Dutch Media Authority rejects request to take enforcement action against broadcaster Ongehoord Nederland

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EDITORIAL

In the last decade, the European media landscape has undergone a deep transformation due to technological innovations and the entry of new global players. The COVID-19 pandemic has further affected the sector, accelerating certain trends while underlining media's relevance in keeping people informed and entertained.

No one is likely to dispute these statements. It is clear that the audiovisual sector has undergone a revolution in the last decade and there is much more to come, especially with the disruptive arrival of artificial intelligence (AI – see, for example, the scriptwriters' strike in the US).

The above quote comes from the recently published European Media Industry Outlook, a European Commission report that explores media trends and analyses their potential impact on EU media markets. In addition to this forward-looking document, in this newsletter we report on the state of play of the EU AI act, the UK government's white paper on the future regulation of AI, Ofcom's guidance to broadcasters on synthetic media (that is, AI-produced content), the Italian data protection authority's decision on "dark patterns" (that is, interfaces and user experiences implemented on social media platforms that lead users into making unintended, unwilling and potentially harmful decisions regarding the processing of their personal data) and the French bill on digital security and regulation.

And much more.

Enjoy the read!

Maja Cappello, Editor

European Audiovisual Observatory

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BELGIUM

Belgian, German, French, British and Cypriot media regulators form international working group on age verification

Christina Etteldorf
Institute of European Media Law

On 24 March 2023, in order to meet the challenges of protecting young people in the media in the 21st century, media regulators from Belgium, Germany, France, the United Kingdom and Cyprus set up an international working group on age verification, which will meet regularly to exchange information about topical issues related to youth protection in the media. They published a joint statement that sets out the main elements of their future cooperation.

The working group's current members are the French *Autorité de régulation de la communication audiovisuelle et numérique* (Arcom), the Belgian *Conseil Superieur de l'Audiovisuel* (CSA), the Cyprus Radiotelevision Authority (CRTA), the United Kingdom's Ofcom and the German *Direktorenkonferenz der Landesmedienanstalten* (DLM). The working group is a forum enabling the participating regulators to exchange information about their respective legal competencies and practical experience of taking enforcement measures, as well as technical aspects of youth protection. It focuses in particular on the proportionality and efficacy of age verification technologies and intends, as far as possible, to adopt a coordinated approach to platforms that provide content that can impair the development of minors.

In their joint statement, the regulators make particular reference to the obligations of video-sharing platforms (VSPs) under the Audiovisual Media Services Directive (AVMSD). VSPs are required to take appropriate measures to protect minors from videos that could harm their development. The AVMSD states that gratuitous violence and pornography should be subject to the strictest measures. The working group wants to ensure that VSPs take these requirements seriously, in particular by ensuring that those providing pornographic content take effective age verification measures. One key challenge is the fact that platforms are often not operated in the country at which their services are targeted. Additionally, many technological measures used to protect minors are new and have not yet been assessed from a regulatory point of view. The regulators concerned are committed to tackling these challenges through coordinated, independent and evidence-based regulation.

In Germany, the *Kommission für Jugendmedienschutz* (Commission for the Protection of Minors in the Media – KJM), the central organ of the German *Landesmedienanstalten* (state media authorities) responsible for the protection of young people in the media, commissioned the Institute of European Media Law (EMR) to draft a report on the status and development of international measures to protect children and young people in the media. Published in early 2023, the report is based on a detailed comparison of the domestic legislation of different countries. It concludes that, although many states are facing very similar problems, they are tackling them in different ways from a regulatory point of view. According to the report, a knowledge- and science-based exchange of best practices between regulators could support the further development of international measures to protect children and young people in the media. The report is also designed to be a starting point for closer international cooperation for the KJM, for which the new working group is an important step forward.

Gemeinsame Erklärung der Internationalen Arbeitsgruppe zu Altersverifikation

https://www.kjm-online.de/fileadmin/user_upload/KJM/Ueber_uns/Positionen/IWG_Joint_Statement_Deutsch.pdf

International Working Group Joint Statement on Age Verification

https://www.kjm-online.de/fileadmin/user_upload/KJM/Ueber_uns/Positionen/IWG_Joint_Statement_Englisch.docx.pdf

Gutachten des EMR zu Stand und Entwicklungen des internationalen Kinder- und Jugendmedienschutzes

https://www.die-medienanstalten.de/fileadmin/user_upload/KJM/Publikationen/Studien_Gutachten/EMR_Stand_und_Entwicklung_des_internationalen_Kinder-_und_Jugendmedienschutzes.pdf

EMR report on the status and development of international measures to protect children and young people in the media

COUNCIL OF EUROPE

FRANCE

European Court of Human Rights (Grand Chamber) : *Sanchez v. France*

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

On 15 May 2023 the Grand Chamber of the European Court of Human Rights (ECtHR) has confirmed its earlier Chamber finding of 2 September 2021 in the case of *Sanchez v. France*. The ECtHR found that the criminal conviction of a politician for failing to promptly delete hate speech, that was posted by others, from his public Facebook account, did not violate the right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR). The Grand Chamber of the ECtHR confirms that imposing criminal liability on internet intermediaries is capable of having chilling effects for the users of Facebook, other social networks or discussion fora. With reference to the Recommendation 1814 (2007) of the Parliamentary Assembly of the Council of Europe, the ECtHR also recognises that there is a movement in favour of decriminalising defamation. But it reiterates that this does not extend to hate speech or calls to violence: criminal prosecution, including the imposition of a prison sentence for an offence in the area of political speech may indeed be compatible with freedom of expression as guaranteed by Article 10 ECHR in exceptional circumstances, notably in the case of hate speech or incitement to violence.

The facts and essence of the domestic proceedings in this case are described in IRIS 2021-9/15 at the occasion of the reporting about the Chamber judgment, finding no violation of Article 10 ECHR. The case concerns the criminal conviction of Julien Sanchez, a politician of the radical right-wing Front National, standing for election to Parliament. Together with the two authors of offensive comments on his Facebook account, Mr Sanchez was prosecuted and finally convicted by the French courts for incitement to hatred or violence against a group of people or an individual on the grounds of their membership of a specific religion in application of the French Law on Freedom of the Press of 28 July 1881 (article 23-24) and the Law of 29 July 1982 on audiovisual communication (article 93-3). The ECtHR noted in particular that the comments posted on Mr Sanchez's Facebook "wall", to which the public had access, were clearly unlawful, as they incited hatred or violence. The Chamber found, having regard to the margin of appreciation afforded to the respondent State, that the decision of the domestic courts to convict Mr Sanchez for not having promptly deleted the unlawful comments posted by third parties on his "wall", which he was using in support of his election campaign, had been based on relevant and sufficient grounds. Accordingly, it held that the interference could be considered "necessary in a democratic society" within the

meaning of Article 10 § 2 ECHR.

This judgment however did not become final, as on 17 January 2022, on request of Mr Sanchez, the case was referred to the Grand Chamber of the European Court of Human Rights. In a judgment of 84 pages, including a concurring opinion and dissenting opinions expressed by four judges, the Grand Chamber, in essence, followed the reasoning and finding of the Chamber judgment, confirming Mr Sanchez's liability in this case and his criminal conviction for not having promptly deleted the illegal incitement to hatred or violence.

The ECtHR emphasized that it attached the highest importance to freedom of expression in the context of political debate. It reiterated that there is little scope under Article 10 § 2 ECHR for restrictions on freedom of expression in the field of political speech, and that the promotion of free political debate is a very important feature of a democratic society. However, since tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society, it follows that, in principle, it may be considered necessary in certain democratic societies to penalise or even prevent all forms of expression that propagate, encourage, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued. And while a degree of exaggeration, or even provocation, is permitted in political speech, remarks capable of arousing a feeling of rejection and hostility towards a community fall outside the protection guaranteed by Article 10 ECHR. Politicians and political parties can propose solutions to the problems linked to immigration, but in doing so they must avoid advocating racial discrimination and resorting to vexatious or humiliating remarks or attitudes, as such conduct might trigger reactions among the public that would be detrimental to a peaceful social climate and might undermine confidence in the democratic institutions.

The Grand Chamber judgment also refers to the ECtHR's approach in *Delfi AS v. Estonia* (IRIS 2015-7/1) emphasizing, in particular, the necessity in a democratic society to combat online hate speech and the responsibility and duty-of-care as an internet intermediary regarding this matter. The ECtHR agreed with the French judicial authorities that the comments at issue were clearly unlawful and that Mr Sanchez was solely convicted for his lack of vigilance and failure to react in respect of these clearly unlawful comments posted by third parties. The Grand Chamber confirmed that the Internet has become one of the principal means by which individuals exercise their right to freedom of expression and that therefore interferences with the exercise of that right should be examined particularly carefully, since they are likely to have a chilling effect, which carries a risk of self-censorship. Nevertheless, the identification of such a risk must not obscure the existence of other dangers for the exercise and enjoyment of fundamental rights and freedoms, in particular those emanating from unlawful, defamatory, hateful or violence inciting remarks, which can be disseminated as never before. For this reason the possibility for individuals complaining of defamatory or other types of unlawful speech to bring an action to establish liability must, in principle, be

maintained to constitute an effective remedy for the alleged violations. To exempt internet intermediaries or “producers” from all liability might facilitate or encourage abuse and misuse, including hate speech and calls to violence, but also manipulation, lies and misinformation. While professional entities, which create social networks and make them available to other users, necessarily have certain obligations, there should be a sharing of liability between all the actors involved, allowing, if necessary, for the degree of liability and the manner of its attribution to be graduated according to the objective situation of each one. When making a Facebook “wall” accessible to the general public, a politician experienced in communication to the public must be aware of the greater risk of excessive and immoderate remarks that might appear and necessarily become visible to a wider audience. The ECtHR found this “without doubt a major factual element”, directly linked to the deliberate choice of Mr Sanchez, who was not only a politician campaigning in the run-up to an election but also a professional in matters of online communication strategy. Additionally, the ECtHR observes that the French courts gave reasoned decisions and proceeded with a reasonable assessment of the facts, specifically examining the question of whether Mr Sanchez had been aware of the unlawful comments posted on his Facebook “wall”. Also, from a practical point of view, Mr Sanchez could have promptly deleted the clearly unlawful content. The question of the difficulties caused by the potentially excessive traffic on a politician’s account and the resources required to ensure its effective monitoring, clearly did not arise in the present case. The ECtHR also accepted the possibility provided by the French law that next to the authors of hate speech, also the “producer”, as an internet intermediary, could be held liable for the unlawful content posted by these authors. Finally the ECtHR found the sanction imposed on Mr Sanchez pertinent and proportionate. It noted in particular that his conviction to a fine and the payment of the cost to the civil party of all together 4.000 EUR had had no chilling effect on the exercise of Mr Sanchez's freedom of expression or any negative impact on his subsequent political career and his relations with voters.

In view of the foregoing, on the basis of an assessment in concreto of the specific circumstances of the present case and having regard to the margin of appreciation afforded to the respondent State, the ECtHR found that the decisions of the domestic courts were based on relevant and sufficient reasons, both as to the liability attributed to Mr Sanchez in his capacity as a politician, for the unlawful comments posted in the run-up to an election on his Facebook “wall” by third parties, who themselves were identified and prosecuted as accomplices, and as to his criminal conviction. The impugned interference was therefore considered to have been “necessary in a democratic society”. Accordingly, the Grand Chamber, with thirteen votes to four, found that there has been no violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, Grand Chamber, in the case of Sanchez v. France, Application no. 45581/15, 15 May 2023

https://hudoc.echr.coe.int/eng?i=001-224928

EUROPEAN UNION

Publication by the European Commission of the first European Media Industry Outlook

Eric Munch
European Audiovisual Observatory

On 18 May, the European Commission published a new report, the European Media Industry Outlook, as part of its Media and Audiovisual Action Plan, launched in December 2020. It was presented by Thierry Breton, Commissioner for Internal Market during the European Film Forum at the *Festival de Cannes*.

The report – the first of its kind – analyses trends in the audiovisual, video game and news media industries, provides market data and identifies challenges and underlying technological trends common to the media industries, with the aim of analysing their potential impact on the EU media market. Its data was gathered through consumer surveys, questionnaires, stakeholders input and secondary sources.

Speaking of the report, the Executive Vice-President for a Europe Fit for the Digital Age, Margrethe Vestager emphasised how critical it is to sustain efforts in helping European Media enterprises digitalise, before adding: “We have to position ourselves early enough on new technological segments. To avoid that others impose standards, we might not agree to. From immersive content to virtual production.”

The report notes that the ongoing shift in media consumption is driven by video on demand (VOD), mobile gaming and immersive content; with video on demand growing fast and recovering faster from the COVID-19 pandemic than other actors – broadcasting remaining stable and cinema recovering slowly. Revenues generated by video games, on the other hand, have been growing continuously, mostly driven by mobile gaming. Community-based games are crossing the boundary between game and platform in allowing the development of other activities, such as social interactions, concerts and shopping. Gaming is also a gateway to Extended Reality, a nascent market of which video games represent the largest part.

Usage of new devices and the development of digital platforms have led to changes in media consumption – gradually shifting online, bringing about new interrogations regarding monetisation for some actors and adding to the decrease of revenues of the printed press.

The European Commission will continue to monitor trends in the European media landscape and report on them in the European Media Industry Outlook’s next editions.

Commission publishes first ever European Media Industry Outlook

https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2814

Livestream of the European Film Forum in Cannes

https://www.youtube.com/watch?v=suAFwhRIbns

European Media and Audiovisual Action Plan

https://digital-strategy.ec.europa.eu/en/policies/media-and-audiovisual-action-plan

The European Media Industry Outlook leaflet

https://ec.europa.eu/newsroom/dae/redirection/document/95881

Recommendation on combating online piracy of sports and other live event

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 4 May 2023, the European Commission published a notable Recommendation on combating online piracy of sports and other live events. The Recommendation encourages member states, national authorities, rightsholders and providers of intermediary services to take effective, balanced and appropriate measures to combat unauthorised retransmissions of live events. The Commission emphasises that sports and live events contribute to “fostering a diverse European cultural scene”, bringing citizens together and providing a sense of community; and unauthorised streaming can cause “significant loss in revenue" for performers, live and sports event organisers and broadcasters. Notably, the Commission states that the Recommendation builds upon the Digital Services Act (DSA), which “streamlines the processing of notices sent to providers of hosting services" in case of illegal content.

The 16-page Recommendation is centred around three main issues. The first is about ensuring the “prompt treatment” of notices related to unauthorised retransmissions of live sports events. In this regard, the Recommendation states that providers of hosting services, other than online platforms, are encouraged to cooperate with rightsholders, in particular by (a) effectively engaging with trusted flaggers for the purposes of this Recommendation; and (b) developing and using technical solutions aimed at facilitating the processing of notices, such as application programming interfaces. The Recommendation notes that the DSA already imposes obligations on online platforms to take the necessary technical and organisational measures to ensure that notices submitted by trusted flaggers are given priority and are processed and decided upon without undue delay.

The second issue is about cooperation between rightsholders and providers of intermediary services. The Recommendation states that providers of intermediary services, particularly those which are able to “identify and locate the source” of unauthorised retransmissions of live sports events, are encouraged to (a) cooperate, including with providers of hosting services and holders of rights in the live transmission of sports events, to facilitate the “identification of the source” of unauthorised retransmissions; and (b) put in place “specific measures against repeated misuse of their services”.

The third significant issue is in relation to injunctions. Importantly, the Recommendation provides that member states are “encouraged to assess whether, in their jurisdiction, sports event organisers are entitled to take legal action to prevent, or to prohibit the unauthorised retransmission of a live sports event”. And where this is not the case, member states are encouraged to grant legal standing to sports event organisers to seek an injunction in order to prevent

imminent unauthorised retransmission of live events. Further, member states are encouraged to provide for injunctions against operators of unauthorised retransmissions of live sports events, as well as against providers of intermediary services whose services are misused by a third party for unauthorised retransmissions of live sports events, “regardless of the intermediary’s lack of liability”, in order to terminate or prevent such unauthorised retransmission of live sports events. Crucially, in relation to “dynamic injunctions”, member states are encouraged to provide for the possibility to seek injunctions imposed on a given intermediary service provider, that can be “extended” to enable the blocking of pirate services which carry out unauthorised retransmissions of live sports event “even if they were unidentified at the time of the application for an injunction, but where they concern the same sports event, in line with their national procedural rules”.

Finally, the Commission stated that it will assess the effects of the Recommendation on unauthorised retransmissions of live events by 17 November 2025. This is also the deadline for the Commission to evaluate how the DSA interacts with other legal acts, including copyright legislation. The Commission will then decide whether additional measures are needed at EU level.

Commission Recommendation on combatting online piracy and other live events, C(2023) 2853 final, 4 May 2023

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

Update on EU sanctions against Russian broadcasters

Mark D. Cole
Institute of European Media Law

The sanctions imposed against Russian state broadcasters shortly after Russia's invasion of Ukraine, which were designed to prevent them broadcasting in the European Union (EU) and have been renewed or extended multiple times, were broadened to include additional broadcasters in decisions adopted on 31 March 2023.

Acting within the framework of the Common Foreign and Security Policy (CFSP), the Council of the European Union adopted Decision (CFSP) 2023/728, in which it ruled that the so-called restrictive measures introduced in a decision of 25 February 2023 could be applied to two additional Russian state media outlets after examination of their respective cases. From 10 April 2023, the broadcasters concerned, RT Arabic and Sputnik Arabic, were therefore added to the list of entities prohibited from broadcasting, transmitting or distributing their services in the EU by any means. Any broadcasting licence or authorisation, or other distribution arrangements with these entities are suspended and advertising in any content that they produce is prohibited. These restrictive measures are described in Article 4g of Decision 2014/512/CFSP and Annex IX thereof, which were originally drafted following theoccupation of Ukraine's Crimean Peninsula by Russian troops and which have been amended accordingly.

For reasons of competence, the economic sanctions imposed within the EU in response to the war started by Russia are based on two distinct decision-making processes, although the decisions themselves have the same effect. On the one hand, the Council of the European Union, which represents the governments of the EU member states, issues such sanctions at the instigation of the European Council (the heads of state and government) within the framework of the CFSP, principally under a CFSP Decision in accordance with Article 29 of the Treaty on European Union. However, since the sanctions also affect the internal market and a rule on competence to adopt economic sanctions is contained in Article 215 of the Treaty on the Functioning of the European Union, such sanctions are also issued in the form of a Council Regulation. The aforementioned extension is therefore also based on Council Regulation (EU) 2023/427 amending Council Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, and Council Implementing Regulation (EU) 2023/722. Article 2f of Regulation (EU) 833/2014 and Annex XV thereof have been adapted so that both broadcasters are now also mentioned and therefore became subject to the sanctions on 10 April 2023.

The reasons for amending and extending the sanctions are the same as those set out in previous decisions. Media under the "control of the Russian leadership" should be prohibited from broadcasting because they are part of a "systematic,

international campaign of media manipulation and distortion of facts" designed to destabilise the neighbouring countries of the Russian Federation in particular, as well as the European Union as a whole. These activities and "propaganda actions" constitute a "significant and direct threat to the Union's public order and security". The decision also recognises that the sanctions were imposed in view of the fundamental rights enshrined in Article 11 of the Charter of Fundamental Rights and are a justified restriction of the right to freedom of expression and information.

The General Court of the European Union had previously taken this stance in its judgment of 27 July 2022 in case T-125/22 between RT France and the Council of the European Union, dismissing the applicant's annulment request. The appeal against this decision, submitted to the Court of Justice of the European Union, is still pending (case C-620/22), but a change in circumstances could mean that there will be no final judgment on the appeal. In a statement, RT France's CEO said that RT France was insolvent and would be forced to shut down after its bank accounts were frozen in accordance with further sanctions in January 2023. Its insolvency could mean that the appellant no longer has a legitimate interest in bringing the action, rendering continuation of the proceedings inadmissible and resulting in their closure. The same would then apply to the other actions brought before the Court by RT France against the decisions extending the sanctions (T-605/22, T-75/23, T-169/23). In case T-605/22, the defendant, i.e. the Council of the European Union, had raised the defence of inadmissibility on the ground that the appeal had been directed against its information letter rather than (as it should have been) against its decision published in the Official Journal. In a judgment of 25 April 2023, the court decided that this plea of inadmissibility should be dismissed because the appellant's application should be interpreted as being directed against the decision and not just the letter. These proceedings are therefore continuing. Another action pending before the court (T-307/22) was brought against the Council on 1 July 2022 by various Dutch Internet access providers who claimed they were affected by the broadcasting restrictions. They argued that the reasons given for the restrictive measures had no lawful basis and that the decisions to impose the sanctions infringed fundamental rights. No decision has been reached in this case, which is separate from the procedures initiated by RT France.

The sanctions against Russian state media are currently due to expire on 31 July 2023.

Beschluss (GASP) 2023/434 des Rates vom 25. Februar 2023 zur Änderung des Beschlusses 2014/512/GASP über restriktive Maßnahmen angesichts der Handlungen Russlands, die die Lage in der Ukraine destabilisieren

https://eur-lex.europa.eu/eli/dec/2023/434/oj?locale=de

Council Decision (CFSP) 2023/434 of 25 February 2023 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine

https://eur-lex.europa.eu/eli/dec/2023/434/oj?locale=en

Konsolidierter Text: Beschluss 2014/512/GASP des Rates vom 31. Juli 2014 über restriktive Maßnahmen angesichts der Handlungen Russlands, die die Lage in der Ukraine destabilisieren

https://eur-lex.europa.eu/eli/dec/2014/512/2023-04-10

Consolidated text: Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine

https://eur-lex.europa.eu/eli/dec/2014/512/2023-04-10

Verordnung (EU) 2023/427 des Rates vom 25. Februar 2023 zur Änderung der Verordnung (EU) Nr. 833/2014 des Rates über restriktive Maßnahmen angesichts der Handlungen Russlands, die die Lage in der Ukraine destabilisieren

https://eur-lex.europa.eu/eli/reg/2023/427/oj?locale=de

Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine

https://eur-lex.europa.eu/eli/reg/2023/427/oj?locale=en

Council Implementing Regulation (EU) 2023/722 of 31 March 2023 implementing Regulation (EU) 2023/427 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine

https://eur-lex.europa.eu/eli/reg_impl/2023/722/oj

Ordonnance du Tribunal dans l'affaire T-605/22

https://curia.europa.eu/juris/document/document_print.jsf?mode=lst&pageIndex=0&docid=272992&part=1&doclang=FR&text=&dir=&occ=first&cid=2144711

CJEU decision in case T-605/22

AI Act: where do we stand?

Justine Radel-Cormann
European Audiovisual Observatory

On 21 April 2021, the European Commission (EC) presented a proposal for a Regulation laying down harmonised rules on artificial intelligence and amending certain Union legislative acts (Artificial Intelligence Act - 'AI Act') (see IRIS 2021-6:1/25 presenting the Commission's proposal).

Since then, the Council of the EU and the European Parliament (EP) Committee on Internal Market and Consumer Protection (IMCO) and on Civil Liberties, Justice and Home Affairs (LIBE) have started their work. Although the European Commission published its proposal about two years ago, substantial digital evolutions (e.g. OpenAI and its diverse services) have erupted in the course of the last months, providing the institutions with plenty generative AI content to reflect on. In Ferbuary 2023, the institutions committed themselves to ensure substantial progress on the AI file in their joint Declaration 2023-24, and agreed on its high level of priority.

The text that the institutions will negotiate in the future follows a risk-based approach: it will establish obligations for providers and users depending on the level of risk of AI - as identified by the future Regulation.

State of the process:

The Council of the European Union adopted its General Approach in December 2022 and the European Parliament is likely to adopt its negotiating mandate with a view to adopt the AI Act during the June plenary session. Once the latter has adopted its negotiating mandate, the institutions will enter negotiations (the so-called 'trilogues') with a view to reaching an agreement on the EC's proposal.

European Parliament:

IMCO and LIBE were appointed as the responsible joint committee in December 2021, with Member of the European Union Parliament (MEP) Brando Benifei (IMCO, Italian, S&D group) and MEP Dragoş Tudorache (LIBE, Romanian, Renew group) as rapporteurs of the text. Together, they prepared a draft negotiating mandate, which IMCO and LIBE MEPs agreed on (vote in committee), on 11th May 2023.

The European Parliament aims to adopt a horizontal text that is present-efficient and future-proof. In the current compromise text, the MEPs agreed on the types of AI and their corresponding obligations. Among the list, we can count: forbidden AI services that bear unacceptable risks (e.g. real-time remote biometric identification in publicly accessible places), high-risk AI with strict obligations (e.g. recommendation systems used by social media platforms categorised as VLOPs

under the DSA), and general-purpose AI (e.g generative AI services such as ChatGPT). Generative AI shall abide by transparency rules that may impact the audiovisual world in the future: MEPs want the systems to disclose content generated by AI, and be built in a way that prevents from generating illegal content. Besides, generative AI services shall publish summaries of copyrighted data used for training the programmes.

Since the text is very much horizontal, it could require institutions to set up vertical rules, which could be more specific and adapted to relevant-related topics (such as cultural and creative industries).

It is worth noting that no more than five other committees presented opinions on the text during last summer 2022, among which the Committee on Culture and Education (CULT). CULT suggested amendments obliging AI systems to be transparent when they recommend, disseminate and order news or creative and cultural content (see amendment 55).

Each of these opinions will be taken into account in the final version of the EP's negotiating mandate.

Council of the EU:

The Council of the European Union adopted its General Approach on the AI Act in early December 2022. One can note that member states of the EU would like to prohibit the use of AI for social scoring by private actors. Furthermore, although prohibited, real-time remote biometric identification in publicly accessible spaces could exceptionally be allowed for law enforcement authorities.

Next steps:

All MEPs are invited to debate the joint committee's draft during the June plenary session (12-15 June 2023), and consequently vote on the draft negotiating mandate (endorse or reject it). Once adopted in plenary session, the report and the opinions will together represent the EP's position ('negotiating mandate'). Interinstitutional negotiations should follow, using the Commission's Proposal read in the light of the Council's General Approach and the EP's negotiating mandate.

Proposal for a Regulation of the European Parliament and of the Councillaying down harmonised rules on artificial intelligence and amending certain Union legislative acts

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206

Council of the EU: Proposal for a Regulation on AI (General Approach)

https://data.consilium.europa.eu/doc/document/ST-14954-2022-INIT/en/pdf

Joint Declaration 2023-24

https://oeil.secure.europarl.europa.eu/oeil/popups/thematicnote.do?id=41380&l=en

Opinion of CULT for IMCO and LIBE on the proposal for a Regulation on AI

https://www.europarl.europa.eu/doceo/document/CULT-AD-719637_EN.html

Committee report tabled for June plenary

https://www.europarl.europa.eu/doceo/document/A-9-2023-0188_EN.html#_section1

European Commission report on the promotion of European works by audiovisual media services

Amélie Lacourt
European Audiovisual Observatory

On 17th May 2023, the European Commission published its report on the application of Articles 13 (non-linear services), 16 and 17 (linear services) of the AVMS Directive for the period 2015-2019. Since the new rules introduced in 2018 had not yet entered into force at national level in 2019, the report only refers to the obligations under Directive 2010/13/EU. It is accompanied by a Study which addresses the legislative changes affecting linear and non-linear services, the developments in the audiovisual market as well as a content analysis of offers by broadcasting and on-demand services.

Application of Article 13 AVMSD

While the Study estimates that the number of VOD services still gradually increased, standing at 713 in 2015, 847 in 2016, 945 in 2017, 999 in 2018 and 1 030 in 2019, the report however indicates that VOD service markets in individual member states developed at different rates. Divergence was indeed felt in terms of practices, resulting from the flexibility offered by the provisions of Article 13 of the 2010 AVMSD, which did not impose a minimum mandatory proportion of European works and offered member states the freedom to choose the manner in which the promotion of the production of and access to European works should be achieved. Based on the national reports, the average proportion of European works on VOD services nevertheless rose from 45% in 2015 to 54% in 2019. The most widespread promotion tool was the display of European works on the service's homepage, followed by the use of trailers and banners and search functions.

In terms of legislation, the report identifies 13 member states which implemented amendments during the reporting period (the Flemish community in Belgium, Cyprus, Croatia, Denmark, Estonia, Finland, Germany, Greece, Hungary, Iceland, Italy, the Netherlands and Slovakia). It also highlights the adoption of substantive reforms in Belgium, Croatia, Hungary and Italy. Finally, with regard to the monitoring systems, eight member states were found to have introduced legislative changes during the reporting period (the Flemish community in Belgium, Cyprus, Croatia, Estonia, Hungary, Italy, the Netherlands and Slovakia). Only Czechia, Luxembourg and Romania however reported having taken measures to address cases of non-compliance.

Application of Article 16 and 17 AVMSD

During the reporting period, legislative changes linked to the implementation of Articles 16 and 17 of the 2010 AVMSD took place in 16 member states (Cyprus,

Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Iceland, Italy, the Netherlands, Poland, Romania and Slovakia).

Regarding the obligation to broadcast, where practicable, a majority of European works (Article 16 AVMSD), the report shows a stable level of reported European works with a slight increase in 2019 compared to 2015, with Hungary displaying on average the highest percentage of European works (94.4%). But while the average time dedicated to European works exceeded the majority proportion required under Article 16 at a national and European level, a substantial share of channels did not reach the quota in Czechia (40%), Lithuania (38%), Portugal (30%), Bulgaria (29%) and Italy (24%).

As regards the obligation under Article 17 related to the transmission time dedicated to independent productions, the reported average was 42.2% in 2015, 37.7% in 2016, 38.5% in 2017, 38.6% in 2018 and 40.8% in 2019, well above the threshold set in the Directive. Although the transmission time dedicated to independent productions fell between 2015 and 2016, it partially recovered by 2019.

Likewise, the reported average transmission time dedicated to recent independent productions by all reported channels in the EU-27 followed the same curve, with 54.0% in 2015, 52.7% in 2016, 53.7% in 2017, 54.5% in 2018 and 54.6% in 2019. The share of qualifying time scheduled for broadcasting such works ranged from 0.9% (the Netherlands) to 29.1% (Germany).

The majority of member states identified cases of non-compliance with the obligatory proportions set out in Articles 16 and 17. The main reasons cited were:

- The small size of certain channels which have difficulties meeting the quotas because of their low audience share and smaller target audience;

- The format or theme of the content (notably cultural, sporting and children's content);

- The competition with US productions;

- The availability of cheaper content outside the EU.

In conclusion, this report shows that Article 13 of the 2010 AVMSD was transposed differently from one member state to another, and, while certain difficulties exist in specific cases, the provisions of Articles 16 and 17 were, in general, being implemented well by the member states.

The implementation of the obligations under the revised Audiovisual and Media Services Directive (Directive 2018/1808/EU), covering the years 2020-2021, will be subject to a separate report.

Commission report on the application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2015-2019

https://ec.europa.eu/newsroom/dae/redirection/document/95884

Study on the practical implementation of the provisions of the audiovisual media services directive concerning the promotion of European works in audiovisual media services

https://op.europa.eu/en/publication-detail/-/publication/41f4a695-f465-11ed-a05c-01aa75ed71a1/language-en

European Parliament report on the 2022 European Commission Report on Serbia

Eric Munch
European Audiovisual Observatory

On 2 May 2023, the European Parliament adopted a motion for a resolution on the 2022 Commission Report on Serbia. The Report is one of seven reports by the European Commission on six Balkan countries and Turkey in relation to their status as candidates for membership of the European Union (EU).

Published on 12 October 2022, the report aims to describe the state of play in Serbia to the European Parliament, the Council of the European Union the European Economic and Social Committee and the Committee of the Regions with an analysis of the progress of the reforms launched in Serbia since the opening of its accession negotiations in January 2014. While, according to the Serbian government, EU membership remains a strategic goal, the report noted that the pace of reforms had slowed down since the calling of parliamentary elections and the dissolution of Parliament in February 2022.

Of note is the absence of progress made regarding freedom of expression during the reporting period (between June 2021 and June 2022). While two working groups on the safety of journalists continued to meet during the year and the police and prosecution reacted swiftly in several cases of attacks and threat against journalists, those cases remain a concern – the report noted. The media strategy's implementation has experienced delays which included amending the Law on public information and media and the Law on electronic media. The report also notes that in July 2022, the Serbian national regulatory authority for the media, the Regulatory Body for Electronic Media (REM), rewarded all four national frequencies to the same television channels that had already been awarded those frequencies in the previous period, and all of which had received warning from REM due to violation of their legal obligations. A quote from the final report of the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) also indicates that, despite equitable coverage of the campaign activities of all contestant, the national public broadcasters had "provided extensive uncritical news coverage to public officials who were also candidates" while private broadcasters with national coverage "presented the election campaign without meaningful editorial input and focused their news coverage on state officials". Overall, it also found REM to have remained passive during the campaign period, despite its mandate to oversee the broadcast media.

In its motion for a resolution, the European Parliament, acting upon the findings of the report, notes in its point F. that over time, the governing majority "has steadily undermined some political rights and civil liberties, putting pressure on independent media, the political opposition and civil organisations", adding that

Serbia has become a safe haven for major Russian media companies, including RT, and that social media platforms have become “tools to foster anti-democratic political movements in the Western Balkans.” Disinformation – the report notes – is also spreading faster than independent fact-checkers can react, often originating from political figure and subsequently being reported upon by state-affiliated media and shared on social media.

Among numerous topics of concern raised in the European Parliament’s report, several relate to journalism and the media. The Parliament indicates “serious concern” about the state of freedom of expression and media independence and “urges” Serbia to “improve and protect media professionalism, diversity and media pluralism”, “to increase the transparency of media ownership and financing” and to ensure the independence of REM. It also “condemns” the opening of an RT office in Belgrade and the launch of its online news service in Serbian and “calls for pro-Russian reporting across the media spectrum to be abandoned”. In the context of the Russian war of aggression against Ukraine, the Parliament is “deeply concerned” about the spread of disinformation on the conflict.

REPORT on the 2022 Commission Report on Serbia

https://www.europarl.europa.eu/doceo/document/A-9-2023-0172_EN.html#_section1

Serbia Report 2022

https://neighbourhood-enlargement.ec.europa.eu/serbia-report-2022_en

Serbia - Presidential and early parliamentary elections - ODIHR Election Observation Mission Final Report

https://www.osce.org/odihr/elections/serbia/524385

NATIONAL

BELGIUM

[BE] Flemish Minister of Media launches online platform with information for influencers: the InfluencerFAQ

Lien Stolle
Ghent University

On 27 March 2022, Benjamin Dalle, Flemish Minister for Brussels Affairs, Youth and Media, introduced the online platform "InfluencerFAQ". The influencerFAQ platform offers all kinds of tips and tricks about being an influencer and was developed in consultation with influencers and media experts and together with various organisations (including non-profit organisations and government agencies) specialising in a number of topics relevant to influencers. These topics range from information on discussing sensitive topics such as suicide, posting about gambling and dealing with hate messages as well as information on taxes and marketing. The FAQ are divided into 6 topics, each of which covers a number of questions.

The InfluencerFAQ platform does not take the form of a binding instrument, nor does it introduce a supervisory authority and neither would it have the intention to hand out fines. The main purpose of the FAQ is to make influencers aware of the influence they can have on their followers. It constitutes a clear and user-friendly overview for influencers of the legal framework that exists in Belgium, along with a number of tips, tricks and recommendations. According to the minutes of the meeting of the Culture, Youth, Sport and Media Committee of the Flemish Parliament on 4 May 2023, this format was chosen as a way of avoiding the introduction of a code that might look like a new set of rules. Indeed, the main purpose of the InfluencerFAQ is to provide clarity on the extisting regulations rather than imposing new ones. Moreover, it has a dynamic character which allows it to be updated with new topics and relevant new information.

It became clear that there was a need for further information and clarification, especially after the recent warnings from the Flemish audiovisual media regulator (*Vlaamse Regulator voor de Media* – VRM) in relation to the obligation to clearly disclose commercial communications. During the period between November 2022 and March 2023, for example, VRM issued warnings to five influencers under the Flemish Radio and Television Decree (*Decreet betreffende Radio-omroep en Televisie* or 'the Flemish Media Decree'). Moreover, a discussion on the proper payment of taxes by influencers has recently gained traction in the media.

The InfluencerFAQ platform is a first step: the necessary relevant points of interest needed to be identified. For now, the main goal is to further disseminate the FAQ. InfluencerFAQ is supported by six Flemish influencers, or so-called

ambassadors, who are committed to bringing the FAQ to the attention of the influencer industry. In addition, a partnership has been set up with We Are Digital, a communication agency that is devising a communication strategy to introduce influencers to the FAQ and actively engage them. As Minister Dalle pointed out during the Committee meeting, possible next steps are being considered, but they are still very much in the early stages. Discussions are underway, for example, about working on a (quality) label for influencers in the future. In any case, such ideas will be further developed in consultation with the influencer landscape and experts.

De InfluencerFAQ

https://www.deinfluencerfaq.be/

The InfluencerFAQ

Verslag vergadering Commissie voor Cultuur, Jeugd, Sport en Media

https://www.vlaamsparlement.be/nl/parlementair-werk/commissies/commissievergaderingen/1728476/verslag/1733761

Report on the meeting of the Committee for Culture, Youth, Sport and Media

VRM t. SARAH PUTTEMANS Beslissing nr. 2022/554C

https://www.vlaamseregulatormedia.be/nl/beslissingen/2022/waarschuwing-voor-sarah-puttemans;

VRM t. SARAH PUTTEMANS Decision No 2022/554C

VRM t. STEFFI MERCIE, Beslissing nr. 2022/036

https://www.vlaamseregulatormedia.be/nl/beslissingen/2022/waarschuwing-voor-steffi-mercie

VRM t. STEFFI MERCIE, Decision No 2022/036

VRM t. MAXIMILIAAN VERHEYEN, Beslissing nr. 2022/037

https://www.vlaamseregulatormedia.be/nl/beslissingen/2022/waarschuwing-voor-maximiliaan-verheyen

VRM t. MAXIMILIAN VERHEYEN, Decision No 2022/037

VRM t. ASTRID COPPENS, Beslissing nr. 2023/010

https://www.vlaamseregulatormedia.be/nl/beslissingen/2023/waarschuwing-voor-

astrid-coppens-duidelijk-herkenbaar-maken-van-commerciele

VRM v. ASTRID COPPENS, Decision No 2023/010

VRM t. ROMY SCHLIMBACH, Beslissing nr. 2023/011

https://www.vlaamseregulatormedia.be/nl/beslissingen/2023/waarschuwing-voor-romy-schlimbach-duidelijk-herkenbaar-maken-van-commerciele

VRM v. ROMY SCHLIMBACH, Decision No. 2023/011

BULGARIA

[BG] CEM report on the monitoring of the election campaign for the 49th Parliament

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

On 27 April 2023, *Съвета за електронни медии* (the Council for Electronic Media – CEM) published its *Доклад за специализираното наблюдение на предизборната кампания за 49-то Народно събрание* (Report on the specialised monitoring of the election campaign for the 49th Parliament – the Report).

In the Report, the CEM presents its findings following the process of specialised monitoring of the activity of 14 channels of public media service providers and 13 channels of commercial media service providers related to yet another parliamentary election in Bulgaria. The Report also includes information on the performance of four online platforms. The Report covers their media behaviour during the election campaign (from 3 to 31 March 2023), on the day of reflection (1 April 2023) as well as on the day of the elections (2 April 2023).

The main purpose of the monitoring process was to establish the way in which providers had presented the campaigns of political parties and coalitions, and whether these had complied with the requirements of *Изборен кодекс* (the Election Code) and *Закон за радиото и телевизията* (the Radio and Television Act).

The CEM concluded that in the first three weeks of the campaign, the political content in the programmes of providers had been somewhat insignificant. However, the political activities had been much more dynamic in the week leading up to the election day.

The CEM made the interesting observation that inviting representatives of non-systemic parties to national television and radio channels in prime time shows ran the risk of disseminating content that violates the principles of morality and promotes hate speech and violence against certain social groups.

Furthermore, the Report finds that there was a lack of political debate and argument between leaders on opposing sides. It further emphasises that communication with the public was very much a one-way affair, and interviews tended to give the interviewees a very easy ride.

The Report also notes the mixture of editorial and agitational content (i.e. political propaganda versus journalism) in the programmes. The CEM argued that this mixture is to the detriment of citizens and democracy as it prevents them from making independent political choices.

Finally, the CEM reports that there was a lack of gender equality in the media campaign. It notes that there was a total of 1 341 femalewomen candidates in comparison with the much higher figure of 3 225 male candidates. Respectively, the level of promotion of women remains relatively low as in the 49th National Assembly women account for only 58 out of the 240 members of parliament.

Доклад за специализираното наблюдение на предизборната кампания за 49-то Народно събрание

https://www.cem.bg/controlbg/1462

Report on the specialised monitoring of the election campaign for the 49th Parliament

GERMANY

[DE] German Film Board publishes 2022 home video market report

Katharina Kollmann
Institute of European Media Law

According to a report on the financial results of the home video market, published by the German *Filmförderungsanstalt* (Federal Film Board – FFA), over EUR 3.8 billion was spent on cinema tickets and the purchase, rental or streaming of films in Germany in 2022. Combined spending on home video and cinema tickets was the highest since market data collection began. At just over EUR 3.1 billion, consumer spending on the different home video products alone also set a new record high and exceeded EUR 3 billion for the first time. Based on market research and statistics gathered by the FFA, in partnership with Germany's largest market research company, GfK, the report forms part of a project that has been analysing the development of the German home video market since 2000.

Founded in 1968, the FFA is a federal institution incorporated under public law. It acts on the basis of the German *Filmförderungsgesetz* (Film Support Act – FFG) and is Germany's national film funding institution, funded through the so-called film levy that is paid by cinemas, the video industry and television companies. One of its tasks is to regularly collate, analyse and publish the most important market data of the film, cinema and video industries in Germany.

The latest home video market report shows that the home video market, including Subscription Video-on-Demand (SVoD) and video rental and sales, grew by 7% in 2022 compared with the previous year. In total, almost 40% of the German population bought, rented or streamed at least one film or series in 2022.

The proportion of spending on digital versions, as opposed to physical data carriers, rose to 89% in 2022. In 2009, the equivalent figure was only 1%. In absolute numbers, turnover in the digital video sector totalled EUR 2.76 billion, compared with EUR 2.48 billion in 2021.

The sector that recorded the highest growth was the SVoD market, i.e. streaming platforms, including giants such as Netflix, Amazon Prime Video and Disney +, as well as niche providers such as Arthouse CNMA and Netzkino. Spending on these services totalled EUR 2.33 billion, representing 75% of the home video market. The previous year's figure was EUR 2.07 billion. The SVoD sector therefore grew by 12% compared with 2021 and held a slightly greater share of the home video market.

The sharpest decline, on the other hand, was in the sale of physical data carriers such as DVD and Blu-ray. Here, the proportion of spending was 15% lower than the previous year and fell to 11% (EUR 339 million). DVD sales dropped more

markedly than Blu-ray.

There was greater stability in the electronic sell-through (EST) sector, which achieved a 14% share of the home video market in combination with the growing Transactional-Video-on-Demand (TVoD) sector. Turnover for these sectors totalled EUR 431 million.

FFA-Pressemitteilung

https://www.ffa.de/pressemitteilungen-detailseite/ffa-studie-der-home-video-markt-im-jahr-2022-rekordausgaben-home-video-gesamtmarkt-erstmals-ueber-3-mrd-euro.html

FFA press release

[DE] KEK amends rules on reporting minor changes to ownership structures

Katharina Kollmann
Institute of European Media Law

At its meeting on 11 April 2023, the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media - KEK) decided to amend the *Meldepflicht-Richtlinie* (directive on notification of ownership structures) adopted on 11 May 2021. Previously, only minor changes to participating interests or other types of influence were exempt from the obligation to report changes, laid down in Article 63 sentence 1 of the *Medienstaatsvertrag* (state media treaty – MStV). Now, a further exemption applies to changes that are not minor *per se*, but that relate to companies whose stake in a broadcaster is considered insignificant.

The KEK is a joint organ of the 14 German state media authorities. It is responsible for guaranteeing plurality of opinion in relation to the organisation of television channels throughout Germany. Its activities in this regard include checking, by analysing their respective audience shares, whether companies exercise a dominant influence on public opinion by acquiring television broadcasting licences or changing their ownership structure.

According to Article 63 sentence 1 MStV, any planned change in participating interests or other influences must be notified in writing to the competent state media authority prior to its implementation. This provision is meant to ensure the transparency of shareholdings and other influences in the German television market. However, the rules do allow various exemptions. Article 63 sentence 6 allows the KEK to issue directives detailing exemptions concerning the reporting obligation for minor changes to participating interests or other types of influence. The KEK used these powers to adopt the aforementioned *Meldepflicht-Richtlinie*, under which it is not required to examine the effects of minor changes of ownership on media concentration.

Under the previous version of the *Meldepflicht-Richtlinie*, minor changes to participating interests, or other types of influence, did not need to be reported if they concerned private broadcasters or companies with a direct or indirect holding in a private broadcaster. The new amendment adds a further exemption, which applies to changes that are not minor but that relate to companies that only have an insignificant holding in private broadcasters. These companies are described as “minor shareholders” and are defined in Article 6 of the *Meldepflicht-Richtlinie*. They are companies that hold less than 5% of the capital or voting rights of a private broadcaster or of companies with direct or indirect holdings in a private broadcaster.

The *Meldepflicht-Richtlinie* was amended because of contradictions under the previous legal situation, where a company could sell a holding of under 5% in a

broadcaster without having to report it while the company itself had to report a change of ownership, even if it involved so few shares that it would only have a limited impact. The amended directive resolves this by extending the applicable exemptions.

The fact that the media concentration effects of minor changes of ownership do not need to be examined lightens the procedural burden for both the KEK and broadcasters. The amendment of the *Meldepflicht-Richtlinie* will lighten the workload even further.

Richtlinie nach § 63 S. 6 Medienstaatsvertrag (MStV) zu Ausnahmen von der Anmeldepflicht für geringfügige Veränderungen von Beteiligungsverhältnissen oder sonstigen Einflüssen vom 11.5.2021 in der geänderten Fassung vom 11.4.2023

https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien/Richtlinie_der_KEK_nach_63_Satz_6_MStV.pdf

Directive issued under Article 63 sentence 6 of the state media treaty on exemptions concerning the reporting obligation for minor changes to participating interests or other types of influence of 11 May 2021, amended on 11 April 2023

KEK-Pressemitteilung 04/2023

https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/aktuelle-entscheidungen-der-kek-9

KEK press release 04/2023

DENMARK

[DK] Transposition of the DSM Directive soon to be completed and with emphasis on extended collective licensing

Terese Foged
Lassen Ricard, law firm

In February 2023 the European Commission referred Denmark, together with a handful of other member states, to the Court of Justice of the European Union for failing to transpose the Directive on Copyright in the Digital Single Market (the DSM Directive) – Denmark had only implemented part of the Directive in time, namely Articles 15 and 17.

Denmark was therefore under pressure to act quickly and, on 10 March 2023, a proposal for a draft bill was issued for consultation, with a deadline of 11 April 2023 for comments on the proposal. On 3 May 2023, a revised proposal for a draft bill amending the Danish Copyright Act in order to implement the DSM Directive in full was introduced to the parliament.

The proposal is expected to be passed in June and, according to the amending bill, the updated Copyright Act will enter into force on 1 July 2023.

The Danish implementation is close to the wording of the DSM Directive. In short, it is proposed that the specific DSM provisions be transposed as follows in the Danish Copyright Act:

The articles on text and data mining (DSM Articles 3 and 4) are implemented via new provisions (Danish Copyright Act sections 11 b and 11 c). The Danish Ministry of Culture notes in the explanatory notes to the draft bill that the placing of the text and data mining exceptions in Chapter 2 of the Danish Copyright Act (about limitations to copyright, etc.) implies that the general rule about lawful access also applies to these copyright exceptions.

Regarding digital teaching activities (DSM Article 5), the Danish implementation (Danish Copyright Act sections 13 and 13 a) implies an extension of the existing extended collective licence for this area. The Danish Ministry of Culture notes that the extended collective licence scheme in Denmark also functions very well within the teaching area and is, therefore, a well-suited, simple and non-bureaucratic way to secure a balance between rights holders' right to remuneration for use of their works by others and users' interest in access to works not being unnecessarily impaired.

Regarding the preservation of cultural heritage (DSM Article 6) and out-of-commerce works (DSM Articles 8-11), the Danish implementation (Danish Copyright Act sections 16(2) and 16 c-16 f) similarly implies an extension of the

existing extended collective licences for these areas, as well as an extension of existing exceptions for out-of-commerce works ; however this does not apply to works from cultural institutions in other member states (Danish Copyright Act sections. 88 a and 88 b).

Regarding collective licensing with extended effect (DSM Article 12), the Danish Ministry of Culture notes that in essence, Article 12 is in harmony with existing Danish rules on extended collective licensing, so only a few corrections are needed. Thus, some of the existing extended collective licences have been slightly amended (Danish Copyright Act sections 14, 16 b, 17 and 50). The ministry notes that DSM Article12 is an important provision for Danish copyright and the Danish extended collective licence model since it recognises the licence at EU level as an effective and useful way to manage copyright. The ministry stresses that extended collective licensing cannot be characterised as an exception to copyright but it is a way to manage copyrights.

The articles on the negotiation mechanism (DSM Article 13) and visual art in the public domain (DSM Article 14) are implemented via new provisions (Danish Copyright Act sections 58 b and 70(4)).

Regarding fair compensation (DSM Article 16), according to the Danish Ministry of Culture, no legislative changes are needed in the Danish Copyright Act.

Regarding the principle of appropriate and proportionate remuneration (DSM Article 18), the transparency obligation (DSM Article 19), the contract adjustment mechanism (DSM Article 20) and the right of revocation (DSM Article 22), new provisions close to the DSM wording have been inserted into the Danish Copyright Act (sections 55, 55 a-55 d and revised 54). With regard to appropriate remuneration and what should be taken into consideration when assessing the value of rights (DSM recital 73), the Ministry of Culture notes that in many areas, market practices in Denmark involve the collective rights management based on rightsholders to a large extent retaining rights, or at least the right to remuneration; this is often referred to as “the Danish model”.

Regarding the alternative dispute resolution procedure (DSM Article 21), the Danish Copyright Licence Tribunal is granted the competence (Danish Copyright Act revised section 47(2)).

Høring over forslag til lov om ændring af lov om ophavsret (gennemførelse af DSM-direktivet)

https://hoeringsportalen.dk/Hearing/Details/67272

Consultation on the draft Act amending the Copyright Act (transposition of the DSM Directive)

Forslag til Lov om ændring af lov om ophavsret

https://www.ft.dk/ripdf/samling/20222/lovforslag/l125/20222_l125_som_fremsat.pdf

Proposal for a draft bill amending the Danish Copyright Act

FRANCE

[FR] Government publishes extensive Digital Safety and Regulation Bill

Amélie Blocman
Légipresse

On 10 May, the Minister of the Economy, Finance and Industrial and Digital Sovereignty and the Minister Delegate for the Digital Transition and Telecommunications presented the Digital Safety and Regulation Bill to the Council of Ministers.

Containing 36 articles split into eight sections, this extensive piece of legislation aims to strengthen the "protection of minors online" and of "citizens in the digital world", "confidence and competition in the data economy", "the governance of digital regulation" and "monitoring of personal data processing carried out by the courts under their judicial remit", as well as to "adapt the national law", in particular by transposing the European Digital Services Act (DSA) and Digital Markets Act (DMA). To this end, advertising aimed at minors or based on sensitive data will be prohibited and the battle against online disinformation will be facilitated through enhanced collaboration between stakeholders and the adoption of common self-regulatory standards. Meanwhile, the giants of the digital industry will not be allowed to prioritise their own services on their platforms.

The most significant provisions of the bill include measures to increase the powers of the *Autorité de régulation de la communication audiovisuelle et numérique* (French audiovisual regulator – ARCOM) to protect minors online. For example, ARCOM will be able to issue recommendations concerning the technical requirements that must be met by age verification systems restricting access to pornographic websites. These systems are designed to ensure that only adults can access pornographic content provided by online public communication services. The bill also amends Article 23 of the law of 30 July 2020 and states that, if a company ignores a request from the ARCOM president that it should take all measures necessary to prevent minors accessing such content, ARCOM itself, rather than the Paris judicial court, may order that access to the website concerned should be blocked. The government hopes that ARCOM will be able to block, delist and heavily sanction pornographic websites that refuse to use a reliable, anonymous, unmonitored age verification system.

The bill also extends the mechanism for dealing with content that incites terrorist acts and makes provision for criminal sanctions against providers of hosting services that fail to comply with a request from the relevant authority to take down, within 24 hours, websites containing child pornography under the terms of Article 227-3 of the Criminal Code.

As far as the “protection of citizens in the digital world” is concerned, the bill establishes new forms of protection against disinformation and foreign interference created by the distribution of media affected by international sanctions: ARCOM will be able to punish companies that circumvent these sanctions, especially broadcasting bans, and, under an amendment of Article 42-10 of the law of 30 September 1986, will be given new powers to implement European sanctions imposed on the basis of Article 215 of the Treaty on the Functioning of the European Union.

The government has launched an accelerated procedure that should ensure the bill is examined by the French parliament before the summer.

Projet de loi visant à sécuriser et réguler l’espace numérique (ECOI2309270L)

https://www.senat.fr/leg/pjl22-593.html

Digital Safety and Regulation Bill (ECOI2309270L)

[FR] Senate adopts bill to regulate influencer marketing and combat abuses by influencers on social networks

Amélie Blocman
Légipresse

Following its adoption by the National Assembly on 30 March, the Senate has adopted, with amendments, the bill to regulate influencer marketing and combat abuses by influencers on social networks. The bill aims to regulate influencer marketing on social networks and the status of influencers and influencer agents in order to combat the spread of misleading or fraudulent commercial practices on the Internet.

In an open session, the senators clarified the relevant legal framework in particular, pointing out that the existing rules governing advertising and promotion already apply to influencer marketing. They called for a more honest approach and supported the obligation to display an “Advertising” or “Commercial collaboration” label. The Senate also showed strong commitment to the protection of web users, consumers and young people. In addition to practices already prohibited by the National Assembly, such as the promotion of cosmetic surgery, it banned advertising of therapeutic abstention and nicotine pouches. It also prohibited the promotion of medical, drug or surgical treatment that endangers the protection of public health. The bill adopted by the Senate also bans influencers from interacting or being depicted on social networks with non-domestic animals. It also prohibits the promotion of subscription-based sports tips or sports forecasting services in order to protect consumers and investors. The maximum sanctions are two years’ imprisonment and a EUR 300 000 fine for breaches of the advertising rules or if an influencer conceals the true commercial purpose of a post, which must in future be clearly labelled as “Advertising”.

On 24 May, the joint committee of senators and MPs reached an agreement on the bill, which was adopted by the National Assembly on 31 May.

Proposition de loi visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux, Texte n° 105 (2022-2023) modifié par le Sénat le 9 mai 2023

https://www.senat.fr/leg/tas22-105.html

Bill to regulate influencer marketing and combat abuses by influencers on social networks, text no. 105 (2022-2023) amended by the Senate on 9 May 2023

UNITED KINGDOM

[GB] Ofcom guidance to broadcasters on synthetic media

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On 3 April 2023, Ofcom (the UK's independent communications regulator) issued guidance to broadcasters on the use of "synthetic media", including "DeepFakes". The regulator stated that its Broadcasting Code is adequately equipped to help maintain trust and fairness in programming and reminded licence holders to give thoughtful consideration to their compliance processes.

Ofcom understands the term "synthetic media" to mean video, image, text, or voice that has been produced (either fully or partly) with the help of artificial intelligence algorithms. Synthetic media is becoming more widespread on the internet and is also utilised in various types of digital media, such as virtual reality, augmented reality, and gaming. It is increasingly used in industries such as marketing, advertising and entertainment, including film-making and broadcasting.

As this technology advances quickly, it is expected that synthetic media will become even more prevalent in broadcast content. In its guidance, Ofcom recognised that broadcasters could reap significant benefits from this technology, such as the ability to enhance audience interaction by producing content that would be difficult or unattainable with conventional methods. The regulator stressed that it is essential for broadcasters and audiences to have the freedom to explore new and emerging technologies like this, in line with their right to freedom of expression and access to information.

However, Ofcom acknowledged the challenges synthetic media pose not only to broadcasters themselves but also to their audiences. For example, DeepFake software is capable of substituting a person's appearance in a pre-existing still or moving image with someone else's likeness and can do so with realistic results. Ofcom identified, in particular, several risks associated with the use of synthetic media and DeepFake technology specifically. First, it has the potential to generate fake news, propaganda, and other types of disinformation. These can spread rapidly on the Internet and broadcast journalists may find it hard to verify the credibility of content from online sources. Second, the increased use of DeepFakes could lead to a loss of trust and credibility among audiences, who may struggle to determine the authenticity of the content. Third, there is a risk that audiences could mistake DeepFake footage for a real person, leading to the unfair treatment of a person appearing in programming or unwarranted privacy violations.

The regulator reminded broadcasters of the rules available under the existing Broadcasting Code (last revised in December 2020) to protect audiences from potential harms arising from the use of synthetic media and maintain high levels of trust in broadcast news. These include (but are not limited to) Section Two of the Code, which aims to establish guidelines that safeguard audiences from potentially harmful or offensive material, as well as from content that might be materially misleading, and Section Five which requires that news content, in whatever form, is reported with “due accuracy” and presented with “due impartiality”. “Due” means adequate or appropriate to the subject and nature of the programme. Moreover, Section Seven mandates broadcasters to avoid “unjust or unfair treatment” of individuals or organisations in their programmes. And finally, Section Eight establishes guidelines to ensure that broadcasters do not invade individuals’ privacy in their programming or in the process of obtaining material for their programming. However, context and public interest may justify derogations from the Code’s rules and practices in certain cases.

In light of this, Ofcom advised all licensees to “consider carefully whether their compliance processes need to be adapted or developed to account for the potential risks involved in the use of synthetic media technologies to create broadcast content”.

Ofcom Note to Broadcasters - Synthetic media

https://www.ofcom.org.uk/__data/assets/pdf_file/0028/256339/Note-to-Broadcasters-Synthetic-media-including-deepfakes-.pdf

[GB] Repeal of the video-sharing platforms regime

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On 3 May 2023, Ofcom (the UK's independent communications regulator) gave an update on the repeal of the video-sharing platform (VSP) regulatory framework and what this means for providers in moving to the new online safety regime.

Background

On 5 December 2022, the UK Government set out the process for repealing the VSP regime in an amendment to the forthcoming Online Safety Bill (OSB). The OSB establishes a new regulatory framework to achieve "the adequate protection of citizens from harm presented by content on regulated services, through the appropriate use by providers of such services of systems and processes designed to reduce the risk of such harm" (cl. 82(2)). The regime is structured around a risk assessment and risk mitigation framework and will apply to certain online services, including user-to-user services, such as Facebook, and search services, such as Google. Regulated service providers will have duties relating to (among others): illegal content, protecting children, user empowerment, content of democratic importance, news publisher content and journalistic content, freedom of expression and privacy, and fraudulent advertising.

The OSB regime will apply to a wide range of services, with different sizes, reach and risk levels, including social media platforms, online forums, messaging apps, some online games where users might interact with other users, and sites hosting pornographic content. All services currently in scope of the VSP regime will also be in scope of the new online safety regime. As well as UK service providers, the OSB will apply to providers of regulated services based outside the UK if they fall within its scope, e.g. because such services have a significant number of UK users (cl. 3(5)).

The bill establishes Ofcom as the regulator, giving it the power to levy fines against non-compliant providers, and make senior managers liable to imprisonment for not complying with a direction to provide Ofcom with information. At the time of writing, the bill is at Committee Stage in the House of Lords. The government plans to introduce more amendments when the OSB reaches Report Stage in the Lords. Details of the legislation are still being debated and some of its provisions are liable to change.

Repeal of the VSP regime

Schedule 17 of the OSB sets out how VSPs will move from being regulated under the VSP regime to being regulated under the online safety framework. Schedule 3, Part 3 of the same bill details the timings for when VSPs providers will need to begin conducting the risk assessments that will be required under the OSB.

The OSB is expected to come into force two months after it gains Royal Assent (RA). After the commencement of the bill, all pre-existing, UK-established VSPs (i.e. platforms that meet the scope and jurisdiction criteria under Part 4B of the Communications Act 2003) *will enter a transition period*. The end date of this period will be specified by the Secretary of State for Science, Innovation and Technology in secondary legislation. After RA, Ofcom will no longer accept new notifications from VSPs. If the platform is first provided on or after that date, it will instead be regulated under the OSB.

During the transition period, pre-existing, UK-established VSPs will not have to comply with most OSB-related duties (this exemption will apply to platforms that meet the notification criteria when the bill comes into force). If a VSP is a dissociable section of a larger service, another part of which qualifies as a regulated service under the OSB, then the exemption will only apply to the VSP part of that service. The non-VSP part will be treated during transition like any other regulated service in the scope of the OSB.

During the transition period, Ofcom will continue exercising its regulatory powers under the VSP regime (for Ofcom's report on its first year of VSP regulation, see IRIS 2023-1:1/18). Already existing UK-established VSPs will be required to comply with Ofcom information requests and notifications for fees. The OSB requires the Secretary of State to provide platforms with at least 6 months' notice of the repeal date (this is likely to happen during the transition period). In the period preceding the formal repeal of the VSP regime, pre-existing, UK-established VSPs will be required to conduct illegal content risk assessments, child access assessments, and children's risk assessments. The precise timings for when they will have to do this have not yet been determined.

Following the end of the transition period, pre-existing, UK-established VSPs will be regulated under the new online safety regime and OSB duties will apply in full. Ofcom will be expected to recover the initial costs of setting up the OSB regime and meet its ongoing costs by charging fees to regulated services with revenue at or above a set threshold. According to a Written Ministerial Statement published on 19 April 2023, regulated services with revenue meeting the said thresholds are expected to be charged from the financial year 2025-26 or later.

The bill continues its journey through parliament, so these provisions may change over the coming months. In its July 2022 roadmap to regulation, Ofcom set out its plans for putting online safety laws into practice, and what it expects from tech firms as the countdown to the new regime continues. Delays to the OSB since the publication of the roadmap are likely to affect expected timescales for implementing the legislation. Expected plans are still dependent on the final shape of the OSB.

Repeal of the VSP regime: what you need to know

https://www.ofcom.org.uk/online-safety/information-for-industry/vsp-regulation/repeal-of-the-vsp-regime?utm_medium=email&utm_campaign=Weekly%20publications%20update%205%20May%202023&utm_content=Weekly%20publications%20update%205%20

May%202023+CID_11ea5eff17a7295b0b163f908f8a44b4&utm_source=updates&utm_term=Repeal%20of%20the%20Video-Sharing%20Platform%20regulatory%20regime

Ofcom letter to Peers on Ofcom's preparations for the online safety regime

https://www.ofcom.org.uk/__data/assets/pdf_file/0030/260697/letter-to-peers-online-safety-implementation.pdf

Online safety: Ofcom's roadmap to regulation

https://www.ofcom.org.uk/online-safety/information-for-industry/roadmap-to-regulation

OSB Government Amendments at Lords Committee Stage (Statement UIN HCWS726)

https://questions-statements.parliament.uk/written-statements/detail/2023-04-19/hcws726

[GB] The Digital Markets, Competition and Consumers Bill iintroduced into the House of Commons

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The UK Government introduced the Digital Markets, Competition and Consumers Bill into the House of Commons on 25 April 2023 with the aim of “driv[ing] growth, innovation and productivity”. It is a substantial bill comprising six parts and 26 schedules and reflects proposals found in two consultation papers from 2021: A new pro-competition regime for digital markets and Reforming Competition and Consumer Policy. The Bill covers two main areas: proposed competition reforms including a specific emphasis on digital markets; and reforms of consumer law enforcement and the introduction of new consumer rights. Both areas relate to the remit of the Competition and Markets Authority (CMA).

Digital Markets and Competition

The Bill grants the CMA new powers to regulate digital businesses with "strategic market status" and impose a wide range of "conduct requirements" on those businesses – essentially ex ante requirements. In practice, these powers will be exercised by the Digital Markets Unit (DMU) within the CMA. The conduct requirements may be imposed only for one of the following objectives: fair dealing; free choice between services and trust and transparency. The Bill also envisages that the DMU can take action to "remedy an adverse effect on competition" through so-called "pro-competition interventions" through orders or recommendations. SME businesses have obligations to report mergers before they take place. The DMU’s enforcement powers include the ability to levy fines up to 10% of businesses’ annual global turnover.

The Bill also introduces a range of general competition law reforms, including the introduction of a new merger control threshold to catch so-called 'killer' acquisitions, and widening the extra-territorial effect of the UK's prohibition on anti-competitive agreements (the so-called Chapter 1 prohibition from the Competition Act 1998). The Bill also contains measures to improve the CMA’s powers to investigate.

Consumer Rights

Consumer protection law in the UK is mainly found in the Consumer Rights Act 2015 (unfair contract terms) and Consumer Protection from Unfair Trading Regulations 2008 (CPRs) (unfair commercial practices). The Government identified enforcement of consumer law as a main weakness, identifying procedural difficulties for enforcers, weak sanctions for breaching the law, and low uptake of alternative dispute resolution services. Currently the CMA has no powers to order the cessation of conduct but must go to the courts. Part 3 of the Bill proposes to change this. It contains two mechanisms for enforcement, crucially giving the CMA the power to dermine when a breach has occurred and to impose fines of up to 10% of global annual turnover on businesses or to impose

"enhanced consumer measures". These new powers have extraterritorial effect: the CMA can act against businesses whose activities are "directed to consumers in the United Kingdom". Part 3 also introduces a court-based regime which would simplify and enhance the court enforcement procedure currently provided by Part 8 of the Enterprise Act 2002. The Bill revokes and replaces the CPRs; the 2015 Act remains. The Bill largely replicates the list of unfair practices in the CPRs but, significantly, envisages that the list could be extended - the Government has indicated it would use this power to prohibit fake reviews online and a consultation on this topic is expected. There are also measures to tackle subscription traps as well as controls around the use of alternative dispute resolution.

Digital Markets, Competition and Consumers Bill

https://bills.parliament.uk/bills/3453

Digital Markets, Competition and Consumers Bill - Statement UIN HCWWS737 made on 25 April 2023

https://questions-statements.parliament.uk/written-statements/detail/2023-04-25/hcws737

A new pro-competition regime for digital markets

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf

Reforming Competition and Consumer Policy

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf

[GB] The UK Government publishes a White Paper about the future regulation of Artificial Intelligence

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Wordley Partnership and Q Chambers

The UK Government's Department for Science, Innovation and Technology published a white paper on 29 March 2023 entitled "AI Regulation: A Pro-Innovation Approach" (the White Paper). The White Paper sets out the UK Government's proposals to regulate artificial intelligence (AI). The proposed regulatory framework adopts a proportionate, trustworthy, adaptable and clear approach.

The White Paper outlines five clear principles that regulators, like Ofcom and the Competition and Markets Authority, should consider to best facilitate the safe and innovative use of AI in the sectors they monitor. The five principles to guide regulators in their approach to AI risks are safety, security and robustness; appropriate transparency and explainability; fairness; accountability and governance; and contestability and redress.

The White Paper acknowledges that explainability can be very difficult to achieve from a technical perspective. Also, the White Paper acknowledges that transparency and explainability are not absolute requirements but should be applied proportionately when considering risks.

Regarding contestability and redress, the White Paper envisages that it should be possible to contest a harmful decision or outcome generated by AI. Although the White Paper does not anticipate creating any new legal rights or new approaches for redress.

The White Paper aims to ensure that any regulation should avoid being overly prescriptive or limiting so as to ensure innovation is not stifled.

The Government considered that the regulators should use their knowledge and experience to adapt the regulations so they can be applied to suit the specific needs and context of AI in their respective sector.

The White Paper proposes that any AI regulation is evaluated to identify any issues and ensure the principles are being applied effectively. There is no intention for the government to introduce specific legislation at this stage.

The regulatory framework should fulfil three parameters, namely to help drive growth and prosperity, including encouraging investment and creating jobs. Secondly, it should increase the public's trust in AI and, in particular, ensure the regulatory framework addresses risks arising from the use of artificial intelligence. Thirdly, the regulatory framework should help strengthen the UK's position as a global leader in AI by being able to help shape international governance and regulation of AI, encourage interoperability and reduce cross-border risks, as well

as protect democratic values.

The White Paper encourages key regulators to publish further guidance and resources, in the next twelve months, as to how they plan to implement the five principles, and how the principles will apply within their specific sectors.

The White Paper recognises that in due course, despite the efforts of the regulators, various differences may arise and legislation may be necessary to ensure a consistent application of the principles.

Furthermore, the White Paper does not define AI, as has occurred in some UK legislation, such as the National Security and Investment Act from 2001. Instead, AI tools, subject to regulation, will be identified by their adaptive and autonomous characteristics.

The White Paper proposes a £2 million sandbox fund to provide a safe trial environment whereby businesses can test how regulation could be applied to AI products and services, as well as support innovators bringing new ideas to market without having inappropriate regulation thwarting innovation.

The UK White Paper does not propose legislation in relation to the allocation of liability for AI. It references the complexity of the AI supply chain and acknowledges that current legal frameworks, combined with implementation of the high-level AI principles, may end up allocating legal responsibility for an AI tool in a way that is not fair or effective. However, for the time being there is no intention by the UK government to regulate in this area. This is in contrast to the EU, where the proposed AI Liability Directive intends to facilitate the exercise of private rights of action.

The regulation of AI will remain with the UK government but it is envisaged that in due course an independent regulator will be established.

The UK Government has launched a public consultation in relation to its proposals on regulating AI, in order to implement a proportionate, future-proofed and pro-innovation framework. The consultation on the White Paper closes on 21 June 2023.

A pro-innovation approach to AI regulation, Command Paper Number: 815

https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach

Artificial intelligence liability directive

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0496

GEORGIA

[GE] Sweeping Amendments to Broadcasting Law Adopted

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On 22 December 2022, the national Parliament of Georgia adopted a draft law "On amendments to the law on broadcasting". The 2004 law has been amended several times (see IRIS 2005-7/24, IRIS 2011-10:1/22, IRIS 2013-8:1/23); this time the amendments were aimed at achieving compliance of the Georgian legislation with the EU Audiovisual Media Services Directive (AVMSD).

Most of the amendments relate to the definitions of the key notions of the law, including the activity of the audiovisual (AV) media regulatory authority, the "authorisation" procedures for activities in the sphere of AV media services (for non-linear services), the regulation of on-demand AV media services, the availability of transfrontier AV media services, the activity of video-sharing platforms, content regulation (accuracy of facts, right of reply, a ban on hate speech based on a wide spectrum of criteria, a ban on incitement to terrorism), transparency of ownership, and regulation of European works.

For example, a right of reply clause was also added, allowing citizens who believe that a particular AV media outlet has spread false and defamatory information about them to file a complaint directly with the National Communications Commission (the AV media regulatory authority). Previously, in such cases, citizens petitioned the Charter of Journalistic Ethics or the court. Furthermore, regardless of whether the regulator's decisions are appealed in court, they will take immediate effect.

A legal review of the amendments to the law on broadcasting written by Council of Europe experts and published on 21 February 2023 tabled 64 major recommendations to be considered in order to align the law with European standards, including the AVMSD. The Legal Opinion suggested, among other things, improvements in the following spheres: guarantees for the independence of the AV media regulatory authority; the right of appeal and the effectiveness of the decisions of the media regulatory authority; complaints handling systems, sanctions and accountability related to video-sharing platforms; licensing and authorisation, including the suspension and reinstatement of AV media services; the right of reply; provisions related to hate speech and incitement to terrorism; and sanctions for violations of the rules for the protection of minors.

„მაუწყებლობის შესახებ" საქართველოს კანონში ცვლილების შეტანის თაობაზე

https://matsne.gov.ge/ka/document/view/5649707?publication=0

Law of the Republic of Georgia, N 242 of 22 December 2022, officially published on 30 December 2022

Legal Opinion on the Law of Georgia on Broadcasting proposes its revision in line with the European standards, prepared by the Council of Europe Directorate General of Human Rights and Rule of Law, Information Society Department, 21 February 2023

https://rm.coe.int/eng-georgia-legal-opinion-law-on-broadcasting-feb2023-2777-8422-2983-1/1680aac48e

ITALY

[IT] The Italian Data Protection Authority adopts first decision on deceptive design patterns (s.c. “dark patterns”)

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Through Resolution No. 51 of 23 February 2023, the Italian Data Protection Authority (*Garante per la Protezione dei Dati Personali* – the Garante) adopted its first ever decision on deceptive design patterns, also known as “dark patterns” (the Decision).

Deceptive design patterns are defined by the European Data Protection Board in its Guidelines 03/2022 (the Guidelines), adopted on 14 February 2023, as “interfaces and user journeys implemented on social media platforms that attempt to influence users into making unintended, unwilling and potentially harmful decisions, often toward a decision that is against the users’ best interests and in favour of the social media platforms' interests, regarding the processing of their personal data”.

Interestingly, the Garante expressly recalls having taken the Guidelines into consideration in reaching its Decision, albeit a version of said Guidelines that was still subject to public consultation at the time. Indeed, the final version of the Guidelines was adopted only one week prior to the publication of the Decision.

The Decision stems from investigative activities undertaken by the Garante in the context of its role as the Italian Data Protection Authority as well as from certain reports received by data subjects against Ediscom S.p.A (Ediscom), in its capacity as a data controller. Ediscom is an Italian based company offering promotional campaigns for medium to large customers via text message and e-mail as well as, more recently, via automated calls.

According to the Garante’s findings, the various websites used by Ediscom to collect the personal data of data subjects, and their corresponding consent to receiving marketing communications, presented deceptive and misleading interfaces which led to unclear submission procedures. According to the Garante, an example of such practices was represented by the interfaces shown to data subjects when the latter had not provided consent to receiving marketing communications. In particular, when the data subjects did not consent to receiving marketing communications and/or did not consent to their personal data being communicated to third parties for the same purpose, the data subjects would be presented with a pop-up further requesting their consent. The Garante deemed this practice to be misleading since the link that would allow users to continue the submission procedure without providing said consents, was not

placed inside the pop-up but, rather, in another section of the web page in a different format and in a smaller font, thereby deceiving the data subjects.

The Garante found such practices to be in violation of Article 5(1)(a) (lawfulness, fairness and transparency), Article 7(2) (conditions for consent) and Article 25 (principles of privacy by design and privacy by default) of the GDPR.

In light of the foregoing, the Garante issued an administrative pecuniary sanction in the amount of 2% of Ediscom's turnover, as resulting from the last financial statements, i.e. EUR 300 000. The Decision highlights the overlap between data protection and consumer protection compliance. While there have been many decisions by the Italian Consumer Protection Authority deeming certain data processing activities to be unfair commercial practices, this is the Garante's first decision focusing on deceptive behaviour and sanctioning it as a violation of data protection law.

Provvedimento prescrittivo e sanzionatorio nei confronti di Ediscom S.p.A. - 23 febbraio 2023

https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9870014

Prescriptive measure and sanction against Ediscom S.p.A. - 23 February 2023

Guidelines 03/2022 on Deceptive design patterns in social media platform interfaces: how to recognise and avoid them

https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-032022-deceptive-design-patterns-social-media_en

NETHERLANDS

[NL] Dutch Media Authority rejects request to take enforcement action against broadcaster *Ongehoord Nederland*

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On 17 April 2023, the Dutch Media Authority (*Commissariaat voor de Media*) rejected a high-profile request from the Board of Directors of the Dutch Public Broadcasting Foundation (*Stichting Nederlandse Publieke Omroep* – NPO) to take enforcement action against the broadcaster *Ongehoord Nederland*. This came after the NPO had imposed three separate fines on the broadcaster, including a EUR 131 000 fine in April 2023 for "systemic violation" of the NPO Journalistic Code in relation to the broadcaster's news programme; a EUR 84 000 fine in July 2022 for an earlier systematic violation of the NPO Journalistic Code, and a EUR 56 000 fine in December 2022 for a "lack of cooperation". Under the Dutch Media Act, the NPO has the task of ensuring public broadcasters meet high journalistic and professional quality requirements, and may impose administrative sanctions. In its mission statement, the broadcaster *Ongehoord Nederland* describes itself as a "critical voice" on important social issues, including "the ill effects of mass immigration", and "the preservation of Dutch traditions and culture".

The NPO requested the Media Authority to take enforcement action over three issues, namely: failure to comply with journalistic quality requirements, hate speech, and disguised broadcasting time for political parties. The Media Authority rejected the request on all three grounds. First, the Media Authority noted that the NPO has already imposed three administrative sanctions on *Ongehoord Nederland* relating to the obligation for broadcasters to comply with journalistic quality requirements. The Media Authority noted that the request for enforcement "related to the same subject", and that if the enforcement request were to be complied with, *Ongehoord Nederland* "would have to defend itself against the same alleged violation before various authorities". The Authority considered this "undesirable, in view of the principle of proportionality and the special requirements arising from Article 10 of the European Convention on Human Rights", which guarantees freedom of expression.

Second, the NPO's request to take enforcement action because of alleged hate speech was also rejected. The Media Authority noted that Dutch law prescribes that a public media institution "must take appropriate measures to prevent its media offerings from inciting violence or hatred", and this provision concerns the establishment of measures to prevent certain punishable expressions. These measures have a "preventive character". In the opinion of the Media Authority, the assessment of whether there is a "media supply that incites violence or hatred is reserved for the criminal court (and therefore in the first instance for the Public Prosecution Service), since it concerns the qualification of criminal law concepts".

Third, the Media Authority also held that in regard to the request for enforcement in relation to improper broadcasting time allocated to political parties, it had "not been made sufficiently clear on what basis the Media Authority should take enforcement action in this case". Further, a violation over political influencing of the media "affects the journalistic quality and the independence of the media". The Authority considered that enforcement action "in that regard" would be "disproportionate because of the administrative sanctions that the NPO itself has already imposed".

Finally, on 24 April 2023, following the Media Authority's rejection of the NPO's request, the NPO's Board of Directors made a formal request to the Secretary of State for Culture and Media to withdraw the provisional recognition of the broadcaster *Ongehoord Nederland*. The Secretary of State will now consider the request and issue a formal response.

Commissariaat voor de Media, Afwijzing handhavingsverzoek NPO m.b.t. Ongehoord Nederland, 17 april 2023

https://www.cvdm.nl/nieuws/afwijzing-handhavingsverzoek-npo-m-b-t-ongehoord-nederland/

Dutch Media Authority, Rejection of NPO enforcement request regarding Ongehoord Nederland, 17 April 2023

[NL] Dutch government moves to ban apps "from countries with an offensive cyber programme against the Netherlands" on government mobile devices

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On 21 March 2023, the Dutch Minister for Digitalisation (*Staatssecretaris Koninkrijksrelaties en Digitalisering*) announced two important policy measures regarding the use of apps carrying a heightened risk of espionage on government mobile devices. The new policy is based on the results of an investigation performed by the General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst*, AIVD) in response to international developments and parliamentary questions submitted in February 2023 (IRIS 2023-4). In particular, on 20 February 2023, the European Commission and the EU Council banned the use of TikTok from staff phones.

In an official statement, the Minister strongly and immediately discouraged central government staff to have installed and use apps on their work phones that "originate from countries with an offensive cyber programme against the Netherlands and/or Dutch interests", including, but not limited to, Russia, China, Iran and North-Korea. She also affirmed that the central government is working towards a situation of so-called "managed devices" where mobile devices are set up in such a way "that only pre-authorised apps, software and/or functionalities can be installed and used" and apps from countries with an offensive cyber programme against the Netherlands will be denied.

With these measures, the Dutch government goes beyond banning just TikTok - which had prompted the AIVD's investigation in the first place - and opts for "a structural solution that government officials can trust in their work in a digital world". As regards to TikTok specifically, the Minister referred to the still-ongoing inquiry, led by the Irish data protection authority, into the company's data processing activities, which focuses on personal data transfers to third countries, including China, and on TikTok's compliance with the requirements laid down in the General Data Protection Regulation (GDPR) in this respect. The results of the inquiry are expected shortly.

Letter from the Minister for Digitalisation, 21 March 2023, Parliamentary Paper 26643, No. 984

Answer to questions submitted by Member of Parliament Dekker-Abdulaziz about TikTok, 21 March 2023, No. 1939

Dutch central government (news), 'Government discourages use of espionage-sensitive apps for central government staff', 21 March 2023

UKRAINE

[UA] Amendments to the advertising statute tabled

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When, on 13 December 2022, the Ukrainian Parliament, the Supreme Rada, adopted the statute “On the Media” (see IRIS 2023-1:1/6), it was decided that the provisions related to advertising would be discussed further. These provisions would be later adopted as straightforward amendments to the statute “On Advertising” (see IRIS 1997-1:1/20). On 13 April 2023, the bill was submitted by more or less the same members of parliament and, on 20 April, the leading committee of the Supreme Rada recommended its adoption at first reading by the full house of parliament in the current session as “a matter of urgency". The recommendation notes that by adopting these amendments, Ukraine will have completed the process of harmonisation of its national information law with the requirements of the EU Audiovisual Media Services Directive (AVMSD), an important step in its process of accession to the European Union.

The bill focuses on compliance of the key notions of the statute “On Advertising” with those of the AVMSD, by introducing criteria for the identification of advertising under the jurisdiction of Ukraine, the introduction of self- and co-regulation mechanisms in advertising, a total ban on advertising from residents of the aggressor state, a ban on discriminatory or hateful statements or images in advertising, as well as some easing of limitations on advertising in linear audiovisual media services.

Проект Закону про внесення змін до Закону України "Про рекламу" щодо імплементації норм європейського законодавства у національне законодавство України шляхом імплементації окремих положень acquis ЄС у сфері аудіовізуальної реклами (Європейської конвенції про транскордонне телебачення, Директиви Європейського парламенту та Ради 2010/13/ЄС про аудіовізуальні медіа послуги від 10 березня 2010 року зі змінами, внесеними Директивою (ЄС) 2018/1808 від 14 листопада 2018 року) та до деяких інших законі

https://itd.rada.gov.ua/billInfo/Bills/pubFile/1733967

Draft Statute on amendments to the Statute of Ukraine “On Advertising” as to implementation of the norms of European law in the national law of Ukraine by means of implementation of certain provisions of the acquis EU in the sphere of audiovisual advertising (European Convention on Transfrontier Television, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on audiovisual media services as amended by the Directive (EU) 2018/1808 of 14 November 2018), as well as to some other statutes), No 9206, registered on

13 April 2023

UNITED STATES OF AMERICA

[US] Ed Sheeran in copyright dispute for “Thinking Out Loud”

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On 4 May 2023, Ed Sheeran was exonerated of copyright infringement by jurors in Manhattan federal court presided by U.S. District Judge Louis Stanton, after they denied liability regarding his 2014 Grammy award-winning song “Thinking Out Loud”. The case opposed the singer-songwriter to the heirs of Marvin Gaye’s co-writer, Ed Townsend, who claimed infringement of their copyright interests.

In 2017, Towsend’s heirs sued Ed Sheeran, his label Warner Music Group and his music publisher Sony Music Publishing, alleging striking similarities with Marvin Gaye’s song “Let’s get it on”, released in 1973. They pointed out the similarities between the melodies, chords and rhythms of the two songs and asserted ownership of "the way in which these common elements were uniquely combined”. In support of their claim, the Towsend heirs also relied on a medley performed by Ed Sheeran, in which he mixes both songs. The motion brought by the defendants to exclude the medleys or “mashups” from evidence were “denied with leave to renew it at trial, when the Court can evaluate the other evidence (…).”

Although the British artist and his lawyers recognized similarities in the chord progressions and rhythms, they defended that such chord progression was unprotectable and available to all songwriters. According to the latter, mainstream pop music is based on a rather limited set of chords that are “common building blocks which were used to create music long before ‘Let’s Get It On’ was written and will be used to create music long after we are all gone.” The Jury eventually gave him right.

On 16 May, Ed Sheeran and co-defendants won yet another battle over the same song in a lawsuit brought by Structured Asset Sales LLC (“SAS”), which owns interests in Marvin Gaye’s "Let's Get It On", and therefore the right to receive copyright royalties. Like Towsend heirs, SAS alleged “Thinking Out Loud” infringed on the copyright of the sheet music of "Let's Get It On". “The question then [was] whether two common elements [the chord progression and harmonic rhythm] are numerous enough to make their combination eligible for copyright protection”. Among their argumentation, the defendants’ experts brought that at least four songs released prior to "Let's Get It On" had used the same combination ("Georgy Girl," "Since I Lost My Baby," "Downtown," and "Get Off Of My Cloud").

In this case, the U.S. District Judge Louis Stanton first ruled that Ed Sheeran would need to face a jury trial. On 29th September 2022, the former denied the defendant’s renewed motion for Summary Judgment dismissing the case (a

motion for reconsideration gives the Court the power to reconsider any of its decisions prior to the entry of a final judgment adjudicating all claims at issue). Judge Stanton considered that “the parties’ dispute over the originality of the selection and arrangement of the combination of two commonplace musical building blocks - the chord progression and harmonic rhythm - in "Let's Get It On" was a genuine dispute necessitating denial of defendants’ motion”. The defendants therefore moved for reconsideration of that order.

The judge finally reversed the decision and dismissed the case on 16th May 2023, considering that “the combination of the chord progression and harmonic rhythm in "Let' s Get It On " was too commonplace to merit copyright protection”.

The jurors’ decisions in both cases have brought some reassurance to the music industry by establishing protection over the creative process of songwriters. The cases have indeed been of great interest following the numerous infringement actions brought in recent years, calling into question the extent to which pop songwriters' work can be protected by copyright.

Griffin et al v. Sheeran et al, 17 CIVIL 5221 (LLS), judgment - United States District Court Southern District of New York

https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2017cv05221/477309/277/0.pdf?ts=1683373111

Structured Asset Sales, LLC vs. Edward Christopher Sheeran, et al., 18 Civ . 5839 (LLS), opinion and order - United States District Court Southern District of New York

https://www.nysd.uscourts.gov/sites/default/files/2023-05/18cv5839%20may%2016%202023%201507%20Opinion.pdf

Griffin et al v. Sheeran et al, dockets and filings

https://dockets.justia.com/docket/new-york/nysdce/1:2017cv05221/477309

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