of live sports events and other live events." Its Recommendations to member states emphasise the importance of promptly treating notices related to unauthorised live event retransmissions and the use of injunctions tailored to the dynamic nature of live events. It also encourages cooperation between public authorities, holders of rights and providers of intermediary services, and raises awareness of the existence of commercial offers. The holders of rights of live transmission events are encouraged to increase the availability, affordability and attractiveness of their commercial offers to end users across the European Union.

Four KPIs have been established to monitor and assess the implementation and effects of the Recommendation. While the first KPI quantifies the number of visits to pirate live sports events websites, differentiated by traffic source and device, the others include both quantitative and qualitative data.

The second KPI focuses on the prompt treatment of notices related to unauthorised retransmission of live events, monitoring the volume and follow-up of notices, the action taken by intermediaries to avoid misuse and/or repeated misuses of their services for unauthorised retransmission of live events and the evolution of voluntary cooperation with other market players to ensure that their services are not used to facilitate the promotion and functioning of operators giving access to unauthorised retransmission of live events.

The third KPI assesses the effects of the Recommendation on the use of blocking injunctions and dynamic blocking injunctions tailored to live events, based on data from public authorities, internet access providers and holders of rights or third-party service providers specialised in enforcing their rights online.

Lastly, the fourth KPI focuses on the availability, affordability and attractiveness of commercial offers, and the awareness of legal offers of live sports and other events, based on data from holder of rights in live transmissions of sports and other events, and from national authorities.

The European Commission will assess the effects of the Recommendation by 17 November 2025, based on the results of the monitoring exercise but potentially also other sources of information. Stakeholders interested in participating in the monitoring exercise should contact the EUIPO.

Recommendation on online piracy of sports and other live events: the Commission services publish Key Performance Indicators

https://digital-strategy.ec.europa.eu/en/news/recommendation-online-piracy-sports-and-other-live-events-commission-services-publish-key

Recommendation on combating online piracy of sports and other live events

https://digital-strategy.ec.europa.eu/en/library/recommendation-combating-online-piracy-sports-and-other-live-events

Preliminary ruling by the CJEU in Case C-426/21

Eric Munch
European Audiovisual Observatory

By judgment dated 13 July 2023, the Court of Justice of the European Union (hereafter referred to as “the Court”) gave a preliminary ruling, at the request of the Austrian Oberster Gerichtshof, in Case C-426/21 opposing Ocilion IPTV Technologies GmbH to Seven.One Entertainment Group GmbH and Puls 4 TV GmbH & CO. KG.

Ocilion, a company incorporated under Austrian law offers an IPTV service to its commercial costumer. The service concerns, among other programmes, programmes for which Seven.one and Puls 4 TV hold retransmission rights and takes the form of either an on-premises solution where Ocilion provides both hardware and software for the network operators to manage themselves but with Ocilion also providing technical assistance, or a cloud-hosting solution managed directly by Ocilion.

Both of Ocilion solutions allow end users to replay programmes via an online video recorder. In order to avoid multiple duplications of the same content, once a user has recorded it, it becomes available to all users who requested access to it, through the provision of a corresponding reference number communicated to users by Ocilion.

Seven.One and Puls 4 TV argue that they did not consent to the communication by Ocilion of their television programmes, which amounts according to them to an unauthorised retransmission of content over which they hold exclusive rights. They also argue that the means by which the online recorder operates does not allow the resulting “de-duplications” to be “regarded to be falling within the ‘private copying’ exception”, for the purposes of Paragraph 42(4) and Paragraph 76a(3) of the UrhG. They brought an application for “interim measures seeking to prohibit Ocilion from making the content of their programmes available to its customers or to reproduce or have third parties reproduce such programmes, without their consent.” The application was granted at first instance and upheld on appeal, leading to Ocilion bringing an appeal before the referring court, the Oberster Gerichtshof (the Austrian Supreme Court).

The referring court stated that it is required to determine whether the recordings are covered by the ‘private copying’ exception. A decisive element would be to determine if Ocilion has the power to organise how the recording function of the online video recorder works or if it merely stores copies made by natural persons without offering a service that makes content available. If the latter is true, the reproductions will be regarded as falling within the concept of ‘private copying’. To answer this question, the Oberster Gerichtshof estimates necessary to obtain clarifications on how to interpret Article 5(2)(b) of Directive 2001/29.

It also asked whether the on-premises service offered by Ocilion constitutes "a communication to the public of protected broadcasting content, within the meaning of Article 3(1) of Directive 2011/29, for which that undertaking should be held responsible." It considers unclear from the case-law of the Court that "acts which are not in themselves to be regarded as transmission but which merely facilitate transmission by a third party fall within the scope of that provision" and that "the case-law arising from the judgment of 14 June 2017, Stichting Brein (C 610/15, EU:C:2017:456), needs to be clarified as regards the concept of the 'indispensable role' that the provider must play in the present case in order to consider that it carries out a 'communication to the public', within the meaning of that provision."

The referring court subsequently stayed the proceedings and referred the questions above to the Court for a preliminary ruling.

The Court ruled that Articles 2 and 5(2)(b) of Directive 2001/29 "must be interpreted as meaning that the exception to the exclusive right of authors and broadcasting organisations to authorise or prohibit the reproduction of protected works does not cover a service offered by an operator of retransmission of online television broadcasts to commercial customers allowing, on the basis of a cloud-hosting solution or based on the necessary hardware and software made available on premises, a continuous or one-off recording of those broadcasts, on the initiative of the end users of that service, where the copy made by the first of those users to have selected a broadcast is made available, by the operator, to an indeterminate number of users who wish to view the same content."

Regarding the Oberster Gerichtshof's second question, the Court rules that Article 3(1) of Directive 2001/29 "must be interpreted as meaning that the supply by an operator of retransmission of online television broadcasts to its commercial customer of the necessary hardware and software, including technical assistance, which enables that customer to allow its own customers to replay online television broadcasts, does not constitute a 'communication to the public' within the meaning of that provision, even if that operator is aware that its service may be used to access protected broadcasting content without the consent of the authors."

Judgment of the Court in case C-426/21

https://curia.europa.eu/juris/document/document.jsf?text=&docid=275384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1343057

Rule of Law Report 2023, including on media freedom and pluralism

Ronan Ó Fathaigh
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On 5 July 2023, the European Commission published its 2023 Rule of Law Report, which is the fourth annual report as part of the European Rule of Law Mechanism announced in the Political Guidelines of the Commission's President in 2019 (see, for example, IRIS 2020-10/9). The purpose of the Rule of Law report is to "take the pulse" of the rule of law situation in each member state and the EU as a whole, "detecting and preventing" emerging challenges and supporting rule of law reforms. The 2023 Report includes separate country chapters for all 27 EU member states, and, crucially, covers four main pillars with a strong bearing on the rule of law, namely (1) justice systems, (2) anti-corruption frameworks, (3) media freedom and pluralism, and (4) other institutional issues linked to checks and balances. Of particular interest are the 2023 Report's findings in relation to media freedom and pluralism.

In this regard, the Report's chapter on media freedom and pluralism begins by referencing the 2023 Media Pluralism Monitor, which notes that news media concentration remains at a "high risk" level across the EU; the overall ranking classifies media pluralism to be at "high risk" in five member states (Croatia, Cyprus, Greece, Slovenia and Malta) and at "very high risk" in four member states (Bulgaria, Poland, Romania, and Hungary). Secondly, the Report then moves on to the issue of the independent functioning of media regulators, and states that concerns persist with regard to the effectiveness or the functional independence of regulators in practice in several member states. Some of these concerns relate to insufficient safeguards against undue political influence over the nomination process or in the functioning of regulators. Thirdly, in relation to the transparency of media ownership, the Report notes that new legislation increasing the transparency of media ownership or improving the public availability of media ownership information has been adopted in Greece, Luxembourg and Sweden, and strengthened in Cyprus. Meanwhile, discussions on revising the rules on the transparency of media ownership have started in France, where transparency concerns had been raised with regard to complex shareholding structures. Fourthly, in relation to safeguarding the media from political pressure and influence, reforms aimed at strengthening the independence of national public service broadcasters are under way in several member states, including Luxembourg, Slovenia, Germany, Estonia, Slovakia and Czechia. However, the Report notes that no measures have been taken to improve the independent governance and editorial independence of public service media in Romania, Malta, Poland or Hungary. Finally, in relation to improving the safety and protection of journalists and addressing legal threats and abusive court proceedings against public participation (Strategic Lawsuits Against Public Participation – SLAPPs), the Report states that defamation is "one of the most

common grounds on which SLAPPs are brought against journalists". And to address the threat of SLAPPs and respond to the recommendations of the 2022 report, several member states envisage introducing specific procedural safeguards and/or revising their defamation laws.

In terms of next steps, the Commission has invited the European Parliament and the Council to continue general and country-specific debates on the basis of the 2023 report. It also called on national parliaments, civil society, and other key stakeholders, to continue national dialogue on the rule of law, as well as at European level. Finally, the Commission invited member states to "effectively take up the challenges" identified in the Report.

European Commission, Communication on the 2023 Rule of Law Report: The rule of law situation in the European Union, COM/2023/800 final, 5 July 2023

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023DC0800

TikTok ordered to eliminate unfair design practices concerning children after EDPB binding decision

Amélie Lacourt
European Audiovisual Observatory

On 14 September 2021, the Irish Supervisory Authority (SA) started an "own volition inquiry" procedure as regards TikTok Technology Limited (hereafter: TikTok). It addressed, in particular, the processing of users' (children aged between 13 and 17) personal data in connection to certain design practices, as well as issues relating to access to the platform for children under the age of 13. The Draft decision issued by the Irish SA (the Leading SA – "LSA") triggered objections from its counterparts, namely the Italian and German SAs (the Concerned SAs – "CSA"), and additional comments from several other CSAs, which led to the submission of the matter to the consistency mechanism.

In its mission to promote and support cooperation among national Supervisory Authorities and to ensure a consistent application and enforcement of data protection law, the European Data Protection Board (EDPB) submitted a binding dispute resolution decision on 2 August 2023, based on Article 60(4) GDPR and Article 65(1)(a) GDPR (Binding Decision 2/2023). The decision covers TikTok's processing activities between 31 July and 31 December 2020. In principle, such decisions are addressed to the national Supervisory Authorities (SAs) to settle disputes when the LSA and the CSA(s) do not reach an agreement on a cross-border case.

The EDPB decision first addressed the processing of personal data of the registered TikTok platform users aged between 13 and 17. It provided an analysis of the design practices implemented by TikTok, namely of two pop-up notifications: the Registration Pop-Up and the Video Posting Pop-Up. The first one encouraged children to skip the registration process, affecting their privacy on the platform. In the second case, the design of the pop-up window further incited children to post videos by enhancing the button "Post Now" rather than the button "Cancel". Similarly, the process to make posts private, requiring switching to a private account by clicking on "Cancel", was not straightforward. The EDPB therefore found that both pop-ups failed to present options to the user in an objective and neutral way, and instead made it harder for them – and particularly for children - to make choices favouring the protection of their personal data. In establishing its decision, the EDPB found that TikTok had infringed the principle of fairness, established under Article 5(1) a) GDPR.

In addition, when assessing whether the platform's age verification measures complied with data protection requirements by design (Art. 25(1) GDPR), the EDPB expressed serious doubts. According to the Board, the measures put in place *a priori* by TikTok to prevent children under the age of 13 to access

the platform could be easily circumvented, and those applied *a posteriori* were not applied in a sufficiently systematic manner. Although the EDPB concluded it did not hold sufficient information to assess the platform's compliance with Article 25(1) GDPR during the said period, it required the Irish Authority to reflect this issue in its decision.

Following the EDPB decision, the Irish Data Protection Authority issued a final decision establishing the infringement of the GDPR by TikTok. The Irish DPA imposed a EUR 345 million fine, in addition to a reprimand and compliance order.

Binding Decision 2/2023 on the dispute submitted by the Irish SA regarding TikTok Technology Limited (Art. 65 GDPR)

https://edpb.europa.eu/our-work-tools/our-documents/binding-decision-board-art-65/binding-decision-22023-dispute-submitted_en

Decision in the matter of TikTok Technology Limited made pursuant to Section 111 of the Data Protection Act, 2018 and Articles 60 and 65 of the General Data Protection Regulation

https://edpb.europa.eu/system/files/2023-09/final_decision_tiktok_in-21-9-1_-_redacted_8_september_2023.pdf

NATIONAL

ARMENIA

[AM] Introduction to the Law on Cinematography of Armenia

Shushan Doydoyan

The Law on Cinematography (hereinafter referred to as the Law) was adopted on 30 June 2021 and entered into force on 26 July 2021. The purpose of adopting the Law is to ensure the development of the cinematography industry in the Republic of Armenia, to create sufficient legal guarantees and to support the creation, distribution, screening and promotion of national films, as well as the preservation of and access to film heritage and film history.

This law, consisting of 10 chapters in total, defines the principles of state policy in the field of cinematography, the goals and forms of state support, the powers of the state and other bodies, and regulates the legal, organizational and financial relations of cinematographic activity.

The first chapter of the Law contains general provisions. The articles of this chapter illustrate the concepts used in the Law, as well as the main principles, objectives and forms of state policy for cinematography. The law also defines principles that govern the state's policy on cinematography, such as guaranteeing the freedom of creators, the obligation and continuity of state support, the transparency of state support, the improvement of the legal framework, the management of conflicts of interest, the guarantee of a favourable tax policy, the preservation, distribution and development of film art, and more.

The law also defines six goals and nine forms of state support for cinematography. Among the latter, the following categories are highlighted:

1. implementation of investments and provision of guarantees;

2. creation and development of supporting infrastructure;

3. guarantee ofnecessary production and technical conditions;

4. creation of accessible conditions for the communication of film art;

5. provision of favourable financing conditions;

6. financing of the creation, distribution and preservation of films;

7. financing of film festivals and other film art events;

8. ensuring participation in film art events;

9. other support not prohibited by law.

The articles of Chapter 2 of the Law define the powers of the RA (Republic of Armenia) Government, the authorized state body and the national body in the field of cinematography.

Chapter 3 of the Law provides for the national body, the council, and the director of the national body, defines the procedure for their election and the scope of powers.

The articles of Chapter 4 of the Law define the standards governing national films, the film register, the preservation of films as well as the ownership rights of films. According to the Law, a national film is a film intended to be shown in cinemas, where the majority of the creative team are citizens of the Republic of Armenia, the author of the script and (or) the film director is a citizen of the Republic of Armenia, and where the film producer has received state registration in the Republic of Armenia.

National films are also those for which ownership rights have been transferred to the Republic of Armenia as part of a comprehensive succession.

Chapter 5 of the Law provides rules on film production, film distribution and film screening. Chapter 6 of the Law defines the rules for issuing and terminating certificates confirming the right to purchase services directly related to film production at a price 20 per cent lower than the minimum profitable price. The articles of Chapter 7 of the Law regulate state support of the cinematography industry. In terms ofstate support, the Law stipulates that in case of an investment of AMD 100 million or more for film production in the territory of the Republic of Armenia, the film producer can receive a certificate and, based on it, obtain the services directly related to film production from suppliers at a price 20 per cent lower than their minimum profitable price.

The provisions of Chapter 8 of the Law refer to international cooperation, and provide, inter alia, that international cooperation in cinematography is carried out in accordance with international agreements and the Law.

Articles of Chapters 9 and 10 of the Law refer to liability for violations of the Law and the final and transitional provisions, respectively.

On 12 September 2023, the RA National Assembly adopted Amendments to the Law on Cinematography in the second reading. As a result of the Amendments made in the Law, Chapter 6 was completely rewritten and the form of state support defined by Chapter 7 was changed. The essence of the legal amendments is that one form of state support in the field of film production has been replaced by another. In particular, the possibility of purchasing services directly related to film production at a price 20 per cent lower than the minimum profitable price has been replaced by the possibility of compensating 10-40 per cent of the monetary costs invested in film production. In the justification of the amendments, the

authors state that according to experts in the field, the current form of state support has never worked since the adoption of the Law, and is ineffective.

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https://www.arlis.am/DocumentView.aspx?DocID=154460

Law on Cinematography

BULGARIA

[BG] The Council for Electronic Media held a discussion concerning commercial communications in the media

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

Съветът за електронни медии (the Council for Electronic Media – CEM) held a discussion focused on the topic of "Commercial Communications in the Media" on 6 July 2023. Representatives of *Комисията за защита на потребителите* (the Commission for Consumer Protection), *Асоциацията на българските радио- и телевизионни оператори* (the Association of Bulgarian Radio and Television Broadcasters), *Националния съвет за саморегулация* (the National Council for Self-Regulation), the general directors of *Българската национална телевизия* (Bulgarian National Television) and*Българското национално радио* (Bulgarian National Radio), as well as journalists from radio, television, and print media took part in the event, along with representatives from *Съюза на българските журналисти* (the Union of Bulgarian Journalists), charitable organizations, and communication agencies.

The core objectives of the discussion revolved around the legal framework governing the presentation of commercial communications, surreptitious commercial communications and the incorporation of common positive actions and trademarks within editorial content. The discourse examined both problematic instances and commendable practices in relation to these issues.

Central to the deliberations were the multifaceted challenges faced by media companies and advertisers alike within the contemporary media landscape. The conversation extended to issues of editorial autonomy and the independence of content creators in integrating commercial messages within their media offerings – as well as the presence and implications of self-censorship, examining whether it exists and whether it causes an information deficit within the media sphere. Additionally, the competition between advertising on the internet and the expanding trend of social media influencers promoting products and services was explored. This highlighted the absence of legal regulations governing these fields.

In summary, the discussion illuminated the delicate balance between commercial imperatives, editorial integrity, and ethical considerations within the media landscape with the ultimate aim of solving the most problematic issues.

BELARUS

[BY] New restrictions for news from non-controlled media

Andrei Richter
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Amendments to the basic media law of Belarus introduce the notion of the “news aggregator”, with specific qualifying requirements as to its nature (minimum 50 news items published within five days, above 50 percent of the news items are taken from other parties, whereas online media, official websites of public bodies and online shops are excluded). News aggregators and their owners now fall under the existing provisions related to other mass media, including on transparency, the right of reply, restrictions on foreign property, content restrictions and bans, privileges, as well as the current registration and closure (blocking) procedures, including blocking for the dissemination of news originating from media already banned in Belarus (or hyperlinks to such media).

The statute specifically bans online dissemination of broadcast programmes that are not registered as media outlets in Belarus.

In its new Article 51-3, the Mass Media Statute now provides the possibility of imposing a ban on the activities of foreign media and journalists on the territory of the Republic of Belarus in the event their state of origin displays “unfriendly actions” towards the Belarusian media.

Amendments to the Statute of the Republic of Belarus “On the Mass Media” were signed into law on 6 July 2023, officially published on 7 July. They enter into force on 7 October 2023.

Amendments to the Statute of the Republic of Belarus “On the Mass Media”) 30 June 2023, No 274-Z

SWITZERLAND

[CH] Investment obligations for audiovisual services come into force in Switzerland

Matthias Bürcher
Federal Office of Culture

In 2021, the Swiss Parliament passed a revision of the Film Act introducing quota and investment obligations for linear and non-linear audiovisual services [see IRIS 2021-9:1/3]. The law was challenged in a public referendum and adopted on 15 May 2022 with 58% approval. On 6 September 2023, the Federal Council adopted the ordinance on the Quota for European Films and Investments in Swiss Film Production (FOIO, FQIV in German) which will enter into force on 1 January 2024.

The ordinance implements the law and defines the conditions that the investment obligation must meet. Audiovisual services must invest 4% of their gross revenues into national independent film production. The volume of investment is estimated at CHF 18 million per year.

The relevant gross revenue is calculated based on the company's VAT declaration, which means that the reporting is lowered for most of the companies (Art. 19). The ordinance foresees a specific situation: if the company can prove that the majority of its revenue comes from other activities, such as the sale of computers or vacuum cleaners, gross revenue is calculated based on revenue from services only, consisting of sales, rentals, subscriptions, advertising and data usage (Art. 20). Companies that are economically linked, e.g. in a holding structure, may also apply for mutualisation of their investments (Art. 21).

Companies providing audiovisual services have multiple options for investing in films: they can acquire licenses for independently produced films, finance commissioned films and invest in the co-production of independently produced films (Art. 12-14). Under certain conditions, they can also invest in promotion, spend for collective royalties and support regional film funds (Art. 15-17).

Investments are eligible only if the partner is an independent producer. Independence is defined by ownership, influence and economic ties to companies subject to the investment obligation. In the case of commissioned films, no more than half of all films produced by the production company in the last five years may be commissioned films of the actual investing company. In the case of acquisitions, the independent third party may be a rights holder other than the production company, such as a distributor (Art. 9).

In addition, the ordinance establishes the concept of independently-produced film, which is more specific than that of independent producer. The independently-

produced film must be realized on the initiative and under the economic and artistic responsibility of an independent producer, and the producer must retain exploitable rights outside the use of the co-producing audiovisual service (Art. 13). It is not stated in this ordinance, but the implicit consequence of this rule is that only independently produced films will have access to federal support schemes. The service can invest in commissioned films but without public funding.

Acquisitions are limited to the Service's own use and the license is limited to five years. Rights granted with a co-production are limited to seven years. In both cases, renewal options up to 15 years can be concluded. In the case of a commissioned film, the license is unlimited in time or place (Art. 15-17).

Eligible works include fiction films, documentaries and animated films or series of any duration. Works from other genres may be eligible if they are structured or creative in their narrative. However, news, events, shows, games, live broadcasts, simple event recordings and promotional films are excluded (Art. 2). Eligible films must be either Swiss films (certificate of origin) or official co-productions. This condition currently poses a challenge for series, as co-production agreements for audiovisual works exist only between Switzerland and Canada, Mexico and the French Community of Belgium. Furthermore, commissioned films may not meet the formal requirements for Swiss films because the executive producers are not the rights holders, and the service is not Swiss. In this case, the Federal Office of Culture (FOC) can issue a confirmation of Swiss origin for a commissioned film, if the other requirements of artistic and technical participation of Swiss talent are met (Art. 8).

With the certification of the invested films, the eligibility is clarified at an early stage for all parties involved. The annual reporting of audiovisual services, therefore consists of the VAT declaration, a list of investments, supplemented by proof of payment and certificates (Art. 25). Based on the reports, the FOC determines every year the investment obligation and the eligible investments. Every four years, a subsidiary levy is charged for missing investments (Art. 28-29)

All companies providing audiovisual services and offering films must register by 31 March 2024. The FOC will conduct an initial overview of the investment volume in the autumn of 2024 and an initial analysis of the investments in the autumn of 2025.

Ordinance on the Quota for European Films and Investments in Swiss Film Production FQIO

https://www.bak.admin.ch/bak/en/home/cultural-creativity/film1/fqiv.html

CZECHIA

[CZ] Amendment to the acts on Czech Television and Czech Radio

Jan Fučík
Česká televize

Parliament has adopted an amendment to the Acts on Czech Television and Czech Radio concerning the Council of Czech Television and the Council of Czech Radio. Until now, the Chamber of Deputies had elected all of the members of these councils. The amendment stipulating that council members are to be elected and dismissed by the Senate in addition to the Chamber of Deputies has been added to the current version. The Chamber of Deputies will elect 12 of the 18 members of the Council of Czech Television, and the Senate will elect six of them. At the Council of Czech Radio, which has nine members, the Chamber of Deputies will elect six members and the Senate three. This will ensure that both chambers of the Parliament of the Czech Republic will participate in the establishment of both councils. The six-year term of office is maintained, as is the replacement of a third of the members every two years. The number of members of the Council of Czech Television is increased from the current 15 to 18, wheras the number of members of the Council of Czech Radio remains the same. The Chamber of Deputies and the Senate elect members of both councils from among candidates proposed by legal entities that have been established for at least 10 years at the time of submission of the proposal and that represent cultural, regional, social, trade-union, employer, religious, educational, scientific, ecological and national interests. The condition of 10 years of existence is a recent addition.

The main goal of the legislation is to enable the members of the Council of Czech Television and the Council of Czech Radio to be elected by both chambers of the Parliament of the Czech Republic. Parliament as a whole is representative of the public. Its members – both in the Chamber of Deputies and the Senate – are elected by the public as their representatives to exercise legislative power and to exercise powers conferred by law. The principle of the legislation is to achieve the involvement of both chambers of the parliament in relation to the election and dismissal of members of the Public Media Councils, who are elected by different systems and thus represent a comprehensive representation of the citizens of the Czech Republic.

225/2023 Sb. - Zákon, kterým se mění zákon č. 483/1991 Sb., o České televizi, ve znění pozdějších předpisů, zákon č. 484/1991 Sb., o Českém rozhlasu, ve znění pozdějších předpisů, a zákon č. 90/1995 Sb., o jednacím řádu Poslanecké sněmovny, ve znění pozdějších předpisů

http://www.sbirka.cz/POSL4TYD/NOVE/23-225.htm

225/2023 Coll. - Act amending Act No. 483/1991 Coll., on Czech Television, as amended, Act No. 484/1991 Coll., on Czech Radio, as amended, and Act No. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies, as amended

GERMANY

[DE] Appeal court lifts public-service news app ban

Christina Etteldorf
Institute of European Media Law

Ruling in summary proceedings on 28 June 2023, the fourth civil chamber of the *Oberlandesgericht Stuttgart* (Stuttgart Appeal Court) set aside the lower court's decision to temporarily ban the distribution of the "Newszone" app by one of the German public broadcasting companies. However, the main reasons for its decision were formal rather than substantive, since, in accordance with the German *Medienstaatsvertrag* (State Media Treaty – MStV), the newspaper publishers that had complained about the app should have first initiated an arbitration procedure with the broadcaster concerned.

The case concerns an app provided by *Südwestrundfunk* (SWR), one of the nine German regional public broadcasters, and its youth radio station, *DasDing*. The Newszone app can be used to download customised news content (text, still and video images and audio content) from the SWR website onto smartphones and other connected mobile devices. According to the MStV, public-service broadcasters that offer telemedia (essentially online services that do not constitute broadcasting) have to meet certain content-related and procedural conditions. These include passing a verifiable "three-step test" to ensure that the proposed online offering is covered by the public broadcasting remit and the integration in a telemedia concept. Article 30(7) MStV also states that telemedia services must not be "press-like", i.e. the focus of their design must be placed on moving images or sound and, if they contain text, they must only provide content from a specific broadcast including background information. This is not the first German courtroom dispute between private and public-service media to be triggered by this rule, which is designed to protect media diversity by limiting the influence of subsidised public-service broadcasters for the benefit of the press in the online sector. In the present case, various newspaper publishers had complained that the app constituted a stand-alone telemedia service rather than being part of SWR's previously authorised telemedia offering, and therefore required a new, independent examination. They also claimed that the app was press-like because it offered content that was not programme-related and therefore intruded into a market reserved for the press in an anti-competitive way.

On 21 October 2022, the *Landgericht Stuttgart* (Stuttgart District Court), which was originally asked to issue the injunction, had upheld the publishers' request and temporarily prohibited SWR from distributing the app. Appealing against this decision, SWR insisted firstly that since the app was part of an existing (and previously approved) online service, it did not require separate authorisation under the procedure outlined in the MStV and was also not press-like. Secondly, it argued that, before filing the complaint, the press companies should in any case

have launched an arbitration procedure, which they had failed to do. The *Oberlandesgericht Stuttgart* agreed with the latter argument and therefore lifted the prohibition order issued by the lower-instance court. In order to enforce the rule that telemedia should not be press-like, Article 30(7) sentence 6 MStV requires public broadcasters and umbrella press organisations to set up an arbitration board. Such a board has been established and a corresponding arbitration agreement has been signed between the *Bundesverband Digitalpublisher und Zeitungsverleger* (Federal Association of German Newspaper Publishers – BDZV) and the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (German Association of Public Service Broadcasters – ARD). In the opinion of the *Oberlandesgericht*, an arbitration procedure should therefore have been carried out in order to seek an amicable solution before the matter was brought before the courts. Unlike the *Landgericht*, the *Oberlandesgericht* held that the failure to conduct arbitration constituted a procedural impediment that meant the application for an injunction against the distribution of the Newszone app was inadmissible. Arbitration was compulsory. The arbitration agreement was applicable on account of both the facts of the case and the parties involved. All the publishing companies concerned were bound by the agreement either as BDZV members or through relationships with other companies, while the defendant was a public broadcaster belonging to the ARD.

Urteil vom 4. Zivilsenat des Oberlandesgerichts Stuttgart vom 28. Juni 2023 - 4 U 31/23

https://openjur.de/u/2473267.html

Ruling of the fourth civil chamber of the Stuttgart Appeal Court, 28 June 2023, 4 U 31/23

[DE] Federal Supreme Court considers parts of TV documentary unlawful on victim protection grounds

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Institute of European Media Law

In a ruling of 6 June 2023, the *Bundesgerichtshof* (Federal Supreme Court – BGH), the highest German civil court, examined the boundaries of film and photo-based reporting with victim protection in mind. It decided that public-service broadcaster Zweites Deutsches Fernsehen (ZDF) had exceeded the limits of permissible reporting in a television programme broadcast in 2018 concerning two child abduction cases dating back to 1981 and 1980 by showing in particular letters and photographs of the abducted children, and playing audio recordings.

Although there was high public interest in the reporting of crimes, even decades after the event in some cases, the media needed to consider the protection of victims and the psychological effect of being reminded of traumatic events. In this case, the BGH considered that the protection of privacy outweighed the public interest in reporting.

The case concerned the television programme “Entführte Kinder”, broadcast on ZDFInfo on 25 February 2018 and subsequently made available for download in the ZDF online media library. The documentary dealt with two child abduction cases dating back to 1980 and 1981, focusing on the role and perspective of a TV journalist who had mediated between the kidnappers, the police and the children’s families at the time. In 1981, an eight-year-old girl had been kidnapped on her way to school and released when a ransom was paid five months later.

The ZDF programme showed two photos of the child that her parents had given to the police at the time to assist with the public search for her, which had been published in the media. It also showed a magazine cover depicting the child with her mother after her release, which had been published at the time with their consent. A letter written by the girl to her parents at the time of the kidnapping and an audio clip of her explaining how the ransom should be paid, were also included in the documentary; at the time, both had been published in various media. The kidnapped girl, now an adult, instigated court proceedings against the programme on the grounds that, although she had consented to general reporting at the time, she did not wish to be presented as the victim in a highly personal way decades after her abduction.

Unlike the appeal court, the BGH upheld the victim’s claim for an injunction after carefully weighing up the interests of media freedom on the one hand, and personal privacy on the other. It was true that this was a particularly newsworthy story, even decades after the event. A crime was a matter of topical interest that could be reported in the media. The fact that the story was being told for the first time from the perspective of the journalist who had acted as an intermediary made the programme, even more topical. Furthermore, the images, audio recording and written documents had been published at the time and had

therefore already been made accessible to the public.

Nevertheless, the BGH concluded that the victim's legitimate interest should take precedence in this case. It points out that the significant public interest is limited to the presentation of the facts and does not lie in a highly individualised and personalised approach such as that shown in the report in question. Moreover, the person concerned, as a child victim at the time of this serious crime, deserved special protection. This covers not only the first public revelation of the identity of a victim previously unknown to the public, but also the reactivation of this identification.

The victim of a crime should be allowed, after a certain period of time, to decide for themselves whether their image could continue to be used to illustrate their role as a victim and bring it back into the public eye. The photos that had been handed over to the investigating authorities had been published in a desperate attempt to increase the chances of the child being released. However, in view of the considerable amount of time that had passed, the victim now had a right to regain control of the photos and take the link between the crime and the images out of the public domain. The audio clips and letter were also much more personal than the photographs, which in themselves were "neutral", and using them in reporting was no longer in the public interest.

BGH, Urteil vom 6. Juni 2023 - VI ZR 309/22

https://openjur.de/u/2473140.html

Federal Supreme Court ruling of 6 June 2023, VI ZR 309/22

[DE] German media regulator urges YouTube to comply with transparency obligations

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Institute of European Media Law

On 28 June 2023, the *Medienanstalt Hamburg/Schleswig-Holstein* (Hamburg/Schleswig-Holstein media authority – MA HSH), as the responsible media regulator, called on the company Google Ireland Ltd. to meet its new obligations under the German *Medienstaatsvertrag* (State Media Treaty – MStV). In its decision, it accused Google of failing to meet its legal obligation to ensure transparency for users on its YouTube platform by informing them about why they were being shown particular content. It is the first time a German media regulator has taken action against a global media intermediary on the basis of rules that entered into force in 2020.

In 2020, the interfederal regulatory framework previously known as the *Rundfunkstaatsvertrag* (State Broadcasting Treaty) was completely overhauled and renamed the *Medienstaatsvertrag*. As well as new rules for video-sharing platforms based on the transposition of the EU Audiovisual Media Services Directive (AVMSD), which was revised in 2018, new provisions were brought in for media intermediaries, user interfaces and media platforms. According to the legal definition, a media intermediary is any telemedia (i.e. essentially online media that are not broadcasting or telecommunications services) that also aggregates, selects and generally presents third-party journalistic-editorial offers without combining them into an overall offer. Under Article 93 MStV, such media intermediaries have to meet certain transparency obligations. In order to protect diversity of opinion, they must make certain information easily understandable, directly accessible and continuously available. This includes the central criteria of an aggregation, selection and presentation of content and the weighting thereof, including information about the functionality of the implemented algorithms in plain language.

The MA HSH does not think YouTube meets these requirements. In particular, it notes that the information that YouTube provides about its content recommendation systems can only be accessed by users in a roundabout way, after several clicks. Whether and how users can find information about the aggregation, selection and presentation of content, and the algorithms on which these are based, is also unclear. The requirement that such information should be easily understandable and directly accessible is not met, and users are therefore denied the opportunity to understand how the services they are using work, which is important for ensuring media diversity. YouTube is not considered as a video-sharing platform within the meaning of the AVMSD and the MStV – even though it clearly should be – but rather as a media intermediary.

Before issuing its decision, the regulator consulted both Google and the *Kommission für Zulassung und Aufsicht* (Commission on Licensing and Supervision – ZAK), a central organ of the German state media authorities with responsibility for online platforms. The complaint that Google was failing to meet

its transparency obligations under the MStV in relation to YouTube was submitted along with a request for improvements to be made. Google was invited to rectify the situation within four weeks of being notified of the decision.

Pressemitteilung der ZAK vom 04. Juli 2023

https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/medienaufsicht-fordert-nachbesserung-der-transparenzangaben-bei-youtube

ZAK press release of 4 July 2023

[DE] Higher Administrative Court rules on public broadcasters' election reporting obligations

Christina Etteldorf
Institute of European Media Law

On 25 May 2023, ruling on an appeal lodged by the *Partei Mensch, Umwelt, Tierschutz* (Animal Protection Party) against a decision favouring the Berlin-Brandenburg state broadcasting authority (rbb), the *Oberverwaltungsgericht Berlin-Brandenburg* (Berlin-Brandenburg Higher Administrative Court) decided that rbb should have specifically mentioned the party's share of the vote in the last Brandenburg state election (2.6% of second votes) in its post-election coverage rather than including it under the heading "Other". The court based its ruling on political parties' constitutional right to equal treatment on the one hand and on public broadcasters' election reporting obligations on the other.

As one of the nine German state public broadcasting authorities, rbb is largely responsible for providing news coverage in the Berlin and Brandenburg area. In several television programmes broadcast after the 2019 Brandenburg state election – "*Brandenburg-Wahl: Die Entscheidung*", "*Brandenburg aktuell*" and "rbb24" – it had reported on the results and the percentage of votes obtained by the various parties. Despite winning 2.6% of the votes, the Animal Protection Party had not been mentioned in its own right but had been grouped together with three other parties, each of which had received well under 1% of the votes, under the heading "Other" in some graphics. Larger parties with higher vote percentages, on the other hand, had been mentioned by name. The Animal Protection Party claimed that this represented a breach of political parties' right to equal treatment enshrined in Article 21(1) in connection with Article 3(1) of the *Grundgesetz* (Basic Law). Arguing that its 2.6% share, which was significant for a small party, should have been clearly communicated to the public in order to prevent it being unfairly treated in comparison with larger parties, it launched court proceedings against rbb. The first-instance administrative court dismissed its claim for an injunction and rectification on the grounds that rbb's summary of the election results had not been arbitrary and was therefore covered by the broadcaster's editorial freedom. The court agreed with rbb's submission that it had followed the principle of so-called tiered equality of opportunity enshrined in party law (although this only applies to pre- rather than post-election reporting) because, as a public broadcaster, it had treated the competing parties "in accordance with their importance" as part of its overall editorial concept. However, in the appeal procedure launched by the Animal Protection Party, the *Oberverwaltungsgericht* rejected this claim. In view of all the circumstances of the case, it held that the party had been unduly disadvantaged compared with other, larger parties. Its election results, which the *Oberverwaltungsgericht* described as "not insignificant", should have been mentioned specifically by rbb rather than combined with the results of parties with much smaller percentages of the vote. The party was entitled to have its result mentioned. At the same time, it would

not have been difficult for rbb to meet this requirement, so its editorial freedom would not have been significantly infringed.

In view of the fundamental importance of the ruling, the *Oberverwaltungsgericht* left it open to appeal. The *Bundesverwaltungsgericht* (Federal Administrative Court) may therefore be asked to rule on the matter.

Pressemitteilung vom 26.Mai 2023 des Oberverwaltungsgerichts Berlin-Brandenburg

https://www.berlin.de/gerichte/oberverwaltungsgericht/presse/pressemitteilungen/2023/pressemitteilung.1328811.php

Berlin-Brandenburg Higher Administrative Court press release of 26 May 2023

DENMARK

[DK] Possible extended collective licence for text and data mining

Terese Foged
Lassen Ricard, law firm

In the spring of this year Denmark was in a hurry to implement the DSM Directive, as fines had been imposed for each day of late implementation (which should have taken place in June 2021). Thus, on 10 March 2023, a proposal for a draft bill was sent out for consultation, with a deadline for comments set to 11 April; on 3 May a revised proposal for a draft bill amending the Danish Copyright Act to implement the Directive was introduced to the parliament, with entry into force on 1 July 2023. In a revised bill of 30 May, this date was, however, amended so that the bill would enter into force as soon as possible, namely when the bill was made public in the Danish Gazette. The bill was passed by parliament on 1 June.

In a press release of 1 June on the new copyright provisions, the Ministry of Culture explained that the new rules were aimed, *inter alia*, at strengthening the position of rightholders when negotiating agreements, achieving greater transparency and a more balanced contract situation between rightholders and the acquirers of rights, and securing the Danish extended collective licensing model.

Thus the Ministry was aware of the importance of agreements on the exploitation of rights, but the new rules on text and data mining in sections 11b and 11c of the Danish Copyright Act are close to the wording of Articles 3 and 4 ofthe DSM Directive (where section 11c implements Article 3 and section 11b implements Article 4); and there is no provision in the Danish rules regarding extended collective licensing in connection with text and data mining.

Rightholder organisations had lobbied for such licensing especially in May this year, among other things via a request in a letter of 15 May for an audience with the Ministry of Culture, a concrete proposal on extended collective licensing for reproductions and extractions in connection with text and data mining outside the Copyright Act sections 11b and 11c, and via a legal opinion of 28 May 2023 from professor Elenora Rosati on the interplay between DSM Article 3 and press publishers' rights in Article 15.

As DSM Article 4 and the Danish Copyright Act 11b recognise the possibility for copyright holders to avoid the limitation to copyright, an extended collective licence for text and data mining could include situations where copyright holders have expressly reserved the use for text and data mining in “an appropriate manner” as required in Article 4 and section 11b.

Previously, in connection with the hearing in March, rightholder organisations had merely commented that the use of works via artificial intelligence (AI) is undergoing a breath-taking development, and that the text and data mining provisions are therefore important. In this regard the Ministry of Culture merely noted in its comments on the hearing of 14 March that DSM Articles 3 and 4 do not include any references to artificial intelligence.

The pressure for fast implementation of the DSM Directive on the one hand, and rightholders' wish for the enactment of an extended collective licence in the field of text and data mining on the other, probably explain the Ministry's letter of 28 May this year to the parliamentary Cultural Affairs Committee. This letter stated that the plan right after implementation is to look, *inter alia*, at the proposal for an extended collective licence in the field of text and data mining, so that a draft bill may be sent out for consultation in the late autumn of 2023. After this a bill can probably be introduced to the parliament in February 2024, and new provisions could enter into force by 1 June 2024.

It will be interesting to see if Denmark enacts provisions on extended collective licensing in the field of text and data mining outside DSM Articles 3 and 4, including in situations where an express reservation on the use of text and data mining has been made by a rightholder, thereby paving the way for agreements between rightholders and users. There is much to suggest this.

The details – and not least the ultimate effect of such an extended collective licence – remain to be seen.

Kommenteret høringsnotat Høring over forslag til lov om ændring af lov om ophavsret (gennemfø-relse af dele af direktiv om ophavsret og beslægtede rettigheder på det di-gitale indre marked)

https://prodstoragehoeringspo.blob.core.windows.net/91107ff3-5449-4172-a920-28b51f88be85/Kommenteret%20h%C3%B8ringsnotat%20DSM-gennemf%C3%B8rsel.pdf

Danish Ministry of Culture's commented hearing note on the bill to amend the Copyright Act

Henvendelse af 15/5-23 fra Danske Medier om, at techgiganters dominerende adfærd kan begrænses i ny copyrightlov

https://www.ft.dk/samling/20222/lovforslag/L125/henvendelser.htm

Letter requesting an audience with the Ministry of Culture and proposal (wording) on extended collective licence – see Bilag 3 and 5

Brev fra Kulturministeriet til Folketingets Kulturudvalg med indikationer på kommende ændringer i ophavsretsloven

https://www.ft.dk/samling/20222/lovforslag/L125/bilag/8/2712861.pdf

Letter from the Ministry of Culture to the parliamentary Cultural Affairs Committee with indications on forthcoming amendments to the Copyright Act

Letter by professor Eleanora Rosati on the interplay between Articles 3 and 15 CDSMD

https://www.ft.dk/samling/20222/lovforslag/L125/bilag/11/2716090.pdf

Forslag til Lov om ændring af lov om ophavsret

https://www.ft.dk/ripdf/samling/20222/lovforslag/l125/20222_l125_efter_2behandling.pdf

Bill amending the Danish Copyright Act to implement the Directive, with entry into force upon publication in the Danish Gazette

SPAIN

[ES] Spain's Central Electoral Commission urges RTVE to be extremely rigorous in its reporting during election periods

Azahara Cañedo & Marta Rodriguez Castro

The Spanish far-right political party Vox filed a complaint with the Central Electoral Commission (CEC) against Radiotelevisión Española (RTVE), the national public broadcaster, during the national election period of July 2023. The representative of VOX argued that the principles of impartiality and neutrality had been infringed by RTVE in the report entitled “Las noches romanas de Mérida” (“The Roman nights of Merida”). The complaint was based on certain statements referring to cancellations of cultural events in a number of Spanish villages after the regional elections of May 2023. According to VOX, these statements linked the political party with censorship actions and the party therefore concluded that they were designed to influence voting intentions during an election period.

After reviewing the case, the CEC upheld the action in part, requiring RTVE to exercise the utmost rigour in its treatment of information affecting the electoral contest (Agreement 524/2023). Despite the fact that RTVE considered that the reported infringement had not taken place t and alleged that the report in question represented the exercise of the fundamental right to information, the CEC considered that two of the denounced statements were, in fact, biased. On the one hand, it pointed out that the inclusion of a reference to the "far-right" introduced value-laden elements into the information content. On the other hand, the CEC’s ruling noted that misleading information was included. Thus, RTVE was reprimanded for the fact that the content broadcast gave the impression that the acts of censorship referred to were directly caused by VOX when in some of the cases mentioned this party had no capacity to be involved in the decision. However, although the CEC considered the above to be a minor transgression, it observed that the publicly owned media must be extremely careful to respect the neutrality of information during election periods, as required by Article 66.1 of the Spanish Organic Law 5/1989 of the General Electoral System (LOREG).

It is worth mentioning that this is not the first complaint filed by VOX against RTVE during an election period. Thus, in the regional elections of May 2023, the political party also alleged that the public service media organisation had included biased information when reporting on alliances between Vox and the Partido Popular to form town councils. On that occasion, the CEC closed the complaint on the ground that there was no indication of any breach of the principles of political pluralism, media neutrality and equality (Agreement 443/2023).

Agreement of Spain’s Central Electoral Commission on the complaint filed by VOX against RTVE with regard to an extract of the report

broadcast on 15 July 2023, "Las noches romanas de Mérida", which VOX considers to be in breach of the principle of informative neutrality (Agreement 524/2023)

Report "Las noches romanas de Mérida"

Organic Law 5/1985 of 19 June 1985 on the General Electoral System

Agreement of Spain's Central Electoral Commission on the complaint filed by VOX against RTVE with regard to the news coverage of the local councils' constitution in the special programme "Nuevos Ayuntamientos" broadcast on 17 June 2023 (Agreement 443/2023)

Special programme "Nuevos Ayuntamientos"

FRANCE

[FR] ARCOM president's request to block pornographic websites: judicial court stays proceedings pending outcome of *Conseil d'Etat* appeal

Amélie Blocman
Légipresse

On 3 March 2022, as part of his remit under the Law of 30 July 2020 and the Decree of 7 October 2021 aimed at preventing minors from accessing pornographic websites, the president of the *Autorité de régulation de la communication audiovisuelle et numérique* (French audiovisual regulator – ARCOM) ordered several Internet access providers to appear before the president of the Paris judicial court. He asked the court, ruling on the merits under the accelerated procedure, to order the ISPs to block the websites Pornhub, Tukif, Xhamster, Xnxx and Xvidéo so they could not be accessed by minors on French territory. The companies responsible for the websites concerned said they would voluntarily take part in the proceedings. They also asked the *Conseil d'Etat* (Council of State) to annul the Decree of 7 October 2021.

After mediation between the parties had failed, a request for a constitutionality ruling had been turned down, and the *Conseil d'Etat*, in a decision of 29 November 2022, had said it had no jurisdiction to examine the validity of the formal notice issued by ARCOM, considering it indissociable from the procedure instigated with the judicial court, the case was re-listed for hearing.

The operators of the pornographic websites asked for the proceedings to be stayed, pending the decision of the *Conseil d'Etat* on the legality of the Decree of 7 October 2021 issued under Article 23 of the Law of 30 July 2020.

The judicial court noted that the *Conseil d'Etat* had been asked to examine two actions against the decree, and that it was indisputable that neither the general provision of Article 23, which required the regulator to define "the conditions of application of the present decree" nor the decree of 7 October contained any criteria or guidelines for website operators regarding the technical measures they should take to prevent minors accessing the pornographic content. It appeared that the legal questions raised with both types of court were identical, with those put to the judicial court questioning the validity of Article 23 and those raised with the administrative court claiming that the associated implementing decree was unlawful.

The court held that a stay of the proceedings was justified to protect the proper administration of justice, since it would enable the court to gain a full understanding of the dispute, once the *Conseil d'Etat* had determined whether the decree was lawful. The issues raised with the two types of court were similar and concerned a subject that was constantly evolving: under a bill currently being

drafted to protect and regulate the digital space, ARCOM would be able to issue recommendations concerning the technical requirements that age verification systems should meet, the *Commission Nationale de l'Informatique et des Libertés* (French data protection authority – CNIL) had published several opinions amending its recommendations, a revised decree was being drafted and age verification systems had recently been trialled.

This measure forms part of the necessary dialogue between the courts, in particular in systemic causes, the cooperation required between the two types of court in the face of multiple norms, and the need to take measures, in the case at hand, to ensure both the reliability of age verification mechanisms and respect for users' privacy.

The court stayed the proceedings regarding the other requests, pending the outcome of the actions filed by the website operators with the *Conseil d'Etat* against the Decree of 7 October 2021.

TJ Paris (procéd. accélérée au fond), 7 juillet 2023, n° 22155687, R. O. Maistre c/ Orange, Free, et a.

Paris judicial court (accelerated procedure on the merits), 7 July 2023, no. 22155687, R.O. Maistre v Orange, Free et al.

[FR] Ahead of the entry into force of the DSA, ARCOM publishes review of resources deployed by online platforms to combat hate content online

Amélie Blocman
Légipresse

On 24 July 2023, one month before the European Digital Services Act (DSA) came into force for the largest online platforms and search engines, the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM) published its 2022 review of the resources deployed by providers to combat the dissemination of hate content online. Based on providers' observations and reports submitted in response to a questionnaire, the review describes the various tools and procedures put in place to combat misuse of the largest online platforms.

Anticipating the European Digital Services Act (DSA), which was still being debated at the time, the Law of 24 August 2021 reinforcing respect for the principles of the Republic increased the responsibility of the main online platforms operating in France for combating the dissemination of hateful content through their services. This national measure will be replaced in early 2024 by the DSA, which will apply to all services concerned from 17 February 2024. This new regulation reaffirms and strengthens the system of limited liability for hosted content, but at the same time introduces a series of new obligations for all providers of so-called "intermediary" services (ISPs and social networks in particular) in terms of diligence, transparency, cooperation with public authorities, civil society and users, and moderation of illegal content.

The report shows that providers have, on the whole, become more transparent, reflecting a tangible willingness to comply with the DSA. It should be noted that, since 24 August 2023, very large online platforms and search engines have been obliged to increase their transparency, and assess and mitigate the systemic risks linked to their platform. ARCOM notes that some of them (e.g. Google and TikTok) have found it difficult to collect and submit detailed data in time. It regrets that greater transparency is needed on the part of moderators responsible for fighting the dissemination of online hate, since relevant information is still too often subject to confidentiality rules (e.g. Meta, Pinterest, Snapchat and TikTok).

The audiovisual regulator also stresses the need for platforms to continue their efforts to make their general terms and conditions clear and accessible, describing this as "both a challenge and a necessity".

Regarding the key issue of reporting illegal content and contesting moderators' decisions, ARCOM notes that, generally speaking, providers have taken steps to improve such reporting mechanisms on their platforms and to involve users. With a few exceptions (Twitter, Pinterest and LinkedIn), they also enable users who are not account-holders to report illegal content. Some services provide an ad hoc form that can be used to report hateful content under Article 6-4 of the *Loi pour la*

confiance dans l'économie numérique (Law on confidence in the digital economy – LCEN) of 21 June 2004. However, the review points out that, on many platforms, the reporting mechanism is accessed by clicking on a button with an obscure title. ARCOM therefore invites the platforms to ensure that these systems are both accessible and comprehensible. However, the number of users who contest moderators' decisions, which are accessible to users almost everywhere, varies widely from platform to platform. Among its recommendations, the regulator repeats what it previously suggested in its guidelines, i.e. that users should be able to indicate whether they would like to receive updates on the status of their reports.

Finally, most providers work with trusted flaggers. ARCOM notes that these partnerships, which play a key role under the DSA, will be strengthened and given a clear legal framework that will require the platforms to give priority treatment to notifications submitted by their partners.

With 85% of data requests submitted to the French authorities for the purpose of identifying potential authors of online hate receiving a favourable response, the high level of cooperation between providers and the judicial and administrative authorities demonstrates the effective criminal law response to the dissemination of illegal content. The need for an effective response will be increased further by the DSA: providers will be required to respond promptly to authorities that ask them to take action against illegal content or to transmit information about its author, as well as to justify any refusal to grant such a request. These requests, the reasons for them and the providers' responses will be the subject of annual public reports.

Lutte contre la diffusion de contenus haineux en ligne – Bilan des moyens mis en œuvre par les plateformes en ligne en 2022 et perspectives, Bilan ARCOM, juil. 2023.

https://www.arcom.fr/nos-ressources/etudes-et-donnees/mediatheque/lutte-contre-la-diffusion-de-contenus-haineux-en-ligne-bilan-des-moyens-mis-en-oeuvre-par-les-plateformes-en-ligne-en-2022-et-perspectives

Combating the dissemination of hate content online - review of the resources deployed by online platforms in 2022 and future prospects, ARCOM, July 2023.

[FR] Information processing and controversial issues: *Conseil d'Etat* highlights the need to distinguish between presentation of facts and commentary, and to allow expression of different viewpoints on air

Amélie Blocman
Légipresse

The company responsible for TV channel CNews asked the *Conseil d'Etat* (Council of State) to annul two formal notices issued by the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM) on 10 May 2022, ordering it to meet the obligations contained in its licence agreement concerning honesty of information and control of its programmes.

The first formal notice followed the broadcast, during the programme "Les Points sur les i" in November 2021, of a sequence in which a professor of medicine, infectious disease expert and author of two books criticising the management of the COVID-19 pandemic was the only person to give his views. He strongly asserted that the epidemic was "virtually finished in France", even though epidemiological data at the time showed that the number of cases was increasing and the virus was spreading rapidly. He also stated that the effectiveness of COVID-19 treatments based on hydroxychloroquine, antibiotics and an antiparasitic medicine, which he said had prevented all deaths in countries where used, was largely proven, and that messenger RNA vaccines "modify people's cells".

The second formal notice followed the broadcast of comments by a pundit who regularly appeared on the programme "L'heure des pros 2", in February 2022. When asked to respond to comments made the same day on the Internet and broadcast on the channel by an epidemiologist who was often involved in media controversies, comparing the situation of people who had not been vaccinated against COVID-19 to that of Jews facing Nazi persecution, the pundit had suggested it was a historical fact that the Nazis created the Warsaw ghetto in October 1940 largely in response to health concerns. However, all historians agree that such concerns were merely a pretext.

The *Conseil d'Etat* referred to Article 3-1 of the Law of 30 September 1986 and the French audiovisual regulator's decision of 18 April 2018 concerning the honesty of information, which was contained in the channel's licence agreement. These stipulations and the provisions to which they referred did not prevent the broadcaster from adopting an editorial approach that might involve giving airtime to individuals with highly controversial views, whose comments should not be regarded as the result of its presentation and processing of information. However, even when a controversial issue was being discussed, including in programmes that were not exclusively dedicated to the presentation of information, but that also contributed to the processing of information, they did require it to tackle such issues in a way that distinguished between the presentation of facts and

commentary on those facts, as well as allowing different viewpoints to be expressed.

Regarding the first case, the *Conseil d'Etat* stressed that the programme's contributors, although they had cast doubt on some of the guest's other comments, including his claim that vaccinated people were more likely to die of COVID-19 than unvaccinated people, and had ended the programme by saying that, "of course, your words are only binding on you", had not contradicted the disputed comments, or had not contradicted them strongly enough. Similarly, concerning the second formal notice, it stated that the pundit's comments had been unambiguous and had not been disputed by the presenter or anyone else in the studio.

In conclusion, by issuing the formal notices, ARCOM had acted in accordance with the powers entrusted to it under Article 42 of the Law of 30 September 1986 and the channel's licence agreement, and had not disproportionately infringed freedom of expression. The applications were rejected.

Conseil d'État, 4 août 2023, décision n° 465759, SESI

https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2023-08-04/465759

Council of State, 4 August 2023, decision no. 465759, SESI

Conseil d'État, 4 août 2023, décision n° 465757, SESI

https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2023-08-04/465757

Council of State, 4 August 2023, decision no. 465757, SESI

[FR] New law establishing digital majority and combating online hate

Amélie Blocman
Légipresse

Under the new law no. 2023-566 of 7 July 2023 “establishing digital majority and combating online hate”, children under 15 will need their parents’ consent to join a social network.

The law also enshrines in French legislation (Article 1 IV of the *Loi pour la confiance dans l’économie numérique* (Law on confidence in the digital economy – LCEN) of 21 June 2004) the definition of a social networking service as “a platform that enables end users to connect and communicate with each other, share content and discover other users and content across multiple devices and, in particular, via chats, posts, videos and recommendations”. This definition is identical to that contained in the Digital Markets Act (DMA).

The law places new obligations on social networks operating in France (new Article 6-7 of the LCEN). They are required to refuse requests from children under 15 to use their services unless a parent or guardian gives their permission; when a child under 15 registers, inform the child and their parents about “the risks linked to digital practices and means of prevention” and the conditions of personal data use; enable parents, or one parent, to ask for their child’s account to be suspended; when a minor opens an account, activate a system that measures the time they spend online and regularly notify the results to the young person concerned.

To verify their users’ ages and parental consent, social networks will be required to employ a technical system that meets standards to be 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). If he finds that a social network has failed to put a certified technical solution in place to verify the age of users and the permission of a parent or guardian of a child under 15 the ARCOM president will be able to issue a formal notice requiring it to do so and, if such notice is ignored, refer the matter to the president of the judicial court. A social network that fails to meet this obligation may be fined up to 1% of its global turnover. This new ARCOM prerogative will take effect one year after the entry into force of this new obligation, which will be established by decree.

The age of digital majority will also apply to accounts that were created and owned by children under 15 before the law was adopted (the obligation for platforms to obtain express permission from a parent or guardian for pre-existing accounts will not take effect until two years after the the law enters into force).

The law also aims to prevent and tackle cyberbullying, with Article 6 I-7, para. 3 of the LCEN amended accordingly. Social networks will be required to provide mechanisms enabling users to report content that breaches “personal representation, privacy and safety” or condones any “type of blackmail or harassment”. They must also display cyberbullying prevention messages and the freephone number set up to combat cyberbullying.

Finally, the law asks the government, within a year, to submit to the parliament a report on the consequences of social network use, information overload and exposure to misinformation for young people’s physical and mental health.

Loi n° 2023-566 du 7 juillet 2023 visant à instaurer une majorité numérique et à lutter contre la haine en ligne, JO du 8 juillet 2023

https://www.legifrance.gouv.fr/download/pdf?id=uixn4vDFFJU_veW4xSVamq3PzXyh2U2x_naRfEud_Wg=

Law no. 2023-566 of 7 July 2023 establishing digital majority and combating online hate, OJ, 8 July 2023

UNITED KINGDOM

[GB] Information Appeals Commissioner determines that BBC did not have to disclose commercially sensitive information that may prejudice a third-party contractor

Julian Wilkins
Wordley Partnership

The BBC commissioned a report on diversity, which was produced by MTM, an independent research agency. On 3 May 2022, a Freedom of Information Act request was made by William Turvill, asking for the costs incurred by the BBC for this report. The BBC considered that the information was commercially sensitive and refused to disclose the details pursuant to section 43(2) Freedom of Information Act 2000 (FOIA). Section 43(2) FOIA provides that: “Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

In a Decision Notice dated 21 October 2022, the Information Commissioner determined that the BBC was wrong to refuse disclosure of the requested information. Upon an appeal by the BBC to the Information Appeals Commissioner, it was upheld that section 43(2) FOIA did apply to the BBC’s commercial interests. In addition, Section 43(2) should be applied to prevent the disclosure of the information, as otherwise, it would also be likely to harm the commercial interests of MTM. The data was indeed commercially sensitive in the particular circumstances of the case. It therefore justified not disclosing the detail to a wider audience, even though the BBC is a public body.

The BBC submitted that it has a roster for the commissioning of the reports and a transparent tendering process, designed to ensure fairness to any tendering contractor as well as to seek value for money.

The BBC and MTM, who had written the report, considered that if the information was revealed it would give away their pricing structure. The consequence would be the undermining of MTM tenders in the future, as competitors would undercut them on price. The risk was therefore that, by undercutting them on price in future tendering competitions, some competitors would win the work, but because they had bid unrealistically low, they would then not be able to afford to do the work, or undertake the work to a poor standard or quality.

The BBC considered that they produced sufficient information as to how their budget funded by the public was spent, and there was suitable transparency to ensure the public was aware of their expenditure, including how it was targeted.

The interests of MTM also had to be taken into account because if a certain level of detail was disclosed it would be relatively easy for someone to extrapolate their charging rates, and competitors would use that to their advantage by undercutting MTM, thus denying them a fair opportunity to tender.

The application of section 43 FOIA was dependent on the test set out in the Court of Appeal decision *DWP v Information Commissioner* [2016] EWCA Civ 758, where Lord Justice of Appeal Lloyd Jones said, when deciding prejudice to a party, to consider whether the "likelihood of occurrence of prejudice" would be "more probable than not, and secondly [whether] there is a real and significant risk of prejudice, even it cannot be said that the occurrence of prejudice is more probable than not." The threshold for the probability of prejudice was "would be likely to occur," which meant a risk of no more than fifty per cent, but still significant.

Considering all the evidence and submission by the BBC, MTM and Mr Turvill, the appeal body determined that there was a causal link between the release of the withheld information and the potential risk of commercial harm, meaning it would be likely to prejudice the commercial interests of both MTM and BBC.

The appeal body determined that the public interest test for justifying the disclosure of the information between MTM and the BBC was addressed, given that the procurement process was designed to ensure value for money in the expenditure of public money funding by the BBC. Also, there was much published detail as to how the BBC spends its income and requesting details on one bespoke report would not reveal much given the MTM report was one cost within a significant marketing budget operated by the BBC.

British Broadcasting Corporation v The Information Commissioner and William Turvill, Appeal Number EA/2022/0376, First Tier Tribunal (General Regulatory Chamber) Information Rights 6 June 2023

https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3223/BBC%20v%20ICO%20&%20William%20Turvill%20%-%20EA.2022.0374%20-informationrights.decisions.tribunals.gov.uk

[GB] People need advanced reading skills to understand UK VSPs' terms and conditions, Ofcom research finds

Alexandros K. Antoniou
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On 9 August 2023, Ofcom, the UK's communications regulator, published its first report on video-sharing platforms' (VSPs) user policies. The report highlights examples of good practice, but also underscores the need for VSPs to simplify their terms, improve communication of content guidelines, and enhance training for content moderators to create a safer online environment.

Background

Ofcom was appointed as the regulator for UK-established video-sharing platforms (VSPs) in November 2020. The Communications Act 2003 lists measures that VSP providers must take, as appropriate, to protect users from relevant harmful material and under-18s from restricted material. The regulator's published guidance explains, among others, that effective user protection requires not only having terms and conditions (T&Cs) in place but also properly implementing them. Clear and unambiguous rules in T&Cs are essential for the successful reporting and moderation of potentially harmful content.

In its first report on VSPs, since becoming the statutory regulator for such platforms (see IRIS 2023-1/18), Ofcom announced that it would examine the way platforms set, enforce, and test their approach to user safety. One of the regulator's stated strategic priorities was to ensure VSP providers had sufficient processes in place for setting and revising comprehensive user policies that cover all relevant harms. To this end, Ofcom looked at platforms' approaches to designing and implementing their T&Cs to protect users.

So, what did the regulator find?

VSPs' user policies

The regulator's report sheds light on the accessibility and clarity of T&Cs set by six VSPs: BitChute, Brand New Tube, OnlyFans, Snapchat, TikTok, and Twitch. T&Cs encompass VSPs' community guidelines and terms of service (publicly available to users). The latter typically represent a legal agreement to which users must consent before using the service. The former differ in that they normally outline usage rules in a more user-friendly language. Ofcom's report also evaluates how these platforms communicate content guidelines to users, the penalties for rule violations, and the training provided to content moderators.

Ofcom's research revealed that VSPs' T&Cs are often lengthy and complex, making them challenging for many users to comprehend and unsuitable for children. OnlyFans (a subscription service specialising in adult content) boasts the longest terms of service, with almost 16,000 words, necessitating over an hour to read. OnlyFans is followed by Twitch, Snapchat, TikTok, Brand New Tube, and

BitChute in decreasing order of term lengths.

A "reading ease" score, evaluated by Ofcom using the Flesch-Kincaid calculator which assesses the readability of a piece of text, revealed that most VSPs' terms of service required high-school graduate level reading skills. Notably, Twitch's terms of service were the most challenging to read. TikTok's terms were relatively more understandable, but still required a higher reading level than the youngest users on the platform possess. Snapchat, TikTok, and BitChute were found to employ "click wrap" agreements, wherein acceptance of the terms of service is implied upon signing up, effectively prompting users to agree without actually reading them.

The report also compares VSPs' community guidelines, with Snapchat's being the shortest (taking approximately 4 minutes to read). Ironically, the language used therein had the poorest reading-ease score and "would likely require a university-level education" to comprehend.

What is being done well

The report highlights some instances of industry good practice:

(a) Inclusive content definitions: some platforms, like TikTok, Snapchat, and Twitch, list in their T&Cs a wide range of content potentially harmful to children.

(b) Transparency in rule violations: Twitch and TikTok present detailed penalty and enforcement information (including banning policies) on external web-pages.

(c) Moderator guidance testing: TikTok employs simulated testing environments to assess the effectiveness of policy changes, while Snapchat evaluates moderators' performance to enhance internal policies.

What needs improvement

In addition, several areas where VSPs could enhance their practices are identified in Ofcom's report:

(a) Unclear content guidelines: some VSPs lack clarity in conveying what content is restricted, particularly concerning harmful material for children. OnlyFans and Snapchat offer little detail about what is prohibited on their platforms.

(b) Understanding of penalties: users may not fully grasp the consequences of violating platform rules. TikTok and Twitch provide comprehensive dedicated information in this regard, but other platforms offer limited insight into potential moderator actions. Discrepancies were also found between Brand New Tube's T&Cs on harmful content and its internal moderator guidance.

(c) Moderator training: moderator training quality differs widely among VSPs, with minimal crisis-specific guidance (e.g., on material that presents an imminent threat to human life).

Overall, this research is important in shaping broader online safety regulations under the forthcoming Online Safety Bill, which is anticipated to receive Royal

Assent in the Autumn of 2023. Ofcom emphasised its commitment to collaborating with platforms to foster improvements.

Ofcom VSP report: What we've learnt about VSPs' user policies

https://www.ofcom.org.uk/__data/assets/pdf_file/0025/266173/VSP-user-policies-report.pdf

Video-sharing platform guidance: guidance for providers on measures to protect users from harmful material

https://www.ofcom.org.uk/__data/assets/pdf_file/0015/226302/vsp-harms-guidance.pdf

[GB] Sky secures new High Court order to block illegal streams

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On 31 July 2023, UK pay-television operator Sky was granted a High Court order requiring internet service providers (ISPs) to block access to illegal streams across a range of the broadcaster's linear channels.

Background

Against the backdrop of escalating piracy concerns (including, e.g., the use of internet TV boxes pre-loaded with software facilitating illegal streaming), Sky has found in recent years its ISP division named as a respondent in injunction applications filed at the High Court in London. To mitigate the prevalence of illicitly duplicated content, film production studios, music record labels, publishing enterprises, and interactive entertainment corporations have identified Sky, alongside competing ISPs such as Virgin Media, BT, TalkTalk, and EE, in injunction applications as enablers of their respective clienteles' unauthorised practices like piracy.

In its capacity as a content producer and proprietor, Sky has often endorsed ISP blocking. For instance, when the Motion Picture Association (MPA) secured in early 2022 a High Court injunction to impede the operations of the cyberlocker platform Mixdrop, Sky aligned itself with the MPA as a co-applicant for the injunction (of note, in this case Sky assumed dual responsibilities, functioning both as an ISP and as a representative of the rightsholders; in the latter role, Sky expressed its approval of the injunction).

A new High Court order

In July 2023, Sky procured a new High Court injunction, this time with the intention of safeguarding its own broadcast interests. The injunction pertains to ISP enforcement, inclusive of the provider under Sky's operational purview, and will allow the broadcaster to enforce a real-time blocking of domains, sites and servers.

The legal basis for such orders in the UK is found in Section 97A(1) of the Copyright, Designs and Patents Act 1988, which provides that "the High Court […] shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright." Under this provision, which implements Article 8(3) of the Information Society Directive, copyright holders can seek court injunctions against ISPs to prevent users from accessing certain websites where ISPs know that their services are being used to infringe copyright. Such orders have previously been used to block access to websites that hosted or provided links to infringing copies of films and TV shows, with famous examples including The Pirate Bay and

Newzbin.

The July 2023 order granted to Sky bears similarities to the orders conferred upon the Premier League during each of the preceding four seasons. However, a novel aspect of the injunction is that it grants Sky the ability to protect a more extensive range of content, for which viewers must tune in to watch, by blocking certain piracy services at certain times. This will be achieved by engaging an external consortium specialised in identifying the origins of unauthorised content dissemination via IP addresses or designated server systems. Subsequently, this information will be relayed to ISPs to effectuate the targeted obstruction of entry to these illicit destinations across their networks.

The order has the potential to prevent unauthorised access to high-profile sports events like *The Ashes* on Sky Sports Cricket, but also specific HBO shows screened as part of its output deal with US studios, like the popular TV show *House of the Dragon* on Sky Atlantic during its initial airing garnering its most extensive viewership.

The implementation of blocking mechanisms has proved an effective tool in addressing content piracy within the entertainment industry. It constitutes, however, a single facet within a spectrum of measures employed to safeguard broadcasting content and fortify the integrity of business operations. Law enforcement agencies have also endeavoured to suppress activities via unlawful streaming networks. In May 2023, following a rare private prosecution by the Premier League, five British men who facilitated the operation of an illicit streaming network broadcasting Premier League games, were imprisoned, with the TV fraudsters' mastermind receiving an 11-year sentence.

Sky wins court order to block illegal streaming of hit shows and football (Financial Times, 31 July 2023)

https://www.ft.com/content/ed022ce0-521a-465f-86b8-b7ea2c403407

English High Court issues blocking order targeting movie-hosting cyberlocker (Kluwer Copyright Blog, 2 March 2022)

https://copyrightblog.kluweriplaw.com/2022/03/02/english-high-court-issues-blocking-order-targeting-movie-hosting-cyberlocker/

TV fraud gang jailed for illegally streaming Premier League games (BBC News, 30 May 2023)

https://www.bbc.co.uk/news/uk-65697595

ITALY

[IT] AGCOM sends a warning to the government to amend the *par condicio* law

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Autorità per le garanzie nelle comunicazioni (AGCOM)

In pursuance of its inherent mandate as codified in Article 1, paragraph 6, letter c), No. 1 of its founding statute, the Italian Communications Authority (AGCOM) has seen fit to formally submit to the government a warning on the Italian statute governing equal access to media platforms during electoral campaigns, referendum initiatives, and broader political discourses, namely, Law No. 28 of 22 February 2000, commonly referred to as the "level playing field" or "*par condicio*".

The warning is motivated by the need to review the legislation governing access to the media environment during electoral campaigns. This is in tandem with the inexorable evolution of technological advancements and the concomitant metamorphosis of communicative paradigms.

Under the current law, AGCOM, which is responsible for the supervision and governance of radio and television services, has the authority, for each electoral or referendum cycle and following consultations with the Parliamentary Commission, to issue an edict tailored to national and local, private and public broadcasting, the written press, institutional messages and the political and electoral forecasting arena. In relation to the concessionaires of the public radio and television service, the procedural provisions of the aforementioned law are exclusively under the purview of the Parliamentary Commission – a modus operandi that remains consistent even outside electoral periods.

The need to rejuvenate the legislative framework for political communication arises, *inter alia*, from the challenges encountered in the practical application of said legislation and rapid technological progress coupled with changes in the way content is consumed.

An in-depth analysis of the disparities and obstacles encountered in the two decades of implementation of Law No. 28/2000, which was initially conceived in an analogue era, propelled AGCOM to submit a report on its deliberations on the subject to the government, whilst duly informing the parliament.

The prerogatives conferred upon the Italian national regulatory authority for communications by the legislative body encompass the duty to inform the government on all matters of interest that fall within the remit of AGCOM’s competencies.

The essence of this approachis, in the first instance, to analyse the national context, whilst judiciously considering the initiatives of the European Union and juxtaposing the experiences of its member states. In a manifestation of proactive

and steadfast institutional synergy, the report dwells upon all facets of communication envisaged by the statute – ranging from political to institutional communication, autonomously crafted political messages, political insights, and extending to institutional information. This is accompanied by a significant reference to political-electoral polls.

Moreover, the warning has duly taken into account the recent decrees of the Administrative Judiciary and acknowledges Resolution No. 165/23/CONS, which effectively aligns online television channels of print media with those disseminated via traditional broadcast media in terms of the application of a level playing field (*par condicio*).

The overarching objective, especially in light of the growing influence of the Internet, is to pave the way for a legislative paradigm, ideally in the forthcoming electoral contests, which stands as a sentinel for all vested interests. This framework should promote full participation in political dialogues and safeguard the sacrosanct rights of individuals, whilst being continually vigilant for any undue influence on the will of the electorate.

Lastly, the objective of the warning is to provide a new law that goes beyond the previous *par condicio* law conceived in the analogue era, and provides anyone interpreting the law in the current digital ecosystem with tools suitable for covering new situations, no longer addressing a few subjects but all the players in the electoral competition.

Segnalazione al governo ai sensi dell'articolo 1, comma 6, lettera c), n. 1 della legge 31 luglio 1997, n. 249 per la revisione della normativa in materia di comunicazione politica e di accesso ai mezzi di informazione

https://www.agcom.it/documents/10179/30998335/Segnalazione+al+Governo+28-07-2023/a07f5954-ea65-47e1-b43c-b075639560f2?version=1.0

Notification to the government in accordance with Article 1, paragraph 6, letter c), No.1 of Law No. 249 of 31July 1997 for the revision of the regulations on political communication and access to information media

[IT] A public consultation on influencers and compliance with the consolidated law of media services launched by Agcom

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

On 21 July, AGCOM launched with resolution no. 178/23/CNS a public consultation on the measures to be adopted to ensure influencers' compliance with the Consolidated Law on audiovisual media services.

AGCOM's goal of extending the scope of the legal and regulatory framework to these subjects stems from the observation that the activities carried out by influencers are comparable to the provision of audiovisual media services.

The activities involved are those carried out by subjects denominated in current language with the term of "*influencer*", but also "*vlogger*", "*streamer*", or "*creator* " who create, produce and disseminate audiovisual and online content to the public pursuant to Directive 2018/1808, for which they exercise editorial responsibility through platforms for sharing videos and, in general, via social media.

Due to the spread and growth of these activities and their impact on users, consumers and society, AGCOM decided to intervene to enhance transparency and awareness towards stakeholders and the public.

Through the text placed for consultation, AGCOM asks all interested parties to express their comments regarding the measures proposed to ensure compliance by influencers to the provisions of the Consolidated Law.

Not having a corresponding primary regulatory provision (both in Directive 2018/1808 and in the Consolidated Law on Media Services), AGCOM proposed to adopt a soft law instrument, i.e. legally non-binding guidelines.

AGCOM's reasoning is based on the provisions of the Audiovisual Media Services Directive and from the fact that influencers carry out an activity similar, or in any case comparable, to that of audiovisual media service providers under national jurisdiction and are, therefore, called to comply with the measures envisaged by the Consolidated Law on Media Services.

Finally, AGCOM intends to provide differentiated measures against influencers based on their success.

In the first category, AGCOM intends to include subjects who offer audiovisual content on a continuous basis, with a method of offering and organizing such as to make them superimposable on a catalogue of an on-demand media service (for example, YouTube channels).

For these subjects, AGCOM suggests extending all the obligations of the Consolidated Media Act, such as, for example, compliance with European quotas, registration in the register of operators (ROC), and obtaining general authorization to carry out the activity (SCIA).

The second category, on the other hand, would include subjects who operate in a less continuous and structured manner, to whom the application of the overall legal regime envisaged for on-demand audiovisual media services does not appear justified.

The Authority therefore intends, with the launch of the aforementioned public consultation, to identify a clear and transparent framework of the provisions applicable to influencers, ensuring, however, not to foresee unnecessary bureaucratic burdens.

The regulatory provisions set out in articles 41 and 42 of the TUSMA (corresponding to articles 28.a and 28.b of the AVMSD Directive in relation to video sharing platform services) remain unchanged.

Delibera n. 178/23/CONS "Avvio della consultazione pubblica relativa alle misure volte a garantire il rispetto, da parte degli influencer, delle disposizioni del Testo unico sui 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_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=31152060&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution No. 178/23/CONS 'Launch of public consultation on measures to ensure compliance by influencers with the provisions of the Consolidated Law on Audiovisual Media Services

[IT] AGCOM fines Meta for failing to provide relevant information

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

The Italian Communications Authority (AGCOM) has once again sanctioned the company META PLATFORMS IRELAND LIMITED (see IRIS 2023-3:1/14) for failing to provide requested information.

The story originates from a previous case, which resulted in a fine of EUR 750 000 and highlighted a clear need to recover information relating to users of Meta's Facebook content sharing platform.

Some users of this platform used Meta's advertising services to promote online gaming sites with cash prizes. In 2018, Italian legislation introduced an absolute ban on any advertising, direct or indirect, carried out in any way on any transmission platform, including social networks, relating to games with cash prizes or games of chance. Furthermore, this law identified several individuals equally responsible for the crime, in particular:

1) the client,

2) the owner of the means or the place of diffusion or destination and

3) the organiser of the demonstration, event or activity.

Therefore, in the context of the proceeding described above, AGCOM requested Meta Platforms Ireland limited to provide, pursuant to art. 1, paragraph 30, of law 249/1997, for each sponsorship in violation of the ban, a series of information, including the related economic value, the data of the contractual counterparty and a copy of the agreement/contract sponsorship executed.

This information was essential for AGCOM to identify the perpetrators, who are otherwise only known by the nickname used on the Facebook platform. In fact, given the short duration of the various sponsored posts, AGCOM couldn't contact the aforementioned individuals or customers in any capacity through the messaging function of the Facebook platform.

Meta Platforms Ireland Limited is the only entity that has the necessary information to identify the perpetrators of the aforementioned crimes, due to the double circumstance that the said perpetrators are both users of the platform and, as shown by the investigations carried out in the scope of the proceedings concluded with resolution no. 422/22/CONS, have signed a real paid sponsorship contract to disseminate advertising messages relating to games with cash prizes and games of chance.

For this reason, the failure to provide the information requested prevented the performance of the related activities and resulted in a fine of EUR 100 000.00, equal to the maximum envisaged.

Delibera n. 204/23/CONS "Ordinanza-ingiunzione nei confronti della società meta platforms ireland limited per la violazione dell'articolo 1, comma 30, della legge n. 249/97 (cont. 3/23/dsdi – proc. 19/fdg)"

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=31233771&_101_INSTANCE_FnOw5lVOIXoE_type=document

Decision No 204/23/CONS 'Order-injunction against the company meta platforms ireland limited for breach of Article 1(30) of Law No 249/97 (cont. 3/23/dsdi - proc. 19/fdg)'

[IT] Piracy is counted out: new Italian Law to fight copyright infringements on electronic communications networks

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

With the adoption of Law n. 93 of 14 July 2023, in force since 8 August 2023, the Italian Communications Regulatory Authority (AGCOM) has been provided with new and relevant powers for copyright protection on electronic communications networks (see IRIS 2021-8:1/28, 2020-7:1/26, 2019-2:1/17. 2017-10:1/25, 2017-5:1/ 26).

In particular, pursuant to article 2 of this Law, AGCOM is now entitled to order service providers, including network access providers, to prevent access to illegally disseminated contents within 30 minutes by blocking DNS resolution of domain names and blocking the routing of network traffic to IP addresses, exclusively intended for illicit activities. Likewise, with the same provision, AGCOM may also order the blocking of any other future domain name, subdomain, where technically possible, or IP address, to anyone attributable, including changes to the name or simple declination or extension (so-called top-level domain), which allows access to the same contents disseminated illegally and to contents of the same nature.

Furthermore, for urgent and serious issues involving live broadcast content, first visions of cinematographic and audiovisual works or entertainment programs, audiovisual contents, including sports or other similar intellectual works, sporting events as well as events of social interest or significant public interest, an urgent measure with an abbreviated procedure without hearing can be adopted by AGCOM, against service providers, including network access service providers, to prevent access to content disseminated illegally by blocking domain names and IP addresses.

Such requests shall be presented by the owner or licensee of the right, by the collective management or trade association to which the owner or licensee of the right has conferred a mandate, or by a person belonging to the category of reliable flaggers (i.e. entities having demonstrated, among other things, that they have particular skills and competences in the fight against the abusive dissemination of content and that they carry out their activities in a diligent, accurate and objective manner). For these subjects, if live transmission is envisaged, the measure is adopted and executed before the beginning or, at the latest, during the transmission itself. If the events are not broadcast live, the measure is adopted and executed before the start of the first broadcast or, at the latest, during the transmission.

To make effective such additional protection, AGCOM will adopt a regulation, following the principles of gradualness, proportionality and adequacy, to regulate

the new urgent procedure.

Furthermore, it is envisaged that AGCOM is required to provide the Public Prosecutor's Office at the Court of Rome with the list of disabling measures adopted pursuant to this article, with details of service providers and other subjects to whom such efforts have been notified. At the request of the same Authority, the addressees of the measures immediately inform the same Public Prosecutor's Office of all the activities carried out in fulfilment of the aforementioned measures and communicate any existing data or information in their availability that could allow the identification of the suppliers of the illegally disseminated contents.

Pursuant to article 5 of the new law, for non-compliance with the prescribed obligations, AGCOM will apply the sanction already provided by article 1, paragraph 31, third sentence, of law 31 July 1997, no. 249, which ranges from a minimum of EUR 10,000 up to 2% of turnover.

Finally, pursuant to article 6, AGCOM, within sixty days from the date of entry into force of the law, is required to amend the regulation on the subject of copyright protection on electronic communication networks adopted with resolution no. 680/13/CONS of 12 December 2013.

LEGGE 14 luglio 2023, n. 93 "Disposizioni per la prevenzione e la repressione della diffusione illecita di contenuti tutelati dal diritto d'autore mediante le reti di comunicazione elettronica". (23G00103) (GU Serie Generale n.171 del 24-07-2023)

https://www.gazzettaufficiale.it/eli/id/2023/07/24/23G00103/sg

Law No. 93 of 14 July 2023 'Provisions for the prevention and suppression of the unlawful distribution of copyright-protected content through electronic communication networks (23G00103) (OJ General Series No. 171 of 24-07-2023)

MOLDOVA

[MD] Central Election Commission now vets public advertising before election

Andrei Richter
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According to the "Regulation on the procedure for the dissemination and broadcasting of political and electoral advertising and messages of public interest", adopted by the Central Election Commission of Moldova (CEC) on 4 August 2023, during the 90-day election period, no public institution or non-commercial organization (NCO) shall distribute, and neither shall the media publish, any such messages without prior approval from the CEC. This was anticipated by the new Statute on Advertising (part 2 of Article 17), which defines such messages as "advertising, the subject of which is the promotion of values, ideas and/or goals of public or community significance, distributed in order to raise awareness, change attitudes and social behaviour, prevent and counteract social vices" (Article 3 of the statute).

A long list of topics of public interest is provided in the statute (Article 12); this allows such messages to embrace a wide range of advertising topics on subjects such as "renewable energy sources and/or the integrity of energy resources"; "promoting the consumption of domestic products"; and "the linguistic, cultural and historical heritage of the Republic of Moldova".

According to the regulation, the Chair of the CEC forms an *ad hoc* commission, which has three days to approve any public message from any authority or NCO. Then the CEC has three more days to vet the message for dissemination through the media or otherwise. Failure to comply leads to an administrative penalty for violation of the Statute on Advertising or (for the media) the Audiovisual Media Code.

The next election in Moldova will be held on 5 November 2023 meaning that the election period started on 7 August.

Decision approving the Regulation on the provision, distribution and dissemination of political and electoral advertising and messages of public interest.

Lege cu privire la publicitate

https://www.legis.md/cautare/getResults?doc_id=134924&lang=ro#

Statute on advertising, No. 62, 17 March 2022.

NETHERLANDS

[NL] Digital Services Act Implementation Bill published

Ronan Ó Fathaigh
Institute for Information Law (IViR)

The Digital Services Act Implementation Bill was published on 14 July 2023. It provides for the national implementation in the Netherlands of the EU's landmark Digital Services Act (DSA), which entered into force in late 2022 (see, for example, IRIS 2023-3:1/18 and IRIS 2023-5:1/2). Crucially, the Bill designates the *Autoriteit Consument & Markt* (Netherlands Authority for Consumers and Markets – ACM) as the national Digital Services Coordinator in the Netherlands under the DSA. In addition, the bill designates the *Autoriteit Persoonsgegevens (*Dutch Data Protection Authority – AP) as a further competent national authority, with competence to supervise certain rules under the DSA concerning advertising on online platforms, and advertising targeting children. Notably, the DSA provides under Article 49(3) that member states must designate national Digital Services Coordinators by 17 February 2024.

The purpose of the DSA is to contribute to the proper functioning of the internal market for "intermediary services", and sets out harmonised rules for a safe online environment. In this regard, it sets down a framework for the conditional exemption from liability of providers of intermediary services; and includes rules on specific due diligence obligations tailored to certain specific categories of providers of intermediary services, including online platforms. Further, the DSA also contains special rules for so-called Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs), which were designated by the European Commission in April 2023 (see IRIS 2023-5:1/2).

Under Article 49(1) of the DSA, member states must designate a competent authority as their Digital Services Coordinator. The Digital Services Coordinator is responsible for all matters relating to supervision and enforcement of the DSA in a member state, unless the member state concerned has assigned certain specific tasks or sectors to other competent authorities. The Digital Services Coordinator is also responsible for ensuring coordination at national level and for contributing to the effective and consistent supervision and enforcement of the DSA throughout the EU. As such, the Digital Services Act Implementation Bill designates the ACM as the Digital Services Coordinator in the Netherlands, pursuant to Article 49(2) DSA. The Bill also provides the ACM with various powers necessary under the DSA, including powers to impose administrative fines, requisition information, conduct inspections of business premises, and investigate cases. Finally, the bill also designates the AP as a further competent national authority to supervise two particular provisions under the DSA, namely Article 26(3) DSA, which prohibits online platforms from presenting advertisements based on profiling using special categories of data; and Article 28(2) DSA, which prohibits platforms from presenting advertisements based on profiling "when they

are aware with reasonable certainty that the recipient of the service is a minor”.

Wetsvoorstel tot uitvoering van de digitaledienstenverordening, 14 jullie 2023

https://www.internetconsultatie.nl/uitvoeringswetdsa/document/11605

Bill to implement the Digital Services Act, 14 July 2023

[NL] Sanction imposed on controversial broadcaster *Ongehoord Nederland* upheld

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 12 July 2023, the Board of Directors of the *Stichting Nederlandse Publieke Omroep* (Dutch Public Broadcasting Foundation – NPO) issued a high-profile decision, upholding a financial sanction imposed on the Dutch broadcaster *Ongehoord Nederland* (ON). This follows a formal request made by the NPO's Board of Directors in April 2023 asking the Secretary of State for Culture and Media to withdraw the provisional recognition of the broadcaster ON, having already imposed three separate fines on the broadcaster, including a EUR 131 000 fine in April 2023 for "systemic violation" of the NPO Journalistic Code in relation to the broadcaster's news programme; a EUR 84 000 fine in July 2022 for an earlier systematic violation of the NPO Journalistic Code; and a EUR 56 000 fine in December 2022 for a "lack of cooperation" (see IRIS 2023-6/16). The broadcaster ON includes in its mission statement the claim that is a "critical voice" on important social issues, including the "ill effects of mass immigration", and the "preservation of Dutch traditions and culture".

Under the Dutch Media Act, the NPO has the task of ensuring that public broadcasters meet high journalistic and professional quality standards, and may impose administrative sanctions. The EUR 56 000 sanction at issue had been imposed on the broadcaster in December 2022 for non-compliance with the legal obligation to cooperate in the performance of the public media assignment. ON had lodged an objection against this sanction with the independent Advisory Committee on Public Broadcasting Objections (*Adviescommissie Bezwaarschriften Publieke Omroep*), but the Advisory Committee advised the Board to reject ON's objection, and declare the decision unfounded.

First, the Advisory Committee stated in its advice that the NPO has rightly concluded that the broadcaster demonstrated insufficient willingness to cooperate in the performance of the public media assignment. The Advisory Committee noted that the broadcaster regularly showed "little constructive behaviour", and used language that did not contribute to "good relations within the public media system". The broadcaster had committed to comply with the media law and all internal codes of conduct, policies and binding rules of the NPO in the context of the admission to the public media system. However, the broadcaster repeatedly failed to comply with these agreements; the broadcaster "chooses its own interpretation" of the Media Act, and its "own interpretation of applicable rules within the broadcasting system", according to the Advisory Committee. The Advisory Committee concluded that the broadcaster had demonstrated an insufficient willingness to cooperate and, according to the Advisory Committee, the NPO was authorised to impose the sanction. Finally, on proportionality, the Advisory Committee concluded that there was a need to impose this sanction, and the amount was proportionate. Following this decision, the NPO is awaiting the

response of the Secretary of State for Culture and Media to withdraw the provisional recognition of the broadcaster ON.

NPO handhaaft tweede sanctie Ongehoord Nederland in bezwaar, 12 juli 2023

https://pers.npo.nl/persberichten/npo-handhaaft-tweede-sanctie-ongehoord-nederland-in-bezwaar

NPO upholds second sanction against Ongehoord Nederland in objection, 12 July 2023

UKRAINE

[UA] “Impeccable reputation” regulation for media owners approved

Andrei Richter
Comenius University (Bratislava)

Following the adoption of the “de-oligarchisation” statute in Ukraine (see IRIS 2023-7:1/19), which aims to eliminate the excessive influence of vested interests in the economic, political and public life of the country including through “exerting significant influence over the mass media”, the national media regulator – the National Council on Broadcasting – adopted, on 28 July 2023, the Regulation on conducting the verification of the business reputation of the purchaser (potential purchaser) of a media outlet.

This verification is to be conducted by the Ministry of Justice at the request of the potential buyer (either domestic or foreign). The Ministry contacts other public competent authorities when necessary. In their turn those authorities have to respond to the Ministry’s inquiry within 10 days with the possibility of having an additional 10-day extension if necessary.

The conclusion on the reputation in question reached by the Ministry of Justice and based on official documents from the competent authorities together with the file on each application is submitted to the National Security and Defence Council of Ukraine (see IRIS 2022-5:1/8) with a copy of the conclusion sent to the buyer.

According to the “de-oligarchisation” statute, oligarchs may lose their status (and accompanying scrutiny and restrictions) if they sell their media business and hand control of the mass media to a person with an “impeccable reputation”. The law denies such a reputation to anyone with a criminal record, those under Ukrainian or international sanctions, any person named in the list of persons linked to terrorism, those prevented by a court from holding certain positions, gross violators of tax regulation, anyone intending to buy the media at a price which is significantly lower than market price or with funds the source of which cannot be proven, or those with a record of essential or systematic violations of media law or financial law (Article 10 of the statute and paragraph 5 of the regulation).

Порядок проведення перевірки ділової репутації покупця (потенційного покупця) засобу масової інформації

https://webportal.nrada.gov.ua/normatyvno-pravovi-akty-natsionalnoyi-rady/

Regulation on conducting verification of the business reputation of the purchaser (potential purchaser) of a media outlet, N 49

Про запобігання загрозам національній безпеці, пов'язаним із надмірним впливом осіб, які мають значну економічну та політичну вагу в суспільному житті (олігархів)

https://zakon.rada.gov.ua/laws/show/1780-IX#Text

Statute of Ukraine on the prevention of threats to national security associated with the excessive influence of persons who have significant economic or political weight in public life (oligarchs), N 1780-IX.

[UA] List of events of major importance to society confirmed

Andrei Richter
Comenius University (Bratislava)

The Ukrainian national media regulator – the National Council on Broadcasting – approved, on 1 June 2023, a List of events of major importance to society. This list includes the following events:

1. All games involving the participation of the national football team of Ukraine, as well as the semi-finals and finals of European and World championships, and the finals in European cups (the UEFA Champions League, the UEFA Europa League and the UEFA Europa Conference League).

2. Summer and Winter Olympic and Paralympic games – all competitions involving the participation of the national team of Ukraine.

3. Fights of the World Boxing Championships in various weight categories and fights for the championship of the leading boxing associations involving the participation of Ukrainian athletes.

4. Finals of world cups and championships in Olympic sports involving the participation of Ukrainian athletes.

5. Eurovision and Junior Eurovision song contests: performances by participants from Ukraine, performances by contest winners, the award ceremony, and the final press conference of participants from Ukraine, subject to availability.

6. The official part of the celebration (military parade) in honour of Ukraine's Independence Day (August 24).

7. Inauguration, addresses and press conferences of the President of Ukraine.

According to the Statute on the Media (see IRIS 2023-1:1/6), the exclusive rightsholder to the audiovisual transmission of such events is obliged to provide access to the transmission, on a fair and non-discriminatory basis, to other audiovisual media for the purpose of independently selecting a segment or segments for their own newscasts (not exceeding 90 seconds in length) to be broadcast within the subsequent 24 hours (Article 46).

Перелік подій значного суспільного інтересу

https://webportal.nrada.gov.ua/normatyvno-pravovi-akty-natsionalnoyi-rady/

List of events of major importance to society, No. 376.

Закон України Про медіа

http://www.golos.com.ua/article/367279

Statute of Ukraine "On the Media", 13 December 2022, No. 2849-IX.

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