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EDITORIAL

As the days grow shorter and trees lose their last leaves, it is time for the Observatory to release this year's final edition of the newsletter, packed with a vibrant mix of topics!

On the traditional broadcasting scene, several European countries are making significant regulatory adjustments. The Italian regulator has adopted guidelines on the prominence of audiovisual and radio media services of general interest. Spain is witnessing a shift in public service media governance, with the government approving changes to the RTVE Board of Directors. Meanwhile, the Netherlands is focusing on improving the safety of public participation through legislation implementing the EU's anti-SLAPP directive.

The digital landscape also came under increased scrutiny across Europe. The UK Financial Conduct Authority stepped up its efforts to curb unauthorised "finfluencer" promotions. In Ireland, Coimisiún na Meán's findings regarding terrorist content on major platforms such as TikTok, X and Meta highlight the importance of platforms' responsibility.

With a little hindsight, we also gain clearer insights into the EU's legislative agenda. The European Commission has published its findings with regard to the Digital Fitness Fairness Check, launched back in 2022. And as part of the implementation process of the AI Act, independent experts have published the first draft of a General-Purpose AI Code of Practice, to be finalised by May 2025.

As we dim the lights and draw the curtains on this year’s Newsletter publications, we look forward to returning in 2025. In the meantime, if you are eager for more, feel free to explore some of our latest reports on AI, video games, or the protection of minors online.

Thank you for being a part of this journey with us. I wish you a peaceful end to the year.

Enjoy the read!

Maja Cappello, Editor

European Audiovisual Observatory

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COUNCIL OF EUROPE

ARMENIA

European Court of Human Rights: *Aghajanyan v. Armenia*

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

The European Court of Human Rights (ECtHR) has added a new and interesting judgment to its case-law on the right to freedom of expression in the workplace and the horizontal effect of the right to freedom of expression in private relations (see also *Halet v. Luxembourg*, IRIS 2023-4:1/23; *Herbai v. Hungary*, IRIS 2020-1:1/4; and *Fuentes Bobo v. Spain*, IRIS 2000-4:1/1). The case concerns the dismissal in 2010 of a senior employee in a chemical factory on the ground that he had disclosed sensitive information concerning the factory in an interview with a journalist. In this interview the employee raised a series of sensitive and important matters of public interest, such as the protection of the environment, damage to human health, and workplace safety. However, the relationship between the employee's duty of loyalty and the public interest in being informed about environmental issues and perceived wrongdoing in Armenia's vast chemicals factory was not examined by the domestic courts at all. The national courts, which confirmed the employee's dismissal, had failed to strike a fair balance between the competing interests at stake. The ECtHR found a violation of the employee's right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR).

The case concerns the dismissal without notice of Ishkhan Aghajanyan from his employment on the ground that he had disclosed sensitive information concerning his employer in a newspaper interview. In particular, the director of the factory who announced the dismissal found that Aghajanyan had disseminated false information about scientific work and experiments, as well as about the salaries of employees in the factory, thereby breaching the Labour Law and certain clauses of his contract of employment on trust, loyalty and confidentiality. Aghajanyan challenged his dismissal in the civil courts, arguing that he had not revealed any commercial secrets and also invoking his right to freedom of expression. The Armenian courts rejected his application on the ground that the information he revealed in the interview, such as details about the production capacities of the factory, the nature of its scientific work, ongoing experiments, the storage of raw material, product types and technological processes that were being developed and implemented, as well the salary of employees were considered as commercial secrets. Aghajanyan lodged an application with the ECtHR, complaining that his dismissal, as a result of his

interview published in the newspaper article, had breached his right to freedom of expression as provided for in Article 10 ECHR. The ECtHR found unanimously that the Armenian courts had indeed violated Aghajanyan's right to freedom of expression. The ECtHR first referred to its previous case-law on the application of Article 10 in the context of professional relationships, regardless whether those relations are governed by public law or by private law. Indeed, 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 individuals.

The Armenian Government argued that Aghajanyan's dismissal had complied with the requirements of Article 10 ECHR, and in particular that Aghajanyan had been dismissed in accordance with the law, namely on account of his employer's loss of trust in him and his gross violation of labour discipline – in the present case, the disclosure of a commercial secret. The ECtHR found it appropriate to examine the present case in terms of the state's positive obligations under Article 10 ECHR and therefore evaluated whether the Armenian judicial authorities, in dismissing Aghajanyan's claim, had adequately secured his right to freedom of expression in the context of labour relations. It also reiterated the importance of the duty of loyalty and discretion of employees to their employers, which requires that the dissemination of even accurate information be carried out with moderation and propriety. However, this duty may be overridden by the interest which the public may have in particular information. The ECtHR also pointed out that when assessing the proportionality of a serious measure such as dismissal without notice, the domestic courts had to take into account and give a comprehensive analysis of such key elements of the case as the nature and veracity of the statements at issue, the employee's motives for giving the interview and the possibility of effectively raising his point before his superiors, as well as the damage caused to the factory as a result of the employee's interview.

The ECtHR observed that the domestic judgments contained very little reasoning on these issues. Firstly, even though Aghajanyan submitted detailed arguments contesting the lawfulness of his dismissal as a result of his interview, the domestic courts failed to address any of his arguments made in that respect. More importantly, the domestic courts failed to assess the case before them in the light of the principles defined in the Court's case-law under Article 10 ECHR. The domestic court judgments did not specify which of the employee's statements published in the newspaper were found to be inaccurate or defamatory and they never analysed Aghajanyan's arguments about his earlier repeated attempts to raise his concerns with his superiors on the issues revealed in the interview. The Armenian courts also failed to verify his motive while there was no mention in the domestic judgments that Aghajanyan had acted in bad faith. Moreover, in his interview Aghajanyan had raised sensitive and important matters of public interest concerning the protection of the environment, damage to human health and workplace safety. However, the relationship between Aghajanyan's duty of loyalty and the public interest in being informed about environmental issues and perceived wrongdoing in Armenia's vast chemicals factory was not examined by

the domestic courts at all. In addition, the domestic judgments, in upholding the dismissal, contained no mention of any harm sustained by the factory as a result of Aghajanyan's interview. Lastly, as regards the severity of the measure imposed on Aghajanyan, the ECtHR noted that it was the heaviest one possible, without any assessment of the appropriateness of a less severe measure. Having regard to the foregoing, the ECtHR considered that the national courts had failed to strike a fair balance in the light of the criteria established in its case-law between the competing interests at stake and adduce "relevant and sufficient" reasons for their decisions. There has accordingly been a violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, Fourth Section, in the case of Aghajanyan v. Armenia, Application No. 41675/12, 8 October 2024

https://hudoc.echr.coe.int/?i=001-236131

PORTUGAL

European Court of Human Rights: *Tânia Alexandra Ferreira e Castro da Costa Laranjo v. Portugal*

Dirk Voorhoof
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The European Court of Human Rights (ECtHR) has dismissed the complaint of a journalist invoking her right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The case concerns the criminal conviction of Tânia Alexandra Ferreira e Castro da Costa Laranjo for the publication of an article based on an audio recording of a taped telephone conversation between two politicians, without their consent.

The litigious article was published in a tabloid newspaper and quoted from a taped telephone conversation between two politicians, A.V., a former minister, and E.E., a member of the European Parliament at the time, in which they criticised other members of the European Parliament. The article was based on an audio recording of the conversation, to which the journalist had access in her capacity as an assistant to the Public Prosecutor in a high-profile criminal investigation and proceedings including A.V. The Criminal Court of Lisbon, acting on a criminal complaint by E.E., convicted Ferreira e Castro da Costa Laranjo for having published the impugned article, based on the taped conversation, without the prior consent of the parties involved. It also imposed a fine in the amount of EUR 1 000, corresponding to ten daily fines. The Lisbon Court of Appeal confirmed this conviction.

Relying on Article 10 ECHR Ferreira e Castro da Costa Laranjo alleged that the judgments against her had breached her right to freedom of expression and to impart information.

As the interference with the applicant’s right was prescribed by law and pursued the legitimate aim of protecting the privacy of A.V. and E.E., the ECtHR considered whether the interference complained of was necessary in a democratic society. It referred to the domestic courts' finding that the information published in the impugned article had not concerned the criminal proceedings ongoing at the time, but only the personal opinions of A.V. and E.E. about other politicians. Accordingly, it had not served any public interest.

The ECtHR emphasised in particular that, although the public has a right to be informed, an article, such as the one in the present case, that aimed solely at satisfying the curiosity of a particular readership regarding the personal opinion of a public figure about other public figures, does not contribute to any debate of general interest. Furthermore, regarding the sanction imposed, the ECtHR found that Ferreira e Castro da Costa Laranjo was sentenced to ten daily fines amounting to a total of EUR 1 000 which did not appear disproportionate in view

of the particular circumstances of the case. The ECtHR concluded that the domestic courts had struck a fair balance, within their margin of appreciation, between the journalist's right to freedom of expression and to impart information under Article 10 ECHR and the rights of A.V. and E.E. to respect for their private life under Article 8 ECHR, taking into account the criteria set out in the Court's case-law. The journalist's complaint under Article 10 ECHR was found to be manifestly ill-founded, and therefore inadmissible.

Decision by the European Court of Human Rights , Fourth Section sitting as a Committee, in the case Tânia Alexandra Ferreira e Castro da Costa Laranjo v. Portugal, Application No. 50253/18, 8 September 2024 and notified in writing on 3 October 2024

https://hudoc.echr.coe.int/eng?i=001-237407

REPUBLIC OF TÜRKIYE

European Court of Human Rights: *Özlü v. Türkiye* and three other judgments *v. Türkiye* relating to content on social media

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

The European Court of Human Rights (ECtHR), in a judgment of 8 October 2024, once again found a violation by the Turkish authorities of the right to freedom of expression on social media, as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). In *Özlü v. Türkiye* the ECtHR found that some statements on Twitter (now X) posted by the applicant might be regarded as a sharp and exaggerated criticism of the organs of the state and its officials, but it found that they were not gratuitously offensive or insulting and did not incite violence or hatred. The ECtHR concluded that the criminal conviction of Özlü was in breach of the applicant's right to freedom of expression. In three other judgments on the same day the ECtHR also found violations of the right to freedom of expression because of (suspended) convictions on account of content the applicants had posted on Facebook.

By an indictment in November 2017, the public prosecutor charged Özlü with the offence of the public denigration of the Turkish nation, the Republic of Türkiye, the Grand National Assembly of Türkiye and the judicial bodies of the state pursuant to Article 301 of the Turkish Criminal Code, due to nine different publications Özlü had posted on his Twitter account. In 2020 Özlü was sentenced to five months in prison on account of the litigious messages on Twitter. The pronouncement of the judgment was suspended, however, and Özlü was subjected to a five-year supervision period. Both the Assize Court and the Constitutional Court dismissed Özlü's appeals. Relying on Article 10 ECHR Özlü complained about the criminal proceedings brought against him because of his publications on social media.

The ECtHR again rejected the argument by the Turkish Government invoking Article 17 ECHR (see also *Gümüs v. Türkiye*, IRIS 2024-9:1/24) alleging that the messages at issue amounted to clear defamation and were specifically directed at organs of the state. The government argued that therefore Özlü could not claim the protection of Article 10 ECHR. The ECtHR found, however, that the content of the litigious posts, which essentially constituted political criticism, was not sufficient to demonstrate that Özlü was seeking to destroy the rights and freedoms guaranteed by the ECHR. Accordingly, the Court found no evidence of an abuse of rights within the meaning of Article 17 ECHR and therefore Özlü was not deprived of the protection of Article 10 ECHR.

Next the ECtHR considered that the criminal conviction of Özlü with the suspension of the pronouncement of the judgment, including a five-year supervision period, amounted to an interference with Özlü's exercise of his right to freedom of expression in view of the deterrent effect it may have had. The ECtHR focussed on the question of the necessity in a democratic society of the interference complained of. It noted that the posts at issue communicated ideas and opinions on current political and judicial news and debates at the time and thus contributed to a debate of public interest in a democratic society. Despite the severity of some of the expressions used, the posts could be regarded as a sharp and exaggerated criticism of the organs of the state and its officials. But these posts were devoid of any gratuitously offensive or insulting character and did not incite violence or hatred. The ECtHR also considered that, by sentencing Özlü to a term of imprisonment, even though the pronouncement of the judgment was suspended, the judicial authorities' decision had a chilling effect on Özlü's desire to express his views on matters of public interest. The ECtHR concluded that the measure in question did not meet a pressing social need, that it was not, in any event, proportionate to the legitimate aims pursued and that, therefore, it was not necessary in a democratic society. Accordingly, the ECtHR found a violation of Article 10 ECHR in the case of *Özlü v. Türkiye*.

On the same day, 8 October 2024, the ECtHR delivered three other judgments in which it found that Türkiye had breached the freedom of expression rights of the applicants by convicting them of insulting the president (*Açıkgöz v.Türkiye* and *Erdoğan and Others v. Türkiye*) or insulting the prime minister as a public official (*Yorulmaz v. Türkiye*). In all three cases the applicants were given a prison sentence combined with a measure of suspension of the pronouncement of the judgment on account of content they had posted on Facebook. In line with the judgment in the case of *Durukan and Birol v. Türkiye* (IRIS 2023-10:1/22) and more recently *Gümüs v. Türkiye* (IRIS 2024-9:1/24) the ECtHR in *Açıkgöz v. Türkiy* e and *Erdoğan and Others v. Türkiye* found that the interference with the applicants' rights under Article 10 ECHR did not afford the requisite protection against arbitrary abuse by the public authorities. In the case of *Yorulmaz v. Türkiye* the ECtHR considered that the Turkish courts did not provide a satisfactory analysis of the question of whether the then prime minister's right to respect for his private life could justify, in the circumstances of the case, the interference with Yorulmaz's right to freedom of expression by his criminal conviction. The ECtHR referred in particular to the status of the prime minister as a politician, the context of the impugned social media post of the applicant, and the deterrent effect that this criminal conviction, even if the pronouncement of the sentence had been suspended, could have on Yorulmaz's exercise of his freedom of expression.

Judgment by the European Court of Human Rights, Second Section sitting as a Committee, in the case of Özlü v. Türkiye, Application No. 45204/20, 8 October 2024

https://hudoc.echr.coe.int/eng?i=001-236144

Judgment by the European Court of Human Rights, Second Section sitting as a Committee, in the case of Açıkgöz v. Türkiye, Application No. 45123/20, 8 October 2024

https://hudoc.echr.coe.int/eng?i=001-236143

Judgment by the European Court of Human Rights, Second Section sitting as a Committee, in the case of Erdoğan and Others v. Türkiye, Application No. 61243/19 and 3 others, 8 October 2024

https://hudoc.echr.coe.int/eng?i=001-236138

Judgment by the European Court of Human Rights, Second Section sitting as a Committee, in the case of Yorulmaz v. Türkiye, Application No. 41400/19, 8 October 2024

https://hudoc.echr.coe.int/eng?i=001-236137

EUROPEAN UNION

EDMO’s media literacy guidelines

Amélie Lacourt
European Audiovisual Observatory

The European Digital Media Observatory (EDMO), a European Union-funded initiative managed by a consortium led by the European University Institute, was set up as part of the European Commission's 2018 action plan against disinformation. Aiming to enable and strengthen cooperation between stakeholders to combat disinformation and promote media literacy across Europe, the EDMO community is large and acts as a hub, bringing together fact-checkers, media literacy experts and academic researchers, media organisations, online platforms and media literacy practitioners. This month, the EDMO launched a set of principles and guidelines for effective media literacy initiatives across Europe. These guidelines were developed by the EDMO’s Working Group on Media Literacy Standards and Best Practices, with input from its 14 national and cross-national hubs, and other practitioners and experts across more than 50 countries.

For this project, the EDMO took as a basis the European Commission’s Media Literacy Expert Group definition of media literacy: “media literacy is an umbrella expression that includes all the technical, cognitive, social, civic and creative capacities that allow a person to access, have a critical understanding of the media and interact and engage with it”. The guidelines were designed for anyone involved in the development of media literacy initiatives, including civil society, educators, policy makers, and those in the media or tech industries. The guidelines can apply to various initiatives, including those regarding:

- mis- and disinformation, supporting the development of critical thinking skills to better detect and counter false or misleading content;

- news literacy, promoting the value of independent journalism in the media ecosystem;

- wider digital literacy, explaining how digital media operate and how to use them;

- algo-literacy, helping individuals understand the role of algorithms in our media consumption.

And since media literacy initiatives vary considerably in scope, size, duration and focus, not all recommendations included in the guidelines will be relevant to all projects. It is up to each actor to select the most appropriate advice for their initiative(s).

The guidelines are grouped around 12 principles covering three different stages of media literacy projects: development, delivery and review.

Development

A good media literacy initiative:

- has clearly defined goals and principles;

- is empowering;

- promotes critical understanding of the media ecosystem;

- is consultative and relevant;

- takes an evidence-based approach;

- is inclusive;

- is ethical and accessible.

Delivery

A good media literacy initiative:

- is transparent;

- is prepared;

- is adaptable.

Review

A good media literacy initiative:

- endures;

- reflects, shares and evaluates.

EDMO Guidelines for Effective Media Literacy Initiatives

https://edmo.eu/wp-content/uploads/2024/10/EDMO-Guidelines-for-Effective-Media-Literacy-Initiatives.pdf

European Commission's findings on the digital fairness fitness check

Amélie Lacourt
European Audiovisual Observatory

Back in 2020, the European Commission announced in its consumer policy strategy that it would analyse whether additional legislation or other action was needed to ensure equal fairness online and offline. A fitness check on the digital fairness of three consumer law directives was therefore launched in 2022:

- the Unfair Commercial Practices Directive

- the Consumer Rights Directive

- the Unfair Contract Terms Directive.

The European Commission’s findings were published on 3 October 2024 in the form of a staff working document, which evaluates whether the EU consumer protection laws are fit to ensure a high level of protection in the digital environment. To reach this point, the Commission also consulted the public through several consultation activities, including a call for evidence and a public consultation. The fitness check was also supported by an external study and existing analyses, such as the behavioural study on unfair commercial practices in the digital environment.

The results show that while these rules remain necessary to ensure a high level of protection for consumers and provide a degree of regulatory certainty and consumer trust, consumers behave differently online and offline and some harmful and evolving practices that are faced online should therefore be addressed more specifically.

According to the Commission’s evaluation, consumers do not always feel fully in control of their online experience due to practices such as:

- dark patterns that can unfairly influence their decisions, for example, by putting unnecessary pressure on consumers through false urgency claims;

- the addictive design of digital services that pushes consumers to keep using the service or spending more money, such as, gambling-like features in video games;

- personalised targeting that takes advantage of consumers' vulnerabilities, such as showing targeted advertising that exploits personal problems, financial challenges or negative mental states;

- difficulties with managing digital subscriptions, for example, when companies make it excessively hard to unsubscribe;

- problematic commercial practices of social media influencers.

The Commission also found that the effectiveness of EU consumer protection is undermined due to fragmented national laws, leading to legal uncertainty and a lack of incentives for businesses to aim for the highest standard of protection.

The fitness check provides a state of play and points to areas for improvement, which can be further analysed and built upon in the future but it does not establish recommendations on the exact format and content of future Commission action. However, in her mission letter addressed to Commissioner-designate for Democracy, Justice and the Rule of Law, Ursula von der Leyen referred to the need to develop “a Digital Fairness Act to tackle unethical techniques and commercial practices related to dark patterns, marketing by social media influencers, the addictive design of digital products and online profiling especially when consumer vulnerabilities are exploited for commercial purposes”.

Commission Staff Working Document Fitness Check on EU consumer law on digital fairness

https://commission.europa.eu/document/707d7404-78e5-4aef-acfa-82b4cf639f55_en

First draft of the General-Purpose AI Code of Practice

Amélie Lacourt
European Audiovisual Observatory

While the EU AI Act came into force on 1 August 2024, the rules on general-purpose AI will, for their part, become effective in August 2025. As part of the implementation process, and as mandated by Article 56 of the AI Act, the AI Office is to encourage and facilitate the drawing up of codes of practice at Union level in order to contribute to the proper application of the act's provisions on general-purpose AI models. These notably include provisions related to transparency, copyright, systemic risk taxonomy, risk assessment, and mitigation measures.

The development process of this code notably involves:

- a multi-stakeholder consultation;

- four specialised working groups led by chairs and vice-chairs selected for their expertise, experience, and independence, as well as to ensure geographical and gender diversity;

- discussions and drafting sessions to be held between October 2024 and April 2025.

On 30 September 2024, the AI Office launched the inaugural event for the Code of Practice Plenary, with nearly 1 000 participants, including a high number of professional organisations. The four working groups, which began their work in October 2024, are each expected to meet three times to discuss various drafts. The four groups focus on:

- transparency and copyright-related rules;

- risk identification and assessment for systemic risk;

- technical risk mitigation for systemic risk;

- governance risk mitigation for systemic risk.

In addition, a workshop held on 23 October 2024 also allowed the main addressees of the code (providers of general-purpose AI models) to contribute to the process.

On 14 November 2024, independent experts unveiled a first draft of the General-Purpose AI Code of Practice. The chairs and vice-chairs presented this first draft as a foundation for further detailing and refinement, inviting feedback to help shape each iteration towards the final version of the code. They also outlined guiding principles and objectives for the code, aiming to provide stakeholders with a clear sense of the direction of the final code's potential form and content. Open

questions were included to highlight areas for further progress.

The drafting principles notably stress that measures, sub-measures, and Key Performance Indicators should be proportionate to the risks, take into account the size of the general-purpose AI model provider, and allow simplified compliance options for SMEs (small and medium enterprises) and start-ups. Following the AI Act, the code will also reflect notable exemptions for providers of open-source models. The principles also highlight the need for a balance between clear requirements and the flexibility to adapt as technology evolves. According to the chairs and vice-chairs, this draft seeks to provide a “future-proof” code that would also be appropriate for the next generation of models that will be developed and released in 2025 and thereafter.

This first draft concludes the first of four drafting rounds until April 2025. The final version of the code should be ready by 1 May 2025.

First Draft General-Purpose AI Code of Practice

https://ec.europa.eu/newsroom/dae/redirection/document/109946

X's online social networking service not designated as gatekeeper

Justine Radel-Cormann
European Audiovisual Observatory

The Digital Markets Act (DMA) establishes criteria for designating companies as "gatekeepers" in the digital market. Gatekeepers are entities that: (i) have a significant impact on the internal market, (ii) provide core platform services (CPS) that serve as important gateways for business users to reach end users, and (iii) enjoy an entrenched and durable market position (Article 3(1) DMA).

Additionally, companies meeting certain turnover thresholds are presumed to be gatekeepers (Article 3(2) DMA).

From March 2024 onwards, the European Commission and X started discussing the designation of two of X's services as CPS under the DMA: its online social networking service and its online advertising service (X Ads).

During the spring of 2024, X invoked Article 3(5) of the DMA to argue that, despite meeting the quantitative thresholds (Article 3(2) DMA presumption), it does not satisfy the gatekeeper criteria. The Commission accepted X's arguments regarding X Ads, concluding that this service does not meet the designation requirements. However, discussions continued regarding X's online social networking service.

Still in the spring of 2024, to rebut its designation as a CPS provider, X presented indicators that its online social networking service is not an important gateway for business users to reach end users. X argued that it operates on a small and decreasing scale with low and declining user engagement. According to data provided by X, its platform is smaller than other platforms: (i) approximately 133% smaller than each of Facebook and Instagram, (ii) about 60% smaller than LinkedIn and, (iii) around 27% smaller than TikTok. The Commission noted considerable discrepancies in data sources but did not further investigate this argument. However, it deemed X's metrics on low and decreasing user engagement relevant in potentially rebutting the gatekeeper presumption.

Consequently, on 13 May 2024, the Commission launched a market investigation to determine whether X's online social networking service exceptionally failed to satisfy the DMA requirements, given the arguments challenging the gatekeeper presumption.

On 16 October 2024, following the market investigation, the European Commission concluded that X's rebuttal arguments regarding its online social networking services should be accepted.

Case DMA.100041 – X online social networking service

https://digital-markets-act-cases.ec.europa.eu/cases/DMA.100041

Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act – DMA)

https://eur-lex.europa.eu/eli/reg/2022/1925/oj

NATIONAL

GERMANY

[DE] Federal Constitutional Court rules in dispute over public broadcasters' presentation of election results

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On 21 September 2024, the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) issued an interim decision in which it overturned a previous ruling of the *Oberverwaltungsgericht Berlin-Brandenburg* (Berlin-Brandenburg Higher Administrative Court – OVG) of 18 September 2024 regarding the presentation of election results by public broadcasters. Unlike the OVG, the BVerfG thought that ordering *Rundfunk Berlin-Brandenburg* (Berlin-Brandenburg state broadcasting authority – rbb) to show the individual election results of parties receiving more than 2% of votes and therefore requiring it to adapt its broadcasting concept represented a severe intrusion of its broadcasting freedom that could not be justified based on political parties' legitimate interests.

In August 2024, in the run-up to the Brandenburg state election, the *Partei Mensch, Umwelt, Tierschutz* (Animal Protection Party) had applied to the *Verwaltungsgericht Berlin* (Berlin Administrative Court – VG Berlin) for an interim injunction against rbb, one of Germany's nine state public broadcasting authorities. The injunction would have forced rbb to show the Animal Protection Party's (expected) election results in all presentations of Brandenburg state election results on its state television channel, provided that it received at least 2% of the votes, so that a maximum of ten candidate lists would need to be shown separately. In its post-election coverage of the previous state election in 2019, rbb had failed to report the party's 2.6% share of the vote (which had been very significant for such a small party), but had included it with those of other smaller parties under the heading "Other" in some graphics. Although the Animal Protection Party had won a court appeal (IRIS 2023-8:1/26), it had been too late to change the coverage after the event. By applying for an injunction against rbb, the party wanted to prevent the same thing from happening again and to ensure its results were specifically mentioned in the reporting of the 2024 election. After its application had been rejected by the VG Berlin, the OVG Berlin-Brandenburg – which had previously ruled in the party's favour in proceedings relating to the 2019 election – granted it and ordered rbb to mention the party's results separately under the aforementioned conditions. In its reasons, the court accepted that the party's right to equal opportunities under the Basic Law was graded by its size. However, the publicity associated with the mention of individual election results in television coverage on election night could have a significant impact on the public perception of smaller parties that failed to reach the 5% threshold required to obtain seats in the state parliament. The OVG ruled

that, since obliging rbb to mention the party's election result would only represent a minor intrusion in the broadcaster's editorial freedom, the Animal Protection Party's legitimate interest should take precedence.

The BVerfG disagreed and overturned the OVG's decision. In interim relief proceedings, in which its remit is limited to a summary weighing the potential consequences of the successful or unsuccessful application, the BVerfG concluded that rbb's legitimate interests should prevail. Unlike the OVG, the BVerfG thought that such an order would significantly infringe broadcasting freedom because it did not just concern conceptual adaptations to graphics and the accompanying explanation, but also interfered with editorial freedom in the creation and implementation of concepts for a broadcast, which was protected under the freedom of programming, a key element of broadcasting freedom. Under this principle, broadcasters must be able to decide how to fulfil a journalistic task free from external influence. The OVG's order would have a "profound" impact on this freedom (regardless of whether the interference was justified, which was not examined in this case). The setting by a court of a fixed percentage of votes above which a party's election result must be shown, the criteria for which could not be determined either in fact or in constitutional law, limited rbb's freedom to adapt its editorial concept where necessary in programme planning that did not always follow a predictable course. This freedom outweighed a political party's right to be mentioned on election night. The publicity that the Animal Protection Party claimed would increase its chances of winning a greater share of the vote in future elections was largely irrelevant, especially in post-election coverage. Election night reporting was primarily focused on the distribution of seats in the newly elected parliament and its impact on the formation of the next government.

BVerfG, Beschluss der 1. Kammer des Ersten Senats - 1 BvQ 57/24 –

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2024/09/qk20240921_1bvq005724.html

Federal Constitutional Court, decision of the 1st chamber of the First Senate - 1 BvQ 57/24

[DE] Fifth state media treaty clarifies media authority supervision under DSA youth protection rules

Christina Etteldorf
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On 1 October 2024, the *Fünfte Staatsvertrag zur Änderung medienrechtlicher Staatsverträge* (fifth state treaty amending the state media treaty – 5. MÄStV) came into force, primarily to introduce changes necessitated by the entry into force of the Digital Services Act (DSA). It deals, firstly, with the relationship between the *Medienstaatsvertrag* (state media treaty – MStV) and *Jugendmedienschutzstaatsvertrag* (state treaty on the protection of minors in the media – JMStV) and the DSA and the German law transposing it, and, secondly, with the supervision provided under the DSA by the state media authorities, which are designated as competent authorities in the field of youth protection in the media.

The 5. MÄStV amends the MStV and the JMStV, primarily making formal changes necessitated by the replacement of the *Telemediengesetz* (Telemedia Act) by the *Digitale-Dienste-Gesetz* (Digital Services Law – DDG) following specific provisions of the DSA. References and terminology also, therefore, needed amending. Both the MStV and the JMStV therefore now specify that they only apply to intermediary services within the meaning of Article 3(g) DSA if the DSA does not apply. Furthermore, the obligation for video-sharing services to report user complaints, required by the Audiovisual Media Services Directive and previously contained in the repealed Telemedia Act, has been incorporated in a new Article 5b of the JMStV, along with specific references to youth protection in the media. The article describes the obligation to create a reporting mechanism for unlawful audiovisual content, the reporting procedure itself and the characteristics of unlawful content.

An important change regarding the supervisory system is contained in Article 111(3) MStV. Article 12 DDG mentions the competent authorities referred to in Article 49 DSA, in particular the *Bundesnetzagentur* (Federal Network Agency) as Germany's Digital Services Coordinator (see also IRIS 2024-5:1/21). According to Article 12(2), the *Bundeszentrale für Kinder- und Jugendmedienschutz* (Federal Office for the Protection of Children and Young People in the Media) is responsible for enforcing Article 14(3) DSA and structural preventive measures in Article 28(1) DSA, apart from measures taken under the JMStV. Responsibility for these measures and individual measures governed by the JMStV will be assumed by the bodies designated by the *Länder* in the 5. MÄStV. The new Article 111(3) MStV, therefore states that the competent authority is the state media authority responsible under Article 106 (by its location), with coordination provided by the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media), a joint body of the German state media authorities. The state media authorities are also required to appoint a joint representative to coordinate cooperation with the Digital Services Coordinator, the other competent authorities under the DDG, the European Commission and other authorities governed by the

DSA. They have already appointed Dr. Tobias Schmid, director of the North Rhine-Westphalia state media authority, European representative of the state media authorities and former chair of the European Regulators Group for Audiovisual Media Services (ERGA), in this role. The MStV also states that, if public broadcasters are the subject of measures under Article 12(2)(2) DDG, the joint representative should include the broadcaster concerned in the proceedings.

Fünfter Medienänderungsstaatsvertrag

https://rundfunkkommission.rlp.de/fileadmin/rundfunkkommission/Dokumente/Staatsvertraege_und_andere_Dokumente/5._MAEStV_final.pdf

Fifth state treaty amending the state media treaty

Pressemitteilung der Landesmedienanstalten

https://www.die-medienanstalten.de/pressemitteilungen/neue-regeln-im-netz-medienanstalten-sichern-grenzueberschreitende-aufsicht/

State media authorities press release

[DE] KEF publishes special report on financial impacts of possible public broadcasting reforms

Christina Etteldorf
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On 27 September, the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission for Determining the Financial Requirements of Broadcasters – KEF) submitted a special report on the financial impacts of possible approaches to public broadcasting reforms to the *Rundfunkkommission* (Broadcasting Commission) of the German *Länder*, which are currently discussing such reforms. The report, designed to help legislators determine the future remit and structure of public service broadcasting, deals with specific questions submitted to the KEF by the *Länder*.

The KEF plays a crucial role in the three-step process for fixing the broadcasting fee used to fund public service broadcasting in Germany. Once the broadcasters have submitted their funding requirements (step 1), the KEF examines them and can recommend that the *Länder* change the broadcasting fee (step 2), which is then determined by the *Länder* (step 3). In February 2024, the KEF published its report and recommended that the *Länder* increase the broadcasting fee by EUR 0.58 to EUR 18.94. However, the *Länder* are currently discussing a comprehensive overhaul of public service broadcasting, including opportunities to make financial savings. Therefore, the recently published special report deals exclusively with the potential economic impacts of possible reforms for public service broadcasting. It is based on a list of 19 questions that the *Länder* had submitted to the KEF, but does not replace or change in any way the February 2024 recommendation.

The questions submitted concern the financial implications of current reform proposals. Regarding possible staff cuts in the joint institutions, the KEF does not believe there are any savings to be made other than those suggested in its February 2024 report, and states that cooperation needs to be expanded rather than cut back. However, it thinks that merging Deutschlandradio's two sites into one could have long-term savings potential in view of the predicted EUR 356.4 million cost of refurbishing its current buildings, which are listed. The same applies to the strategic sale of buildings.

On the other hand, the KEF indicates that the savings to be made by reducing the number of partner and specialist channels cannot be accurately quantified. However, it points out that, in many cases, closing such channels down does not mean an end to all related costs, which can only be reduced over time. Savings may be made, however, by broadcasting fewer TV play, film and series premieres and replacing them with news-based programmes, although such a change could also result in lower advertising revenue. The KEF also believes that stricter cooperation obligations both within the ARD and between the ARD, ZDF and Deutschlandradio could produce significant savings, which are broken down in the

report into individual cooperation areas such as production and programming, programme distribution and administration (e.g. staffing, procurement, business processes, broadcasting fee collection). Establishing joint bodies to carry out broadcasters' administrative tasks, in particular, is also likely to increase efficiency and cut costs. However, while the creation of a joint technical platform system could, in principle, have the same impact in the medium term, the resulting benefits are currently difficult to quantify and could be offset by the associated set-up costs. Regarding the savings potential of a planned increase in the shared use of buildings and technical equipment, the KEF believes that consideration should be given to consolidating the ARD and Deutschlandradio buildings.

As regards savings in the sports broadcasting sector, the KEF believes there could be scope to reduce the expected EUR 1.674 billion spent on sports rights between 2021 and 2024; however, potential savings linked to coverage of major/sports events over and above those proposed in the February 2024 report are not quantifiable. A more accurate estimate of the increase or decrease in costs that would result from more independent or centralised budget management through a so-called mandating system for joint services is impossible unless more detail is provided regarding the actual structure. On the other hand, reassigning so-called "non-broadcasting fee services" that concern the funding of state media authorities and orchestras, for example, may significantly reduce the burden on fee-payers.

Overall, the report concludes that by implementing the reforms and remit changes for 2025 to 2028 that were mentioned in the questions submitted by the *Länder*, the broadcasting authorities cannot achieve any significant savings other than those already identified in the February 2024 report. However, in the medium to long term, from 2029 onwards, there are numerous areas in which the legislator can develop and implement practical measures, some of which have the potential to produce substantial savings relevant to the broadcasting fee. These include building and related property costs, programming remittance, using different distribution methods, and developing shared technical infrastructure.

Sonderbericht der KEF zu finanziellen Auswirkungen möglicher Ansätze zur Reform des öffentlich-rechtlichen Rundfunks

https://rundfunkkommission.rlp.de/fileadmin/rundfunkkommission/Dokumente/ReformStV/KEF-Sonderbericht_zu_finanziellen_Auswirkungen_moeglicher_Ansaetze_zur_Reform_des_oe-r._Rundfunks_final.pdf

KEF special report on the financial impacts of possible public broadcasting reforms

DENMARK

[DK] Danish Act on Cultural Contribution accepted by the EU Commission.

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On 30 May 2024 the Danish Parliament passed a bill on Certain Media Service Providers' Contribution to Promote Danish Culture (the Act), with entry into force on 1 July. Prior to this, the Act had been adjusted somewhat to comply with the European Commission's comments from early May.

The purpose of the Act is to introduce an obligation for VOD service providers to pay a cultural contribution to promote Danish culture.

Under the Act, providers of VOD services must make an annual payment to the Danish state of 2% (the "basic levy") of their turnover in Denmark stemming from the VOD service, and an additional 3% (the "increased levy") if the provider's investment in new Danish content is below 5%.

The levy will be collected annually by the Agency for Culture and Palaces based on VOD service providers' statements of turnover in Denmark in the most recent calendar year. It will be due for the first time in 2025, based on the VOD service providers' contributory turnover in Denmark for 2024.

In its decision of 25 July, after the entry into force of the Act, the European Commission determined that **the Act does not constitute state aid**. This is also in line with the Danish Ministry of Culture's previous evaluation. However, the Act was notified to the Commission to ensure legal certainty. For example, the EU Commission finds it acceptable that the cultural contribution is structured in such a way as to encompass only part of the turnover.

First, revenues generated from **sports or news programmes** are excluded.

The Commission finds in its decision that the exclusion of sports and news programmes does not fall under the categories of audiovisual content (films, series and documentaries) which the levy aims to support. Therefore, the exclusion of those programmes from the contributory turnover, even if they are made available through a VOD service, is "consistent with the levy's objective to support the production of new Danish films, series, and documentaries".

Secondly, revenues from **linear programming services** are excluded. It should be noted that the levy applies to broadcasters providing VOD services insofar as the revenues from the VOD services are concerned.

In its view in response to the consultation on the Act in February, Netflix, among others, had criticised the exclusion of linear programming services, and noted that the Act implies a discrimination against the VOD sector.

But the Commission finds in its decision that the exclusion of linear programming services "is also consistent with the underlying logic of the levy". On this point the Commission refers to the information provided by Denmark that VOD services are not subject to the same content-related obligations as linear services, and that public-service broadcasters, which represent the large majority of linear viewing in Denmark, already have extensive obligations to invest in and broadcast Danish audiovisual content. Therefore, the Commission finds that their exclusion from the contributory turnover is "consistent with the levy's objective to address the gap in the contribution to the production of Danish audiovisual content" between linear and VOD services.

Thirdly, revenues from the **redistribution of other media service providers' VOD services** are excluded from the contributory turnover.

The Commission finds in its decision that the exclusion of revenues generated through "the mere redistribution" of other VOD services from the contributory turnover "ensures that media service providers are not required to pay for revenues from services for which they do not have editorial responsibility and are not providers of within the meaning of the Act". Further, "[i]t also aims to avoid the double payment of the levy" for the same VOD service.

By this endorsement from the EU Commission, the Danish Act on Cultural Contribution can be upheld, and the payment can be collected for the first time in 2025.

2. februar – 1. marts 2024 høringssvar; se Netflix' høringssvar på side 38-43 (på dansk)

https://www.ft.dk/samling/20231/lovforslag/L159/bilag/1/2850383.pdf

2 February – 1 March 2024 hearing comments; see Netflix' view on pages 38-43 (in Danish)

https://www.ft.dk/samling/20231/lovforslag/L159/bilag/1/2850383.pdf

Comments from the EU Commission

Brev fra den danske Kulturminister til Folketingets Kulturudvalg, bl.a. vedrørende statsstøtte (på dansk)

https://www.ft.dk/samling/20231/lovforslag/L159/bilag/11/2873425.pdf

Letter from the Danish Minister for Culture to the Parliament Culture Committee about state aid, among other things

Lov om visse medietjenesteudbyderes bidrag til fremme af dansk kultur (kulturbidragsloven) som vedtaget af Folketinget den 30. maj 2024 (på dansk)

https://www.ft.dk/ripdf/samling/20231/lovforslag/l159/20231_l159_som_vedtaget.pdf

Act on Certain Media Service Providers' Contribution to Promote Danish Culture (the Act on Cultural Contribution) as passed by the parliament on 30 May 2024

Decision from the EU Commission

https://www.ft.dk/samling/20231/almdel/KUU/bilag/190/2904958.pdf

SPAIN

[ES] The Spanish Government approves changes to the RTVE board of directors in a context of corporate crisis and instability

Azahara Cañedo & Marta Rodriguez Castro

On 22 October 2024, Royal Decree-Law 5/2004 amending the governance model of the state-level public service broadcaster (RTVE) was published. Against the backdrop of a corporate crisis, the public corporation has been in a situation of institutional standstill and its board of directors in a state of provisionality since the resignation of José Manuel Pérez Tornero in September 2022, who was the last president of RTVE elected by the Congress of Deputies. In consideration of this the Spanish Government decided to change the Board of Directors' composition, increasing the number of directors and reducing the parliamentary majorities required to confirm them in office.

Following Pérez Tornero's resignation and given the impossibility of reaching a parliamentary agreement, the board of directors was temporarily chaired on an interim basis by two members proposed by the governing party: Elena Sánchez (from September 2022 to March 2024) and Concepción Cascajosa (from March 2024). Although, after the appointment of the latter, it was agreed among the board members that the presidency would last six months, this temporary period has already been exceeded without a review of the position having taken place. At the same time, the mandates of several members of the board of directors have expired without the necessary replacement having taken place. All of this is happening in a climate of political confrontation that has left RTVE in crisis and in a state of corporate instability.

In this context, Royal Decree-Law 5/2024 was approved; it modifies the composition, election and functions of the highest governing body of the public service broadcaster. The measures approved by the Spanish Government include an increase in the number of board members (from 10 to 15, 11 of whom are elected by Congress and 4 by the Senate) and the obligation for them to work full-time. In addition, the possibility of electing directors by an absolute majority of the Congress of Deputies (which does not require an agreement between the PSOE and the PP) was reintroduced, and the president is granted greater powers at the expense of the powers of the board.

Moreover, Royal Decree-Law 5/2024 provides for the possibility of appointing a single administrator for a term of three months, which may be extended if parliament does not proceed to the election of the members of the board of directors or the person who will chair it. The deadline for these elections is set for 23 November 2024.

Royal Decree-Law 5/2024 of 22 October amending Law 17/2006 of 5 June 2006 on state-level public radio and television in order to adopt urgent measures relating to the legal regime applicable to RTVE

https://www.boe.es/boe/dias/2024/10/23/pdfs/BOE-A-2024-21699.pdf

BOE – Agreement of 24 March 2021, of the Plenary of the Senate, electing members of the RTVE Board of Directors

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-4889

Letter from the president of RTVE

https://www.rtve.es/rtve/20220926/carta-del-presidente-corporacion-rtve/2403772.shtml

FRANCE

[FR] ARCOM publishes minimum technical standards for age verification systems

Amélie Blocman
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The *Loi visant à sécuriser et réguler l'espace numérique* (Law aiming to secure and regulate the digital space – SREN) of 21 May 2024 contains provisions aimed at preventing minors from accessing pornographic websites in accordance with Article 227-24 of the Penal Code, and requires the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM) to publish a framework document setting out minimum technical standards to be met by age verification systems.

Published on 22 October, the document was drawn up in connection with the work carried out in recent years by the *Commission nationale de l'informatique et des libertés* (the French data protection authority – CNIL) to ensure that age verification systems protect minors while also respecting the right to privacy. Rather than certify individual solutions, it gives services that disseminate pornographic content the freedom to choose their own child protection mechanisms, as long as they comply with the technical requirements laid down. The services concerned must comply within three months.

The first section of the framework document sets out some general provisions on the reliability of age verification systems required under the law. Article 1 SREN expressly stipulates that services that disseminate pornographic content must display a screen that does not contain any such content “until the user’s age has been verified”. As well as requiring minors to be protected by default, i.e. before a service is even accessed, it describes the necessary level of effectiveness of online age verification systems and the need to prevent them from being circumvented. However, for an interim period, the services concerned will be allowed to employ systems in which users can prove their age with a bank card, subject to strict adherence to certain conditions. The tools used must ensure that minors cannot use fake documents, such as AI-generated images, to prove their age. Finally, each site will be required to offer at least one ‘double-blind’ age verification system, in which an intermediary (bank, telephone provider) can be called upon without the website knowing the user’s identity or the intermediary being aware that the person concerned is visiting a pornographic site.

The second section of the document deals specifically with the protection of privacy by age verification systems. Websites can use systems that offer different levels of privacy protection, provided they inform users of the level they provide. The fourth and final part describes key principles designed to help services that disseminate pornographic content to audit their age verification systems.

The framework document is meant to be an interim measure pending the introduction of an effective Europe-wide solution.

A few days earlier, the Paris Court of Appeal issued a decision on the blocking of websites that enable minors to access pornographic content on French territory. In a case referred back to it after appeal, it upheld applications in which child protection organisations had called for access to several websites based outside the EU (xHamster, TuKif, Mr Sexe, IciPorno) to be blocked. Regarding some of the sites concerned (Pornhub, Youporn, Redtube, Xvideos and XNXX), whose publishers had claimed that blocking them would contravene European law, the court stayed the proceedings pending the CJEU's response to a number of preliminary questions (filed after the publishers asked the *Conseil d'Etat* to annul Decree No. 2021-1306 of 7 October 2021 on methods for implementing measures to prevent minors accessing sites with pornographic content, see IRIS 2024-4:1/12). However, the court ordered that all access to the other sites should be blocked until it could be shown that their checks were more stringent than a simple requirement for users to declare that they were adults.

Paris, pôle 1 – ch. 3, 17 octobre 2024, n° 23-17972

https://www.legifrance.gouv.fr/download/pdf?id=wGtgP2XARQBIlmFV3twRcHEvSu76wkc5KYAilwqhZo0=

Paris Court of Appeal, section 1, chamber 3, 17 October 2024, no. 23-17972

[FR] The exhaustion of distribution rights rule does not apply to video games

Amélie Blocman
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Valve Corporation, an American company, offers, via the 'Steam' platform, an online distribution service for digital content such as video games, developed by Valve or third parties, software, films and television series that can be downloaded to the user's computer, as well as associated services such as functions allowing users to exchange with other Internet users or to participate in games with several players. To use this platform, subscribers must download software and accept the Steam Subscription Agreement. The online availability of video games and related services was provided in Europe by a Luxembourg subsidiary of Valve Corporation, and then by Valve itself. In 2015, the Association UFC Que choisir took the companies to court, claiming that the terms of the Steam subscription agreement were unfair or unlawful and requesting the deletion of several clauses, in particular that prohibiting the resale and transfer of Steam accounts and subscriptions acquired on the platform. When the Court of Appeal rejected UFC-Que Choisir's application and its request to refer a preliminary question to the Court of Justice of the European Union (CJEU), the association appealed to the Court of Cassation. The Court of Cassation pointed out that Article 4(2) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programmes provides that the first sale of a copy of a computer programme in the Community by the rightsholder or with his consent exhausts the right of distribution of that copy. According to the CJEU, if the exhaustion of the distribution right provided for in that provision concerns both tangible and intangible copies of a computer programme, and therefore also copies of computer programmes which, at the time of their first sale, were downloaded onto the first purchaser's computer via the internet, the provisions of Directive 2009/24, and in particular Article 4(2) thereof, constitute a lex specialis in relation to the provisions of Directive 2001/29 (CJEU, judgment of 3 July 2012, UsedSoft, C-128/11). In this case, after recalling the provisions of the aforementioned directives and the case law of the CJEU in this regard (in particular the Tom Kabinet judgment, C-263/18 of 19 December 2019), the Court of Appeal correctly stated that a video game is not a computer programme in its own right but a complex work in that it includes software components as well as numerous other elements such as graphics, such as graphics, music, sound elements, a scenario and characters, and unlike a computer programme, which is intended to be used until it becomes obsolete, a video game is quickly put on the market once the game is finished and, unlike software, can still be used by new players several years after it was created. It therefore correctly concluded that only Directive 2001/29 is applicable to video games, that the exhaustion of rights rule does not apply in this case and that, in the absence of any reasonable doubt as to the interpretation of European Union law, there is no need to refer a question to the Court of Justice of the European Union for a preliminary ruling.

Civ. 1re, 23 octobre 2024, n° 23-13.738, UFC-Que Choisir c/ Valve Corporation

https://www.legifrance.gouv.fr/juri/id/JURITEXT000050443215

[FR] Visibility of audiovisual services on connected devices: ARCOM adopts two decisions on general interest services

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Today, the vast majority of television viewers watch audiovisual content on smart TVs and other connected devices. The interfaces on these devices are operated by a variety of companies, including Internet access providers and their boxes, smart TV manufacturers and app stores that aggregate numerous audiovisual services. Viewers are therefore finding it more and more difficult to access their favourite services and programmes quickly and easily.

In order to address the problems that this creates in terms of pluralism and cultural diversity, ARCOM has adopted two decisions on the visibility of services of general interest in line with the amended Audiovisual Media Services Directive, Article 20-7 of the Law of 30 September 1986 and its implementing decree of 7 December 2022, and an accompanying memorandum. The decisions meet three key objectives: to optimise exposure to the services and content of national audiovisual media groups that contribute to the vitality of democratic debate and creativity, to increase public use of such services by making them more accessible via different types of devices, and to make them easy for interface operators to use.

The decisions are set to apply to all interfaces that meet the thresholds laid down in the decree of 7 December 2022 and that enable users to access audiovisual services, including those based outside France. An amended list of user interfaces affected has also been adopted in order to take into account comments made by the European Commission in May.

ARCOM will shortly be asking all the service providers concerned to declare that their service of general interest meet the criteria laid down in the decision. After it has been checked, the list of services of general interest will be published on the ARCOM website and notified to service providers and interface operators. ARCOM plans to help all interface operators implement appropriate visibility measures and ensure that they are compliant.

In an environment characterised by rapidly changing consumer behaviour and fierce competition between video platforms, especially those based outside Europe, these decisions recognise the important role played by public and private digital terrestrial television (DTT) channels in protecting pluralism of information, diversity of opinion and cultural diversity in France. They demonstrate that France is leading the way in Europe in terms of promoting the visibility and, therefore, the future of national audiovisual media.

Délibération du 25 septembre 2024 relative à la liste des services qualifiés d'intérêt général, en application des dispositions de l'article 20-7 de la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication, JO du 27 septembre 2024

https://www.legifrance.gouv.fr/download/pdf?id=F7nusAmtC1YwwbTWbR4xUDgg58_xRNHhcDvF5k3Ph1I=

Decision of 25 September 2024 on the list of general interest services, implementing the provisions of Article 20-7 of Law no. 86-1067 of 30 September 1986 on the freedom of communication, OJ of 27 September 2024

UNITED KINGDOM

[GB] The FCA intensifies crackdown on unauthorised "finfluencer" promotions

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The UK's Financial Conduct Authority (FCA) is ramping up its regulatory scrutiny of social media influencers, popularly known as "finfluencers", who use their platforms to promote financial products. In a significant development, the FCA has called in 20 individuals for interviews under caution.

In conjunction with these interviews, the FCA issued 38 alerts targeting social media accounts managed by finfluencers suspected of promoting financial products unlawfully. These recent actions form part of the FCA's ongoing strategy to curb misleading financial promotions, particularly on social media, where informal financial advice proliferates and reaches vast numbers of users. The impact of finfluencers has surged alongside the popularity of platforms like Instagram, YouTube and TikTok, where personalities often share financial advice or promote investment products to followers. Young people are especially drawn to them; according to the FCA, roughly two-thirds of individuals aged 18 to 29 follow social media influencers, with a substantial 74% expressing trust in their advice. This influence is significant, as 90% of young followers reported changing their financial behaviour based on finfluencers' recommendations. However, as this new digital financial ecosystem expands, so do concerns regarding potential consumer harm.

The FCA's concerns stem from the fact that many finfluencers are not authorised by the regulator and lack the qualifications to provide financial advice. Under UK law, only FCA-authorised firms or individuals are permitted to communicate financial promotions to the public. Unauthorised persons, including influencers or other affiliate marketers, promoting investments or financial products are potentially in violation of the Financial Services and Markets Act 2000. In the case of finfluencers, the lack of FCA authorisation combined with their significant influence over financial behaviours is a regulatory red flag.

Earlier this year, in May 2024, the FCA launched a landmark prosecution against a group of social media influencers for promoting an unauthorised foreign exchange trading scheme (see IRIS 2024-7:1/16). This involved trading Contracts for Difference (CFDs), complex financial instruments that allow investors to speculate on asset price movements but carry a high risk of loss. The prosecutions involve prominent influencers (also known from popular TV shows like *Love Island* and *The Only Way is Essex*) and represent the first FCA action explicitly targeting finfluencers.

The regulator’s latest interventions against finfluencers reflect a broader regulatory stance aimed at ensuring that financial promotions on social media adhere to strict compliance standards. The Authority's guidance mandates that all financial promotions, including those on digital platforms, provide a balanced view of benefits and risks, ensuring that potential investors can make well-informed decisions. This responsibility extends to all channels used to advertise, including social media.

To mitigate risks associated with social media promotions, the FCA also requires firms working with influencers to have compliance checks in place and maintain accountability for the content promoted by their affiliates. Any entity endorsing financial products through influencers must closely monitor the promotional material to avoid misleading claims that could harm consumers.

In the recent FCA-led prosecutions, the defendants appeared in court in July 2024 but notably, several influencers pleaded not guilty, setting the stage for further legal proceedings to assess the legitimacy of their promotional activities. The FCA’s stance signals increased oversight in which social media promotions are likely to face heightened scrutiny and highlights broader concerns about consumer harm linked to influencer marketing. Recent research points to persistent issues of influencers flouting several established marketing rules, beyond financial promotions.

FCA cracks down on illegal finfluencers

https://www.fca.org.uk/news/press-releases/fca-cracks-down-illegal-finfluencers

Fin-fluencers face legal action for promoting unauthorised high-risk investments on social media

https://merlin.obs.coe.int/article/10109

When likes go rogue: advertising standards and the malpractice of unruly social media influencers

https://doi.org/10.1080/17577632.2024.2361517

IRELAND

[IE] Irish Media Commission determines TikTok, X and Instagram are exposed to terrorist content

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On 13 November 2024, the Irish national media regulatory authority, *Coimisiún na Meán* (the Commission), announced that it had determined that TikTok, X and Instagram were "exposed to terrorist content".

The decision was reached in accordance with its Decision Framework on Hosting Service Provider Exposure to Terrorist Content published in June 2024. The Decision Framework defines "terrorist content", in its introduction, as content that incites, solicits, threatens or instructs on the commission of terrorist offences. A longer, more detailed definition is included in the annex to the document, as well as a reminder of the content of Article 3(1) of Directive (EU) 2017/541 on combating terrorism, which establishes what acts can be defined as terrorist offences, based on their nature and context.

The Commission was designated as a competent authority under Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online (TCOR) to oversee the specific measures taken by a hosting service provider within Irish jurisdiction when it is deemed to be exposed to terrorist content. Exposure to terrorist content is determined based on objective factors, such as the hosting service provider having received two or more final removal orders over the previous 12 months. At this stage, the Commission will take a preliminary decision and engage with the hosting service provider, initiated via a letter informing them that the Commission has become aware that they are exposed to terrorist content, granting them the possibility to provide the Commission with comments within three weeks.

The Commission then takes a decision, based on all the information at their disposal, determining whether the hosting service provider is indeed exposed to terrorist content. Based on this decision, the hosting service provider may be required to take specific measures to prevent the dissemination of terrorist content. This includes taking appropriate technical and operational measures to identify and expeditiously remove or disable access to terrorist content, setting up easily accessible and user-friendly mechanisms for users to report or flag alleged terrorist content and reporting to the Commission on the measures taken.

TikTok, X and Meta will now be obliged to take specific measures to protect their services from being used for the dissemination of terrorist content and to report to the Commission on those measures within three months of receiving the decision. Should the Commission consider that the measures do not comply with legislative requirements, they will address a further decision to the hosting

service provider, requiring them to ensure that legislative provisions are complied with. Infringements of the TCOR by hosting service providers can lead to administrative fines, including financial penalties of up to 4% of global turnover.

Coimisiún na Meán makes determination on three hosting service providers under Terrorist Content Online Regulation

https://www.cnam.ie/coimisiun-na-mean-makes-determination-on-three-hosting-service-providers-under-terrorist-content-online-regulation/

Coimisiún na Meán Decision Framework on Hosting Service Provider Exposure to Terrorist Content

https://www.cnam.ie/wp-content/uploads/2024/06/TCOR_Decision-Framework_ENG.pdf

ITALY

[IT] The Italian Communications Authority (AGCOM) adopts guidelines on the prominence of audiovisual and radio media services of general interest

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Portolano Cavallo

In its board meeting of 9 October 2024, the Italian Communications Authority (*Autorità per le Garanzie nelle Comunicazioni* – AGCOM) approved the Guidelines on the prominence of audiovisual and radio media services of general interest (the Guidelines).

The Guidelines are aimed at ensuring a prominent position for services of general interest on television screens, without prejudice to the possibility for users to customize how services are displayed, as required under the European Media Freedom Act (Regulation (EU) 2024/1083).

To do so, the Guidelines lay down the criteria to qualify a service as being of "general interest" thereby ensuring that adequate prominence is afforded to it on any receiving device and through any platform. The services of general interest identified by the Guidelines include:

(i) free-to-air audiovisual and radio media services broadcast by the Italian public service broadcaster (RAI) on digital terrestrial television (DTT), satellite and online;

(ii) nationwide free-to-air audiovisual and radio media services broadcast on DTT, satellite and online (e.g. linear television and radio channels, catch-up tv and catch-up radio, etc.) with a generalist, semi-generalist and information thematic genre and whose programming schedule includes news programmes, as well as those with a programming genre for "children and youth" and "culture" as defined by an underlying AGCOM resolution.

(iii) local free-to-air audiovisual and radio media services broadcast on DTT, whose programming schedule includes news programmes.

The Guidelines require that the abovementioned services of general interest are afforded prominence on all devices and user interfaces which enable access to such services, including smart TVs, decoders, devices such as dongle and console, smartphones, tablets and PCs. To achieve this, the Guidelines provide specific icons to be displayed in a navigation rail on the home page of the devices.

AGCOM, Allegato A alla Delibera 390/24/CONS: "Linee guida in materia di prominence dei servizi di media audiovisivi e radiofonici di interesse

generale”.

https://www.agcom.it/provvedimenti/delibera-390-24-cons

AGCOM, Annex A to Resolution No. 390/24/CONS: Guidelines on the prominence of audiovisual and radio media services of general interest.

NETHERLANDS

[NL] Bill implementing the EU Anti-SLAPP Directive published

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Institute for Information Law (IViR)

On 7 October 2024, the Dutch Government published an important bill to implement the 2024 EU Directive on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (strategic lawsuits against public participation – SLAPPs), known as the Anti-SLAPP Directive (see IRIS 2024-3/5 and IRIS 2022-5/6). The purpose of the directive is to provide safeguards against SLAPPs, which are manifestly unfounded claims or abusive court proceedings brought against natural and legal persons on account of their engagement in public participation. Notably, the directive only applies to "civil matters with cross-border implications", although an accompanying European Commission Recommendation states that member states "should aim to include in their national laws similar safeguards for domestic cases", and should ensure their legal frameworks governing "criminal proceedings" provide for the necessary safeguards to address SLAPPs. Member states are required to implement the directive by May 2026.

Of note, while the directive has over 21 provisions with various rules on definitions, procedural safeguards, accelerated treatment of applications, and support for defendants, the Dutch implementing bill is only two pages long, and contains only one article. In this regard, the bill amends the Code of Civil Procedure, and inserts a new Article 224a into the code. It seeks to implement Article 10 of the directive on security for costs, and the Article 224a amendment to the code provides that in court proceedings brought against natural or legal persons on account of their engagement in public participation, the court may, at the request of the other party, oblige the person instituting the action to provide security for the costs of the proceedings and damages under Articles 10 and 14 of the Anti-SLAPP Directive which they could be ordered to pay. The provision does not apply if it would hinder effective access to justice for the person from whom security is sought.

Crucially, the Explanatory Memorandum to the bill states that "with the exception of the measure of security for legal costs and damages" included in Article 10 of the directive, "Dutch (procedural) law already provides for the measures prescribed by the Directive". It continues, "[t]herefore, no separate implementation is required for this". As such, the bill contains no further implementing provisions.

Notably, a consultation period on the bill was open until 12 November. A coalition of 25 press freedom and human rights organisations (CASE) made a submission in response to the consultation, stating that the Dutch bill "does not meet the Directive's minimum standards regarding effective safeguards", and that "it does

not offer meaningful protection to SLAPP targets in its current form". The submission makes a number of recommendations, including that the bill should include the definition and indicators to assess a SLAPP, as otherwise, "Dutch judges are provided with little guidance when assessing potential SLAPP cases". Finally, the coalition is "disappointed" that the bill "focuses solely on the protection against SLAPP cases with a cross-border element", and states that the Dutch Government "should ensure that protection is provided for in domestic SLAPP cases as well".

Wijziging van het Wetboek van Burgerlijke Rechtsvordering ter implementatie van Richtlijn (EU) 2024/1069 betreffende bescherming van bij publieke participatie betrokken personen tegen kennelijk ongegronde vorderingen of misbruik van procesrecht ('strategische rechtszaken tegen publieke participatie'), 7 oktober 2024

https://www.internetconsultatie.nl/antislapp/b1

Amendment of the Code of Civil Procedure to implement Directive (EU) 2024/1069 on the protection of persons involved in public participation against manifestly unfounded claims or abusive litigation ("strategic litigation against public participation"), 7 October 2024

[NL] Court rules that investigative broadcast journalist can invoke right to protection of journalistic sources

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Institute for Information Law (IViR)

On 7 November 2024, the *Rechtbank Rotterdam* (District Court of Rotterdam) delivered an important ruling on the protection of journalistic sources, and when courts can compel journalists to testify in criminal proceedings. Notably, the court ruled that an investigative journalist of the public broadcaster BNNVARA was entitled to refuse to testify in criminal proceedings against a Dutch local councillor accused of leaking confidential information.

The case arose in May 2023, during a meeting of the Municipality of Dordrecht, where councillors were confidentially informed about legal correspondence between the municipality and the global chemical company Chemours, which has a large chemical plant in Dordrecht. The confidential information concerned a possible settlement between the municipality and the chemical company over legal proceedings for pollution. The confidential information was leaked, and subsequently, the investigative current affairs programme Zembla, of the public broadcaster BNNVARA, published reports on the confidential information.

Notably, in March 2024, the Dutch Public Prosecution Service decided to prosecute a councillor for leaking the confidential information. During the criminal proceedings, the defendant councillor requested the Zembla journalist as a witness; the defendant stated that he had “shared information from the meeting” with the journalist. According to the defendant, the municipality wanted to “secretly settle” with the chemical company. In addition, the defendant alleged that the journalist “did not inform the defendant that the information leaked would be published and in what form this would happen”. In August 2024, at the defendant’s request the journalist was summoned to appear as a witness. However, the journalist’s legal representative appeared during the criminal proceedings, and sought to have the summons withdrawn. It was argued that the journalist was entitled to protection of journalistic sources, and due to the “importance of future sources continuing to trust the journalist”, and the “social importance of source protection”, the journalist would “not disclose information from and about his sources or otherwise act as an extension of the judiciary or of parties in the criminal investigation”.

In its ruling on whether the journalist should be ordered to testify, the District Court first stated that it can be “sufficiently inferred” from the procedural documents that the “leaked information was collected by [the journalist] with a view to reporting for the benefit of the public debate”. Second, the court considered that source protection applies not only to the personal details of the source, but also to the “information provided by that source and the context in which that information was provided (source-related information)”. The court also added that in order “not to deter future sources”, the right to refuse to testify also applies to the situation in “which the source is (now) known”. Crucially, the court noted that the defence’s questions to be asked to the journalist relate to source-

related information, and it is “more than plausible” that the journalist “can and will rightly invoke his journalistic right to refuse to testify” in response to “almost all of the questions to be asked”. In this regard, the court held that the “discovery of the truth” and the “defence’s interest” in this case are “not of such a weighty (social) interest that they justify an infringement of the right to source protection”. As such, the court held that the journalist should not be questioned, and the court would refrain from hearing the journalist as witness.

Rechtbank Rotterdam, ECLI:NL:RBROT:2024:11231, 7 november 2024

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBROT:2024:11231

District Court of Rotterdam, ECLI:NL:RBROT:2024:11231, 7 November 2024

[NL] The Dutch Media Authority publishes the report on news consumption by young people

Valentina Golunova
Maastricht University

On 1 October 2024, the Dutch Media Authority (‘*Commissariaat voor de Media’*) published the report ‘Young people, news and social media. A look at the future of the news’. It posits that since young people increasingly rely on social media rather than traditional media to stay updated on current events, news consumption, in general, is undergoing both massive and permanent transformation. The media routines that young people are developing now determine their media behaviour in the future. The report highlights the main implications of the increasing role of social media in news delivery and presents recommendations for media organisations.

The report is based on a large-scale survey among young people (16-24 years, 2,010 participants) and more senior news consumers (40-65 years, 497 participants). Its key finding is that 78% of young people use social media to stay informed about what is going on in the world. Although 48% of young people also use news websites and apps, they encounter news primarily on social media through automated notifications. The large majority of both young and older people (94%) trust the news they see online. The familiarity and reputation of media organisations play an important role in creating trust for the information they disseminate. Social media groups or channels do not produce news themselves but reproduce it from other sources. Since young people’s interest in news increases with age, there is a strong demand for quality journalism accesible via social media. However, media organisations are still reluctant to be present on social media. Since private organisations earn their revenue from subscriptions or advertisements through their own websites but cannot do the same on social media platforms, reaching young people with youth-oriented journalism offerings is challenging. As a result, large tech firms, through their algorithms, continue to have a far-reaching influence on the type of news users see online. According to the Dutch Media Authority, this could undermine the future of journalism and adversely impact democratic discourse in the long term.

In view of the identified challenge, the Dutch Media Authority outlined four main strategies for safeguarding a pluriform media landscape and enabling traditional media outlets to establish a stronger connection to their younger audience. Above all, news organisations should make news visible, accessible, and recognisable to young people. This could be achieved primarily by developing a youth-oriented approach to social media. Additionally, since social media platforms do not offer proper revenue models for news organisations, (temporary) incentive measures, such as tax incentives or subsidies, would incentivise the news sector to put in place initiatives specifically aimed at young people. Further regulatory measures targeting social media platforms would also stimulate the emergence of revenue models beneficial for media organisations. According to the Dutch Media Authority, existing EU-wide and national legislation remains insufficient and would

benefit from more precise definitions and a broader scope. Finally, it is important to enhance young people's media literacy, enabling them to distinguish professionally created news from other forms of reporting and recognise misinformation. The recommendations are expected to increase the trust in journalism, which is crucial for a well-functioning democracy.

Dutch Media Authority, report 'Young people, news and social media. A look at the future of the news' (1 October 2024)

[NL] The Dutch Minister of Interior and Kingdom Relations responds to parliamentary questions regarding disinformation networks on social media

Valentina Golunova
Maastricht University

On 2 October 2024, the Netherlands Ministry of Interior and Kingdom Relations (BZK) published a response to parliamentary questions by Kati Piri and Barbara Catharina Kathmann, MPs from the GreenLeft-Labour political party alliance (GroenLinks–PvdA). The questions were related to the recent research on online disinformation networks during the recent elections to the European Parliament conducted by the Dutch consultancy firm Trollrensics. As seen in this research, coordinated networks of social media accounts were active in France, Germany and Italy, and they aimed to interfere with public discourse by discrediting public authorities. Piri and Kathmann, who submitted their questions on 12 July 2024, inquired about the Ministry's position concerning the outcomes of the research as well as the current national and EU-wide measures against disinformation and election interference. The answer was provided by Minister Uitermark, also on behalf of the State Secretary of Interior and Kingdom Relations and the Ministers of Defence and Justice and Security.

Minister Uitermark acknowledged that she was aware of the published research and expressed her concern regarding the drastic impact of disinformation networks on the rule of law and public trust in democratic institutions. Although the study did not establish any malicious activities in smaller Member States, including the Netherlands, Minister Uitermark indicated that Russian influence campaigns posed a threat to the Dutch society and must be appropriately addressed. In response to the inquiry whether the Netherlands, being a prominent attraction point for digital services, carries a special responsibility to tackle disinformation, Minister Uitermark stated that the EU legal framework, particularly the Digital Services Act (DSA), already obliges hosting providers (including online platforms) to take action on false and misleading information, including both its illegal and harmful forms. At the same time, given the documented misuse of Dutch ICT infrastructure by malicious actors, strengthening its resilience is essential to countering digital espionage, sabotage, and influence operations. Hence, Minister Uitermark underscored the need to effectively implement the Dutch Cybersecurity Strategy 2022 – 2028. Additionally, she pointed to the new measures against disinformation announced in June 2024, which include establishing a reporting facility, dispute resolution body and knowledge centre enabling citizens to bring complaints against content moderation decisions of online platforms.

Concerning additional measures taken during the EU elections, Minister Uitermark outlined both EU-wide and national initiatives. The former include the efforts made by the European External Action Service to analyse and expose disinformation, the 'stress test' conducted by the European Commission, as well as various coordination mechanisms among Member States. The latter

encompasses disseminating reliable information about electoral processes, the inter-institutional dialogue involving municipalities, the Electoral Council and security authorities, as well as the communication with online platforms through the mechanism of 'trusted flaggers'. It was also revealed that the Ministry of Interior and Kingdom Relations has recently commissioned further research into the vulnerabilities of open public debate, including how disinformation can undermine the Dutch democratic rule of law, as well as possible interventions which can enhance its protection. The first outcomes of this research will become available at the end of 2024. Additionally, Minister Uitermark remarked that during the informal session of the European Council, which took place on 17 June 2024, the Dutch Prime Minister emphasised the need for further research on potential foreign interference in European Parliament elections.

The response to parliamentary questions posed by MPs Piri and Kathmann signals growing attention to the issues of foreign interference and disinformation in the Netherlands.

Answer to questions posed by MPs Piri and Kathmann regarding Trollrensics' research on disinformation networks during the EU elections

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