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Publisher:

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

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

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

Executive Director: Susanne Nikoltchev

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

Documentation/Press Contact: Alison Hindhaugh

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

E-mail: alison.hindhaugh@coe.int

Translations:

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

Corrections:

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

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EDITORIAL

The start of a new year brings with it a fresh sense of possibilities and new beginnings, but also a moment of reflection that allows us to pause and appreciate how far we have come.

This year holds special significance for our Newsletter, marking three decades of continuous publications. What began as "Legal Observations" in January 1995 has blossomed into a more sophisticated project. This evolution reflects not just technological progress, but especially the remarkable collaborative spirit of our network of correspondents. For those feeling nostalgic, we invite you to explore our archive of past newsletter editions, available on our website. It is a journey through thirty years of audiovisual insights and developments.

And while we can fondly remember the past, you may also be interested in our inaugural 2025 edition. It presents a comprehensive overview of recent regulatory developments, from the adoption of a code of conduct between the Dutch regulator and Snapchat, to the update of the influencer marketing rules in France. Germany also saw an agreement on the reform of the state treaty on public broadcasting. Recent case law, such as the Constitutional Court's annulment of Romania's presidential election process, or, on another level, the ongoing infringement proceedings against EU member states, may also pique your interest.

On behalf of the entire team at the European Audiovisual Observatory, I wish you all a healthy, prosperous and successful 2025. Here's to continued learning, innovation and cooperation!

Maja Cappello, Editor

European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

HUNGARY

European Court of Human Rights: *Klaudia Csikós v. Hungary*

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

The European Court of Human Rights (ECtHR) has added a new wagon to its locomotive judgment in the case of Goodwin v. United Kingdom (IRIS 1996-4:1/4) on the protection of journalistic sources. The recent judgment in the case of Klaudia Csikós v. Hungary summarises and applies the court's case law robustly protecting journalistic sources against secret surveillance by the police or other government agencies (see also Sergey Sorokin v. Russia, IRIS 2022-9:1/17 and Big Brother Watch a.o. v. the United Kingdom, IRIS 2021-7:1/20). The ECtHR found that the Hungarian authorities failed to address the journalist's grievances and that there were no adequate procedural safeguards for the applicant journalist to challenge the alleged use of secret surveillance against her to discover her journalistic sources. The ECtHR, unanimously found a violation both under Article 8 (right to privacy) and Article 10 (freedom of expression and information) of the European Convention on Human Rights (ECHR)

The applicant in this case is Klaudia Csikós, a journalist regularly reporting on court cases and criminal investigations. She complained that the phone she used, which her employer had provided, had been tapped between 3 and 6 November 2015. The (alleged) secret telephone tapping by the police had gathered evidence for the criminal prosecution of a police officer, T., on charges of abuse of authority for having shared secret information with Csikós. She raised her concerns about the monitoring of her telephone conversations with the National Defence Service under the Police Act, the Minister of the Interior and the National Security Committee of Parliament under the National Security Act, arguing that the secret surveillance measure had been used in respect of her and had been applied without judicial authorization. Each of Csikós' requests or complaints, however, have been dismissed. Lastly, she requested leave to access the documents produced in the context of the criminal proceedings against T. from the National Defence Service and, subsequently, from the Budapest Administrative and Labour Court, seeking access to information about the surveillance measures. However, none of these authorities provided any clarification as to the question whether Csikós had been subjected to covert information gathering and if so, whether the measure had been proportionate to her individual circumstances and whether it had been authorized by a judge.

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In 2016, Csikós lodged a complaint with the ECtHR, arguing that her rights under Articles 8 and 10 ECHR had been violated because of the tapping of her telephone calls. She also argued that she had been denied an effective remedy in that connection, invoking her right under Article 13 ECHR. The ECtHR found it appropriate to consider the matter under Articles 8 and 10 ECHR concurrently, and to examine from that perspective the complaint about lack of effective remedy.

The ECtHR reiterated that protecting journalistic sources is one of the cornerstones of freedom of the press: "Without such protection, sources may be deterred from assisting the press in informing the public about matters of public interest. As a result, the vital public watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information may be adversely affected. Therefore, any interference with the right to protection of journalistic sources must be attended to legal procedural safeguards commensurate with the importance of the principle at stake. First and foremost among these safeguards is the guarantee of a review by a judge or other independent and impartial decision-making body with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not" (see also Sanoma Uitgevers BV t. the Netherlands, IRIS 2010-10:1/2). The ECtHR clarified that even in situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk. Applying these principles, the ECtHR analysed the question whether Csikós had been able to complain in an effective manner about the alleged ordering of the surveillance measure, while the alleged absence of judicial authorisation was analysed as a separate issue.

The ECtHR found it relevant that in Hungarian law, no provision was made for any form of notification of secret surveillance measures. It, therefore, accepted that Csikós was unlikely to find out whether her communications had been intercepted, making it inherently difficult for her to eventually seek a remedy for the presumed measure. Furthermore, it did not appear that Csikós had access to an independent and impartial body with jurisdiction to examine any complaint of unlawful interception, independently of a notification that such interception had taken place. Although Csikós had raised her concerns about the monitoring of her telephone conversations with several relevant authorities, none of these authorities provided any clarification as to the question whether she had been subjected to covert information gathering and if so, whether the measure had been proportionate to her individual circumstances and whether it had been authorised by a judge.

The ECtHR also observed that covert information gathering could be ordered under section 69 of the Police Act, allowing such a measure without any restrictions on the persons subject to those measures. While the legislation set out the criminal offences which could give rise to interception, it did not describe the categories of persons who could be subjected to surveillance and did not

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provide for exceptions or limitations. Furthermore, there was no guarantee that any consideration was given to whether the interception of communications involved confidential journalistic sources, or that it was open to the judge to refuse to authorise a measure so as to protect sources from being revealed. Neither was there a requirement of any balancing of the aims pursued by the application of secret surveillance measures and the ramifications of the tapping of a journalist's telephone. In light of these considerations, and in particular the domestic authorities' failure to address Csikós' grievances, the ECtHR found that no adequate procedural safeguards were in place for the applicant journalist to challenge the alleged use of secret surveillance against her to discover her journalistic sources. There has therefore been a violation of Articles 8 and 10 ECHR.

Judgment by the European Court of Human Rights, First Section, in the case of Klaudia Csikós v. Hungary, Application no. 31091/16, 28 November 2024

https://hudoc.echr.coe.int/eng?i=001-238107

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RUSSIAN FEDERATION

European Court of Human Rights: Kobaliya and Others v. Russia

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

The European Court of Human Rights (ECtHR) found once more gross and systemic violations by the Russian state of the right to freedom of expression and freedom of association as protected by Articles 10 and 11 of the European Convention on Human Rights (ECHR). 107 applicants, including human rights organisations, media outlets and journalists, had complained about measures and sanctions in the application of the Foreign Agents Act of 2012, as amended in 2017, 2019 and 2020 and the Federal Law No. 255-FZ of 14 July 2022 that repealed and replaced all previous "foreign agent" legislation. The ECtHR found the restrictions imposed by the Russian authorities on the applicants because of their status as "foreign agents" a breach of their freedom of expression and association, and it labelled the legal provisions and their application as bearing "the hallmarks of a totalitarian regime".

The ECtHR build on its earlier case law in Ecodefence and others v. Russia (IRIS 2022-8:1/29), now also taking into consideration the broadening of the concept of "foreign agent" in the more recent version of the law, the expansion of the consequences of being labelled as "foreign agent" and the punitive measures and sanctions for non-compliance with the legal provisions of the Foreign Agent Act. In addition to the finding of a violation of Articles 10 and 11 ECHR, the ECtHR also found that the Russian authorities have violated the applicant's right to privacy under Article 8 ECHR.

The applicants complained that the restrictions imposed by the "foreign agent" legislation and the fines for alleged non-compliance, violated their rights to freedom of expression, association and assembly as guaranteed under Articles 10 and 11 ECHR. The facts constituting the interference with the applicant's Convention rights, including their designation as "foreign agents" or their conviction of "foreign agent" offences, occurred prior to 16 September 2022, when the Russian Federation ceased to be a party to the ECHR. The ECtHR, therefore, had jurisdiction to examine these complaints.

The applicants, in particular, emphasized the severe and disproportionate nature of the penalties imposed for non-compliance. They cited examples of substantial fines, such as those imposed on the International Memorial and Memorial Human Rights Centre, which ultimately led to their forced dissolution. The media outlet Novyye Vremena was fined an amount equivalent to 99.7% of its annual income for a purely formal violation. In the applicants' view, these actions were part of a systematic campaign against human rights and media organisations critical of the

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authorities, which had a chilling effect on Russian civil society as a whole and discouraged participation in public debate and human rights advocacy.

The ECtHR agreed that the applicants were affected by the designation as a "foreign agent", which is a stigmatising label and triggered additional accounting, auditing and reporting requirements, along with a wide range of restrictions on certain activities, including participation in electoral processes and the organisation of public events, as well as the obligation to label all their publications as originating from a "foreign agent". Also, the sanctions and penalties ranging from administrative fines to forced dissolution imposed on them for alleged non-compliance with the "foreign agent" legislation were considered individually or cumulatively, as measures having a significant impediment to the applicants' activities, restricting their capacity for expressive conduct.

The ECtHR concentrated its analysis on whether these interferences could be justified under Article 10 § 2 ECHR in terms that they were "necessary in a democratic society". It found that the stigmatising effect of the "foreign agent" label, already identified in Ecodefence and Others v. Russia has been further reinforced. New restrictions on "foreign agents", progressively excluding them from various aspects of public life and civil activities – such as holding public office, participating in election commissions, supporting political campaigns, educating minors and producing content for children – have reinforced the perception that "foreign agent" organisations and individuals pose a threat to society and should be viewed with suspicion and kept away from sensitive areas. The stigma associated with the designation has been further strengthened by the requirement for "foreign agents" to label all their communications with a notice of their status. The ECtHR also observed that it provided the authorities with unlimited discretion to apply the "foreign agent" designation. This fundamental flaw has created a distorted perception of dependence and foreign interference where none had been shown to exist, thereby undermining, rather than enhancing, transparency. It also referred to a series of examples in which NGO's were fined, without providing any evidence showing that the applicants were actually under foreign control or direction or that they were acting in the interests of a foreign entity. It was observed that by forcing the applicants to attach the "foreign agent" label to all their public communications, the authorities compelling them to express a message with which they disagreed. In addition, the applicants were effectively prevented from making meaningful use of social media platforms where the character limit was almost equal to the size of the notice itself. Over and above, non-compliance was punished with allegedly excessive fines.

The ECtHR found that the requirement to use the stigmatising and misleading "foreign agent" label in public communications is unrelated to the stated purpose of transparency and creates an environment of forced self-stigmatisation instead while severely restricting the ability of the applicant media organisations and individual journalists to participate in public discourse and carry out their professional activities. This chilling effect on public discourse and civic engagement does not correspond to a "pressing social need" and is

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fundamentally at odds with the notion of a democratic society, as the ECtHR has already noted in Ecodefence and Others v Russia. The ECtHR emphasized that the "legislation examined in this case goes even further and bears the hallmarks of a totalitarian regime". The ECtHR also found that the severity and scope of the sanctions applying the Foreign Agent legislation were manifestly disproportionate to the declared aim of ensuring transparency. They imposed a punitive regime on "foreign agents" that far exceeded what could be deemed necessary in a democratic society, creating a significant chilling effect on civil society and public debate. The ECtHR concluded that the "foreign agent" legislative framework and its application to the applicants was arbitrary and was not "necessary in a democratic society". Moreover, such legislation has contributed to shrinking democratic space by creating an environment of suspicion and mistrust towards civil society actors and independent voices, thereby undermining the very foundations of a democracy. Accordingly, there has been a violation of Articles 10 and 11 of the Convention. In addition, the ECtHR also found that these unjustified restrictions and sanctions had serious consequences for the applicants' social and professional lives and reputations and constituted interferences that violated the applicants' right to respect for private life protected by Article 8 ECHR.

The ECtHR awarded substantial amounts to some of the applicant NGOs and persons concerning pecuniary damage, costs, and expenses, while most applicants were awarded EUR 10 000 for non-pecuniary damages.

Judgment by the European Court of Human Rights, Third Section, in the case of Kobaliya and others v. Russia, Applications nos. 39446/16 and 106 others, 22 October 2024

https://hudoc.echr.coe.int/eng?i=001-237425

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EUROPEAN UNION

Follow up on infringement proceedings against EU member states for their failure to designate digital services coordinators

Justine Radel-Cormann
European Audiovisual Observatory

In December 2024, the European Commission took further action against several EU member states for non-compliance with the Digital Services Act (DSA). Belgium, Bulgaria, the Netherlands, Poland and Spain were informed of their failure to properly nominate or empower national Digital Services Coordinators (DSCs) as required by Article 49(1) of the DSA. According to DSA Article 49(3), member states were required to designate DSCs by 17 February 2024.

DSCs play a role in implementing the DSA, being responsible for all matters relating to supervision and enforcement within their respective member states (Article 49(2) DSA).

The infringement procedure, as detailed in Article 258 of the Treaty on the Functioning of the European Union (TFEU), involves several steps. The European Commission sends a formal notice to a non-compliant member state. The member state must respond and take appropriate measures. If the Commission deems the response unsatisfactory, it issues a reasoned opinion. If non-compliance persists, the Commission may refer the case to the European Court of Justice.

The status of the infringement procedures for the countries mentioned as of December 2024 was as follows:

Belgium received a formal notice on 25 July 2024 and a reasoned opinion on 16 December 2024 for failing to designate and empower its DSC (INFR(2024)2164).

Bulgaria received a letter of formal notice on 16 December 2024 for failing to empower the nominated DSC (INFR(2024)2241).

The Netherlands received a formal notice on 25 July 2024 and a reasoned opinion on 16 December 2024 for failing to designate and empower its DSC (INFR(2024)2163).

Poland received a formal notice on 24 April 2024 and a reasoned opinion on 16 December 2024 for failing to designate and empower its DSC and for failing to establish penalty rules (INFR(2024)2041).

Spain received a formal notice on 25 July 2024 and a reasoned opinion on 16 December 2024 for failing to empower its DSC (INFR(2024)2165).

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More information on the above procedures can be found in this previous article: IRIS 2024-8:1/23.

December 2024 infringements package (press release of the European Commission)

https://ec.europa.eu/commission/presscorner/detail/en/inf_24_6006

Search infringement decisions (European Commission database)

https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en&langCode=EN

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

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

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[FI] European Commission rejects complaint of unlawful State aid to Finnish public service broadcaster YLE

Eric Munch
European Audiovisual Observatory

On 29 November 2024, the European Commission (the Commission) rejected a complaint by Sanoma Media Finland Oy concerning the granting of alleged unlawful Staite aid to the Finnish public service broadcaster Yleisradio Oy (YLE) for video-on-demand and online learning services.

The complainant is a Finnish media and learning company which, among other services, offers educational publishing and VOD services. It claimed that the public funding to YLE for the provision of its VOD and online learning services constituted unlawful aid. The complainant argued that while YLE's public funding scheme could be viewed as existing aid (put in place before Finland's accession to the EU and therefore not notified to the Commission), the public funding of YLE's online learning services and VOD constituted a new aid. The complainant contended that this new aid distorted competition to the detriment of private market players that offer VOD and online learning services. It further argued that YLE's online learning services, being provided free of charge to students and teachers, further reduced the customers' willingness to pay for similar products and services offered by commercial operators.

In detailed observations challenging the complainant's claim, the Finnish authorities argued that the aid granted to YLE (including the aid for VOD and online learning services) was existing aid, as those services allow for the use of new technologies and distribution platforms. As such, they allow YLE to reach the whole Finnish society and fulfil their public service mandate which predates Finland's accession to the EU in 1995. In the absence of significant changes in the financing of YLE or in the definition of its public service remit, considering VOD and online learning services a new aid would have been unjustified, according to the Finnish authorities. Additionally, they argued that YLE Areena, a free VOD offer addressed to all Finns, constitutes an adjustment to the decreasing consumption of traditional radio and television and increase in consumption on non-linear media. Among other arguments, the Finnish authorities further indicated that the potential impact of YLE's VOD services on commercial operators was small, citing two reports of 2021 and 2022 by economic consulting company Copenhagen Economics.

In its Decision, the Commission notes that not every modification of existing aid qualifies as an alteration of existing aid, and therefore, as new aid, as per Article 4(1) of the Implementing Regulation. It also considers that the modifications, which regard the organisation and functioning of YLE and the scope of its activities, are non-severable from the original measures. Regarding the

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replacement of the license fee set by a broadcast fee (the YLE tax) in 2013, the Commission considered that it could not be seen as a substantial alteration of the existing aid, as that change took account of technological changes and is meant to reflect the variety of devices and communication methods used by viewers to access YLE's broadcasting content. Moreover, it noted that the Court of Justice held that replacing a broadcasting fee payable based on the possession of a receiving device, by a broadcasting contribution payable on the basis of occupation of a dwelling or business premises does not constitute an alteration to existing aid (C-492/17 *Südwestrundfunk v Tilo Rittinger and Others*).

With regard to YLE's VOD services, the Commission considers that the introduction of VOD services is not in itself a substantial modification of the public service remit, in part due to the fact that the content provided "corresponds overwhelmingly to YLE's existing programme remit." Lastly, with regard to the provision of online learning services, the Commission is of the view that the online education activities of YLE also fall within the public service remit, in adequation with Article 7 of the YLE Act which refers to its duty to take educational and equality aspects into consideration in its programmes and to provide an opportunity for learning and self-development.

The Commission also pointed to significant differences with the BBC Digital Curriculum case, in which the Commission had stated the planned services were outside of the BBC's public service remit and had to be regarded as new aid. The latter intended to be an extensive online service, provided through a dedicated online interface, with curriculum mapping, assessment, communication, delivery, tutor support and tracking facilities. In the BBC Digital Curriculum case, the Commission held that "*the provision of educational material over the internet may be considered to be within the 'existing aid' nature of the scheme to the extent that it remains closely associated with the BBC's "television and radio services". If, however, the proposed "ancillary service" sheds this "close association" it can no longer be considered as one offering continuity within the existing scheme.*" Contrary to the BBC Digital Curriculum, YLE's online learning services remain closely associated with its public service programming mission, as described in the YLE Act. The Commission further pointed to the fact that the BBC had planned to spend GBP 150 million from the license fee funds on the Digital Curriculum service over a period of five years, while YLE's spending on these services was limited (approximately EUR 1 050 000 in 2021).

SA.62830 - State aid to public service broadcaster YLE for VOD and online learning services - FI

https://competition-cases.ec.europa.eu/cases/SA.62830

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NATIONAL

BELGIUM

[BE] Adoption of final measures implementing Digital Services Act (DSA)

Olivier Hermanns
European Audiovisual Observatory

Belgium has adopted the final measures required to implement Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

As previously announced (IRIS 2024-3:1/26), a legal instrument of federal cooperation, known as a "cooperation agreement", needed to enter into force. However, this process was delayed on account of the federal and regional elections held on 9 June 2024.

All the parliamentary assemblies of the political entities that signed the cooperation agreement have now given their approval, which was required before it could enter into force.

Under the agreement, the *Institut belge des services postaux et des télécommunications* (Belgian postal and telecommunications authority – IBPT-BIPT) is the appointed digital services coordinator (DSC) for Belgium. The agreement sets out the collaboration arrangements between the DSC and the authorities responsible for audiovisual media, i.e. the *Vlaamse Regulator voor de Media* (Flemish media regulator – VRM) for the Flemish-speaking Community, the *Conseil supérieur de l'audiovisuel* (Higher Audiovisual Council – CSA) for the French-speaking Community and the *Medienrat* (Media Council) for the German-speaking Community.

13 novembre 2024 – Décret [de la Communauté française] portant assentiment à l'accord de coopération du 3 mai 2024 entre l'Etat fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone, relatif à l'exécution coordonnée du Règlement (UE) 2022/2065 du Parlement européen et du Conseil du 19 octobre 2022 relatif à un marché unique des services numériques et modifiant la directive 2000/31/CE (Règlement sur les services numériques), Moniteur belge du 29 novembre 2024, p. 130312

https://www.ejustice.just.fgov.be/eli/decret/2024/11/13/2024010762/justel

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13 November2024. - French-speaking Community decree approving the cooperation agreement of 3 May 2024 between the Federal State, the Flemish-speaking Community, the French-speaking Community and the German-speaking Community concerning the coordinated application of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), Moniteur belge of 29 November 2024, p. 130312

https://www.ejustice.just.fgov.be/eli/decret/2024/11/13/2024010762/justel

20. Dezember 2024. Gesetz zur Billigung des Zusammenarbeitsabkommens vom 3. Mai 2024 zwischen dem Föderalstaat, der Flämischen Gemeinschaft, der Französischen Gemeinschaft und der Deutschsprachigen Gemeinschaft zur koordinierten Umsetzung der Verordnung (EU) 2022/2065 des europäischen Parlaments und des Rates vom 19. Oktober 2022 über einen Binnenmarkt für digitale Dienste und zur Änderung der Richtlinie 2000/31/EG/ (Gesetz über digitale Dienste)

20 DECEMBER 2024. - Law approving the cooperation agreement of 3 May 2024 between the Federal State, the Flemish Community, the French Community and the German-speaking Community on the partial coordinated implementation of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC, Moniteur belge of 30 December 2024, p. 143703

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GERMANY

[DE] ARD and ZDF lodge constitutional complaint regarding licence fee increase

Christina Etteldorf
Institute of European Media Law

On 19 November 2024, the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (German Association of Public Service Broadcasters – ARD), which comprises the nine German regional state broadcasting authorities, and *Zweites Deutsches Fernsehen* (ZDF) lodged a constitutional complaint with the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG). The action was designed to ensure that an increase in the broadcasting licence fee, which had been recommended through an independent procedure but was currently blocked due to the opposition of several *Länder* (federal states), was implemented.

In the first part of the three-stage process employed to fix the public broadcasting fee in Germany, the ARD, ZDF, *Deutschlandradio* and ARTE submit the funding requirements associated with fulfilment of their legal remit to the independent *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission for Determining the Financial Requirements of Broadcasters – KEF). The KEF then examines these requirements and recommends that the *Länder* either maintain or amend the fee, which is paid by private households in Germany. Finally, the 16 German *Länder*, which hold legislative power in the broadcasting sector, set the fee in a new state treaty. In February 2024, the KEF, after examining the broadcasters' requirements, had recommended a monthly fee increase of EUR 0.58 (from EUR 18.36 to EUR 18.94) from 1 January 2025. However, since some *Länder* governments opposed the proposed increase, largely on account of a lack of public support and understanding, the *Länder* have yet to agree to the change. A state treaty that covers all the broadcasting authorities can only be passed if all the *Länder* agree. The Conference of Minister-Presidents held at the end of October 2024, which gave them a final chance to adopt the increase before the start of 2025, failed to produce a unanimous decision.

By submitting a complaint to the BVerfG, the ARD and ZDF hope to obtain a court order to ensure that the fee increase is implemented. They argue that the KEF stated in its report that, if its recommended increase was not fully adopted, the funding they needed to fulfil their current remit would be jeopardised. The *Länder* should take this into account. In particular, media policy objectives should not play a role in the setting of the licence fee, which was determined by an independent body in order to ensure the independence of funding. This is not the first legal dispute concerning the extent to which the *Länder* are bound by the KEF's recommendations when setting the licence fee. In 2005, for example, the ARD, ZDF and *Deutschlandradio* appealed against a decision to set the fee EUR

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0.28 below the figure recommended by the KEF. The BVerfG (judgment of 11 September 2007 – 1 BvR 2270/05) ruled in their favour and found that the freedom of broadcasting, protected under the German Constitution, had been infringed because the grounds given for deviating from the KEF recommendation were either invalid, insufficiently convincing or based on false assumptions. In 2020, the broadcasters filed another complaint, this time after one *Land* (Saxony-Anhalt) had failed to approve the KEF's recommended fee increase, to which all the other *Länder* had agreed. The BVerfG (ruling of 20 July 2021 – 1 BvR 2756/20, 1 BvR 2777/20, 1 BvR 2775/20) again found in the public broadcasters' favour, ruling that Saxony-Anhalt's rejection of the proposal had been unlawful. It was true that the three-stage cooperative process for setting the broadcasting fee did not exclude the possibility of deviating from the KEF's recommendation. However, it should not be affected by programming-related and media policy objectives.

The BVerfG must therefore now issue another ruling. The constitutional complaint was lodged shortly after the Conference of Minister-Presidents held at the end of October 2024 had adopted a comprehensive reform of public service broadcasting that is expected to be ratified through an amended state media treaty in the next year. The reforms mainly comprise cost-cutting measures, although these will not have any immediate effect. Meanwhile, the heads of government of the *Länder* have also announced that they intend to propose a new model for setting the broadcasting fee in the near future. They want to introduce a staggered opposition model in which a change to the fee would no longer require the approval of all 16 *Länder*. Instead, a certain proportion of the *Länder*, depending on the proposed percentage increase, would have to actively oppose the increase for it not to be effective.

Pressemitteilung des ZDF

https://presseportal.zdf.de/pressemitteilung/zdf-legt-verfassungsbeschwerde-ein

ZDF press release

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[DE] Collecting society files model lawsuit against OpenAI to clarify remuneration rights and usage exemptions

Christina Etteldorf
Institute of European Media Law

In mid-November 2024, the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (German collecting society for music rights – GEMA) announced that it was the first collecting society in Europe to file a lawsuit against the US company OpenAI for the unlicensed use of protected musical works. GEMA wants the courts to clarify the remuneration obligation that it thinks should arise from OpenAI's systematic use of its repertoire to train its AI systems. It has also asked the *Landgericht München* (Munich District Court) to decide whether the public communication of original song lyrics by ChatGPT is lawful.

GEMA is a collecting society for musical works that manages the copyright-protected exploitation rights of around 90 000 members in Germany and around 2 million rights holders worldwide. Its primary role is to grant exploitation rights in return for a fee that is then passed on to the relevant rights holder. The lawsuit it filed against OpenAI Ireland Ltd. (the operator of the ChatGPT AI tool in Europe) and its American parent company OpenAI L.L.C. was based on the claim that the rights holders' works were being used in contravention of copyright. Despite generating billions of dollars in turnover, the company had not acquired any licences or paid any usage fees. The works were being used to train AI systems and original song lyrics were being communicated to the public by the company's chatbot. GEMA assumed that song lyrics from its repertoire were being used because, firstly, ChatGPT could reproduce them at its users' request, which was a case of communication to the public under copyright law. Secondly, this was only possible if the AI system on which the chatbot was based had been fed the relevant lyrics in order to be trained. GEMA claimed in its press release that this amounted to deliberate copyright infringement through systematic use of third-party works.

The Munich District Court will now examine various questions concerning a range of different legal aspects. In particular, it will need to decide whether training AI systems with and communicating protected song lyrics are activities covered by copyright law and what the consequences are for the act of communication if the lyrics are freely accessible on the Internet. If it decides that these activities are covered by copyright law, it may need to address exemptions that could be cited by OpenAI. These particularly include text and data mining, which is regulated in Article 44b of the German *Urheberrechtsgesetz* (Copyright Act – UrhG). According to this provision, the reproduction of lawfully accessible works is permitted in order to carry out automated Internet searches and gathering of information for analysis purposes. In another case at the end of September 2024, the *Landgericht Hamburg* (Hamburg District Court) decided that Article 44b UrhG could be used to justify the training of AI systems (Judgment of 27 September 2024, case No. 310 O 227/23). However, this case concerned text and data mining for scientific

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purposes, which is governed by Article 60d UrhG, implementing Article 3 of Directive (EU) 2019/790. Nevertheless, since commercial text and data mining may also fall under Article 44b UrhG, it may not be permitted if the rights holder has made an effective reservation of use. A reservation of use in the case of works that are available online is only effective if it is made “in a machine-readable format”. The dispute with OpenAI is also expected to revolve around whether GEMA has made such an effective reservation of use. The Hamburg District Court had decided – without needing to refer to Article 44b UrhG because of the relevance of Article 60d UrhG – that a declaration in natural language was sufficient to achieve this because AI was able to understand it.

Pressemitteilung der GEMA

https://www.gema.de/de/aktuelles/ki-und-musik/ki-klage

GEMA press release

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[DE] State treaty on public broadcasting reforms agreed

Christina Etteldorf
Institute of European Media Law

On 25 October 2024, the heads of government of the German *Länder*, which are responsible for media regulation in Germany, agreed to adopt a draft *Staatsvertrag zur Reform des öffentlich-rechtlichen Rundfunks* (state treaty on the reform of public broadcasting – *Reformstaatsvertrag*). The draft treaty sets out fundamental public broadcasting reforms designed to ensure that the nine regional broadcasters that make up the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (German Association of Public Service Broadcasters – ARD), *Zweites Deutsches Fernsehen* (ZDF) and *Deutschlandradio* are, in future, "more digital, more streamlined and more modern". Its key provisions concern the confirmation of the public service remit, the amalgamation of administrative structures, the partial reduction of services and the switch to exclusively digital transmission, the tightening of rules prohibiting press-like services, the cost of sports rights, cooperation with private broadcasters and changes to internal supervision.

As far as confirmation of the public service remit is concerned, the draft treaty seeks, in particular, to strengthen interactive and participatory formats, as well as educational skills and media literacy activities, and to promote coverage of the full breadth of sport. Fulfilment of the remit will be regularly monitored against legally defined criteria (e.g. availability and accessibility, usage, impact, balance, etc.). A *Medienrat* (Media Council) comprising six independent experts will be set up for this purpose, and will conduct an extensive external assessment of the entire system every two years.

The reform also includes a number of structural changes, especially in relation to cooperation between the broadcasting authorities that make up the ARD, which should also cut administrative costs. In order to reduce multiple structures and create clear decision-making processes, management teams will be assigned to the key joint services within the ARD and ZDF. Joint services will therefore remain, but mirroring or duplication of decision-making structures (e.g. duplicate management boards) should be prevented. As a general principle, the broadcasting authorities must also work together more closely, in particular by combining operational, technical and human resources, including studios in Germany and abroad. The number of special-interest channels will also be cut: *tagesschau*24, Phoenix, ARD-alpha and ZDFinfo are all linear special-interest channels that focus on news, education and documentary programmes. Under the reforms, this number will be reduced from four to two, while the number of radio stations will be cut from 69 to 53.

The requirement that the telemedia services of public service broadcasters should not be press-like will remain in place. Newspaper publishers and publisher associations, in particular, had previously criticised – and taken legal action

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against – individual services offered by broadcasters on the ground that they were too text-intensive. The new treaty therefore tightens certain rules, stating that the use of text is limited to (1) programme-related text, (2) service overviews, (3) current news headlines, including related real-time reporting, (4) fact-checks, (5) information about the broadcaster concerned, (6) accessibility measures, (7) admissible chats and forums, and (8) information that must be provided according to law. This "positive list" of permitted uses therefore mainly concerns the primary areas of the information remit of public broadcasters and excludes all other forms of text-based reporting.

Meanwhile, the treaty also introduces a spending cap for sports rights (with certain exemptions). Until now, for example, the ARD and ZDF have spent 8 to 10% of their programming budget on sports rights. In future, total expenditure on sports broadcasting “must not exceed a reasonable proportion of overall spending”. It is considered reasonable to devote 5% of total spending to sports rights, although a higher proportion is possible in sport-heavy years.

The treaty also contains new rules designed to strengthen cooperation. In order to fulfil their public service obligations, the state broadcasters that form the ARD, ZDF and *Deutschlandradio* must cooperate with private broadcasters and related companies. The treaty stresses that such cooperation may particularly include embedding or other networking of public service content or offerings, simplified processes for making available public service content or shared use of infrastructure.

Finally, the treaty’s new provisions related to internal supervision mainly concern governance structures. They require broadcasters to develop governance standards within the ARD, ZDF and *Deutschlandradio*. This should help to guarantee comparable quality and scope of governance, as well as to define management and supervision obligations.

The amended state treaty must now be ratified by the *Länder* in an official legislative act that is expected to enter into force in 2025.

Beschlussfassung des Entwurfs für einen Staatsvertrag zur Reform des öffentlich-rechtlichen Rundfunks (Reformstaatsvertrag)

https://rundfunkkommission.rlp.de/fileadmin/rundfunkkommission/Dokumente/ReformStV/Synopse_ReformStV_MPK_Beschlussfassung_2024-10-25_Clear.pdf

Resolution on the draft state treaty on the reform of public broadcasting

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SPAIN

[ES] Draft royal decree regulating the granting of extended collective licences for mass exploitation of works protected by intellectual property rights for the development of general-purpose AI models

Maria Bustamante
-

On 19 November 2024, the Spanish government presented a draft royal decree aimed at regulating the granting of extended collective licences for the mass exploitation of works and performances protected by intellectual property rights in the development of general-purpose artificial intelligence models.

This instrument is designed to balance technological developments with the protection of rightsholders in order to promote the development of artificial intelligence as a strategic sector.

The royal decree transposes EU Directive 2019/790, which allows member states to introduce mechanisms such as extended collective licences, legal mandates and presumptions of representation in order to facilitate the large-scale use of content protected by intellectual property rights. It is particularly relevant in circumstances where obtaining individual licences from each holder of intellectual property rights is a difficult and costly process.

The main aspects of the regulations proposed by the Spanish government, which are essential to achieve correct implementation and effective protection of intellectual property rights, are as follows:

- Extended collective licences will allow collecting societies to grant non-exclusive licences for protected works and performances, even for rightsholders who have not granted a mandate, provided they do not exercise their opt-out right (Article 1). These licences will apply exclusively in situations where obtaining individual licences is considered excessively difficult or costly on account of the large number of rightsholders involved.

- Rightsholders retain the possibility to exclude their works from extended collective licences at any time via a simple, accessible opt-out procedure that enables them to control the use of their works (Article 5).

- The certificate of representativeness is a requirement that ensures that only collecting societies with sufficient representation can grant extended collective licences. In order to obtain it, entities will have to demonstrate criteria such as the extent of their repertoire and the number of rightsholders represented (Article 3).

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- The licences will have a maximum term of three years and will not apply to rights already subject to mandatory collecting mechanisms, thus ensuring that they do not interfere with previously regulated systems (Article 2.5).

- Collecting societies are obliged to inform rightsholders and ensure equal treatment between members and non-members in the distribution of economic benefits (Articles 4 and 6).

- Users who subscribe to these licences must exclude works whose owners have exercised their opt-out right. They must also ensure transparency in the use of their content (Article 7).

The draft decree addresses the need to use large volumes of data to train generative artificial intelligence models and other advanced systems. At the same time, it seeks to provide an effective response to the concerns of rightsholders who wish to ensure fair participation in the economic benefits derived from these technologies.

Proyecto de Real Decreto por el que se regula la concesión de licencias colectivas ampliadas para la explotación masiva de obras y prestaciones protegidas por derechos de propiedad intelectual para el desarrollo de modelos de inteligencia artificial de uso general

https://www.cultura.gob.es/en/dam/jcr:95c986c7-893f-46c6-81d4-3ba822a6696e/proyecto-rd-licencias-colectivas.pdf

Draft royal decree aimed at regulating the granting of extended collective licences for the mass exploitation of works and performances protected by intellectual property rights in the development of general-purpose artificial intelligence models

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FRANCE

[FR] ARCOM fines CNews EUR 50 000 and EUR 100 000 for failing to exercise rigour and honesty

Amélie Blocman
Légipresse

The CNews programme “Morandini Live”, broadcast on 28 September 2023, dealt with a newspaper’s claim that parents of Muslim schoolchildren had persuaded school leaders in Pau to provide their children with a prayer room during a school trip. This story was told to illustrate what was presented as a broader phenomenon, i.e. the failure to respect the principle of secularism in schools, which was the subject of a studio debate. A banner containing the words “Pau: school gives in to pressure from Muslim parents” was also displayed throughout the debate.

After examining the programme concerned, the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM) concluded that the story had been used to stimulate a studio debate that had provided a pretext for the expression of aggressive and controversial points of view. The facts of the case, which later proved to be inaccurate, had not been sufficiently verified or presented with due care by the broadcaster. The broadcaster had therefore violated Article 2-3-7 of its broadcasting licence and Article 1 of the decision of 18 April 2018, which required broadcasters to exercise rigour in the presentation and processing of information. ARCOM therefore fined the channel EUR 50 000.

Meanwhile, on 25 February 2024, the presenter of the CNews programme “En quête d'esprit”, which dealt with the psychological consequences of abortion, claimed that voluntary termination of pregnancy was “the biggest cause of mortality worldwide [according to] Worldometer, with 73 million in 2022, or 52% of all deaths”. A computer graphic was also shown, describing abortion as the number one cause of “mortality worldwide”, ahead of cancer and smoking.

After analysing the footage, ARCOM noted that the programme had treated abortion as a cause of death and, therefore, an aborted embryo or foetus as a deceased person. However, the law did not consider a foetus or embryo as a person. Abortion should therefore not be presented as a cause of death, according to the regulator. Moreover, the information given by the presenter and computer graphic was expressly based on the Worldometer website, which merely referred to the World Health Organization’s claim that 73 million abortions took place worldwide each year. The WHO website described abortion as a “common health intervention” and stated that “unsafe abortion is an important preventable cause of maternal deaths and morbidities”. The programme presenter had described abortion as “the biggest cause of mortality worldwide” and commented on the computer graphic without questioning its accuracy. This claim, which the

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broadcaster agrees is grossly inaccurate, was not disputed by anyone else in the studio.

ARCOM therefore decided that the broadcaster had breached the provisions of its licence and of Article 1 of the decision of 18 April 2018, which required broadcasters to exercise rigour in the presentation and processing of information. The channel's claim that the wrong version of the programme had mistakenly been broadcast was irrelevant. Finally, analysis of the programme showed that nobody present in the studio had disputed the claim that abortion was the biggest cause of mortality worldwide. The broadcaster had also therefore breached its obligation to control its programmes.

Taking into account the decision of 10 May 2022, in which the broadcaster had been served with a formal warning, and the previous fine imposed on 17 January 2024, ARCOM fined the broadcaster EUR 100 000.

Décisions n° 2024-1011 du 13 novembre 2024 portant sanction à l'encontre de la société d'exploitation d'un service d'information (SESI), JO du 15 novembre 2024

https://www.legifrance.gouv.fr/download/pdf?id=RNcWDDhGxhgkoKmcH-oLOafnZhQYvseZTGXlWvrPu1M=

Decision no. 2024-1011 of 13 November 2024 to sanction the operator of an information service, OJ of 15 November 2024

Décision n° 2024-1012 du 13 novembre 2024 portant sanction à l'encontre de la Société d'exploitation d'un service d'information (SESI)

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000050495790

Decision no. 2024-1012 of 13 November 2024 to sanction the operator of an information service, OJ of 15 November 2024

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[FR] Influencer marketing rules brought into line with European law

Amélie Blocman
Légipresse

On 6 November 2024, in the light of observations by the European Commission in particular, a decree was passed to amend the law of 9 June 2023, which regulates influencer marketing and seeks to combat abuses by influencers on social networks (see IRIS 2023-6:1/10), in order to bring it into line with European law. The decree was issued pursuant to Article 3 of Law no. 2024-364 of 22 April 2024, which contains various provisions adapting national law to European Union law in the fields of economy, finance, environment policy, criminal law, social law and agriculture (DDADUE), in order to ensure that certain provisions comply with various EU laws. In particular, it details the ban on certain types of health-related influencer marketing, clarifies the wording of applicable sanctions and eases the requirement for consumers to be informed about edited and virtual images in the light of the rapid development of technologies and legal standards (especially the EU Artificial Intelligence Act of 13 June 2024). The decree also aims to safeguard the country-of-origin principle enshrined in the 2010 Audiovisual Media Services Directive (AVMSD) and the Electronic Commerce Directive, and lists various exceptions to this rule. It also brings provisions on the labelling of advertising into conformity with European law (in accordance with the 2005 Unfair Commercial Practices Directive): labels must be “clear, legible and identifiable”, but no longer need to be displayed “throughout the advertisement”. Article 9 of the law is amended in order to clarify that it applies to influencers living abroad who target audiences in France (for the appointment of a legal representative and conclusion of civil liability insurance in the European Union). The definition of influencer marketing (Art. 1) and provisions governing the activities of influencer agents (Art. 7) and influencer marketing contracts (Art. 8) remain unchanged.

A ratification bill will need to be brought before the French Parliament within three months of the decree’s publication, i.e. before 7 February 2025.

Ordonnance n° 2024-978 du 6 novembre 2024 modifiant la loi n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux, JORF du 7 novembre 2024

https://www.legifrance.gouv.fr/download/pdf?id=nnKsSCPW60ezk7NlP1zrGB4APX7KalcLgYeuznhj5ZE=

Decree no. 2024-978 of 6 November 2024 amending Law no. 2023-451 of 9 June 2023 regulating influencer marketing and combating abuses by influencers on social networks, OJ of 7 November 2024

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[FR] Renewal of DTT licences: ARCOM shortlist cannot be contested on grounds of abuse of power

Amélie Blocman
Légipresse

In a decision adopted on 28 February 2024 on the basis of Article 30-1 of the Law of 30 September 1986, the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM) issued a call for tenders for the allocation of 15 licences to operate digital terrestrial television (DTT) services. In a press release published on 24 July 2024, ARCOM announced that it had "shortlisted, as a preparatory measure," 15 of the 25 eligible applicants and intended to negotiate agreements with them, an "indispensable condition for the granting of a DTT licence valid for up to ten years". The companies Le Média, C8, NRJ 12 *et al* then asked the *Conseil d'Etat* (Council of State) to annul the shortlist on the grounds of abuse of power, insofar as their applications had been rejected before the selection process was complete.

In its decision, the *Conseil d'Etat* pointed out that, under Articles 28, 30-1 and 32 of the Law of 30 September 1986, as part of the procedure for the allocation of DTT licences, ARCOM, having checked the admissibility of the applications received, was then responsible for examining those that were deemed admissible. In order to weigh up the respective merits of the various applications, ARCOM was required to review all of them before either accepting or rejecting them at the same meeting. The *Conseil d'Etat* thought it was acceptable for ARCOM, in the interests of sound administration, to announce, during the review phase, a list of candidates with which it intended to start negotiating the terms of licences pursuant to Article 28 of the Law of 30 September 1986, since it was not making a final decision at this stage to reject certain applications. Even after publishing such a list, it could still end negotiations with any of the shortlisted applicants or open them with another applicant that had not been shortlisted.

In this case, the *Conseil d'Etat* thought that, although the companies concerned claimed that the shortlist was likely to have serious economic consequences for applicants depending on whether they were on it or not, the shortlisting process was a preparatory measure that could not be treated as separate from the licensing decisions themselves and could not therefore be referred to the courts on the grounds of abuse of power. However, applicants who were rejected at the end of the procedure, just like anyone else with a sufficient interest in doing so, would be able to contest, including by way of interim measures, the issuing of licences or the rejection of their own applications, which would be notified to them with grounds in accordance with the aforementioned provisions of Article 32 of the Law of 30 September 1986.

On 22 November, the *Conseil d'Etat* therefore ruled inadmissible the claims lodged by the companies Le Média, C8, NRJ 12 *et al*, requesting the annulment of

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the ARCOM decision announced in the press release of 24 July 2024.

On 12 December, ARCOM published its decision to award DTT licences to 11 of the broadcasters shortlisted in July. The Canal+ group had announced a few days earlier that it was withdrawing the applications for its pay-TV channels (Canal+, Canal+ Cinéma, Canal+ Sport and Planète+). The rejected broadcasters have already filed a new appeal with the *Conseil d'Etat*.

CE, 22 novembre 2024, n° 497830, Le Média, C8, NRJ 12 et autre

http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2024-11-22/497830

Conseil d'Etat, 22 November 2024, no. 497830, Le Média, C8, NRJ et al

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UNITED KINGDOM

[GB] The Data (Use and Access) Bill is introduced in the House of Lords

Julian Wilkins
Wordley Partnership

The Data (Use and Access) Bill (DUAB) was introduced in the House of Lords in October 2024. The report stage started on 21 January 2025. It is essentially a revised version of the Data Protection and Digital Information Bill (DPDI) which fell when the 2024 General Election was called. The Secretary of State for Science, Innovation and Technology (SoS) is responsible for the DUAB. Parts of the DPDI such as the removal of records of processing activities, data protection impact assessments, exemptions for vexatious data subject access requests (DSARs), and the shift from Data Protection Officers to “Senior Responsible Individuals” have been removed.

The main changes under the DPDI included rules relevant to the use of AI systems in decision-making processes and to the use of data for the purposes of scientific research, as well as new rules aimed at liberalising the use of data held by public sector organisations and businesses.

The DUAB retains the DPDI's approach to AI Automated Decision Making (ADM) allowing its use in low-risk scenarios, but maintaining protections for sensitive data and ensuring that people can challenge decisions and request human review. The DUAB would effectively permit automated decision making in most circumstances provided the organisation has safeguards when using AI or other technology. Restrictions would apply where an automated decision is “significant”, where it affects an individual and is based entirely or partly on “special category” personal data such as health, political opinions, religious or philosophical beliefs, sex life, sexual orientation, genetic data or biometric data such as facial recognition. In such cases, decisions made by ADM would require the individual’s explicit consent, or where the decision is necessary for entering into, or performing, a contract with that individual, or where the decision is required or authorised by law, and there is a “substantial public interest” in the decision being made.

The DUAB follows the DPDI's provisions allowing companies to use personal data for research and development projects subject to safeguards. The DUAB restricts the power of the SoS to change core research safeguards to ensure continuity.

The DUAB retains the concept of "recognised legitimate interests" to use data processing for national security, emergency response, and safeguarding for which organisations are exempt from conducting a full Legitimate Interests Assessment of data. The SoS can only change the recognised interests list if needed for specific objectives like public security, crime prevention, public health, judicial

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proceedings, regulatory functions, or protecting individual rights.

Another provision following from the DPDI relates to international data transfer provisions but adds one limitation whereby the SoS can create new data transfer safeguards or modify existing ones. The SoS can only remove safeguards that were previously added through regulations, not those originally established in law. Unlike the EU's approach, the DUAB's materiality test requires third countries to maintain protections "not materially lower" than the UK's, rather than requiring exact equivalence.

A new DUAB provision is Clause 123 which, subject to certain criteria, including privacy protection measures, allows researchers to access data from online services for safety research. Clause 123 requires government consultation with relevant organisations like OFCOM, before making new rules.

Another new provision under the DUAB includes an additional duty for the Information Commissioner of the Information Commissioner's Office (ICO) to consider children's vulnerability regarding data processing albeit balanced against other provisions of the DUAB to encourage innovation, competition, crime prevention and security.

The DUAB retains the DPDI's framework for the secure sharing of so-called "smart data" between service providers at consumers' request for key sectors such as finance, transport, energy, and home buying. The DUAB adds a new Clause 17 whereby the government can compel the FCA (Financial Conduct Authority*)* to coordinate with other regulators to improve payment systems. A new Clause 22 strengthens parliamentary oversight and consultation requirements before regulations are made.

The DUAB allows for increases in potential fines for PECR (Privacy and Electronic Communications Regulations) regarding direct e-marketing and the use of cookies in Adtech technology used by advertisers.

Also, the DUAB adopts the DPDI Digital ID Trust Framework to support greater innovation and adoption of digital IDs including streamlined rules for digital verification services, parliamentary fees oversight, strengthening national security provisions, and expanding consultation requirements to include the devolved governments of Scotland and Wales. The DUAB enables consistent information standards to ensure unified accessibility to health and adult social care records.

The DUAB introduces data access standards similar to the EU's Data Governance Act, facilitating controlled data sharing between businesses and public authorities.

A provision for digital registers to manage UK assets like land is included under the DUAB.

Simplified data subject access requests are provided under Article 15 GDPR by allowing reasonable and proportionate responses. This allows data controllers to respond with proportionate searches and avoid addressing requests that may be burdensome or disproportionate.

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The ICO will change from a "body sole", i.e. sole commissioner, to a "body corporate", introducing a formal board structure with an appointed CEO if the DUAB is enacted.

The Data (Use and Access) Bill [HL]: HL Bill 40 of 2024-25

https://bills.parliament.uk/bills/3825

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[GB] The Property (Digital Assets Etc.) Bill is introduced to the House of Lords

Julian Wilkins
Wordley Partnership

The Property (Digital Assets Etc.) Bill (the Bill) was introduced to the UK Parliament via the House of Lords on 11 September 2024, and its purpose is to make provision about the types of things that are capable of being objects of personal property rights. Since the Bill's introduction, it has had its first and second reading and now awaits the committee (the date of which has yet to be set) and report stages, before its third reading in the House of Lords. After its passage through the upper chamber the Bill will be transferred to the House of Commons to follow a similar process to determine whether the proposed legislation should be enacted in law.

The Bill confirms that certain digital assets such as crypto tokens can attract legal property rights even if they do not qualify by definition as one of the two established forms of personal property, namely "things in possession" such as gold or a valuable picture; or as "things in action", for example a share certificate or a contractual right. Things in action have the attribute of being able to be claimed or enforced by court action.

In English and Welsh law, the definition of personal property has been left to common law and court precedent. One of the most significant decisions on the meaning of personal property is in the court decision *National Provincial Bank v. Ainsworth (1965) 1AC 1175* (Ainsworth). One of the presiding judges in Ainsworth, Lord Wilberforce, determined that certain items may not easily be defined as a thing in possession or a thing in action, but instead be treated as "another kind of property".

In Ainsworth, Lord Wilberforce specified the characteristics of property to be property that has to be definable, identifiable by a third party, capable in its nature of assumption by third parties and having some degree of permanence.

In recent years, the Ainsworth decision has been used to define certain types of crypto assets as a kind of property, for instance in the High Court case of *AA v. Persons Unknown*when the court determined that crypto assets were a kind of property and, therefore, could be subject to an injunction.

Given the well-developed common law, the Bill resists classing digital assets as a third category of personal property rights, but instead allows the courts to develop what is classified as personal property on a case-by-case basis. This non-prescriptive approach is to allow for flexibility and accommodate new circumstances as well as nascent technology.

The Bill aims to afford some certainty so that different forms of digital assets can be recognised in law as personal property. This provides both individuals and

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businesses alike with assurance when undertaking a transaction. Another benefit is that giving legal status to digital assets means that they can form part of a person's estate upon death and be inherited by the deceased's beneficiaries.

Also, the Bill aims to reduce the number of court cases which aim to try and identify something as personal property, as instead the parties can rely on the Bill, once it has received Royal Assent, to enforce rights regarding property that does not fall within the traditional definition of personal property or property in possession.

The Bill further intends to help maintain England as an attractive place to transact assets and litigate issues relating to crypto assets, and other forms of digital assets.

The precursor to the Bill was the Law Commission report on digital assets which published the Bill in draft form to address things that are not demonstrably a thing in possession or a thing in action.

Digital assets include crypto tokens, non-fungible tokens (NFTs), virtual carbon credits, digital files and domain names. However, the common law principles described in Ainsworth will determine whether something has the characteristics of property in law.

The Property (Digital Assets etc) Bill (the Bill) (HL)

https://bills.parliament.uk/bills/3766

National Provincial Bank v Ainsworth (1965) 1AC 1175

https://www.casemine.com/judgement/uk/5a8ff8ca60d03e7f57ecd788

Law Commission report Digital Assets: Final Report Law HC 1486 Com 412, 27 June 2023

https://lawcom.gov.uk/document/digital-assets-final-report/

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IRELAND

[IE] Publication of revised media service codes and rules

James Kneale
Bar of Ireland

On 5 December 2024, *Coimisiún na Meán* (the Commission), the Irish media regulatory authority, published revised broadcasting codes and rules for radio and television broadcasters as well as a new Video-on-Demand code and rules, following a public consultation.

Under the Broadcasting Act 2009 (as amended), the Commission has the power to make media service codes and media service rules. Media service codes govern the standards and practices of broadcasters and producers of audiovisual on-demand media services to ensure, amongst other things, that audiences are protected from anything harmful or unduly offensive, in particular in respect of programme material relating to gratuitous violence or sexual conduct. Media service rules relate, generally, to the amount of time permitted for broadcasting commercial communications and the accessibility of programmes by persons who are deaf or have a hearing impairment or who are blind or partially sighted. The Commission is empowered to make such codes and rules in order to give effect to the Audiovisual Media Services Directive (AVMSD).

A number of codes and rules had already been adopted by the Broadcasting Authority of Ireland (the Commission's regulatory predecessor), which have now been revised, namely:

- Media Service Code and Rules (Advertising, Teleshopping, Signal Integrity and Information)

- Media Service Code and Rules (Advertising for Radio Broadcasters)

- Media Service Rules (Access Rules for Television Broadcasters)

- General Commercial Communications Code (Radio and Television Broadcasters)

- Children's Commercial Communications Code (Radio and Television Broadcasters)

- Code of Fairness, Objectivity and Impartiality in News and Current Affairs (Radio and Television Broadcasters)

- Code of Programme Standards (Radio and Television Broadcasters)

- Short News Reporting Code

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Notably, the Commission has now published a new Media Service Code and Rules for Audiovisual On-Demand Media Service Providers, which contains provisions on harmful content, intellectual property rights, commercial communications, sponsorship, product placement and accessibility, intended to give effect to Articles 5, 6(1), 6a(1) to (3), 7, 8, 9, 10 and 11 of the AVMSD.

All of the new and revised rules and codes took effect from 5 November 2024, with the exception of the Media Service Code and Rules (Advertising for Radio Broadcasters), the Children's Commercial Communications Code and the Code of Fairness, Objectivity and Impartiality, which tookeffect from 6 December 2024.

Coimisiún na Meán, Revised Media Services Codes and Rules published

https://www.cnam.ie/coimisiun-na-mean-publish-revised-media-services-codes-and-rules/

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ITALY

[IT] AGCOM opens public consultation on new code of conduct for influencers

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

On 26 November, AGCOM (Italy's Communications Authority) launched a 45-day public consultation through Resolution No. 472/24/CONS. The initiative aims to redefine the term "influencer" and introduce a new code of conduct tailored to the evolving influencer landscape. These measures are the result of collaborative efforts by a technical working group established under the same resolution.

The consultation proposes the introduction of the notion of "relevant influencers", defined as those who meet at least one of the following criteria: at least 500 000 subscribers on a single social media or video-sharing platform or an average of 1 million monthly views on a single platform.

Influencers reaching either threshold on one platform are required to comply with the guidelines and code of conduct across all the platforms they use, irrespective of their audience size on other platforms.

For those who do not meet these thresholds and operate less frequently or in a less structured manner, the imposition of the same obligations is considered unnecessary.

The proposed code of conduct was developed with input from over 120 stakeholders, including influencer associations, platform representatives, marketing agencies, and intermediaries between influencers and brands. Its goal is to establish clear, enforceable standards, particularly for "relevant influencers", while offering guidance applicable to all.

The code of conduct introduces several important measures to regulate influencer activity, including the establishment of a centralised registry updated every six months to ensure the identification of influencers, which will include personal data such as name, nickname, brand, and tax code, as well as links to platforms, audience metrics, and official contact information. Influencers are required to uphold objectivity, fairness, and impartiality in their content, avoiding the spread of disinformation or material that infringes on intellectual property rights. Content must not harm minors or exploit their inexperience and there is an emphasis on transparency in the use of filters and editing tools. Clear labelling of commercial content is mandated to prevent hidden advertising, aligning with the "Digital Chart" guidelines of the Italian Advertising Standards Institute. Finally, influencers are expected to refrain from publishing content that promotes violence, hate, or discrimination, in accordance with Article 21 of the EU Charter of Fundamental

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Rights.

AGCOM will monitor compliance, both proactively and through reports of violations, and initiate sanctioning procedures when necessary.

To support these changes, AGCOM plans training programmes for influencers and educational campaigns for the public, in collaboration with the technical working group.

Delibera 472/24/CONS Avvio della consultazione pubblica sulle proposte di modifica alle linee-guida e sul codice di condotta rivolti agli influencer di cui alla delibera n. 7/24/CONS

https://www.agcom.it/provvedimenti/delibera-472-24-cons

Resolution 472/24/CONS Launch of the public consultation on the proposed amendments to the guidelines and code of conduct addressed to influencers referred to in Resolution No. 7/24/CONS

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LUXEMBOURG

[LU] ALIA reprimands RTL Gold

Amélie Lacourt
European Audiovisual Observatory

On 28 February 2024, television channel RTL Gold broadcast the programme "Mónika – A KIBESZÉLŐ SHOW". On 13 March 2024, the *Autorité Luxembourgeoise Indépendante de l'Audiovisuelle* (Luxembourg Independent Authority for Audiovisual Media – ALIA) received a complaint from the Hungarian media regulator NMHH following a viewer's complaint. Since RTL Gold's broadcasting licence was issued in Luxembourg (to the company s.a. CLT-Ufa), the matter fell under ALIA's jurisdiction. However, the complaint was examined in the context of Hungarian law, which applied in this case.

The complainant claimed that the programme should have been classified as unsuitable for under-16s (category IV) rather than under-12s (category III) and should not have been broadcast in the morning. The show's presenter had invited a guest to talk about her extra-marital relationship with a man who had introduced her to sadomasochism. The guest's lover had then arrived on the set dressed in leather covering only his private parts and holding a whip. The story had later turned out to be an April fool's joke.

Since the case concerned the protection of minors, the *Assemblée consultative* (consultative assembly) was asked for its opinion in accordance with Article 35ter(4)(1) of the amended Electronic Media Act of 27 July 1991. The assembly considered, in particular, that the programme's light-hearted nature could have trivialised adultery and that the man's reference to his 'slaves' had been discriminatory towards women, even though it had been an April fool's joke. It therefore concluded that, although the programme's classification under category III was appropriate, the time of its broadcast was not.

According to the ALIA investigating officer's analysis, since the programme had dealt with the themes of sadomasochism and sexual violence, it should have been placed in category IV (unsuitable for under-16s) under section 9(5) of Hungarian law no. 185-2010 on media and services and mass media. The fact that it had been broadcast in the morning was also unlawful, since section 10 stated that such programmes should only be shown between 9pm and 5am. The investigating officer particularly highlighted the risk that the content could create a false perception of sexuality among children. Such content was only suitable for a more mature audience that could understand it in its proper context.

Responding to this argument, the service provider, RTL Gold, pointed out that the programme had been an April fool's joke with fictitious content, and that children aged between 12 and 16 understood humour and sarcasm. However, it admitted

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that an administrative error had led to the programme being wrongly classified and stated that it had taken steps to avoid similar mistakes in the future.

The ALIA Council held that the morning broadcast of the programme “Mónika – A KIBESZÉLŐ SHOW” with the warning “unsuitable for under-12s” had infringed Articles 9(4) and 9(5) of the Hungarian law, as the service provider acknowledged in its observations to the Council.

The regulator therefore concluded that the service provider had committed a clear and serious breach of its obligations and issued a formal reprimand to s.a. CLT-Ufa.

Décision DEC028/2024-P021/2024 du 25 novembre 2024 du Conseil d’administration de l’Autorité luxembourgeoise indépendante de l’audiovisuel concernant une plainte à l’encontre du service de télévision RTL Gold

https://alia.public.lu/wp-content/uploads/2024/12/D028-2024_P021-2024_RTL-Gold_ECsite.pdf

Decision DEC028/2024-P021/2024 of 25 November 2024 of the Administrative Council of the Luxembourg Independent Authority for Audiovisual Media concerning a complaint against the RTL Gold television service

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NETHERLANDS

[NL] Dutch Government implements additional measures on the safety of journalists

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 27 November 2024, the Dutch Minister for Education, Culture and Science, in a letter to parliament, announced a significant policy measure for the protection of journalists in the Netherlands. In particular, the minister announced that *PersVeilig*, a joint initiative of the Dutch Association of Journalists, the Dutch Association of Editors in Chief, the Police and the Public Prosecution Service, which aims to strengthen the position of journalists against violence and aggression, will receive significant structural government funding from 2025. This follows a previous 2022 government measure on the safety of journalists, where government funding of *PersVeilig* had been temporary, on an annual basis (IRIS 2022-8/15).

PersVeilig was established in 2019, and is a reporting point and helpdesk for incidents of violence and aggression against journalists. *PersVeilig* also provides training courses where journalists learn how to improve their safety, for example on the street or during demonstrations. *PersVeilig* also offers legal support to journalists through the Press Freedom Desk section. Notably, in the letter to parliament, the minister noted that an evaluation had shown that *PersVeilig*'s activities had "contributed to strengthening the position of journalists against aggression and violence", while the international press freedom organisation Free Press Unlimited called *PersVeilig* "an excellent practical example that deserves to be followed internationally". Indeed, the European Commission, in its Recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, cited *PersVeilig* as an example to be followed by other EU member states (IRIS 2021-9/5).

Further, the letter to parliament detailed how, in the period 2020-2023, a total of 722 reports were received by *PersVeilig*. The majority of these concerned "threats" (58%), followed by "physical violence" (19%) and "stalking/harassment/intimidation" (10%). Almost two-thirds of the reports were made by freelance journalists. The number of reports to *PersVeilig* is also increasing. In 2023, 218 reports were received, which was 10% more than the year before; research from 2021 showed that 8 out of 10 journalists in the Netherlands have had to deal with some form of violence or aggression.

Crucially, under the new government measure, the Ministry for Education, Culture and Science will provide structural funding of EUR 500 000 per year to *PersVeilig* to make journalism more resilient. Further, and in order to better support journalists, *PersVeilig* will also receive a one-off subsidy of EUR 300 000 from the ministry in 2025 for the Press Freedom Desk, where *PersVeilig* offers legal support to journalists. The minister stated that "[i]ndependent, strong media are

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indispensable in a well-functioning democracy. Every incident in which a journalist is intimidated or threatened is one too many. And every incident has an impact. Journalists must be able to do their work safely and in complete freedom."

Ministerie van Onderwijs, Cultuur en Wetenschap, Extra investeringen in persveiligheid, 27 november 2024

https://www.rijksoverheid.nl/ministeries/ministerie-van-onderwijs-cultuur-en-wetenschap/nieuws/2024/11/27/extra-investeringen-in-persveiligheid

Ministry for Education, Culture and Science, Additional investments in press safety, 27 November 2024

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[NL] Dutch Supreme Court files a request for a preliminary ruling on copyright in the geoblocking context

Valentina Golunova
Maastricht University

On 14 November 2024, the Dutch Supreme Court filed a request for a preliminary ruling from the Court of Justice of the European Union (CJEU). The questions concern the interpretation of the notion of "communication to the public" under Article 3(1) of the Copyright in the Information Society Directive (InfoSoc Directive) in the context of geo-blocking measures.

The request for a preliminary ruling has been made in the dispute between the Anne Frank Fund (the non-profit organisation based in Basel, Switzerland, which owns copyrights on Anne Frank's diary), and the Anne Frank Foundation (which owns the Anne Frank House in Amsterdam and acts as the guardian of the Anne Frank diaries), the Royal Netherlands Academy of Arts and Sciences (KNAW), and the Belgian Association for Research and Access to Historical Texts (VOOHT). For over ten years, the defendant organisations jointly carried out an extensive research project on Anne Frank's writings. The outcomes of this project, which include the original manuscripts of Anne Frank's diary as well as accompanying historical and comparative linguistic data, were published by VOOHT on the Belgian website www.annefrankmanuscripten.org in September 2021. While this website is accessible from the countries where copyrights on Anne Frank's writings have expired, including Belgium, access from the Netherlands, where part of her writings are copyright protected until 2037, is restricted via geo-blocking measures. Individuals who visit the website from Dutch IP addresses or declare, in an additional access check, that they are located in the Netherlands, are restricted from viewing its content. Nevertheless, Dutch users can still gain access to the website by using advanced VPN and proxy services. As a result, shortly after the publication of the research online, the Anne Frank Fund brought legal proceedings against the three organisations before the District Court of Amsterdam, claiming copyright infringement in the Netherlands given the possibility of circumventing the geo-blocking measures. In February 2022, the District Court of Amsterdam found no infringement of the Anne Frank Fund's copyrights since the organisations took all the necessary measures to prevent the publication of the manuscripts in the Netherlands. The ruling of the District Court of Amsterdam was confirmed by the Amsterdam Court of Appeal in March 2023. The Anne Frank Fund then lodged its appeal in the Dutch Supreme Court. As the dispute raises questions of the interpretation of EU law, the Dutch Supreme Court decided to stay the proceedings and refer the following questions to the CJEU.

1. Must Article 3(1) of the InfoSoc Directive be interpreted as meaning that the publication of a work on the Internet can only be regarded as a communication to the public in a particular country if the publication is addressed to the public in that country? If so, what factors should be taken into account in assessing this? 2. Can there be a communication to the public in a particular country if, by means of

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(state-of-the-art) geo-blocking, it has been ensured that the website on which the work is published can be reached by the public in that country only by circumventing the blocking measure using a VPN or similar service? Is the extent to which the eligible public in the blocked country is willing and able to access the website concerned via such a service of relevance? Does it make any difference to the answer to this question whether, in addition to the measure of geo-blocking, other measures have been taken to impede or discourage access to the website by the public in the blocked country? 3. If the possibility of circumventing the blocking measure entails communication of the work published on the Internet to the public in the blocked country within the meaning of Article 3(1) of the InfoSoc Directive, is that communication deemed to have been made by the person who published the work on the Internet, even though knowledge of that communication requires the intervention of the provider of the VPN or similar service concerned?

The preliminary ruling by the CJEU in *Anne Frank Fonds* will provide important guidance on the interpretation and application of the concept of communication to the public in the online environment.

C-788/24 - Anne Frank Fonds

https://curia.europa.eu/juris/liste.jsf?num=C-788/24&language=en

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[NL] New research investigates the impact of Chinese interference and intimidation on the Dutch media landscape

Valentina Golunova
Maastricht University

On 30 October 2024, researchers from Leiden University published a report entitled "Chinese Influence and Interference in the Dutch Media Landscape". The report was completed at the request of the *Tweede Kamer* (the lower chamber of the Dutch Parliament) in April 2023 on behalf of the China Knowledge Network (CKN), funded by the Dutch Ministry of Foreign Affairs. The motion was filed by Ruben Brekelmans, who currently serves as the Dutch Minister of Defence, after Marije Vlaskamp, a journalist at the Dutch newspaper Volkskrant, reported threats in connection with her critical stance on China. The authors Susanne Kamerling and Ardi Bouwers, affiliated with the LeidenAsiaCentre (LAC), determined that China is using a wide range of tactics, from spreading propaganda to intimidating journalists and engaging in cyber infiltration both in and outside the Netherlands. The researchers also found that reporters are not properly equipped to resist these diverse influence operations. As a result, these operations have a "chilling effect" on critical voices about China and its politics.

The report addresses three main issues. First, it explores the working conditions of Dutch correspondents in China by conducting a survey and interviews with correspondents, journalists and Dutch support staff. The researchers described a high level of social or psychological insecurity. Over 42% of the respondents indicated that they often felt unsafe in China and more than half admitted to having faced attempts at influence. China’s influencing or interfering practices were found to affect journalists' work and private decisions.

The report then investigates undesirable Chinese influence and interference in Dutch-language media. It discusses the Marije Vlaskamp case and maps other known instances of intimidation of journalists from Western media. However, it notes that it is often difficult to determine whether the provocations are carried out by official Chinese authorities, criminal groups, or citizens with nationalist views. Even though China’s influence operations on Dutch soil remain subtle, editorial boards remain ill-equipped to properly recognise and address them due to their limited knowledge about China in general.

Finally, the report puts a spotlight on undesirable Chinese influence in Chinese-language and diaspora media in the Netherlands by drawing on interviews as well as the available research on the matter. The researchers discovered that most Chinese migrants living in the Netherlands are cautious about expressing their views on sensitive political issues and avoid critiquing Chinese politics even without explicit coercion from the Chinese Government. The report also emphasises transnational repression faced by Chinese minority groups, such as Uighurs and Tibetans, and human rights defenders.

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Based on the insights presented, the report offers a detailed classification of the main Chinese tactics targeting the Dutch and EU media landscape, which include: (1) the spread of propaganda and disinformation; (2) deals with local media organisations; (3) the expansion of Chinese state media; (4) diplomatic pressure; (5) censorship; as well as (6) deception and obstruction. The report ends with policy recommendations to the Dutch Government, editors and interest groups. It emphasises the importance of strategic communication and firm condemnation of influence and interference from authoritarian countries while preventing any form of discrimination or isolation of Chinese and Asian Dutch people. Media outlets should in turn engage in structural discussions on transnational repression and develop protocols for protecting journalists both in the Netherlands and in authoritarian countries. The report also calls for additional technical support and lists various capacity-building activities which would help address Chinese interference and intimidation.

Susanne Kamerling and Ardi Bouwers, "Chinese influence and interference in the Dutch media landscape" (China Kennisnetwerk, Leiden Asia Centre and Clingendael, 30 October 2024)

https://www.chinakennisnetwerk.nl/sites/ckn/files/2024-11/CKN-report-Chinese-influence-and-interference-in-the-Dutch-media-landscape.pdf

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[NL] Dutch Media Authority and Snapchat adopt code of conduct under Media Act and AVMS Directive

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 18 December 2024, the Dutch Media Authority (*Commissariaat voor de Media* – CvdM) and the video-sharing platform Snapchat, jointly adopted a code of conduct under the Dutch Media Act, which implements the EU's Audiovisual Media Services Directive (AVMSD) (see IRIS 2021-1/24). Snapchat is a video-sharing platform and app "designed for people ages 13 and up" which operates throughout the EU, and is established in the Netherlands. Notably, Snapchat is considered a video-sharing platform under the Dutch Media Act and the AVMSD. Under Article 3a(3) of the Dutch Media Act, video-sharing platforms established in the Netherlands must implement a code of conduct setting out measures to comply with Article 28b of the AVMSD, including measures to protect minors. Crucially, the new code of conduct is applicable throughout the EU, as well as the European Economic Area.

The 22-page code of conduct is divided into a number of sections, with section 2 setting out the measures Snapchat implements to protect minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development. Section 3 sets out measures to protect the general public from programmes, user-generated videos and audiovisual commercial communications (a) containing incitement to violence or hatred; and (b) content the dissemination of which constitutes an activity which is a criminal offence under EU law, namely public provocation to commit a terrorist offence, offences concerning child pornography, and offences concerning racism and xenophobia. Section 4 sets out measures on Snapchat's advertising restrictions.

Notably, under section 2 on the protection of minors, Snapchat is to implement a range of specific measures, including restricting Snapchat to minors aged 13+, and requiring teenagers to confirm that they are at least 13 years old in order to create a Snapchat account. Notably, where Snapchat can reasonably determine that the user is under 13 years of age, it will remove and delete the account; and when teens post public content on Snapchat, Snapchat "by default" hides their name "as an extra precaution". Snapchat also aims to distribute content created by teens only "to other teens" and "limit widespread distribution to avoid a teen user building a following that is not their own age". Further, public content on Snapchat goes through "auto-moderation and/or human review before being eligible for distribution to a wide audience". Snap also "takes measures to ensure content does not go viral without being subject to human review".

Finally, on the supervision and enforcement of the code of conduct, sections 6 and 7 detail how the code enables the CvdM to "appropriately exercise its co-regulation powers", and states that Snap "shall cooperate with the CvdM as needed and meet with the CvdM on a regular cadence to report progress on its

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objectives”. Meanwhile, Snap has established an independent compliance function to provide oversight to ensure that the necessary internal processes, resources, testing, documentation, or supervision are in place for compliance with the Dutch Media Act, and to monitor Snap’s compliance with the Dutch Media Act.

https://www.cvdm.nl/nieuws/commissariaat-voor-de-media-en-snapchat-stellen-gedragscode-vast/

Snap code of conduct

https://shorturl.at/qbY6Z

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ROMANIA

[RO] Annulment of the electoral process for the election of the President of Romania in 2024

Galina Dobrescu
Romanian Radio Broadcasting Company

On 4 December 2024, the "Information Notes" of the Ministry of Internal Affairs – General Directorate of Internal Protection, of the Foreign Intelligence Service, of the Romanian Intelligence Service and of the Special Telecommunications Service, were declassified. These Information Notes had been registered with the Presidential Administration under Nos. DSN1/1741/4.12.2024, DSN1/1740/4.12.2024, DSN1/1742/4.12.2024 and DSN1/1743/4.12.2024. Since, and as a result of this declassification of information, public attention in Romania and beyond has focused on the fairness and legality of the electoral process in relation to the Romanian presidential elections of 2024.

Thus, in an *ex officio* judgment of 6 December 2024, the Constitutional Court (hereinafter "the Court"), drew up File No. 3771F/2024 based on its own report which examined the issues related to the fairness and legality of the electoral process regarding the election of the President of Romania in 2024. These issues were examined in accordance with the provisions of the Romanian Constitution, Law No. 47/1992 on the organisation and functioning of the Constitutional Court and Law No. 370/2004 on the election of the President of Romania. In this regard, pursuant to Article 146, letter f) of the Constitution, the Court is mandated to ensure that the procedure for the election of the President of Romania is properly observed and to confirm the results of the election.

Following the examination of the declassified documents, the Court noted that, according to the above-mentioned information notes, the main concerns around the process for the election of the President of Romania in 2024 were those involving the manipulation of votes and the distortion of equal opportunities for the electoral candidates. This distortion was achieved through the non-transparent use of digital technologies and artificial intelligence in the electoral campaign, in violation of the electoral legislation, as well as through the financing of the electoral campaign from undeclared sources, including online sources.

The Court also found that the free expression of the vote was distorted by the fact that voters had been misinformed by means of an electoral campaign in which one of the candidates was aggressively promoted in circumvention of national electoral law and by misusing the algorithms of social media platforms. In the Court's opinion, the manipulation of the vote was all the more evident as the electoral materials promoting one of the candidates did not bear the specific signs of electoral advertising as required by Law No. 370/2004. In addition, the candidate also benefitted from preferential treatment on social media platforms,

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which had the effect of distorting the voters' expression of their will.

The Court considers that the principle of national sovereignty enshrined in Article 2 (1) of the Constitution, presupposes fair and transparent elections and that the state has a responsibility to prevent any unjustified interference in the electoral process. The Court also noted that, according to the documents analysed, the electoral campaign was marked by massive disinformation, favouring one candidate through digital means that violated the legislation in force. The Court emphasised that the voters' right to be correctly informed had been violated, directly affecting the freedom to vote.

The Court finds that the electoral process was seriously affected by vote rigging, the distortion of equal opportunities for electoral contestants and the improper use of digital technologies and artificial intelligence. The Court finds that some candidates benefitted from non-transparent online promotional campaigns which unduly influenced voter behaviour.

Another significant aspect analysed was the financing of the electoral campaign. The Court held, in this regard, that one of the candidates had violated the electoral legislation on campaign financing for the presidential elections, considering that the statements submitted to the Permanent Electoral Authority by this candidate regarding his campaign budget, which he reported as RON 0.00, contradicted the data presented in the information notes of the Ministry of Internal Affairs – General Directorate of Internal Protection and the Romanian Intelligence Service. However, it is common knowledge that an election campaign entails significant costs and expenses, and the situation under analysis raises suspicions of non-compliance with the legislation on electoral financing, thus violating the principle of transparency and legality in the financing of electoral campaigns.

In conclusion, the Court decided to annul the entire electoral process for the election of the President of Romania in 2024, establishing the need to rerun it in its entirety. The government will have to set a new date for the elections, as well as a new calendar programme, and to ensure compliance with the constitutional principles of legality, fairness and transparency. With this judgment, the Court states that it seeks to restore citizens' confidence in the democratic process and in the state authorities, thus protecting the constitutional foundation of Romania as a constitutional state.

Hotararea No. 32/6.12.2024

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UKRAINE

[UA] Russian cultural figure sentenced in absentia for war propaganda

Andrei Richter
Comenius University (Bratislava)

On 13 November 2024, the city court in the regional centre of Vinnytsia in Ukraine convicted, in absentia, a popular Russian film/theatre actor and director, Vladimir Meshkov, for propaganda for war and an attempt to violate the territorial integrity of Ukraine. He was sentenced to ten years of imprisonment (including three years imprisonment for propaganda for war, the maximum penalty envisioned by the criminal code), as well as confiscation of his property, in particular Mashkov's seaside apartment in Odesa. Mr. Mashkov is also a public figure in Russia, as he has held, since December 2023, the position of the chair of the Union of Theatre Workers, the national guild of theatre actors.

The Vinnytsia Investigative Department of the regional branch of the Security Service of Ukraine subpoenaed – through the *Uryadovyi kurier* (the national daily newspaper published by the executive branch of Ukraine) – Mr Mashkov to attend an interrogation, to no effect. Ukraine has issued a national and international warrant for Mr Mashkov. The court found proof that all available means to inform the accused on the court trial had been used.

The Vinnytsia city court found the calls for war of aggression in recordings of the public speech made by Mr. Mashkov at the Olympic Stadium in Moscow on 18 March 2022. The accused, said the court's verdict, was aware that the event, a rally-cum-concert to mark the anniversary of Crimea's annexation by Russia, was being transmitted live on a channel in YouTube, which is considered a mass media in Ukraine. The court found particular expressions of public calls for waging an aggressive war against Ukraine in "motivational constructs" such as "We stand for our Army!" "We shall win!" "To victory!" taken in the context of the entire message of his speech.

Back in 2023, the Shevchenkivsky district court in Kyiv had already sentenced, also in absentia, a Russian presenter of the talk show to five years imprisonment with confiscation of property for public calls to overthrow the constitutional order of Ukraine and dissemination of such calls in the mass media, as well as for public calls to genocide and dissemination of such calls (For more details see: IRIS 2023-4:1/29)

Вінницький міський суд, вирок

https://reyestr.court.gov.ua/Review/123006255

Verdict, City court of Vinnytsia, case No. 127/10902/24, 13 November 2024

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Criminal Code of Ukraine, 2001, N 2341-III, Art. 436

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UNITED STATES OF AMERICA

[US] Meta terminates its fact-checking programme

Amélie Lacourt
European Audiovisual Observatory

In 2016, Mark Zuckerberg, co-founder and CEO of Meta, announced that he was instituting a fact-checking programme after being accused of disseminating mis/disinformation around the first election of Donald Trump. The fact-checking programme consisted in partnering with independent third-party fact-checkers to review and rate the accuracy of content posted on the social media.

On 7 January 2025, the tech giant decided to stop these independent fact-checking efforts in the United States and rely on a system similar to X's (formerly Twitter's) “Community Notes”. This system allows users to add contextual notes to publications they consider incomplete or misleading. Following this announcement, US media outlets or organisations partnering with Meta for the fact-checking programme have seen their collaboration terminated.

While this decision initially concerns the United States, it has been strongly criticised by technology and media groups and associations in Europe as it raises crucial questions about the responsibility of digital platforms in the fight against disinformation. Replacing independent experts with a collaborative, user-based moderation system could entail risks. The effectiveness of “Community Notes” has been called into question. Some organisations, such as Reporters without Borders (RSF) and the European Federation of Journalists (EFJ), have already urged the President of the European Commission to act swiftly to prevent the closure of Meta’s fact-checking programme in Europe. According to the latter, “Meta's decision, if applied on EU territory, would constitute a serious and immediate attack on the integrity of the European information space, as well as on the democratic sovereignty of the Union”.

Mark Zuckerberg, who has accused the fact-checking partners of political bias, has added to the controversy and fear of an increase in misinformation on Meta's platforms. The European Commission’s chief spokesperson Paula Pinho said the Commission “absolutely refute[s] any claims of censorship on [their] side”.

In their open letter to the Commission, RSF and EFJ request the opening of an investigation in X's Community Notes system and the risks of ending Meta fact-checking in Europe. Since its enforcement, the Digital Services Act (DSA) requires major online platforms with over 45 million active monthly users (VLOPs) to “identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services” (Article 34 DSA). VLOPs are also required to put in place “reasonable, proportionate and effective mitigation measures, tailored to the specific systemic risks identified” (article 35

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DSA). If it fails to comply, Meta could face sanctions for breaching these obligations.

The end of Meta's fact-checking programme in the US marks a turning point in online content moderation.

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