IRIS newsletter

IRIS 2024-8

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Publisher:

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

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

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

Executive Director: Susanne Nikoltchev

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

Documentation/Press Contact: Alison Hindhaugh

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

E-mail: alison.hindhaugh@coe.int

Translations:

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

Corrections:

Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Sophie Valais and Amélie Lacourt • Linda Byrne • Glenn Ford • David Windsor • Aurélie Courtinat • Barbara Grokenberger

Web Design:

Coordination: Cyril Chaboisseau, European Audiovisual Observatory
ISSN 2078-6158

EDITORIAL

The summer holidays provide an ideal opportunity to disconnect from work or even to engage in a digital detox. This newsletter may serve as a good back-to-school update, to help you catch up with the numerous media developments that have occurred over the sunny season.

Online platforms have recently had their fair share of attention with the CJEU dismissing ByteDance's attempt to overturn the European Commission's designation of TikTok as a gatekeeper, while the platform also committed to permanently withdraw its TikTok Lite Rewards programme from the EU. Other platforms experienced their own share of scrutiny: in the Netherlands, the courts ruled on the suspension of an online news outlet from YouTube’s monetisation programme and X was at the centre of a "shadowbanning" case, for silently hiding a user's account from search suggestions. For its part, Instagram was temporarily blocked in Türkiye.

The broadcasting sector, particularly public service media (PSM), saw notable developments too with a decision by the Italian regulator about hidden advertising, and Slovakia's new Act on Public Broadcasting. In Austria, the reform of the ORF law to ensure the independence and pluralism of the PSM, as mandated by the Constitutional Court, is more than ever at the centre of discussions.

I have no doubt that everyone will find something of interest in this month’s edition, which also features the initiation of proceedings by the European Commission regarding the failure to appoint Digital Service Coordinators, Poland's progress on transposing the CDSM Directive, and the Council of Europe's newly released report on the metaverse.

Enjoy the read!

Maja Cappello, Editor

European Audiovisual Observatory

Table of content

INTERNATIONAL

COUNCIL OF EUROPE

The Council of Europe and IEEEL publish a joint report on "The Metaverse and its Impact on Human Rights, the Rule of Law, and Democracy"

Cesare Pitea
Council of Europe

The report entitled "The Metaverse and its Impact on Human Rights, the Rule of Law, and Democracy", jointly developed by the Council of Europe and the Institute of Electrical and Electronics Engineers (IEEE) Standards Association under the Council of Europe Digital Partnership and launched at the EuroDIG (European Dialogue on Internet Governance) Conference last June, is now publicly available for download.

The report examines how the metaverse could reshape our societies and the associated benefits, risks and challenges. Drawing on insights from over 50 international experts, the report underscores the need for a human-centric approach to metaverse development.

The term "metaverse" has transitioned from literary fiction to describe an emerging set of technologies aiming to build a vast, interconnected network of real-time 3D virtual worlds and environments. The vision of the metaverse imagines it as a unified virtual universe, integrating all digital worlds, including gaming platforms, alongside and in connection with the physical world, allowing an unlimited number of users to navigate seamlessly between them. A key aspect of this is the reliance on new forms of human-machine interfaces, which bridge experiences between the real world and virtual spaces through extensive and advanced data collection and processing.

The report is intended to guide policymakers and stakeholders through the complexities of the evolving landscape of virtual realities. It enhances their understanding of the metaverse’s potential applications and benefits, while also addressing the risks associated with its development and use. The report explores the implications for human rights, the rule of law, and democracy, which the Council of Europe will continue to assess to promote relevant policies. It represents the initial step in considering how the Council of Europe can contribute to developing legal frameworks for this emerging technology.

To protect human rights, the rule of law, and democracy, the report concludes with several areas for consideration. It calls for developing a shared

understanding of the metaverse, mapping its ecosystem, technologies, and stakeholders, and creating inclusive frameworks to assess its impacts on human rights for example as well as assessing environmental risks. Shaping the metaverse's future should involve diverse stakeholders and reflect shared values. Ensuring accessibility, safety, and inclusion for vulnerable groups is essential, alongside prioritising children's rights through age-appropriate design. It also highlights the need to address challenges in enforcing the rule of law, particularly in relation to proprietary content and control over user access.

Key decisions that need to be made at this early stage centre around several unresolved questions, including:

- What are the terms used to describe the metaverse and what is understood by them?

- How much can the metaverse impact our lives, societies and the values we live by, and if that is so transformative, what are the societal values on which we want to base the design of the metaverse?

- How different is the metaverse in the issues it brings from known technologies and environments such as previous iterations of the internet, AI, gaming and social platforms? What can we learn from the way issues in these areas were addressed?

- Are existing legal frameworks enough to safeguard human rights, the rule of law and democracy, or are new ones needed? Should we move towards international regulation or other global governance models and are regional or domestic regulation and approaches enough? Can the metaverse self-regulate, or is hard law needed? And, if the answer is both, for which areas is what approach more appropriate? Should regulation be technology-specific or principle/outcome/risk-based?

- What do jurisdiction, supervision and enforcement look like and what are the roles and responsibilities of governments, technology and platform providers and users themselves?

- How can we build an inclusive, democratic and responsible metaverse that does not violate, but rather promotes, the exercise of human rights, the rule of law and democracy?

These questions lay the groundwork for ongoing discussions about how to responsibly develop and govern the metaverse.

The Council of Europe is building upon the report's findings to advance its efforts. Under its terms of reference for 2024-2025, the Steering Committee on Media and Information Society (CDMSI) is currently developing a feasibility study that explores the challenges and implications of content and behaviour moderation in immersive realities (XR technologies), with a focus on the rights to freedom of opinion, thought, and expression. The study will assess whether, and to what extent, existing legal frameworks – such as the European Convention on Human

Rights, Council of Europe standards, and other European regulations – are adequate to address these concerns, or whether new measures are necessary.

The Metaverse and its Impact on Human Rights, the Rule of Law, and Democracy

https://rm.coe.int/the-metaverse-and-its-impact-on-human-rights-the-rule-of-law-and-democ/1680b178b0

HUNGARY

European Court of Human Rights: Boronyák v. Hungary

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

The European Court of Human Rights (ECtHR) delivered an interesting judgment on the impact of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) within private relations and the positive obligation of the authorities to safeguard the right to freedom of expression and information in contractual relations.

The ECtHR unanimously found that imposing a fine on an actor for having disclosed confidential information about the terms of his contract with a TV company, did not violate the actor’s freedom of expression. The Court held that the dissemination of the information in question could be restricted by contractual confidentiality obligations to protect business interests in the audiovisual sector.

The agency contract concerned Gergely Boronyák's acting in a television series which was produced by Media Services and Support Trust Fund, a State-owned company. The contract contained a confidentiality clause by which the TV actor agreed not to disclose any confidential business information covered by the agreement, including data and information related to the principal and its partners, its ownership and business connections, media service activities, programme production, the actors of the series or to any other persons who received fees for their contribution to the series. Under the terms of the agreement, besides any payment of damages, the TV actor was to pay a penalty of HUF 10 000 000 , approximately EUR 26 000 if he breached the obligation of confidentiality, unless the production company had agreed to the disclosure of confidential information.

The production company retained the right to terminate the contract at any time unilaterally. Apparently, due to the low interest in the television series, its production ended a year later and the TV production company terminated the contract with Boronyák. About one and a half years later, Boronyák gave an interview to investigative journalists concerning the contract and the TV series, including about the fees he had received from the TV production company. Following court proceedings in Hungary, he was ordered to pay HUF 10,000,000 and the production company’s legal expenses.

Relying on Article 10 ECHR, Boronyák complained that the penalty was disproportionate. He also submitted that the information he had disclosed had been public-interest information, which was already in the public domain: an investigative internet portal specialising in publishing public-interest information, in particular about public expenditure, had succeeded in obtaining access to

information about the production costs of the TV series and to various documents about the termination of the production. Boronyák argued that the national courts had paid no heed to the circumstances of the disclosure or to the fact that the information had been of public interest as it concerned payments from public funds. The Hungarian Government, in essence, submitted that the restriction of Boronyák's free speech had been prescribed in the contractual provision, which he had voluntarily agreed to, and which had been in compliance with the relevant provisions of the Civil Code on contractual obligations.

Regarding the general principles applicable, the ECtHR reiterated that in case of disputes involving freedom of expression in the context of professional relationships, the protection of Article 10 ECHR extends to the workplace in general. Article 10 ECHR is not only binding in the relations between an employer and an employee when those relations are governed by public law, but may also apply when they are governed by private law. Indeed, the genuine and effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In certain cases, the State has a positive obligation to protect the right to freedom of expression, even against interference by private persons. Therefore, the ECtHR had to ascertain whether, in the present case, the Hungarian judicial authorities, in upholding the claims of the production company, had adequately secured Boronyák's right to freedom of expression as guaranteed by Article 10 ECHR in the context of contractual relations and balanced it against the right of the TV company to the protection of its commercial interests.

The ECtHR first observed that Boronyák did not argue that he was seeking to uncover any wrongdoing by the TV company, and therefore it does not find it necessary to enquire into the kind of issues which have been central to its case-law on whistleblowing (contrast Halet v. Luxemburg, IRIS 2023-4:1/23). Next, the ECtHR took note of the fact that the parties themselves determined the scope of their obligations set out in the agency contract and that Boronyák voluntarily and knowingly agreed to the non-disclosure clause, waiving his right to release information about the terms of the contract. However, the voluntary nature of the contract was not the sole factor relied upon by the domestic courts as justification for allowing the restriction on Boronyák's right to freedom of expression. Rather than automatically upholding the confidentiality obligation and the ensuing penalty by relying on the parties' freedom to enter into contracts, the domestic courts analysed the implications of the clause for free speech and the public's access to information of public concern, to weigh up the conflicting interests of the contracting parties.

The ECtHR accepted that Boronyák relied on the public interest in disclosing information about State budget expenditure to justify the publication of specific terms of his contract. Indeed, the conduct of private parties, such as companies, who also inevitably and knowingly lay themselves open to scrutiny of their acts can, in certain situations, constitute information of public concern. However, the disclosure of public-interest details cannot be assessed independently of the duty

of confidentiality or of secrecy which has been breached.

The ECtHR considered that the public interest in disclosure of confidential information decreases depending on whether the information disclosed relates to unlawful acts or practices, to reprehensible acts, practices or conduct, or to a matter that sparks a debate, giving rise to controversy as to whether or not there is harm to the public (see Halet v. Luxembourg, IRIS 2023-4:1/23). The ECtHR referred in this connection to the relative weight of the public interest in the information disclosed in the present case, regarding the fact that it concerned neither unlawful acts nor reprehensible practices, but merely the individual terms of Boronyák's contract.

The disclosure of confidential information by Boronyák was not an indispensable way of securing the availability of information to enable a debate on matters of public interest, the more because the entities managing the State budget were under a statutory obligation to disclose such data upon request. The domestic courts granted journalists' requests, ordering the TV company to release the requested information about the budget of the television series. Still, the ECtHR accepted that the confidentiality as stipulated in the contract with Boronyák's was, generally speaking, necessary for the company's business operations.

Lastly, the ECtHR considered that the penalty imposed in an amount equivalent to approximately EUR 26,000 could appear high in view of the circumstances of the disclosure of the information in question, but was justified because of the particularly serious nature of the breach of contractual obligations.

Therefore, the ECtHR discerned no strong reasons that would require it to substitute its own view for that of the domestic courts and to set aside the balancing exercise. It found that the Hungarian judicial authorities struck a fair balance between Boronyák's interest in free speech, on the one hand, and the TV company's interest in the protection of its business secrecy, on the other hand, thus acting within their margin of appreciation. Accordingly, there has been no violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, First Section, in the case Boronyák v. Hungary, Application no. 4110/20, 20 June 2024.

https://hudoc.echr.coe.int/eng?i=001-234265

RUSSIAN FEDERATION

European Court of Human Rights: Ukraine v. Russia (re Crimea)

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

In its judgment in the case of Ukraine v. Russia, the Grand Chamber of the European Court of Human Rights (ECtHR) highlighted the repression of freedom of expression and media freedom in Russia-occupied Crimea since 27 February 2014. The Court's finding of systemic violations of Article 10 of the European Convention on Human Rights (ECHR) is part of other gross or large-scale violations by Russia of several provisions of the ECHR and its additional Protocols, including of Article 2 (right to life), Article 3 (prohibition of inhuman treatment), Article 5 (prohibition of unlawful deprivation of liberty), Article 9 (freedom of religion) and Article 11 (freedom of peaceful assembly and association).

The Ukrainian Government's complaints under Article 10 ECHR concerned, in particular, the alleged existence of an administrative practice of suppression of non-Russian media, including the closure of Ukrainian and Tatar television stations. The Ukrainian Government submitted that since the annexation of Crimea by Russia, legal issues regarding freedom of speech, information policy and the provision of information and communication on the territory of "temporarily occupied regions" had been unlawfully regulated by legal instruments of the Russian Federation.

The complaint also included "intimidation and harassment of journalists perceived as critical of the Russian occupation" and violation of the rights of political prisoners. The Russian authorities maintained before the ECtHR that the allegations by the Ukrainian Government were unsubstantiated. They stated that the Crimean authorities had taken an active role in supporting the development of public broadcasting, allowing all citizens, irrespective of their national background, to actively participate in the decision-making process and receive information in their native language without any restrictions.

In its assessment, the ECtHR recaps the general principles established in its case law concerning pluralism in the audiovisual media (Centro Europa 7 S.r.l. and Di Stefano v. Italy, IRIS 2012-7/2 and NIT S.R.L. v. the Republic of Moldova, IRIS 2022-6:1/13). With regard to the general principles concerning the question on whether an interference is "necessary in a democratic society", the ECtHR referred to its case-law, in particular to Animal Defenders International v. the United Kingdom (IRIS 2013-6/1) and Delfi AS v. Estonia (IRIS 2015-7/1). The ECtHR also referred to its admissibility decision in which it found that the incidents and conclusions noted by several IGOs and NGOs (e.g. the UN HRC Concluding Observations of 2015 and the 2014 Human Rights Watch Report) provided

sufficient *prima facie* evidence of the administrative practices curtailing media freedom and journalists' rights: in March 2014 all Ukrainian television channels were shut down and the only Ukrainian-language newspaper (Krymska) was banned from distribution. In addition, some Tatar-language media outlets were denied either re-registration or licences to operate in accordance with Russian Federation legislation and had to cease operations on the peninsula. Official "warnings" by officers of the Federal Security Service of the Russian Federation (FSB) and the Crimea prosecutor's office often preceded the closing down of a media outlet on the basis that its views, articles or programmes were deemed "extremist", for example, for the use of the terms "annexation", and "temporary occupation".

For that purpose, the authorities used Russia's "vaguely worded and overly broad anti-extremism legislation" to pressure Crimean Tatar media outlets into ceasing criticism of Russia's "occupation" of Crimea. The IGOs and NGOs also reported harassment and intimidation of journalists, while the ECtHR observed that the above information was concordant with the additional evidential material submitted to the Court. The Russian Government neither contested nor explained the significant decline from 3,000 to slightly over 200 operating media outlets in Crimea since the Russian occupation. The ECtHR further observed that the Russian Government did not engage with the credible allegations of systematic intimidation and harassment of journalists, a particular aspect of the alleged practice of suppressing non-Russian media.

The ECtHR considered that there was sufficient evidence to prove to the requisite standard that, during the period under consideration (between 27 February 2014 and 26 August 2015), there were numerous and interconnected instances sufficient, under the Court's case law, to constitute an administrative practice of interference with the freedom of expression, such as refusal to grant broadcasting licences, revocation of broadcasting licences, failure to allocate broadcasting frequencies, warnings, cautions and orders by the Russian authorities under "anti-extremism" legislation, prosecutions, pre-trial detention and convictions on these grounds. Based on the finding that the regulatory nature of the alleged practice, its scale and its general application confirmed the existence of both the "repetition of acts" and "official tolerance", the ECtHR found that these interferences with the right to freedom of expression and information could not be regarded as provided by "law" in the meaning of the ECHR. The Russian Government did not make any submissions. It did not provide any evidence to address, let alone refute, the alleged lack of foreseeability of their anti-extremism legislation that had been used to suppress the freedom of expression in Crimea during the period under consideration.

Furthermore, the ECtHR noted that the Russian Government did not provide any documentary evidence regarding any of the relevant procedures, such as the licensing of media outlets and the allocation of frequencies. Owing to this failure, the Russian Government failed to establish that the interferences complained of were necessary within the meaning of Article 10 ECHR. In particular, as regards the sending of "warnings" to journalists, their prosecution and detention for

actions allegedly aimed at violating the territorial integrity of the Russian Federation, the Russian Government failed to prove that the publication of views aimed at preserving the territorial integrity of Ukraine included any incitement to violence or advocated recourse to violent action. The creation of a public Crimean Tatar television channel, a radio company and a Crimean Tatar editorial office could not be considered to offset the general decline in the number of independent television stations serving the Crimean Tatar population of Crimea. Assuming that certain media outlets remained available online could not be regarded as a sufficient substitute for the availability of print media and standard television channels. Against this background, the ECtHR found unanimously that during the period under consideration, there existed an administrative practice of suppression of non-Russian media, including the closure of Ukrainian and Tatar television stations, which was not only unlawful, but also, in any event, not necessary in a democratic society. There has, therefore, been a violation of Article 10 ECHR.

In its 347-page judgment, the ECtHR also found a violation of Articles 10 and 11 ECHR because of an administrative practice of unlawful deprivation of liberty, prosecution and conviction of Ukrainian political prisoners for exercising their freedom of expression, and peaceful assembly and association. It also found that there has been a violation of Article 18 ECHR in conjunction with Articles 10 and 11 ECHR on account of an ongoing administrative practice of restricting Ukrainian political prisoners' rights and freedoms in Crimea for an ulterior purpose not prescribed by the ECHR.

Judgment by the European Court of Human Rights, Grand Chamber, in the case Ukraine v. Russia (re Crimea), Application nos. 20958/14 and 38334/18, 25 June 2024

https://hudoc.echr.coe.int/eng?i=001-235139

EUROPEAN UNION

Bytedance’s action dismissed by the CJEU

Amélie Lacourt
European Audiovisual Observatory

On 5 September 2023, the European Commission designated Bytedance and the companies which it controls directly or indirectly (including TikTok), as a gatekeeper under Article 3(1) of the Digital Markets Act (DMA). The DMA contributes, *inter alia*, to the proper functioning of the internal market by laying down rules to ensure the contestability and fairness of markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular. It aims to limit anti-competitive practices, imposing requirements and constraints on platforms with a major influence on the market.

In November of the same year, Bytedance brought an action for annulment of the Commission’s decision. An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to EU law. At Bytedance's request, the General Court decided to rule on the case under the expedited procedure. On 17 July, the court dismissed Bytedance’s action, confirming that TikTok is a gatekeeper under the DMA. This is the first time that the General Court has interpreted the DMA.

In particular, the court found that Bytedance met the quantitative thresholds set out in the DMA. According to the court, the company’s global market value and the number of TikTok end users and business users in the EU had continued to increase in the last three financial years, far exceeding the thresholds. The arguments submitted by Bytedance, including the fact that Bytedance’s global market value was mainly attributable to its activities in China and that its EU turnover was low, were not sufficiently substantiated to manifestly call this into question.

On the presumption that TikTok is an important gateway, the court found that the Commission was entitled to consider that Bytedance’s high global market value, together with the large number of TikTok users in the EU, reflected its financial capacity and its potential to monetise those users. It further considered that TikTok had succeeded in increasing its number of users very rapidly and exponentially since its launch in the EU in 2018, reaching, in a short time, half the size of Facebook and of Instagram, and a particularly high engagement rate, with young users in particular, who spent more time on TikTok than on other social networks.

As regards TikTok’s entrenched and durable position, called into question by Bytedance arguing that the platform had been considered a challenger in the

market, the court emphasised that, although in 2018 TikTok was indeed a challenger seeking to contest the position of established operators such as Meta and Alphabet, it had rapidly consolidated its position, and even strengthened that position over the following years, despite the launch of competing services such as Reels (Meta) and Shorts (Alphabet).

Finally, the court rejected the arguments raised by Bytedance regarding the alleged infringement of its rights of defence and breach of the principle of equal treatment.

As a result of the court's decision, TikTok remains a gatekeeper and must comply with the DMA.

Bytedance Ltd v. European Commission, Case T-1077/23, CJEU, 17 July 2024

https://curia.europa.eu/juris/document/document.jsf?text=&docid=288383&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1899491

Infringement proceedings against six EU member states for their failure to designate digital services coordinators

Valentina Golunova
Maastricht University

On 25 July 2024, the European Commission sent a letter of formal notice to Belgium, Croatia, Luxembourg, the Netherlands, Spain and Sweden, indicating their failure to comply with the Digital Services Act (DSA). These member states had failed to designate or afford the necessary powers to their Digital Services Coordinators (DSCs) – national competent authorities responsible for the supervision of providers of intermediary services and enforcement of the DSA. The deadline for the designation of DSCs passed on 17 February 2024.

The responsibility for monitoring the application and implementation of the DSA is shared between the member states and the Commission. The latter is authorised to supervise and enforce the DSA against providers of very large online platforms (VLOPs) and very large online search engines (VLOSEs). DSCs must enjoy far-reaching investigative and enforcement powers against all other providers of intermediary services whose main establishment is located in the member state in question, including the powers to handle complaints from recipients of digital services and to impose sanctions in the event of non-compliance. Member states may designate one or several competent authorities in addition to the DSC, but must provide a clear division of tasks between those authorities and the DSC, as well as ensuring their close and effective collaboration.

Of all six member states who received the Commission's letter, Belgium is the only member state that has yet to designate its DSCs. The delay occurred due to the specifics of the Belgian division of powers (since the designation of the DSC requires the conclusion of a cooperation agreement between the Federal State and the Communities) as well as the parliamentary summer recess. Other member states have not yet granted their DSCs sufficient powers and competences. For example, the Netherlands has provisionally designated the Authority for Consumers and Markets (*Autoriteit Consument & Markt* – ACM) as its DSC. It will share the supervision and enforcement tasks with the Authority for Personal Data (*Autoriteit Persoonsgegevens* – AP). However, the ACM has not been given some of the powers listed under the DSA, including the authority to certify out-of-court dispute settlement bodies or to afford the status of "trusted flaggers" to independent entities responsible for detecting, identifying, and reporting illegal content.

In April 2024, the Commission had already sent letters of formal notice to six member states, namely Czechia, Cyprus, Estonia, Poland, Portugal and Slovakia, where considerable delays in the designation or empowerment of the DSCs were anticipated. In the meantime, Estonia and Slovakia have taken the necessary

steps to ensure compliance with the DSA.

Letters of formal notice constitute the first step of infringement proceedings. The six member states who received those letters are now afforded two months to respond to the Commission's notice and comply with the DSA. Should the shortcomings remain unaddressed, the Commission may issue reasoned opinions. If the member states keep failing to ensure compliance with the DSA, proceedings before the Court of Justice of the EU (CJEU) can be initiated.

July infringement package: key decisions

https://ec.europa.eu/commission/presscorner/detail/EN/inf_24_3228

Rule of Law Report 2024, including media freedom and pluralism

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 24 July 2024, the European Commission published its 2024 Rule of Law Report, which is the fifth annual report as part of the European Rule of Law Mechanism (see, for example, IRIS 2023-8/18). The purpose of the Rule of Law Report is to examine developments across all EU member states, both positive and negative, in four key areas for the rule of law: the justice system, the anti-corruption framework, media pluralism and freedom, and other institutional issues related to checks and balances. The report includes country chapters for all 27 member states and, for the first time, the 2024 report also includes country chapters on four enlargement countries (Albania, Montenegro, North Macedonia, Serbia). Of particular interest is the 2024 report's findings in relation to the pillar of media pluralism and freedom.

In this regard, the report's chapter on media pluralism and media freedom first details issues around strengthening the independent functioning of media regulators. The report noted that there were "continued concerns" about the independence or impartiality of regulators in several member states, including "insufficient safeguards" against undue political influence over the nomination process or in the functioning of regulators, including in Bulgaria, Croatia, Hungary, Poland and Slovenia. Second, on increasing the transparency of media ownership, the 2024 report stated that there had been "positive developments" in Greece, Ireland and Spain, each having established or extended online ownership registries. However, previously highlighted "challenges" regarding transparency of media ownership "persist" in Bulgaria, Cyprus, Czechia, France and the Netherlands. Third, in relation to the issue of safeguarding media from political pressure and undue influence, the report highlighted that in some member states (Austria, Bulgaria and Slovenia), "positive steps" had been taken; however, "no steps" had been taken to increase the transparency and fairness in the allocation of state advertising in Croatia, Hungary, Malta and Spain. Further, previously voiced concerns with regard to the independent governance and editorial independence of public service media have not yet been addressed in Hungary, Malta and Romania. Indeed, the report noted that in Slovakia, a law was adopted in 2024 which dissolved the public broadcaster and established a new one, "leading to concerns on the future independence of the broadcaster". Fourth, in relation to improving access to information, the report mentioned how "limited progress" had been seen in several member states where problems had previously been identified, such as Germany, Greece, Malta, Poland, Romania and Spain. Finally, on improving the safety and protection of journalists and addressing legal threats and abusive court proceedings against public participation (SLAPP), the report noted that journalists "continue to face physical and legal threats", with online smear campaigns and censorship both also

compromising their safety. Specifically on the threat of SLAPPs, the report highlighted how Greece and Ireland had progressed with legislative work to introduce specific procedural safeguards and/or revise their defamation laws.

In terms of next steps, the Commission also published a list of concrete recommendations for each member state. The Commission stated that the recommendations aim to "further assist the Member States in their efforts to take forward ongoing reforms" and help them "identify where improvements are needed".

European Commission, 2024 Rule of Law Report: The rule of law situation in the European Union, COM(2024) 800 final, 24 July 2024

https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en

[EU] TikTok to permanently withdraw TikTok Lite rewards programme from the EU

Amélie Lacourt
European Audiovisual Observatory

In April 2024, the European Commission opened proceedings against TikTok (a designated Very Large Online Platform) for its new “Reward Program”, which allows users to earn points which can be exchanged for rewards, including Amazon vouchers, gift cards via PayPal or TikTok's coin currency. The Commission was particularly concerned by the impact of such functionality on minors. According to the latter, the programme could infringe provisions of the Digital Services Act (DSA) on the diligent assessment of risks (particularly in relation to the addictive effect of the programme) and the effective mitigation measures. As a VLOP, TikTok had indeed failed to perform such risk assessment and submit a report to the Commission before launching the new functionalities. For more details about the programme or the opening of proceedings by the Commission, please see IRIS 2024-5:1/7.

Following the formal proceedings opened by the European Commission earlier this year, TikTok finally committed to permanently withdraw the TikTok Lite Rewards Program from the European Union and not to launch any other programme which would circumvent the withdrawal, thereby ensuring compliance with the DSA.

On 5 August, the Commission made the platform’s commitments legally binding and closed the proceedings. This decision follows the VLOP’s decision to voluntarily suspend the programme right after the Commission had opened the proceedings against it. Any breach of commitments would amount to a breach of the DSA and could, therefore, lead to fines. Margrethe Vestager, Executive Vice-President for a Europe Fit for the Digital Age, emphasised that the Commission “will carefully monitor TikTok’s compliance. Today’s decision also sends a clear message to the entire social media industry.”

These are the first VLOP commitments accepted by the Commission under the DSA.

Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065

NATIONAL

AUSTRIA

[AT] Austrian Constitutional Court mandates reform of ORF law to ensure independence and pluralism

Maren Beaufort
Institute for Comparative Media and Communication Studies (CMC) of the Austrian Academy of Sciences (ÖAW) and the University of Klagenfurt (AAU)

On 29 September 2024, the national parliamentary election in Austria will shape the course of the implementation of a ruling by the Constitutional Court (the VfGH), which declared certain provisions governing Austria's public service media (PSM) organisation, the Austrian Broadcasting Corporation (ORF), unconstitutional. The ruling issued on 5 October 2023 pursuant to Article 140 of the Federal Constitutional Law (B-VG), following a public oral hearing and a request for judicial review, will take effect on 31 March 2025, with the previous provisions not being reinstated. The legislature is required to enact new regulations by that date.

The decision of the VfGH essentially calls for more pluralism and greater independence of the ORF. The relevant provisions of the Federal Act on the Austrian Broadcasting Corporation (the ORF Act), Federal Law Gazette 379/1984 as amended by I 112/2023, pertain to the appointment and composition of the ORF's governing bodies – the Foundation Board (Stiftungsrat) and the Audience Council (Publikumsrat). While the Foundation Board oversees the management of Austria's PSM, the Audience Council represents public interests, mainly by advising on programming. Under the Federal Constitutional Act on the Independence of Broadcasting of 1974 (the Broadcasting Constitutional Act – Rundfunk-BVG), the legislature must ensure regulations that guarantee objectivity, impartiality, diversity, balanced programming, and the independence of individuals and governing bodies (Article I (2)). The VfGH concludes that the composition of the ORF's governing bodies must be such as to prevent unilateral state influence and ensure diverse representation in order to safeguard independence and pluralism. In its reasoning for the decision, the court identified the following violations of constitutional requirements concerning the Foundation Board:

- Government influence: The federal government currently appoints more members (9 out of 35) than the Audience Council (6) without being required to take recommendations into account (section 20 (1) ORF Act); this violates the principle of pluralism and independence. Constitutionally unobjectionable, however, are the appointments by the federal states (9), those proposed by parties represented in the parliament (6), and appointments by the ORF employee council (5). However, in practice, these provisions enable the government to

appoint a simple majority of the 35 members of the Foundation Board, which is sufficient for most decisions, including the appointment of the director general and the directors.

- Early dismissal provisions: Members of the Foundation Board are appointed for a four-year term. However, pursuant to section 20 (4) of the ORF Act, the members appointed by the federal government and the Audience Council can be dismissed before the end of their term if a new government is formed or the Audience Council is reconstituted, which contradicts the principle of independence. There are no constitutional concerns regarding the early removal of the six party representatives and the five employee representatives on the Foundation Board.

- Insufficient pluralism: Members of the Foundation Board are required to meet high personal and professional standards. However, the ORF Act lacks provisions to ensure diversity in appointments. This broad discretion risks disregarding the constitutionally mandated pluralism, thereby violating Article I (1) (Broadcasting Constitutional Act).

Regarding the Audience Council, the primary concern is the influence of the chancellor (section 28 (3) ORF Act):

- The Audience Council includes members appointed by representative institutions (13 out of 30) and others appointed by the federal chancellor from nominees (17). Those appointed by the chancellor hold a disproportionate advantage, which violates the independence requirement.

- The federal chancellor appoints the members of the Audience Council based on proposals from organisations representing various societal groups. However, there are no specific guidelines on how organisations are selected or how members are distributed across the groups. This broad discretion allows undue influence by the chancellor. The constitutional provisions mandate that the legislature ensure equitable representation of members.

In summary, the court ruled that the current structure of the ORF’s governing bodies allows for overreaching government influence, violating the constitutional requirements of independence and pluralism. The legislature is now tasked with enacting reforms that address these issues. The possible courses of action are currently the subject of intense debate in the ongoing election campaign and range from minor adjustments to a genuine reform.

The Media Pluralism Monitor also identifies a significant risk to the ORF’s independence, with the appointment procedures, referenced by the Constitutional Court, playing a substantial role in this assessment. However, the risk pertains not only to the governing bodies discussed above, but also to the appointment of the director general and other management positions within the ORF. While the law (section 20 (3) 5 ORF Act) aims to provide objective and transparent appointment procedures for the management and board functions in the PSM, for example, by prescribing a variety of qualifications and incompatibility rules, or by requiring a two-thirds majority for the dismissal of the director general, the incompatibility of

numerous political functions applies only to the four years prior to the appointment.

Meanwhile, on 5 July 2024, the VfGH dismissed a complaint against the constitutionality of the ORF household levy, ruling the application inadmissible. A total of 331 individuals, the majority of whom do not own a television, had filed an individual application for judicial review. The financing of the PSM was restructured in 2023 through the introduction of a household levy to replace the traditional fees. Nonetheless, the matter of the ORF's future financing remains a subject of considerable controversy, primarily driven by the Freedom Party of Austria, and is contingent upon the outcome of the election scheduled for 29 September. The possibility of state budget financing is being evaluated as a potential alternative.

The ORF is the only public service provider in Austria. It offers two full programmes and two special interest channels, twelve radio programmes, a news site, a video-on-demand service and an online platform for all radio offerings with high ratings in news usage, reach, market share, and still relatively strong trust levels (59.6%). Although trust in ORF news has been steadily declining – this is occurring at a significantly lower level than with other information providers in the country: according to the Reuters Digital News Report 2024, trust in news in Austria stands at 34.9%, which falls below the global average.

Decision G 215/2022: Provisions of the ORF Act (ORF-Gesetz) regarding the Foundation Council and the Audience Council are in part unconstitutional.

https://www.vfgh.gv.at/downloads/VfGH-Erkenntnis_G_215_2022_vom_5._Oktober_2023_EN.pdf

Bundesgesetz über den Österreichischen Rundfunk (ORF-Gesetz, ORF-G)

https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1984_379/ERV_1984_379.html

Federal Act on the Austrian Broadcasting Corporation (ORF Act)

https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1984_379/ERV_1984_379.html

Federal Constitutional Act of 10 July 1974 on Guaranteeing the Independence of Broadcasting

https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1974_396/ERV_1974_396.html

Federal Constitutional Law

https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.html

Seethaler J. and Beaufort M. (2024), Monitoring media pluralism in the digital era: Application of the Media Pluralism Monitor in European member states and candidate countries in 2023. Country report: Austria,

Florence: European University Institute – Centre for Media Pluralism and Media Freedom (CMPF). DOI: 10.2870/98299

https://cadmus.eui.eu/bitstream/handle/1814/76993/Austria_EN_mpm_2024_cmpf.pdf?sequence=1&isAllowed=y

Gadringer, S., Sparviero, S., Trappel, J., & Colaceci, A. (2024). Digital News Report Austria 2024. Detailergebnisse für Österreich. DOI: 10.5281/zenodo.11546856

https://digitalnewsreport.at/wp-content/uploads/2024/06/DNR_2024-AT.pdf

S. Gadringer, S. Sparviero, S. Trappel, J. and A. Colaceci (2024). Digital News Report Austria 2024. Detailergebnisse für Österreich. DOI : 10.5281/zenodo.11546856

GERMANY

[DE] Berlin Administrative Court rules on regional advertising ban

Christina Etteldorf
Institute of European Media Law

In a recently published decision of 22 April 2024 (Case No. 32 K 1/23), the *Verwaltungsgericht Berlin* (Berlin Administrative Court – VG Berlin) upheld a complaint concerning a breach of the ban on regional advertising lodged by a *Landesmedienanstalt* (state media authority) against a national television broadcaster. It held that the advertising ban, enshrined in the German *Medienstaatsvertrag* (state media treaty – MStV), was not unconstitutional. However, a different court had previously found that the ban, which was also the subject of a 2021 European Court of Justice ruling in the *Fussl Modestraße Mayr* case (C-555/19, ECLI:EU:C:2021:89), contravened EU law.

Article 8(11) MStV states that the transmission of non-national (e.g. regional) advertising in a national broadcasting service is, in principle, prohibited. Exceptions only apply if the *Länder* permit it in their broadcasting laws in general or on a case-by-case basis, which has happened only occasionally. In May 2016, in spite of the ban, which applied in Berlin and was defined using identical wording in Article 7(11) of the *Rundfunkstaatsvertrag* (state broadcasting treaty – RStV) at the time, a national television broadcaster licensed in Berlin had broadcast separate regional advertising during several programmes in Baden-Württemberg, Hessen and North Rhine-Westphalia. The broadcaster had informed the relevant state media authority, *Medienanstalt Berlin-Brandenburg* (mabb), and asked for a test case to be brought because it considered the ban on regional advertising unconstitutional. Following proceedings involving the *Kommission für Zulassung und Aufsicht* (Commission on Licensing and Supervision – ZAK), the mabb decided that the broadcaster had infringed Article 7(11) RStV and had therefore breached the conditions of its broadcasting licence (Article 20(1) RStV, now Article 52(1) MStV). Its licence only covered nationwide broadcasting and, since advertising was part of its programming, the transmission of regional advertising was excluded.

Meanwhile, the lawfulness of the regional advertising ban was also scrutinised by the *Landgericht Stuttgart* (Stuttgart Regional Court – LG Stuttgart) in a civil law dispute between an Austrian advertiser and a broadcaster. As part of these proceedings, the European Court of Justice issued a ruling on 3 February 2021, stating that it was true that neither Article 4(1) of the Audiovisual Media Services Directive nor fundamental rights and freedoms, including the principle of equal treatment, precluded national legislation prohibiting regional advertising per se. However, such legislation needed to comply with the proportionality principle and the ECJ expressed particular doubt as to whether the ban was an appropriate means of protecting media diversity, especially since no such ban applied to

online service providers, for example. In the end, however, it was the national courts' responsibility to judge whether the proportionality principle had been breached. The LG Stuttgart therefore ruled that the ban was incompatible with EU law and therefore inapplicable (IRIS 2022-2:1/18). However, this does not mean that it was abolished at the national level, since only the *Bundesverfassungsgericht* (Federal Constitutional Court) can take such a decision. The *Länder*, which are responsible for the relevant legislation, are still currently considering the consequences of the ruling.

The VG Berlin, however, reached a different conclusion to the LG Stuttgart and did not consider the ban on regional advertising to be unconstitutional. Rather than infringing broadcasting freedom, it thought it was an acceptable means of protecting such freedom. When regulating broadcasting, the legislator had a broad scope of discretion. Judicial control was limited to determining whether an appropriate allocation of the constitutional positions concerned had been carried out. In this case, the legislator had met this requirement. The VG Berlin did not think the assessment of whether the ban was a suitable means of protecting diversity had been "obviously incorrect". In particular, the assumption that the emergence of competitors with a wide reach on the regional advertising market would cause many regional media advertising customers to migrate to nationwide broadcasters, which could damage the refinancing and journalistic quality of regional publishers and broadcasters and thereby harm diversity, was not open to challenge. The fact that no similar ban applied to online media was irrelevant and did not mean that broadcasters were unfairly disadvantaged. Despite increasing media convergence, broadcasting and online services were different types of media. They could therefore be regulated differently on cultural grounds, since it would be wrong to only take economic factors into consideration. The court's reasoning therefore reflects the situation at the EU level, where broadcasting and online services are (or can be) governed by different regulations.

VG Berlin 32. Kammer, ECLI:DE:VGBE:2024:0422.32K1.23.00

https://gesetze.berlin.de/bsbe/document/NJRE001576665

Berlin Administrative Court, 32nd chamber, ECLI:DE:VGBE:2024:0422.32K1.23.00

[DE] European Commission criticises planned reform of youth media protection law in Germany

Christina Etteldorf
Institute of European Media Law

In April 2024, on the basis of the notification obligations provided for in Directive (EU) 2015/1535, the German *Länder*, as the competent legislative body, notified the European Commission of a draft amendment to the *Jugendmedienschutz-Staatsvertrag* (State Treaty on the Protection of Minors in the Media – JMStV). However, in its opinion of 1 July 2024, the European Commission was critical of the draft. Although it shared the objective of providing children and young people with safe access to online content and protecting them from harmful content, the Commission considered that, as far as online platforms were concerned, this was already achieved by the new provisions of Regulation (EU) 2022/2065 (Digital Services Act – DSA), which did not need to be transposed into national law.

The proposed reform of the JMStV at *Bundesland* level is designed to provide children and young people with maximum access to online content, while at the same time protecting them from harmful content. As well as amending provisions applicable to all telemedia (a concept that essentially includes all online media apart from broadcasting and telecommunications), it places certain obligations on providers of operating systems commonly used by children and young people. They are required to introduce child protection systems, including age verification systems that can be used to limit access to apps and search engines. App stores will also need to be included in the age classification system provided for under German law.

In its opinion, the European Commission criticised not only the planned amendments, but the JMStV as a whole, which is currently applicable law in Germany (the state legislators had included the whole of the JMStV in its notification rather than just the proposed amendments). It referred in particular to the country-of-origin principle established in the e-Commerce Directive and the Audiovisual Media Services Directive. For example, the German provisions required telemedia (which included information society services such as video-sharing platforms) to introduce safety measures (e.g. age verification mechanisms) to protect children and young people from content that could harm their development. The Commission considered this a general, abstract obligation that applied to all providers, wherever they were established. However, this did not fall under any of the derogations listed in Article 3(4) of the e-Commerce Directive, as had been clarified in recent ECJ case law. The German authorities' suggestion in the notification procedure that these measures were designed to promote linguistic and cultural diversity, i.e. falling within the scope of Article 1(6) of the e-Commerce Directive, was also criticised by the Commission: even if such an objective were inherent in the regulations, the country-of-origin principle would still apply because Article 1(6) of the e-Commerce Directive only served to underline the importance of this objective.

The European Commission also referred to the DSA's full harmonisation effect on the regulation of online intermediary services. Provisions such as Articles 28 and 35(i) DSA were particularly designed to protect minors and would override national regulations regarding technical protection mechanisms, for example, but not provisions determining what type of content was illegal. The JMStV was also criticised in relation to the ban on general monitoring obligations contained in Article 8 DSA, since it would mean, for example, that intermediary services would need to monitor content on their platforms as a result of their age categorisation obligations. Finally, as regards the proposed rules for operating systems, the European Commission referred to their impact on fundamental freedoms and the need for proportionate regulation.

Notification 2024/188/DE

https://technical-regulation-information-system.ec.europa.eu/en/notification/25746

[DE] First national dispute settlement body for online platforms established

Christina Etteldorf
Institute of European Media Law

The *Digitale-Dienste-Gesetz* (Digital Services Law – DDG), which entered into force in May 2024, transposed certain provisions of Regulation (EU) 2022/2065 (Digital Services Act – DSA) into German law. On 12 August 2024, the *Bundesnetzagentur* (Federal Network Agency – BNetzA), appointed as Germany's Digital Services Coordinator under the DDG, certified the first national dispute settlement body for online platforms. The Berlin-based User Rights GmbH was the first organisation to submit an application to the BNetzA and will now assume its responsibilities in accordance with Article 21 DSA.

Under Article 21(1) DSA, service recipients who are affected by decisions taken as part of online platforms' internal complaint-handling systems are entitled to refer those decisions to an out-of-court dispute settlement body. Article 21(3) DSA requires these bodies to meet certain criteria (e.g. impartiality, expertise, etc.) and entitles the Digital Services Coordinator to certify them for a maximum period of five years. Dispute settlement bodies should seek an amicable solution to disputes between users and online platforms, and report to the Digital Services Coordinator. Having reviewed the documents submitted by User Rights GmbH so as to ensure fulfilment of the legal requirements for certification, the BNetzA concluded that the applicant had demonstrated the necessary independence and impartiality, professional knowledge of the applicable legal norms and of the online platforms' terms and conditions, and a quick and efficient approach to the dispute resolution procedure. User Rights GmbH was expressly created to assume tasks under Article 21 DSA and therefore has no other responsibilities. It is financed through fees that can be charged to participating online platforms when it reviews cases. These fees, which must be reasonable, are capped and subject to review by the relevant authorities. The dispute settlement process is free for users. The company's website, which is already operational, contains rules of procedure that govern dispute settlement proceedings and procedural principles, as well as a schedule of costs.

Pressemitteilung der BNetzA

https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2024/20240812_DSC_Zertifizierung.html?nn=660040

BNetzA press release

User Rights GmbH Plattform

https://user-rights.org/de

User Rights GmbH platform

FRANCE

[FR] ARCOM clarifies monitoring of TV and radio channels' respect for pluralism

Amélie Blocman
Légipresse

The *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM) published a decision dated 17 July 2024, in which it issued new rules on the monitoring of private and public broadcasters' compliance with their obligations regarding pluralism of opinion. In its decision, the regulator explained the conditions for the implementation of the *Conseil d'Etat* (Council of State) decision of 13 February 2024 (see IRIS 2024-3:1/12), in which ARCOM was given six months to review the compliance of TV channel CNews at the request of Reporters Without Borders (see IRIS 2024-8). The *Conseil d'Etat* had ruled that, when carrying out this task, the regulator should take into account the diversity of opinions expressed by all participants in the programmes broadcast.

ARCOM reaffirmed the primacy of freedom of communication, which meant that broadcasters had sole responsibility for choosing the topics to be covered on their channels and the people who should speak about them. It had to ensure that "the expression of views and opinion does not, with regard to the need for diversity, show a clear and lasting imbalance, in particular in news bulletins and news-based programmes. In its assessment, it will take into account the comments of all participants in the programmes broadcast".

In order to assess a channel's overall respect for pluralism, ARCOM explained that it would examine a range of evidence based on the variety of topics discussed in its programmes, the diversity of speakers and the plurality of points of view expressed. Broadcasters will not be required to set up a reporting system, nor to classify or categorise everyone who speaks on air with regard to their viewpoints or political leanings (subject to the application of the provisions of the decision of 22 November 2017 on the principle of political pluralism).

ARCOM will also take into account broadcasters' compliance with their obligation to ensure the expression of different points of view in their coverage of controversial issues in accordance with the decision of 18 April 2018, as well as their compliance with the decision of 22 November 2017 on the principle of political pluralism in radio and television services and, during election periods, with the decision of 4 January 2011 on the principle of political pluralism in radio and television services during election periods.

ARCOM's assessment will be carried out over a period of at least one month for 24-hour news channels and three months for all other channels. At ARCOM's request, broadcasters will need to provide the evidence it requires to monitor

their compliance with this obligation during the period indicated. At the end of this assessment, any “clear and lasting imbalance” in the expression of opinions may be punished.

On the basis of these clarified evaluation criteria, ARCOM reviewed the request of Reporters Without Borders that it should issue a formal notice to CNews, requiring it to comply with its obligations in this area. It issued its decision on 29 July (see IRIS 2024-8).

Délibération n° 2024-15 du 17 juillet 2024 relative au respect du principe de pluralisme des courants de pensée et d'opinion par les éditeurs de services, JO du 19 juillet 2024

https://www.legifrance.gouv.fr/download/file/Jq9Wy7eevAOYPsFSdT4hSEd9U0FCEBUDGln4NG1t4R8=/JOE_TEXTE

Decision no. 2024-15 of 17 July 2024 on broadcasters' respect for the principle of pluralism of opinion, OJ of 19 July 2024

[FR] Meta breached contract by closing Facebook account of historian who denounced Daesh abuses

Amélie Blocman
Légipresse

In a ruling of 5 June 2024, the *Tribunal Judiciaire de Paris* (Paris Judicial Court) passed judgment in a case between a historian and the company Meta Platforms Ireland Limited, which had closed her Facebook account after she published an article denouncing the abuses committed by the Daesh movement in Africa. The historian had, in particular, complained of a breach of contract and the unfairness of the termination clause contained in the social network's terms of service.

The court ruled firstly on Meta's fulfilment of its contractual obligations. It analysed the content of Facebook's terms of service in force at the time of the publication, in particular Article 4.2, which stated that the platform would only disable an account if its owner had clearly, seriously or repeatedly breached its terms or policies, in particular the Community Standards. The company had not told the plaintiff on what grounds it had disabled her account (thereby terminating the contract between the parties), but sent her a generic email listing various prohibited types of publication, including "support for a violent and/or criminal organisation or group" and "hate speech". In the case at hand, the court ruled that the plaintiff had clearly denounced the terrorist group, whose actions she opposed, by writing that: "Daesh lies like no other", "Its goal is to cross the Mediterranean to Italy, and from there to the rest of Europe", "Daesh calls the soldiers of the Syrian army. If there were eight dead, it is probably because it won the battle and killed them as prisoners". It also considered that, in view of the contextualisation within the publication, the simple reproduction of a Daesh press release could not be considered as an endorsement of its actions. The content of this publication did not fall within the list of prohibited actions contained in the generic email and could not therefore be considered as a suitable reason to suspend or terminate an account. Meta had therefore breached the contract.

The court also ruled that Article 4.2 of the network's terms of service should be considered unfair insofar as it stated that users would be notified by message of the suspension or deactivation of their account without notice. This clause thus created, for the benefit of the professional and to the detriment of the consumer, a significant imbalance within the meaning of Article L. 212-1 of the Consumer Code. It was therefore deemed null and void.

Meta was ordered to pay the plaintiff EUR 4 000 in compensation for the damage related to the advertising expenses she incurred (in order to allow wide distribution of her publications on Facebook and thus increase her community); EUR 1 000 in compensation for the damage related to the loss of her intellectual works; and EUR 2 000 in compensation for the damage caused by being deprived of a means of communication. On the other hand, the court held that the plaintiff's freedom of expression had not been infringed since she was able to express her views on other media and by means other than using her Facebook

account.

Tribunal judiciaire de Paris, 5 juin 2024.

https://www.dalloz.fr/documentation/Document?id=TJ_PARIS_2024-06-05_2100726

Paris Judicial Court, 5 June 2024

[FR] RSF case review: ARCOM urges CNews to meet pluralism obligations

Amélie Blocman
Légipresse

In its decision of 13 February 2024 concerning Reporters Without Borders (RSF), the *Conseil d'Etat* (Council of State) asked the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM) to review RSF's request that it serve a formal notice to CNews, requiring it to meet its obligations with regard to pluralism and independence of information. The regulator issued its decision on 29 July.

In order to assess the channel's overall respect for pluralism, ARCOM explained, in line with the *Conseil d'Etat's* ruling and its own decision of 17 July, that it would be examining a body of evidence based on the variety of topics discussed in its programmes, the diversity of speakers and the plurality of points of view expressed. It would also monitor the channel's compliance with its obligation to ensure that different viewpoints were expressed in its coverage of controversial issues.

In May 2021 and again when it had concluded its analysis, ARCOM decided that, despite the variety of topics discussed and the diversity of speakers, the broadcaster's coverage of numerous issues, such as violence against the police, the functioning of the judicial system and the effects of immigration on society, appeared one-sided, with opposing points of view very rarely broadcast.

It therefore issued a formal notice to CNews and urged it to be more careful to meet the pluralism requirement, which would be assessed in the light of the decision of 17 July 2024 (see IRIS 2024-8).

As regards independence of information, ARCOM rejected RSF's request that CNews be formally warned to meet its obligations in this area.

A few days earlier, on 24 July, with the licences of 15 national DTT broadcasters set to expire in 2025, ARCOM had announced a shortlist of channels that had applied for national terrestrial broadcasting licences. It had focused on the criteria listed in Articles 29, 30 and 30-1 of the Law of 30 September 1986, closely scrutinising each channel's contribution to the expression of diverse points of view.

Although the 15 shortlisted channels included CNews, the regulator did not select the applications of C8 and NRJ12, which had both sought to retain their DTT broadcasting rights. C8 has received numerous warnings and sanctions in recent years, resulting in fines totalling EUR 7.6 million.

ARCOM announced that it would draw up licence agreements with each selected channel, which would be valid for up to ten years. These agreements will be

established on the basis of the requirements enshrined in the Law of 30 September 1986 as interpreted under the case law of the *Conseil d'Etat*, especially with regard to pluralism (RSF decision and its consequences, ARCOM decision of 17 July), and in view of the commitments made by each applicant both in its written application and during its public hearing before the regulator.

Réexamen de la saisine de l'Association Reporters sans frontières, Communiqué de l'Arcom, 31 juillet 2024

https://www.arcom.fr/nos-ressources/espace-juridique/decisions/reexamen-de-la-saisine-de-lassociation-reporters-sans-frontieres-rsf

Review of the request of Reporters Without Borders, ARCOM press release, 31 July 2024

ITALY

[IT] AGCOM defines icon to access digital terrestrial television channels

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

The Italian Communications Authority (AGCOM), by means of Resolution No. 259/24/CONS of 10 July 2024, published on 24 July, approved a regulation aimed at ensuring the immediate, easy, and clear accessibility of digital terrestrial television content, as provided by the Consolidated Law on Audiovisual Media Services (TUSMA) and its Resolution No. 294/23/CONS.

This regulation was adopted following a specially established technical committee, in which associations of broadcasters and equipment manufacturers participated. These stakeholders progressively aligned their respective positions, allowing AGCOM to arrive at widely accepted solutions.

The regulation defines the icon that serves as an immediate access point to digital terrestrial channels and establishes its specifications. Specifically, this access point is required to be: 1) available to users on the home pages of all devices capable of receiving the transmitted content; 2) of a size no smaller than that of other icons or boxes present in the section of the screen where it is positioned; and 3) identical on all devices and user interfaces to ensure clear and immediate visibility.

The icon itself, which was also presented, features a lightly shaded blue background, a stylised television screen in the centre, and the white text "TV Channels". The design of the new symbol is decidedly minimalist and it will appear on all devices compatible with content reception technology.

Therefore, the icon will appear within the proprietary interface of various devices that can display digital terrestrial programming, including stand-alone decoders or systems integrated within TVs.

The regulation also allows users to customise the interface configurations in accordance with current legislation and the provisions of the European Media Freedom Act (EMFA).

In a scenario where the presentation methods of content on user interfaces can influence or even direct users' choices by emphasising certain content or limiting customisation options, the adoption of this measure represents a significant step for the Authority.

It aims to ensure, while respecting users' freedom of choice, adequate prominence for informative, political, educational, scientific, and entertainment content, which is essential for building a collective conscience and shaping public opinion.

Delibera 259/24/CONS "Definizione dell'icona per accedere ai canali della televisione digitale terresTRE"

https://www.agcom.it/provvedimenti/delibera-259-24-cons

Resolution 259/24/CONS "Definition of the icon to access digital terrestrial television channels"

[IT] AGCOM adopts regulations on out-of-court dispute resolution bodies and trusted flaggers under Articles 21 and 22 DSA

Ernesto Apa & Eugenio Foco
Portolano Cavallo

In the Board meeting of 24 July 2024, the Italian Communication Authority (*Autorità per le Garanzie nelle Comunicazioni* – "AGCOM") approved the Regulations laying down the procedural rules for the certification of out-of-court dispute resolution bodies between online platform providers and service recipients (Resolution No. 282/24/CONS) and for the issuance of the qualification as trusted flaggers (Resolution No. 283/24/CONS) under, respectively, Articles 21 and 22 of Regulation (EU) 2022/2065 ("DSA").

The Regulations, which will enter into force on 15 September 2024, represent the first regulatory acts adopted by AGCOM in its role as Digital Services Coordinator for Italy.

Starting from 15 September 2024, out-of-court dispute resolution bodies established in Italy will be able to apply before AGCOM to obtain the certification necessary to handle disputes concerning decisions adopted by online platform providers regarding content published by users deemed contrary to national and/or European Union law. To obtain the certification, such bodies must meet the requirements set forth under Article 21 DSA.

Therefore, users who report the publication of inappropriate/unlawful content, and those who experience restrictions on the use of their accounts on online platforms (including social networks), will be afforded access to expedited and cost-effective forms of alternative dispute resolution. However, it should still be noted that the decisions adopted by such bodies will not be binding for the parties involved, as expressly provided under Article 21, paragraph (2) of the DSA. Furthermore, to ensure a uniform application of Article 21 DSA, AGCOM is also afforded the power to promote roundtables and the adoption of guidelines and codes of conduct.

In addition, AGCOM has set forth the procedural rules to obtain the qualification as a trusted flagger under Article 22 DSA. The qualification as trusted flaggers will be recognised by any entity established in Italy that meets the requirements provided under Article 22 DSA, among which, *inter alia*, expertise, competence and independence. Online platform providers must take all the necessary technical and organisational measures to ensure that notices submitted by trusted flaggers are given priority and are processed and decided upon without undue delay.

AGCOM Delibera n. 282/24/CONS recante "“Regolamento di procedura per la certificazione degli organismi di risoluzione extragiudiziale delle controversie tra destinatari del servizio e i fornitori di piattaforme online ai sensi dell’art. 21 del Regolamento sui servizi digitali”

https://www.agcom.it/sites/default/files/media/allegato/2024/Allegato%20A%20alla%20delibera%20n.%20282-24-CONS.pdf

AGCOM Resolution No. 282/24/CONS laying down the "“Rules of procedure for the certification of out-of-court dispute resolution bodies between service recipients and providers of online platforms pursuant to Article 21 of the Digital Services Regulation”

AGCOM Delibera n. 283/24/CONS recante “Regolamento di procedura per il riconoscimento della qualifica di segnalatore attendibile ai sensi dell’art. 22 del Regolamento sui servizi digitali”

https://www.agcom.it/sites/default/files/media/allegato/2024/Allegato%20A%20Regolamento%20di%20procedura.pdf

AGCOM Resolution No. 283/24/CONS “Rules of procedure for the recognition of the qualification as trusted flagger under Article 22 of the Digital Services Regulation”

[IT] AGCOM sanctions RAI for hidden advertising during the Sanremo Festival

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

The Italian Communications Authority (AGCOM), by means of Resolution No. 94/24/CSP dated 24 July 2024, published on 5 August 2024, fined the Italian broadcasting company RAI EUR 206 580.00, equivalent to twenty times the minimum fine, for an incident involving the shoes worn by John Travolta during the 74th edition of the Sanremo 2024 Italian Song Festival. The Authority deemed it a case of covert advertising, concluding that the current regulations on the proper disclosure of advertising messages had not been adhered to.

RAI argued that it had a specific contract with the renowned actor prohibiting the introduction of "elements with direct and/or indirect advertising and/or promotional value (including clothing and/or accessories used)" during his participation in the Sanremo Festival.

However, AGCOM examined whether covert audiovisual commercial communication occurs in two distinct phases. In the first phase, which involves determining the commercial nature of the communication, particularly product placement, the presence of promotional intent is verified through historical evidence of a client relationship between the audiovisual media service provider and the company producing the goods or providing the service. If such a relationship is not found or is denied, indirect evidence based on serious, precise, and consistent presumptions that indicate the promotional nature of the audiovisual communication is considered. In the second phase, which involves establishing the recognisability of the audiovisual commercial communication, it must be determined whether the audiovisual media service provider has taken all necessary measures to allow viewers to easily distinguish such commercial communication from editorial content.

In light of these considerations, AGCOM decided to sanction RAI due to the specific manner in which the product was depicted in the television footage. This footage included repeated, close-up shots of the product, making the relevant trademark clearly recognisable to viewers, particularly due to its distinctive colour.

Essentially, the covert audiovisual commercial communication was achieved through the surreptitious placement of the product during the television programme, with specific, persistent, and contextually irrelevant shots of the footwear aimed solely at advertising it.

AGCOM, in a specific press release, deemed the episode extremely serious, stating that

The product was displayed during RAI's most-watched television programme and during the performance of a guest of clear international fame, resulting in significant prejudicial effects to the detriment of viewers. In determining the sanction, AGCOM considered the repeated nature of RAI's conduct, noting that it had already been sanctioned for instances of covert advertising during the previous edition of the Sanremo Festival.

Delibera 94/24/CSP, Ordinanza ingiunzione nei confronti di Rai radiotelevisione italiana s.p.a. per la violazione della disposizione normativa contenuta nell'art. 43, comma 1, lett. a) del decreto legislativo 8 novembre 2021 n. 208 e nell'art. 48, comma 3, lett. d) del decreto legislativo 8 novembre 2021 n. 208 in combinato disposto con l'art. 6.2. del codice di autoregolamentazione di rai radiotelevisione italiana S.p.A. recante "Inserimento di prodotti nelle trasmissioni radiotelevisive" (Cont. 4/24/DSM n°proc. 2853/ZD)

https://www.agcom.it/provvedimenti/delibera-94-24-csp

Resolution 94/24/CSP, Injunction order against RAI Radiotelevisione Italiana S.p.A. for breach of the regulatory provision contained in Article 43, paragraph 1, letter a) of Legislative Decree No. 208 of 8 November 2021 and in Article 48, paragraph 3, letter d) of Legislative Decree No. 208 of 8 November 2021 in conjunction with Article 6.2 of the self-regulation code of RAI Radiotelevisione Italiana S.p.A. concerning "product placement in radio and television broadcasts" (Cont. 4/24/DSM No. proc. 2853/ZD)

MOLDOVA

[MD] Media subsidy fund

Andrei Richter
Comenius University (Bratislava)

On 2 August 2024, the Law on the Media Subsidy Fund entered into force in Moldova, adding to the framework for the promotion of media pluralism in the country.

The budget for the fund is drawn from the annual national budget; from donations, sponsorship and grants from legal entities and individuals in Moldova and abroad; and from other financial sources not prohibited by law (Article 10).

The “priority areas” for the subsidisation of media institutions are established on an annual basis by the Ministry of Culture, based on public discussions (Article 12) and in line with the aims of the law such as strengthening media literacy, investigative journalism and editorial independence; and covering issues related to education, culture and matters of general public interest (Article 2).

The eligibility criteria for the applicants include compliance with the Moldovan Journalists' Code of Ethics; the absence of previous (within the last 12 months) sanctions by the national media regulator, the Audiovisual Council, for serious violations of the Audiovisual Media Services Code; the annual publication of an activity report on its website; and formal registration as a legal entity (Article 12).

According to the law, a new body, the Expert Council, is to become responsible for governing the fund, by developing criteria and conditions for participation in the competition for the allocation of grants, reviewing applications, awarding subsidies, and monitoring the use of funds by the winning media entities (Article 18). The Expert Council consists of seven members. Four of them are to be selected in a competitive procedure by the Press Council of Moldova (recognised by the law as “the national journalistic self-regulatory structure”) or by media civil society organisations. Three others are to be appointed by the Ministry of Culture, the Ministry of Education and Research, and the Ministry of Finance. The law provides for a number of safeguards to avoid conflicts of interest in the selection of members and the functioning of the Expert Council (Article 17).

On 1 August 2024, a meeting of the Press Council of Moldova put forward its candidates for the Expert Council. The Ministry of Culture is still in the process of forming its new Media Policy Directorate that will deal with “ensuring the implementation of the mission of the Ministry of Culture in the media policy fields and media subsidies”. It had to approve the delegates from the Press Council by 2 August 2024 and must provide the necessary by-laws for the Expert Council by 2 November 2024. The Fund is not likely to start its activity before 2025.

Statute on the Media Subsidy Fund (cu privire la Fondul pentru subvenționarea mass-mediei) No. 50, 12 April 2024, officially published on 2 May 2024 in Monitorul Oficial No. 192-194 Article246

Moldovan Journalists' Code of Ethics, 2019

https://consiliuldepresa.md/en/page/moldovan-journalist-code-of-ethics

Announcement on the meeting of the Council of Experts of the Press Council of Moldova to delegate members to the Expert Council, 31 July 2024

NETHERLANDS

[NL] District Court of Amsterdam rules that X has violated the DSA and the GDPR by “shadowbanning” its user

Valentina Golunova
Maastricht University

On 5 July 2024, the District Court of Amsterdam (*Rechtbank Amsterdam*) declared that Twitter International Unlimited Company – the Irish subsidiary of X – violated Articles 12 and 17 of the Digital Services Act (DSA) by failing to designate a single point of contact for recipients of its services and silently hiding its user’s account from search suggestions (the practice also known as ‘shadowbanning’).

The proceedings were initiated by the Dutch entrepreneur and PhD student Danny Mekić, who has a paid X Premium subscription. In October 2023, he made a post criticising the European Commission for spreading misleading information concerning its proposal for a regulation laying down rules to prevent and combat child sexual abuse.

Shortly after that, he was informed by other X users that his account was no longer searchable. The applicant contacted X to demand an explanation for the exclusion of his account from ‘autocomplete’ search suggestions.

At first, he received merely a general response indicating that his request was being reviewed and that temporary account-level restrictions may have been triggered by X’s automated systems. In January 2024, the applicant was finally informed that his account had been subject to a restriction as his post had been wrongfully associated with child sexual exploitation.

The restriction was lifted as the post in question was ultimately found not to violate X’s User Agreement. Before the District Court of Amsterdam, the applicant sought a declaratory judgment that X had acted in violation of Articles 12 and 17 DSA, obliging providers of intermediary services to designate a single point of contact enabling direct and rapid communication and to provide a clear and specific statement of reasons to any affected user for any restriction on their content or account respectively. Additionally, he sought an order to terminate both violations and symbolic compensation of 1.87 US dollars (USD) for the period during which the service for prioritising his account and posts under X Premium subscription was not fulfilled.

Twitter did not dispute that the applicant’s account had been temporarily restricted but appealed to its terms and conditions (‘X’s User Agreement’), which reserves its right to limit access to various aspects and functionalities of its service. It also argued that since the applicant had access to other key functionalities, Twitter’s obligations towards the user were fully met. However, the

court found that the clause enabling Twitter to suspend or terminate access to its paid service at any time without any reason was contrary to the Unfair Terms Directive. Hence, Twitter was found to be in violation of its obligations under X's User Agreement.

The court then established a breach of Article 17 DSA since its first two responses to the applicant's request for information were too vague and did not elucidate the exact reasons behind the restriction. However, the applicant's claim for an order requiring Twitter to comply with Article 17 DSA was rejected since it had already provided information on the limitation applied and no new restrictions on the applicant's account have been imposed since. Furthermore, the court found that X's Help Centre did not meet the requirements of Article 12 DSA as it does not enable effective communication between the platform and its users. It ordered it to provide an appropriate point of contact to the applicant. In light of these multiple violations, the court ordered Twitter to pay the applicant the requested compensation as well as the costs of judicial proceedings.

One day earlier, the District Court of Amsterdam also ordered Twitter to comply with Mekić's data access requests under Articles 15 and 22 of the General Data Protection Regulation (GDPR) filed following the imposition of the account restriction. In the event of non-compliance, Twitter will have to pay EUR 4 000 per day until the requested data is provided.

Both judgments represent a resounding victory for platform user rights.

Rechtbank Amsterdam, 5 July 2024, ECLI:NL:RBAMS:2024:3980

https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBAMS:2024:3980

District Court of Amsterdam, 5 July 2024, ECLI:NL:RBAMS:2024:3980

Rechtbank Amsterdam, 5 July 2024, ECLI:NL:RBAMS:2024:4019

https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBAMS:2024:4019

District Court of Amsterdam, 5 July 2024, ECLI:NL:RBAMS:2024:4019

[NL] Online news outlet's proceedings over suspension from YouTube monetisation programme

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 2 August 2024, the Amsterdam District Court (*Rechtbank Amsterdam*) delivered a significant judgment on YouTube's suspension of an online news outlet from YouTube's monetisation programme, over the channel's "misleading content", including on the climate crisis. Notably, the Court rejected the news outlet's claim that there had been a violation of its right to freedom of expression, and said YouTube had the freedom to create an "advertising-friendly environment", where certain channels are deemed "unsuitable for advertising" over misleading and harmful content.

The case involved Blckbx.tv, an independent news outlet based in the Netherlands that produces various current affairs programmes. The outlet makes its programmes available through its website and YouTube channel, with over 2,200 Blckbx videos hosted on its YouTube channel. Notably, in September 2020, Blckbx was admitted to YouTube's "Partner Program",a monetisation programme that gives channels access to monetisation features through YouTube, including revenue-sharing from ads being served on the channel. However, YouTube terminated Blckbx's participation in the programme in 2022, and refused to re-admit the outlet to the monetisation programme over "repeated violations" of YouTube's advertising-friendly guidelines. In particular, Google considered that various content on the channel was "unsuitable for advertising", such as unreliable content on vaccines and the climate crisis.

Blckbx initiated legal proceedings against Google over its suspension from YouTube's monetisation programme and sought an order from the Court for re-admission to the programme. In particular, the news outlet claimed that YouTube's refusal was a violation of the outlet's freedom of expression, as it was "unable to generate advertising revenue, which limits the financing of the production of new content" (Blckbx claimed over EUR 100 000 in lost income per year due to the suspension).

The Court first noted that Google has "broad discretion" in assessing which channels it considers suitable for realising an "advertising-friendly environment", in accordance with its own policy. The main question for the Court was whether how Google applied its policy was contrary to the "reasonableness and fairness" standards that govern the relationship between the parties. In this regard, the Court noted that Google explained it assessed the "advertising-friendliness" of Blckbx's channel using a "holistic assessment", and concluded that Blckbx's channel contains "numerous videos stating that vaccines are dangerous", that there is "no climate crisis". Crucially, the Court held that Google acted within the policy freedom to which it is entitled, and it had not been made plausible that Google has denied Blckbx's channel access to the monetisation programme in a "frivolous or arbitrary manner". Google had "sufficiently substantiated" that it

would “(too often) get into trouble with parties that purchase advertising space” from it if it were to place those advertisements on Blckbx’s channel.

The Court also considered Blckbx’s claim that there had been a violation of its right to freedom of expression, as it was “unable to generate advertising revenue, which limits the financing of the production of new content”. However, the Court rejected the claim, noting that YouTube hosted over 2 000 videos from Blckbx’ and made them available to the public. The Court ruled that only if Google's refusal to grant Blckbx’s access to the programme would have the effect of “preventing any effective exercise” of Blckbx’s freedom of expression, or of “destroying” the essence of that right, could there be grounds for intervening in the private-law relationship between the parties. The fact that BLCKBX was able to produce more than 2 000 videos, even without participating in the monetisation programme, and to distribute them via YouTube already showed that there was “no such drastic restriction of freedom of expression”.

Rechtbank Amsterdam, ECLI:NL:RBAMS:2024:4917, 23 augustus 2024

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2024:4917

Amsterdam District Court, ECLI:NL:RBAMS:2024:4917, 23 August 2024

[NL] Public broadcaster’s interview using false pretences seriously violated journalistic standards

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 12 July 2024, the Ombudsman of the Dutch Public Broadcasting Foundation (*Stichting Nederlandse Publieke Omroep*) issued a significant decision on a recent controversial interview conducted by the public broadcaster PowNed. Notably, the Ombudsman held that the interview violated the Journalistic Code of Conduct and could be “damaging to the trust in journalism as a whole, and in public broadcasting in particular”. The case garnered considerable public debate, with the broadcaster admitting it was a “tasteless item” and was “completely disrespectful to women in general”. At the same time the Dutch Media Authority also issued a notice that the interview “did not meet the high journalistic and professional quality requirements that may be expected of a national public broadcaster”.

The case involved a reporter from PowNed, a Dutch public broadcaster, who sought to interview several young women attending a concert in Amsterdam by the well-known musician Taylor Swift. The reporter sought to see “how far Swift's fans would go for a meet-and-greet with the artist”, and interviewed a number of women by falsely promising he could arrange a meet-and-greet with Swift. The reporter asked the women “How far would you go, what is the craziest thing you would do, now on camera, to go to a meet-and-greet with Taylor?” In response, and with the reporter’s “encouragement”, one young woman kissed an unknown fan, and another woman showed her bare breasts on camera. The reporter then disclosed the promise of the meet-and-greet was a lie, with one of the women asking that the video not be published. However, PowNed published the interviews, with the women’s faces recognisable, on the broadcaster’s website and YouTube channel, under the tile “Screaming girls become sluts for Taylor Swift”.

Following the publication of the video report, a “storm of criticism” broke out in the media, and the Ombudsman received hundreds of complaints. The Ombudsman is an independent and impartial body that can examine and investigate complaints made by the public about journalistic practices and products by Dutch Public Broadcasters under the Dutch Journalistic Code of Conduct. The complaints made included that PowNed had “lied to young women to get them to film their breasts,” dismissed the women as "sluts ”, and was “sexist, derogatory and distasteful”, and intentionally harmed the women in the report.

In its decision, the Ombudsman stated that under the Journalistic Code of Conduct, broadcasters are free in what they produce, and editorial freedom gives journalists the freedom to choose what they report on and in what form. However, the Journalistic Code of Conduct is violated when the reporter “tells the

interviewees something that is not true", and under the Code, reporters must "make their identity known to potential interviewees and are clear to them about their intentions and the nature of the publication". Turning to PowNed's interview, the Ombudsman noted that it was "clearly a case of deception", and the reporter "was not honest about what he was doing", in violation of the Code. Further, the Ombudsman noted that in the case of the woman who showed her breasts, "an ethical boundary was also crossed". Not only was she "lied to", but when this became clear to her, instead of deleting the video, the video was published, and her face was not blurred or otherwise made unrecognisable; again, in violation of the Code. The Ombudsman also added that the use of the word "sluts" in the title on the broadcaster's website also shows "little respect for women in general and the women in this video in particular".

Finally, the broadcaster accepted the Ombudsman decision, and issued a statement admitting that "[m]any mistakes were made in the production chain of the video in question. This should never have happened and has nothing to do with journalism. It was not only a tasteless item, but even worse: completely disrespectful to women in general".

Ombudsman Nederlandse Publieke Omroep, PowNed, 12 juli 2024

https://omroepombudsman.nl/uitspraken-en-columns/swifties-misleid-in-respectloze-video

Dutch Public Broadcasting Foundation Ombudsman, PowNed, 12 juli 2024

POLAND

[PL] Amendments to the Polish Copyright and Related Rights Act and transposition of the DSM Directive

Michal Passon
Czyżewscy Law Firm

Due to the obligation to implement Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Official Journal of the EU L 130 of 17.05.2019, p. 92) (the DSM Directive), there has been a need to amend the Polish Copyright and Related Rights Act of 4 February 1994 (Dz.U.2022.2509 consolidated text of 6 December 2022 – the Act). The amendment to the Act, from 26 July 2024 (Journal of Laws 2024, item 1254) entered into force, with few exceptions, on 20 September 2024.

The DSM Directive introduces, *inter alia*, an obligation of transparency (Article 19). It is intended to ensure that authors and performers receive, at least once a year, relevant information from the parties on the exploitation of their works, in particular, the revenue derived therefrom. This information is intended to ensure that the remuneration received by authors and performers for any exploitation of their work is not disproportionately low compared to all revenues generated and due remuneration.

Until now, the existing Article 47 of the Act entitled an author to obtain information and to inspect relevant documentation, but only when significant for determining the amount of the remuneration. Such a situation might be encountered when, in a contract concerning the exploitation of a work, instead of agreeing on a lump sum (a one-off remuneration payment), the parties had agreed, for example, on a remuneration payment calculated as a percentage of the revenue generated from the exploitation of the work.

Article 47 [1] has been added to the Act in order to fully transpose Article 18 of the DSM Directive. It ensures that authors are provided with information and documents on the current revenue for the exploitation of the work in question and separately for each use. This applies both to contracts transferring economic copyrights and to licensing contracts. This means that this entitlement will be extended (with certain exceptions – see Article 47 [1] sections 4 and 6 of the Act) to a broader and much larger group of authors than previously and regardless of the wording of the relevant contractual provisions. This provision will also apply to performers of artistic performances under the current Article 92 of the Act.

This change will enable authors to independently verify whether or not the remuneration they receive for the exploitation of their work is disproportionately low in relation to the revenue for the exploitation of the work.

Information/documentation obtained in this way may be useful in a court case aimed at increasing the remuneration due to the author under a previously concluded agreement transferring the author's economic rights or a licence agreement according to Article 44 of the Act.

The legislator specified that this type of information/documentation should be provided, taking into account the type of activity to which it relates, at least once a year, but no more frequently than once a quarter. If this would entail disproportionately burdensome costs, there is the option of limiting the scope of the information to be provided only to the total revenue from use and the total remuneration due to the author. These solutions should be assessed favourably as they maintain a balance and compromise between the interests and protection of the author or the performer and the parties exploiting the work or artistic performance.

added by Linda Byrne on Sep 22

Ustawa o prawie autorskim i prawach pokrewnych z dnia 4 lutego 1994 r. (Dz. U.2022.2509 t.j. z dnia 6 grudnia 2022 r.)

https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19940240083

The Act on Copyright and Related Rights of 4 February 1994 (Journal of Laws 2022.2509, consolidated text of 6 December 2022)

Ustawa z dnia 26 lipca 2024 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych, ustawy o ochronie baz danych oraz ustawy o zbiorowym zarządzaniu prawami autorskimi i prawami pokrewnymi (Dz. U. 2024 poz. 1254)

https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20240001254

The Act of 26 July 2024 on amending the Act on Copyright and Related Rights, the Act on Protection of Databases and the Act on Collective Management of Copyright and Related Rights (Journal of Laws 2024, item 1254)

SLOVAKIA

[SK] The Act on the public broadcaster enters into force

Andrei Richter
Comenius University (Bratislava)

The Act on Slovak Television and Radio and on Amendments to Certain Acts was adopted by the National Council (the Parliament) on 20 June 2024 and promulgated on 1 July 2024. It effectively replaced the earlier Act on Radio and Television of Slovakia, No.532/2010. The Act changed the name of the public broadcaster: Slovak Television and Radio (*Slovenská televízia a rozhlas* – STVR) is the legal successor to Radio and Television of Slovakia (*Rozhlasu a televízie Slovenska* – RTVS) and took over all its rights and obligations on the day the Act was promulgated.

The Submission Report by the Ministry of Culture of the Slovak Republic on the draft law explained that "[t]he intention of the proposed legislation is to create a new institution that will objectively fulfil the public nature of broadcasting" as opposed to the "negative experiences" resulting from the application of Act 532/2010. It pointed out that the bill

"creates conditions for the independent development of Slovak Television and Slovak Radio, brings a higher form of flexibility and introduces new elements and a combination of public and private law into the process of electing and dismissing the director-general of the institution, into the process of creating the Board of Slovak Television and Radio and introduces a new advisory body for the board".

Indeed, the Act changes the oversight system of the broadcaster which the current government had earlier accused of being biased. Now, the board consists of nine members, four appointed by the Minister of Culture of the Slovak Republic, including one member proposed by the Minister of Finance of the Slovak Republic. These board members are appointed based on the results of a selection process. Five additional members are elected and dismissed by the National Council of the Slovak Republic by a majority of the deputies present. These members come from the list of candidates proposed by the relevant parliamentary committee on the basis of submissions by a spectrum of institutions and other legal entities. All board members should be experts in various fields relevant to the activity of the broadcaster. An individual with a second-level university education and at least five years of professional experience is considered to be an expert (section 11 of the Act). There are restrictions on the candidates in view of a possible conflict of interests (section 12).

The board appoints the director-general of Slovak Television and Radio, on the basis of a public hearing of registered candidates, by a secret ballot. In his/her

turn, the director-general appoints subordinate directors of Slovak Television and Slovak Radio (sections 18 and 19).

The Act establishes an ethics commission from among representatives of civil society and academia, as an advisory body for the board. Its role is, in particular, to provide opinions on the observance of the general principles of ethics by employees of STVR and those of its external programme collaborators, as well as to propose appropriate measures in order to ensure such observance. The by-laws of the ethics commission are approved by the board (sections 21 and 22). The previous Board of Radio and Television of Slovakia was abolished on the date of the Act's entry into force, and the then director-general of Radio and Television of Slovakia was dismissed (section 30).

The Act preserves the abolition of the licence fee, which was introduced under the previous government, in 2023. The key source of financing is the “claimable contribution” from the state budget. It is provided annually in the amount of at least 0.12% of the gross domestic product of the Slovak Republic “expressed in current prices for the calendar year two years prior to the calendar year for which the claimable contribution is provided”. It may not be lower than the contribution provided to the broadcaster the year before (section 27). The Submission Report claims that the Act introduces “a more rigorous control of the handling of allocated funds” through the experts nominated by the Ministry of Culture and the Ministry of Finance, who “will be directly involved in the decision-making and especially [in the] control processes in the new public entity.”

The Council of Europe’s Commissioner on Human Rights, Michael O’Flaherty, questioned whether the Act on Slovak Television and Radio ensures the independence of public service media from government control. Similar concerns were earlier raised by the European Broadcasting Union (EBU).

Act on Slovak Television and Radio and on Amendments to Certain Acts, No. 157/2024, 20 June 2024

Submission Report

Slovak Republic: new draft laws risk having a chilling effect on civil society and interfering with the independence of public service media, Commissioner for Human Rights Letter, 14 May 2024

https://www.coe.int/en/web/commissioner/-/slovak-republic-new-draft-laws-risk-having-a-chilling-effect-on-civil-society-and-interfering-with-independence-of-public-service-media

Slovak government proposals threaten media independence, EBU press release, 13 March 2024

https://www.ebu.ch/news/2024/03/slovak-government-proposals-threaten-media-independence

REPUBLIC OF TÜRKIYE

[TR] Türkiye blocks access to Instagram for nine consecutive days

Kaya Gönençer & Aylin Savaşlar
Bridgepeer Media Consulting

On 2 August 2024, access to the social media platform Instagram was blocked on the basis of a decision taken by the Turkish Information and Communication Technologies Authority (ICTA) that same day.

Although the ICTA did not provide a specific reason for the blocking decision, it was stated later by government officials that the decision to block the platform was taken on the grounds that the social media platform did not abide by Turkish laws, in particular those regarding "catalogue crimes" and, furthermore, that it did not comply with the values and sensitivities of Turkish society. Pursuant to Article 8, paragraph 1 of the Turkish Internet Law, "catalogue crimes" include, *inter alia*, incitement to suicide, the sexual abuse of children, facilitating the use of drugs or stimulants, supplying substances which endanger health, obscenity, prostitution, providing a venue and opportunity for gambling, crimes specified in Law No. 5816 concerning crimes against Atatürk, and illegal betting offences.

Among the reasons often cited by the Turkish media for blocking access to the platform are claims that in the aftermath of the assassination in Iran of Ismail Haniyeh, political bureau chief of the Palestinian militant group Hamas, Instagram applied censorship by blocking posts related to Haniyeh. Following these developments, Fahrettin Altun, the President of Türkiye's Communications Directorate, also made statements criticising Instagram.

As a result, Instagram, one of the most widely used social media platforms in Türkiye with an estimated user base of approximately 58 million, ranking fifth in the world after India, the United States, Brazil and Indonesia, suddenly became inaccessible nationwide for nine consecutive days.

According to an official statement by Abdulkadir Uraloğlu, Türkiye's Minister for Transport and Infrastructure, on 10 August 2024, on his social media account on X (formerly Twitter), the ban was subsequently lifted since Instagram's parent company, Meta Platforms Inc. (Meta), had cooperated and agreed to comply with Turkish laws. In particular, according to Mr Uraloğlu's statement, Meta promised the removal of content and posts that fall under the category of "catalogue crimes" if they carry elements of certain crimes or "terrorism propaganda", and also – with regard to Instagram's internal policy on content moderation – "to protect the rights and accounts of Turkish users", "not closing accounts without prior warning" and "reactivating accounts that were closed by Instagram without warning". As a result, in the event of violations of the law, a quick and effective

intervention would be in place. Neither Instagram nor its parent company Meta gave any statement or explanation regarding the matter.

The ban prompted protests from individual users and small e-commerce businesses conducting their commercial activities, both groups claiming the negative social and economic impact that resulted from the ban. According to Emre Emekçi, Vice Chair of the Turkish Board of the Electronic Commerce Operators Association (ETİD),10% of total e-commerce in Türkiye is conducted on social media corresponding to a value of TRY 930 million (EUR 24 million) per day. Together with influencers who generate traffic to the platforms, a volume of TRY 1.9 billion (EUR 50 million) per day could be affected. The ban of Instagram for nine days could have affected an estimated 500 000 small businesses suffering losses in excess of EUR 400 million.

İnternet ortamında yapılan yayınların düzenlenmesi ve bu yayınlar yoluyla işlenen suçlarla mücadele edilmesi hakkinda kanun

https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=5651&MevzuatTur=1&MevzuatTertip=5

Law No. 5651 on the Regulation of Broadcasts Made on the Internet and Combating Crimes Committed Through These Broadcasts

UNITED STATES OF AMERICA

[US] Disney, Fox and Warner’s alliance in sports streaming blocked by District Court decision

Mario Gheza
European Audiovisual Observatory

On 16 August 2024, the US District Court Judge Margaret Garnett issued a temporary injunction freezing the launch of the streaming service planned by Walt Disney Co., Fox Corp. and Warner Bros. Discovery.

For a monthly fee of USD 43, the three players planned, with the signature of a non-binding term sheet on 6 February 2024, to launch their new platform dedicated to live sports competitions. However, on 8 April 2024, a direct competitor called “Fubo", which also offers sports content, filed a complaint against the alliance, accusing it of violating competition law.

According to Fubo, the new platform would represent too large a share of American sports rights broadcast nationally (at least 60%) including some of the major sports leagues (NBA, NFL, MLB,etc.). As a reminder, Walt Disney Co. owns the ESPN+, Hulu and Max subsidiaries, which have significant influence in the sports streaming industry. This phenomenon is referred to as "bundling", the definition of which is given in the court decision : “The term “bundling” in the pay TV ecosystem refers to the practice by programmers of packaging several of their networks together to be distributed either together (to at least some degree), or not at all. For example, in exchange for the rights to distribute ESPN to subscribers, Disney might require a distributor to also carry its entertainment channels like the Disney Channel or Freeform; and if that distributor does not want to carry these other channels, it does not get to distribute ESPN. Hence, ESPN is “bundled” with Disney Channel and Freeform.”

According to Fubo, the situation would force it to carry non-sports channels that it does not want or risk losing contracts it has with certain channels. Carrying unwanted channels would force it to cover its licensing costs by charging higher prices for its services than it would like.

Fubo also argued that having a single platform like Venu would generally lead to higher prices due to a monopolistic situation and would undermine the negotiating power of third-party video distributors. This monopolistic situation would be reinforced by a “Non-Compete” agreement which forbids the joint venture from “owning any form of equity interest, including a revenue-sharing or profit-sharing interest, in a commercial venture, where the focus of the commercial venture is the operation of a sports-centric distributor similar to the Venu Sports platform, for a period of three years from the Launch Date." The result would be the dependency of millions of American consumers on these services.

For the injunction to be upheld, Fubo had to demonstrate an irreparable harm. To prove this, the company argued that launching an anti-competitive platform like Venu Sports would result in a loss of 300 000 to 400 000 subscribers (30% of their total audience). The defendents offered three main arguments in response to Fubo's charges of imminent harm. First, they asserted that Fubo's claims of irreparable harm lacked credibility. Second, they said Fubo's alleged harms were the result of its own "weak" business, and that its failure was likely to be imminent regardless of any action taken by the joint venture. Finally, they argued that any purported harm to Fubo could be remedied by money damages later.

Judge Margaret Garnett upheld Fubo's arguments for blocking the platform's launch because "Fubo is likely to successfully prove its claims that the partnership will violate competition law" stating also that "Fubo and American consumers will suffer irreparable harm absent an injunction". For Fubo's CEO, the said "ruling is a victory not only for Fubo but also for consumers. This decision will help ensure that consumers have access to a more competitive marketplace with multiple sports streaming options". Direct TV, another player in the market, indeed supported Fubo's complaint by arguing that the greater the flexibility of pay-TV distributors, the better the offer will be.

According to the American press, the three companies intend to appeal this decision in court. They believe that "Venu Sports is a pro-competitive option that aims to enhance consumer choice by reaching a segment of viewers who currently are not served by existing subscription options".

This decision is part of a context where many streaming players are joining forces to have a particularly attractive offer. This is, for example, also the case of the cable operator Comcast offering its "StreamSaver" service, which includes Netflix, Apple TV+ and Peacock.

This decision comes a few days before the planned launch of the platform.

FuboTV Inc. et al. v. The Walt Disney Company et al.

https://www.scribd.com/document/759675195/Fubo-v-Disney-Fox-Warners#fullscreen&from_embed

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE