Recent rulings from the CJEU and the ECtHR impacting audiovisual media services and the media

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Annual Conference on European Media Law,
02–03 June 2022, ERA/EMR Hybrid Conference

Overview

- ...CJEU leftovers from last year
- What is new from Luxembourg?
- What to look out for from Luxembourg…
- What is new from Strasbourg?
- What to look out for from Strasbourg…

Leftovers
CJEU – C-319/20 – Meta Platforms Ireland

- Case facts:

- The Facebook internet platform, managed by Meta Platforms Ireland (Meta) which is also controller of users' personal data, contains an 'App Center' on which Meta makes available to users free games provided by third parties. When viewing some of those games, the user is informed that use of the application concerned enables the gaming company to obtain a certain amount of personal data and gives it permission to publish data on behalf of that user. By using that application, the user accepts its general terms and conditions and data protection policy. In addition, in the case of a specific game, the user is informed that the application has permission to post photos and other information on their behalf.

- The German Federal Union of Consumer Organisations and Associations considered that the information provided by the games concerned in the App Center was unfair. Therefore, as a body with standing to bring proceedings seeking to end infringements of consumer protection legislation, it brought an action for an injunction against Meta. That action was brought independently of a specific infringement of the right to data protection of a data subject and without a mandate from a specific data subject. The decision upholding that action was the subject of an appeal brought by Meta which, after that appeal was dismissed, then brought a further appeal before the German Federal Court of Justice. Since it had doubts as to the admissibility of the action brought by the Federal Union, and in particular as to its standing to bring proceedings against Meta, that court referred the matter to the CJEU.

Leftovers
CJEU – C-319/20 – Meta Platforms Ireland

- Question:

- Is it compatible with the GDPR for competitors and associations to take action under national competition law against a company that breaches data protection rules? And specifically, can an association bring an action without being mandated by an individual data subject and without referring to a concrete violation of rights?

- AG Opinion in 2021:

- National legislation which allows consumer protection associations to bring legal proceedings against the person alleged to be responsible for an infringement of the protection of personal data, on the basis of the prohibition of unfair commercial practices, the infringement of a law relating to consumer protection or the prohibition of the use of invalid general terms and conditions, is in line with the GDPR, provided that the objective of the representative action in question is to ensure observance of the rights which the persons affected by the contested processing derive directly from that Regulation.

- Judgement:

- The CJEU follows the AG opinion. Such an action is possible where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation. Art. 80 (2) GDPR allows for national solutions which introduce representative actions even without representation of a specific individual. This is in line with an effective protection of data protection rights.

Leftovers
CJEU – C-251/20 – Gtflix Tv / DR

- Case facts:

- Gtflix Tv is a Czech company which produces and distributes adult audiovisual content. DR, domiciled in Hungary, is another professional in that field. Gtflix alleges that DR made disparaging comments about it on a number of websites and brought proceedings against him before French courts, seeking the removal of those comments, the rectification of the published information and compensation for the damage suffered as a result of those comments. French courts declared that they had no jurisdiction to rule on those claims.
- This was challenged by Gtflix Tv before the French Court of Cassation, claiming alleged disregarding of the rule of special jurisdiction laid down in Art. 7(2) Regulation 1215/2012 (Brussels I Recast) in favour of the courts 'for the place where the harmful event occurred or may occur', by excluding the jurisdiction of the court seised on the ground that it is not sufficient that the comments deemed to be disparaging which were published on the internet are accessible within the jurisdiction of that court, but that those comments must also be liable to cause damage there.
- The Court of Cassation held that the French courts had no jurisdiction to hear the application for removal of the comments and rectification of the published information. It asked the CJEU whether the French courts nevertheless have jurisdiction to rule on the claim for compensation in respect of the damage allegedly caused to Gtflix Tv in France, even though French courts do not have jurisdiction to rule on the application for rectification and removal.

Leftovers
CJEU – C-251/20 – Gtflix TV / DR

- Question:
- What is the appropriate forum (place of jurisdiction) in actions against the dissemination of derogatory statements on the internet? Are damages to be claimed in connection with an application for rectification/ removal?
- AG Opinion in 2021:
- Action or claim may be brought before the courts of each Member State in the territory of which content published online is or was accessible, for compensation only for the damage caused in the territory of that Member State. Claimant must demonstrate that it has an appreciable number of consumers in that jurisdiction who are likely to have access to and have understood the publication in question.
- Judgement:
- The CJEU follows the AG opinion. A person who, considering that their rights have been infringed by the dissemination of disparaging comments concerning them on the internet, seeks not only the rectification of the information and the removal of the content placed online concerning them but also compensation for the damage resulting from that placement may claim, before the courts of each Member State in which those comments are or were accessible, compensation for the damage suffered in the Member State of the court seised, even though those courts do not have jurisdiction to rule on the application for rectification and removal. Sufficient that content causing damage is available, not "directed at" the territory in question.

Leftovers
CJEU – C-442/19 – Stichting Brein / News-Service Europe BV

- Question:

- On the question of liability in light of Art. 3(1) InfoSoc Directive of a (former) *Usenet* services provider, for the distribution via Usenet of protected works without the consent of the rightholders represented by Stichting Brein → the "old" internet still relevant.

https://de.usenetreviewz.com/tutorials/der-komplette-usenet-leitfaden/

- This case was mentioned last year as one to look out for…

- …but, given the CJEU in the meantime has delivered its judgement in the similar cases YouTube and Cyando (joined cases C-682/18 and C-683/18), the referring Dutch court withdrew its referral to the CJEU. The case was consequently deleted from the register.

Leftovers... on copyright and platforms
CJEU – joined cases C-682/18 and C-683/18 – YouTube and Cyando

- Case facts:

- C-682/18: Frank Peterson, a music producer, is bringing an action against YouTube and its legal representative Google before the German courts in respect of the posting online, on YouTube, in 2008, of a number of recordings over which he claims to hold various rights. Those recordings were posted by users of that platform without his permission.
- C-683/18: The publisher Elsevier is bringing an action against Cyando before the German courts in respect of the posting online, on the 'Uploaded' file-hosting and -sharing platform, in 2013, of various works over which Elsevier holds exclusive rights. Those works were posted by users of that platform without its permission. They could be consulted on Uploaded via various link collection websites.

- Questions:

- Does the *operator* of an internet video sharing platform on which videos containing content protected by copyright are made publicly accessible by users without the consent of the rightholders carry out an act of communication (Art. 3(1) of Directive 2001/29/EC)?
- The underlying tension: online platforms allow large-scale copyright infringement, from which their operators profit to the detriment of the rightholders and this therefore may justify extensive obligations to monitor content uploaded (→ see now Art. 17 DSM Directive), but imposing such obligations can significantly affect the platforms' activity and the rights of end-users potentially undermining freedom of expression and creativity online.

CJEU – joined cases C-682/18 and C-683/18 – YouTube and Cyando

- AG Opinion:
  - Platform operators such as YouTube (a *VSP*) and Cyando (a s*harehoster*) do not, in principle, carry out acts of 'communication to the public' and are therefore not directly liable for an infringement of that provision when their users illegally upload protected works.
  - However, rightholders may obtain injunctions against those operators which can impose new obligations on the latter, but only where, after a clear infringement has been pointed out, such an infringement occurs again.
  - *Interesting: Although rejecting a retroactive application of the DSM Directive, the AG discusses the change between the time when ECD and InfoSoc Directive were passed and the setting of the DSM Directive. Gives lengthy explanation as to why he concludes a rather wide understanding of liability exemption through Art. 14 ECD for platforms such as those in the case. → CJEU does not discuss DSM Directive*
- Main findings of CJEU judgement:

1. As EU law currently stands, operators of online platforms do not, in principle, themselves make a communication to the public of copyright-protected content illegally posted online by users of those platforms.
2. However, those operators do make such a communication in breach of copyright where they contribute, beyond merely making those platforms available, to giving access to such content to the public, e.g. by not reacting expeditiously on knowledge, by ignoring use for illegal purposes without taking appropriate technical measures or actively selecting illegal content or assisting this with tools for users (financial model!)

Leftovers… on copyright and platforms
CJEU – C-597/19 – M.I.C.M.

- Case facts:

- The undertaking Mircom International Content Management Consulting (M.I.C.M.) submitted a request for information against Telenet BVBA, an internet service provider, to the Ondernemingsrechtbank Antwerpen (Companies Court, Antwerp, Belgium). That request seeks a decision requiring Telenet to produce the identification data of its customers on the basis of IP addresses collected, by a specialised company, on behalf of Mircom. The internet connections of Telenet's customers have been used to share films in the Mircom catalogue, on a peer-to-peer network, using the BitTorrent protocol. Telenet challenges that request.

- Questions:

- A different angle: Do *users* sharing protected works in peer-to-peer networks carry out acts of communication to the public? Is a copyright troll (a rightholder who does not actually exploit the rights but is merely claiming damages from alleged infringers) allowed to benefit from EU law protection? Is it lawful to collect the IP addresses of internet users who have allegedly shared protected works on peer-to-peer networks in light of data protection law?

CJEU – C-597/19 – M.I.C.M.

- AG Opinion:
  - Yes, users carry out acts of communication to the public. No, EU law does not prevent the denial of legal protection to (real) 'copyright trolls', but such abusive character of rights collection needs to be proven (and MS law can nonetheless award higher level of protection). Yes, it is lawful to collect the IP addresses to enable defending of copyright.

- Main findings of CJEU judgement:

1. The uploading of pieces of a media file onto a peer-to-peer network, such as that at issue, constitutes making available to the public within the meaning of EU law.
2. The systematic registration of IP addresses of users and the communication of their names and postal addresses to the holder of intellectual property rights or to a third party in order to enable an action for damages to be brought is permissible under certain conditions.
3. The request for information from a holder of intellectual property rights may not be abusive and must be justified and proportionate.

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New from Luxembourg
CJEU – C-401/19 – Poland / EP and Council

- ## Case facts:

- Directive 2019/790 on copyright and related rights in the digital single market established a new specific liability mechanism with respect to online content-sharing service providers ('the providers'). Art. 17 of that directive lays down the principle that the providers are directly liable where works and other protected subject matter are unlawfully uploaded by users of their services. The providers concerned may nevertheless be exempted from that liability. To that end, they are, inter alia, required, in accordance with the provisions of that article, to actively monitor the content uploaded by users, in order to prevent the placing online of the protected subject matter which rightholders do not wish to make available on those services.
- The Republic of Poland brought an action seeking, principally, the annulment of Art. 17(4) points (b) and (c), *in fine*, Directive 2019/790 and, in the alternative, annulment of that article in its entirety. It submits, in essence, that those provisions require the providers to carry out – by means of IT tools for automatic filtering – preventive monitoring of all the content which their users wish to upload, without providing safeguards to ensure that the right to freedom of expression and information is respected.

- ## Question:

- Is the obligation of the providers to carry out a prior automatic review of the content uploaded by users accompanied by appropriate safeguards in order to ensure respect for the right to freedom of expression and information of those users and a fair balance between that right and the right to intellectual property?

CJEU – C-401/19 – Poland / EP and Council

- AG Opinion:
  - Yes. In order to prevent the risk which, in particular, the use of automatic recognition and filtering tools entails for the right to freedom of expression and information of users of online content-sharing services, the EU legislature laid down a clear and precise limit on the measures that may be taken or required in implementing the obligations laid down in point (b) and point (c), *in fine*, of Art. 17(4) of Directive 2019/790, by excluding, in particular, measures which filter and block lawful content when uploading.
- Main findings of CJEU judgement:
  - Yes. The obligation on the providers to review, prior to its dissemination to the public, the content that users wish to upload to their platforms, resulting from the specific liability regime established in Art. 17(4), has been accompanied by appropriate safeguards by the EU legislature in order to ensure respect for the right to freedom of expression and information of users, and a fair balance between that right, on the one hand, and the right to intellectual property, on the other. It is for the Member States, when transposing Art. 17, to take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the EU Charter. Further, when implementing the measures transposing that article, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that article but also make sure that they do not act on the basis of an interpretation of the article which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality.
    → Polish action dismissed in its entirety → Consequences for national DSM-Directive-Transpositions

New from Luxembourg
CJEU – C-302/20 – Mr. A / AMF

- **Case facts:**
  - A, a journalist, reporting financial market rumours, authored two articles relating to securities admitted to trading on Euronext, which were published on Mail Online, the Daily Mail's website. They mentioned possible takeover bids for shares of companies by other companies at a specified price per share. After publication, the relevant share prices increased significantly. The French Market Authority AMF found that shortly before the publication of the articles, purchase orders were made for the relevant shares by British residents who sold their shares once that publication took place.
  - The AMF accused A of having unlawfully disclosed to two persons inside information relating to the forthcoming publication of the relevant articles and imposed a financial penalty of EUR 40.000 on him. It considered that the information at issue, relating to the forthcoming publication of press articles reporting on rumours about transactions concerning listed securities, satisfied the conditions to be classified as 'inside information'.
- **Question:**
  - When is information disclosed by a journalist of a 'precise nature' in order to be classified as inside information?

CJEU – C-302/20 – Mr. A / AMF

- AG Opinion:

- If a disclosure has been made for the purpose of the publication of a press article, it is necessary to examine whether that disclosure went beyond what was necessary in order to verify the information contained in that article. In particular, as regards the verification of information relating to a market rumour, it must be examined, where relevant, whether it was necessary for the journalist to disclose to a third party, in addition to the content of the rumour itself, the specific information relating to the forthcoming publication of an article reporting that rumour.
- Compliance with the rules and codes governing the profession of a journalist does not, in itself, lead to the conclusion that the disclosure of inside information was proportionate within the meaning of Art. 10 of Regulation No 569/2014.
- It is also necessary to take into consideration the negative effects of the disclosure of the inside information in question on the integrity of the financial markets. In particular, in so far as insider dealing occurred following that disclosure, that insider dealing is liable to lead to financial losses for other investors and, in the medium term, to a loss of confidence in the financial markets.

CJEU – C-302/20 – Mr. A / AMF

- Main findings of CJEU judgement:

1. Art. 1(1) of Directive 2003/6/EC (now repealed) means that, for the purposes of classification as inside information, information relating to the forthcoming publication of a press article reporting a market rumour about an issuer of financial instruments is capable of constituting information 'of a precise nature' as regards the definition and public disclosure of inside information and the definition of market manipulation. The fact that that press article mentions the price at which the securities of that issuer would be purchased in the context of a possible takeover bid and the identity of the journalist who authored that article and of the media organisation that published it are relevant factors for the purpose of assessing that 'precise nature', in so far as they were disclosed before that publication.
2. Art. 21 of Regulation (EU) No 596/2014 (repealing above Directive after events took place, but referring court sees a different approach in this Directive) means that the disclosure by a journalist, to one of their usual sources of information, of information relating to the forthcoming publication of a press article authored by them reporting a market rumour is made 'for the purpose of journalism', within the meaning of that provision, where that disclosure is necessary for the purpose of carrying out a journalistic activity, which includes investigative work in preparation for publication.
3. Art. 10 and 21 of that Regulation mean that a disclosure of inside information by a journalist is lawful where it must be regarded as being necessary for the exercise of their profession and as complying with the principle of proportionality.

New from Luxembourg
CJEU - C-716/20 – RTL Television

- ## Case facts / Question:

- On the questions whether the concept of 'cable retransmission', as provided for in Art. 1(3) of Council Directive 93/83/EEC, covers distribution to the public in the case where the person performing the distribution is not a broadcasting organisation, and whether the simultaneous distribution of the satellite broadcasts of a television channel, through television sets installed in hotel rooms, and by means of coaxial cable, constitutes a retransmission of those broadcasts.

- ## AG Opinion:

- The term 'cable retransmission' in Art. 1(3) of Council Directive 93/83/EEC refers to the retransmission of a first transmission by cable retransmission companies which carry out this retransmission as companies specialised in this activity within the framework of a traditional cable network.
  The simultaneous retransmission, by means of a coaxial cable, of the broadcasts of a television station transmitted by satellite via television sets installed in hotel rooms does not constitute 'cable retransmission' within the meaning of Art. 1(3) of Directive 93/83, since the hotel undertaking cannot be regarded as a retransmitting cable undertaking within the meaning of that directive.

Another year, another chapter in the data retention story: CJEU – C-140/20 – G.D. / Commissioner …

- After Privacy International, La Quadrature du Net, Prokuratuur it is G.D. / Commissioner of An Garda Síochána this year.
- Case facts:
  - The request for a preliminary ruling was submitted by the Supreme Court (Ireland) in the context of civil proceedings brought by a person sentenced to life imprisonment for a murder committed in Ireland. That person challenged the compatibility with EU law of certain provisions of national law on the retention of data generated in the context of electronic communications. Pursuant to that law, traffic and location data relating to the telephone calls of the person charged had been retained by providers of electronic communications services and made accessible to the police authorities.
- Question:
  - Is a system of general and indiscriminate retention of such data, in connection with combating serious crime, compatible with the e-privacy Directive, read in light of the EU Charter of Fundamental Rights?
- CJEU judgement:
  - The general and indiscriminate retention of traffic and location data relating to electronic communications is not permitted for the purposes of combating serious crime and preventing serious threats to public security. Access by the competent national authorities to those retained data is subject to a prior review carried out either by a court or by an administrative body that is independent in relation to a police officer.

By the way on cooperation of authorities… CJEU – C-645/19 – Facebook Ireland Limited and Others

- Case facts:
  - The Belgian Privacy Commission brought an action before the Dutch-language Court of First Instance, Brussels, seeking an injunction against Facebook Ireland, Facebook Inc. and Facebook Belgium, aiming to put an end to alleged infringements of data protection laws by Facebook. Those infringements consisted, inter alia, of the collection and use of information on the browsing behaviour of Belgian internet users, whether or not they were Facebook account holders, by means of various technologies, such as cookies, social plug-ins or pixels. That court held that it had jurisdiction to give a ruling on that action and, on the substance, held, inter alia, that the Facebook social network had not adequately informed Belgian internet users of the collection and use of the information concerned. The defendants brought an appeal against that judgment.
- Questions:
  - What is the effect of the application of the 'one-stop shop' mechanism provided for by the GDPR on the competences of Belgian authorities? May they bring an action against Facebook Belgium, given it is Facebook Ireland which has been identified as the controller of the data concerned?
- CJEU judgement:
  - Yes. Under certain conditions, a national supervisory authority may exercise its power to bring any alleged infringement of the GDPR before a court of that Member State, even though that authority is not the lead supervisory authority with regard to that processing.

New from Luxembourg – Zero-rating cases after C-807/18 – Telenor Magyarország CJEU – C-34/20 – Telekom Deutschland

- The lessons from Telenor Magyarország:
  - Zero-rating packages are liable to increase the use of the favoured services and, accordingly, reduce the use of others making their use technically more difficult, if not impossible. Irrespective of a concrete assessment of the effect of measures blocking or slowing down traffic on the exercise of end users' rights, as zero tariffs are already in general incompatible with the Net Neutrality Regulation on open internet access
- Case facts:
  - Telekom offered some of its end customers an additional option in the form of a free 'zero tariff' option, allowing the data volume consumed by audio and video streamed by Telekom's content partners not to be counted towards the data volume included in the basic package. When activating that option, all bandwidth for video streaming is limited to a maximum of 1.7 Mbit/s.
- Question:
  - Is such a limitation of bandwith compatible with Art. 3 of Regulation (EU) 2015/2120?
- CJEU judgement:
  - No. Art. 3 of Regulation (EU) 2015/2120 means that a limitation on bandwidth, on account of the activation of a 'zero tariff' option, applied to video streaming, irrespective of whether it is streamed by partner operators or other content providers, is incompatible with the obligations arising from Art. 3(3).

New from Luxembourg: on advertorials… CJEU – C-371/20 – Peek & Cloppenburg (P&C)

- Case facts:

- P&C Düsseldorf launched a nationwide advertising campaign in the fashion magazine 'Grazia' by means of a double-page article which invited readers, under the heading 'Reader offer', to an evening of private sales under the title 'Grazia StyleNight by Peek & Cloppenburg'. Against the background of images in which the designation 'Peek & Cloppenburg' featured in luminous letters above the entrances to the stores there represented, the text stated as follows: 'The night for all Grazia-Girls: Browse around the fashion temple with us after closing! Includes sparkling wine and a personal stylist. How to become a V.I.S. (Very Important Shopper)? Register right away!'. It was indicated that there are two independent companies named Peek & Cloppenburg and that, in this instance, the advertisement emanated from P&C Düsseldorf. The images used displayed goods sold by that company in the course of that event. The images were provided by P&C Düsseldorf free of charge to the magazine. The costs of the event were shared between P&C Düsseldorf and the company which publishes the magazine.

Peek&Cloppenburg 🤔 🤔 Peek&Cloppenburg

CJEU – C-371/20 – Peek & Cloppenburg (P&C)

- Questions:

- Is there a "payment" for product promotion within the meaning of the first sentence of point 11 of Annex I to Directive 2005/29/EC only in the case where monetary consideration is provided for the use of editorial content in the media to promote a product, or does the term "payment" cover every kind of consideration, irrespective of whether this consists of money, goods, services or assets of any other kind?
- Does the first sentence of point 11 of Annex I to Directive 2005/29/EC presuppose that the trader provides the company acting as media operator with a non-cash benefit as consideration for the use of editorial content and, if so, must such consideration also be assumed to be present in the case where the company acting as media operator reports on an advertisement organised in conjunction with a trader, where that trader has made image rights available to the company acting as media operator for the purposes of that report, both undertakings have contributed towards the costs and effort associated with that advertisement and the advertisement serves to promote sales of the products of both undertakings?

- CJEU judgement:

- The first sentence of point 11 of Annex I to Directive 2005/29/EC means that the promotion of a product by the publication of editorial content is 'paid for' by a trader, within the meaning of that provision, in the case where that trader provides consideration with an asset value for that publication, whether in the form of payment of a sum of money or in any other form, provided that there is a definite link between the payment thus made by that trader and that publication. That is the case where that trader makes available, free of charge, images protected by copyright on which are visible the commercial premises and products which it offers for sale.

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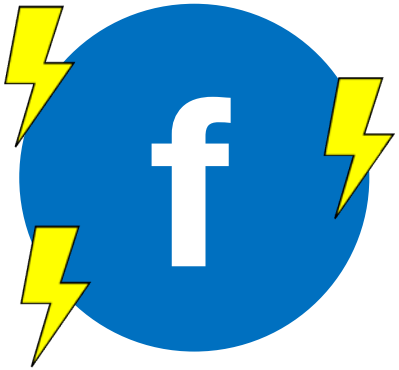
What to look out for from Luxembourg…
…facebook/Meta Platforms still in the focus

Competition Law



Data Protection Law

- C-252/21 – Meta Platforms and Others
- Is it compatible with Art. 51 et seq. of the GDPR if a national *competition authority* finds, for the purposes of monitoring abuses of competition law contractual terms relating to data processing and their implementation breach the GDPR and issues an order to end that breach (incl. problem of subsidiary and parent company)? → extensive list of questions

What to look out for from Luxembourg…

- T-125/22 – RT France / Council

- EU Sanction decision against certain providers of media content, namely different RT channels and Sputnik service. By means of a decision (in CFSP) and amendment to a Regulation (general on sanctions against Russia after invasion of Crimea) ordering no further distribution and no support measures:
  - 1. It shall be prohibited for operators to broadcast or to enable, facilitate or otherwise contribute to broadcast, any content by the legal persons, entities or bodies … including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed.
  - 2. Any broadcasting licence or authorisation, transmission and distribution arrangement … shall be suspended.
- Interim measures only if:
  - justified on first view concerning circumstances and the law
  - justified by urgency because otherwise a serious, irreparable damage
- By order of the president rejected
  - urgency lacking: the sanctions have mainly economical/financial consequences which could still be rectified after a decision by the Court on the merits. Damage to applicants' reputation is already done, but could be sufficiently removed if successful in the case eventually
  - damage in case of suspension to goal of EU action (which is peaceful as underlined by President in the Order) which is against a disinformation and destabilizing campaign (belonging to arsenal of modern warfare) by media under control of the Russian regime which is endangering public order and security in the EU (endangering foundation of democratic societies)
- President promises quick decision, and indeed hearing in the annulment procedure already Friday, 10 June (note: sanction decision on 1 March, case brought on 8 March, Order of the General Court on 30 March)

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New from Strasbourg
ECtHR – 28470/12 [Grand Chamber] – NIT S.R.L. / Republic of Moldova

- Case facts:

- A television channel (NIT) broadcasting licence was revoked for repeated failure to comply with the requirement that broadcasters ensure political and social balance and pluralism. In particular, the channel was accused of politically biased programmes, favouring the then opposition Party of the Communists of the Republic of Moldova and broadcasting distorted news items.

- Underlying question:

- → May domestic law provide for the requirement of an internal pluralism for TV channels' programmes?

- ECtHR judgement:

- No violation of Art. 10 ECHR
- States should enjoy a wide discretion in their choice of the means to be deployed in order to ensure pluralism in the media; notably, the margin to be accorded in that regard should be wider than that normally afforded to restrictions on expression on matters of public interest or political opinion.

New from Strasbourg
ECtHR – 77419/16 – Biancardi / Italy

- Case facts:

- An online newspaper published an article about a fight which had taken place in a restaurant and the related criminal proceedings. One of the accused and the restaurant requested that the article be removed from the Internet. The applicant de-indexed the article eight months later only. Domestic courts found him liable for not having de-indexed it for an excessive period of time despite the plaintiffs' formal request, thus allowing anyone to access information related to the criminal proceedings in issue by simply typing into the search engine the names of the restaurant or of the accused.

https://www.maltinpr.com/navigating-eu-right-forgotten-law/

- Underlying question:

- → Is a journalist's civil liability for not de-indexing information published on the Internet (right to be forgotten) compatible with Art. 10 ECHR?

- ECtHR judgement:

- No violation of Art. 10 ECHR; not only Internet search engine providers could be obliged to de-index material but also administrators of newspaper or journalistic archives accessible through the Internet.

New from Strasbourg
ECtHR – 45581/15 – Sanchez / France

- Case facts:
  - A local councillor and candidate in parliamentary elections was convicted in criminal proceedings of incitement to hatred or violence against a group of people on the grounds of their membership of a specific religion, following his failure to take prompt action in deleting comments posted by others on the wall of his Facebook account, which was freely accessible to the public and used during his election campaign.

- Underlying question:
  - → Is there an obligation to take prompt action in deleting illegal comments by others on the wall of one's Facebook account?
- ECtHR judgement:
  - No violation of Art. 10 ECHR
  - Domestic law and practice should establish a clear distinction between the responsibility of the author of statements constituting hate speech and the potential responsibility of any media outlets and professionals contributing to their dissemination while performing their task of imparting information and ideas on matters of public interest. In the present case, the comments had been clearly unlawful and, moreover, in breach of the Facebook terms of use.

New from Strasbourg
ECtHR – 41387/17 – Norman / United Kingdom

- Case facts:
  - The applicant passed information about the prison he was working in to a tabloid journalist in exchange for money. In 2011, a public inquiry was launched into the conduct of some journalists working for certain UK newspapers, and the police launched a criminal investigation into allegations of inappropriate payments by some journalists to public officials. On police request, the owner of a newspaper disclosed to the police details of public officials who had been paid for information including the name of the applicant who was subsequently convicted of misconduct in public office and sentenced to twenty months' imprisonment.

https://ec.europa.eu/competition-policy/cartels/whistle-blower_fr

- Underlying question:
  - → How far does the scope of protection of whistleblowers reach?
- ECtHR judgement:
  - No violation of Art. 10 ECHR; the motive with which a public officer had acted, the circumstances in which the impugned conduct had occurred and the consequences of the breach play a dominant role in establishing whether the behaviour is justified. This is not the case here due to the underlying financial motives of the public service official working at the prison.

New from Strasbourg
ECtHR – 11884/22 – ANO RID Novaya Gazeta and Others / Russian Federation

- Case facts:
  - Following Russia's invasion of Ukraine, Russian media is subject to limitations in their operation such as the blocking of information and materials containing opinions that differ from the official views of the Russian authorities up to complete blocking and termination of their activities. The applicants ask for urgent interim measures to be applied by the ECtHR with the aim that the Russian government be ordered not to interfere with the lawful activity of Russian mass media.
- Noteworthy in this case:
  - → Urgent interim measure are only applied when there is an imminent risk of serious and irreparable harm. Their application in Art. 10 cases is atypical.
  - Decision on interim measure taken on 10 March, Russia declared its intention to withdraw from Council of Europe on 15 March, before even dealing with this the Committee of Ministers of the Council of Europe decided on 16 March to expel the Russian Federation from the organization. The ECtHR has explained that it will continue to deal with cases emanating from Russia until the 6-month period after expulsion comes to an end.
- ECtHR decision:
  - The ECtHR called on the Russian authorities to refrain, until further notice, from taking measures and decisions aimed at completely blocking and terminating the activities of Novaya Gazeta, as well as from taking other measures which, in the present circumstances, could deprive Novaya Gazeta of the enjoyment of its rights guaranteed by Art. 10 ECHR.

Cover page of Russian newspaper Novaya Gazeta, 25.02.2022 – „Russia. Bombs. Ukraine."

New from Strasbourg
ECtHR – Further relevant judgements

- 56176/18 and others – BURESTOP 55 and Others / France (Access to information held by the state; no violation of Art. 10 ECHR)
- 61737/08 – Dareskizb Ltd / Armenia (Unjustified ban on publication of opposition newspaper as a result of state of emergency declared in the context of massive post-election protests; violation of Art. 10 ECHR)
- 26826/16 – Ringier Axel Springer Slovakia, a.s. / Slovakia (No. 4) (Imposition of administrative fine on multimedia publishing house for broadcasting a programme containing a celebrity's statements on his drug use; violation of Art. 10 ECHR)
- 39378/15 – Standard Verlagsgesellschaft mbH / Austria (No. 3) (Court orders against media company to disclose data of authors of offensive comments posted on its Internet news portal as part of a political debate; violation of Art. 10 ECHR)
- 2840/10 – OOO Memo / Russian Federation (No legitimate aim for civil defamation proceedings against a media outlet, seeking to protect "reputation" of a public authority as such and unrelated to any economic activity; violation of Art. 10 ECHR)

Overview

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- What is new from Luxembourg?
- What to look out for from Luxembourg…
- What is new from Strasbourg?
- What to look out for from Strasbourg…

What to look out for from Strasbourg?

- 61435/19 – Macatė / Lithuania: The since deceased applicant was an openly homosexual writer and specialist in children's literature. In 2013 the Lithuanian University of Education published her book "Amber Heart", a collection of original fairy tales. They were based on traditional fairy tale motifs and aimed at fostering social inclusion of various marginalised groups, including ethnic minorities and persons with disabilities. Out of the six fairy tales, two depicted love between people of the same sex. The university later stopped the distribution of the book, on the grounds that it might have a negative effect on minors because of its depiction of same-sex family relationships. When renewing the distribution, the book was marked with a warning that it "might have a negative effect on persons below the age of fourteen".
- Interference with the applicant's freedom of expression? Discrimination on the grounds of sexual orientation?

http://amberheart.lt/

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