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

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Institut für Europäisches Medienrecht
Institute of European Media Law
Institut du droit européen des médias

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Overview

- …CJEU leftovers from last year
- What is new from Luxembourg?
  - Judgments
  - AG Opinions
- What to look out for from Luxembourg…
- And what about Strasbourg?

General Court – T-125/22 – RT France/Council

- **Reminder:** (economic) sanctions by EU against certain providers of media content, namely different RT channels and Sputnik service. By means of a Decision (in CFSP) and (extending) amendment to an existing Regulation (generally on sanctions against Russia after invasion of Crimea) ordering no further distribution and no support measures:
  - 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.
  - Any broadcasting licence or authorisation, transmission and distribution arrangement … shall be suspended.

- Request on the basis of Artt. 278, 279 TFEU for suspension of the implementation of the CFSP Decision was rejected by order of the president on 30.3.2022 due to lack of urgency.
- RT France based on Art. 263 TFEU seeks **annulment** of Council Decision (CFSP) 2022/351 …

General Court – T-125/22 – RT France/Council

- **Now Judgment of the General Court (Grand Chamber) of 27.7.2022:**

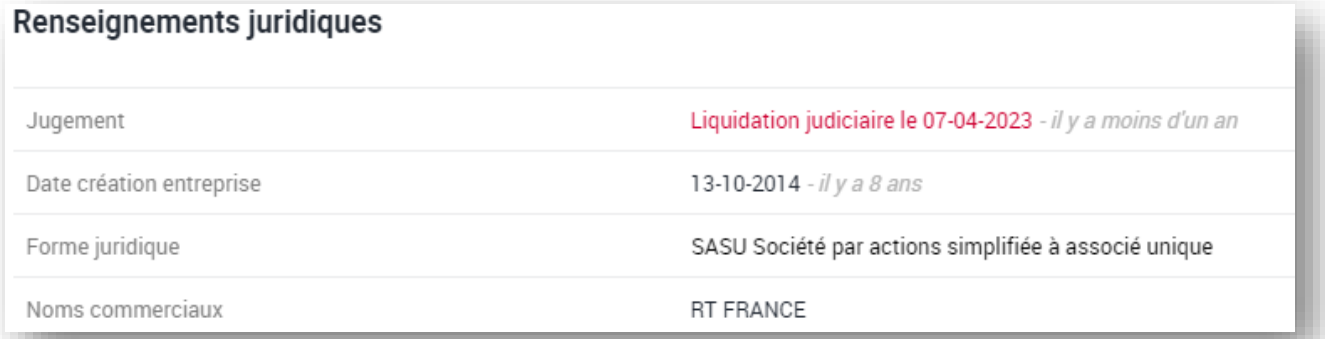
1. **Dismisses the action (entirely)**

- alleged breach of **rights of the defence:** dismissed because RT France was able properly to ascertain the actual and specific reasons that justified the adoption of the contested acts and therefore has no basis for claiming that the statement of reasons is inadequate;
- alleged FR infringement of **freedom of expression and information**: dismissed (very detailed argumentation) because the measures causing an infringement were justified as they pursue an objective of general interest with proportionate action (esp.: RT failed to establish an error by the Council by considering RT to be essentially under governmental control);
- alleged FR infringement of **freedom to conduct a business:** dismissed because restrictive measures did not constitute a disproportionate interference and RT's arguments regarded to be unfounded;
- alleged breach of **principle of non-discrimination** on grounds of nationality: dismissed because RT failed to establish how it had been subject to any discrimination whatsoever prohibited by Article 21 of the Charter.

2. **Orders RT France to bear its own costs** and to pay those incurred by the Council of the EU, including those relating to the interim proceedings…

General Court – T-125/22 – RT France/Council

- **… Meanwhile:**



Renseignements juridiques

Jugement	Liquidation judiciaire le 07-04-2023 - *il y a moins d'un an*
Date création entreprise	13-10-2014 - *il y a 8 ans*
Forme juridique	SASU Société par actions simplifiée à associé unique
Noms commerciaux	RT FRANCE

- Insolvency of RT France will most likely affect **Appeal Case** before the Court of Justice (C-620/22 P) due to cessation of the interest in legal protection.

- **… and also:**
  - Additional applications before GC against the extensions of the respective sanctioning acts (T-605/22 RT France / Council , T-75/23 RT France / Council and T-169/23 RT France / Council)
- **But still:**
  - Application by Dutch ISP (T-307/22 - A2B Connect a. O. / Council)

- (further) sanction **updates** from the Council:
  - Council Decision (CFSP) 2023/434 of 25 February 2023 amending Decision 2014/512/CFSP;
  - Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) No 833/2014;
  - Council Implementing Regulation (EU) 2023/722 of 31 March 2023 implementing Regulation (EU) 2023/427.

(3) in Annex IX to Decision 2014/512/CFSP, the following entities are added:

'RT Arabic

Sputnik Arabic'.

CJEU – Case C-716/20 – RTL Television

- **Reminder**:
  - 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.
  - **AG Opinion** last year: Term 'cable retransmission' in Art. 1(3) refers to the retransmission of a first transmission by cable retransmission companies which carry out this retransmission as companies specialised in this activity (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 that meaning, since the hotel undertaking cannot be regarded as such retransmitting cable undertaking.

CJEU – Case C-716/20 – RTL Television

- **Now CJEU judgment of 8.9.2022 essentially following AG Opinion**:
- Article 1(3) 93/83/EEC ("CabSat Directive") must be interpreted as meaning:
  - that it does not provide for an exclusive right for broadcasting organisations to authorise or prohibit cable retransmissions, within the meaning of that provision, and
  - that the simultaneous, unaltered and unabridged distribution of television or radio programmes broadcast by satellite and intended for reception by the public, where that retransmission is carried out by a person other than a cable operator, within the meaning of that directive, such as a hotel, does not constitute cable retransmission.
- An interpretation of the term 'cable operators' as including any person who carries out a cable retransmission meeting the technical characteristics in Art. 1(3) even where that person's professional activity does not consist in the operation of a traditional cable network, would in actual fact have the effect of extending the scope of the related right provided for in Article 8(3) of Directive 2006/115, treating it in the same way as the exclusive right of communication to the public in Article 3(1) of Directive 2001/29/EC (and CJEU interpretation) in favour of authors.

CJEU – Case C-716/20 – RTL Television

- **Now CJEU judgment of 8.9.2022 essentially following AG Opinion**:
- CJEU stated that even if national law provides for an exclusive right for broadcasters to authorise or prohibit cable transmission, Directive 93/83/EEC governs only exercise of the cable retransmission right in the relationship copyright owners/rightsholders and 'cable operators/distributors'.
- It is "common ground" that that Directive was adopted principally in order to facilitate, in particular, cable retransmission by promoting the granting of authorisations, ie. not intended to affect the scope of copyright and related rights such as those defined by EU and Member States laws.

- *On a side note:* CabSat Directive-cases are quite rare, but very recently another CJEU judgment on 25.5.2023 (C-290/21 – AKM) on a case from Austria between copyright association and Canal+ Luxembourg on authorization for communication to the public by satellite (satellite bouquet).

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Audiovisual media
CJEU – C-662/21 – Booky.fi

- **Case facts:**

- Finnish law provides that an audiovisual programme may only be made available if it has been age-rated in accordance with the procedure under Finnish law and contains or is accompanied by a clearly visible indication of the age rating and content. The Finnish media regulatory authority (KAVI) can approve the age rating and a symbol granted elsewhere in the Union for use of that programme in Finland without the programme having to be rated (again) in Finland.
- Booky.fi is a Finnish company that sells DVDs and Blu-ray discs of audiovisual programme recordings through its online shop. KAVI required the company to provide the offerings with the required age rating according to the Finnish system. Booky.fi took legal action against the order.
- Booky.fi argues a violation of Art. 34 TFEU: It is disproportionate and goes beyond what is necessary to achieve the objectives of the protection of minors if a rating under Finnish law is required even if a rating has already been carried out in another country, and that this applies even if the product has only been offered but not (yet) bought and imported to Finland.
- The referring court raises concerns as to the conformity with EU law: unlike in Dynamic Medien (C-244/06), Finnish law (1.) does not allow derogation from the labelling requirements even if it is established that the purchaser is of adult age, and (2.) only addresses domestic sellers of audiovisual recordings and not also companies outside Finland.

Audiovisual media
CJEU – C-662/21 – Booky.fi

- In its judgment of 23.3.2023, the CJEU ruled that Art. 34, 36 TFEU do not preclude a system such as the Finnish one even if it applies inrrespective of the fact that an age rating has already been carried out in another Member State for the programmes distributed.
- The fact that some of the recordings which may be distributed in the Member State concerned but coming from another Member State are excluded from the scope of that provision is not decisive, provided that such a restriction does not jeopardise the attainment of the objective pursued.
  - With regard to this, the CJEU discusses the effectiveness of the rule in achieving its objectives in terms of the protection of minors (para. 51), if online shops from other countries are allowed to sell the same items without (Finnish) age labelling. In particular, the CJEU emphasises (para. 56) that "in the absence of Union-wide harmonisation of rules on the classification and labelling of audiovisual programmes, it is for the Member States to determine the level at which they wish to ensure the protection of minors from audiovisual content which may impair their well-being and development".
- Similarly, it is irrelevant that the national legislation in question does not provide for an exception to that requirement where it can be proven by the provider in question that the purchaser of a recording within the meaning of that legislation is of age.

Audiovisual media
CJEU – C-411/21 – Instituto do Cinema e do Audiovisual

- Recent discussions on promotion of European works (AVMSD) and expansion of levy obligations in particular for (non-domestic/foreign) VOD providers explain relevance.
- **Case facts:** The request was made in proceedings between the Portuguese Film and Audiovisual Media Institute (ICA, the body responsible for awarding film funding) and the subscription television operator NOWO Communications SA concerning the collection of a subscription fee payable by such operators.
- NOWO claimed a violation of Art. 56 TFEU by the fee because, in essence, the revenues generated through it are intended solely to finance the promotion and dissemination of Portuguese cinematographic works, with the result that the allocation of that revenue reduced the cost of domestic production compared to that of foreign production and, consequently, indirectly discriminated against the cross-border supply of those services in relation to the national supply thereof.
- ICA argued, that (1.) there is no cross-border element justifying the application of Art. 56 TFEU (confined to Portuguese territory), (2.) financing promoting Portuguese works also benefits European works and (3.) there is no evidence that TV operators would favour the acquisition of national works to the detriment of European works.

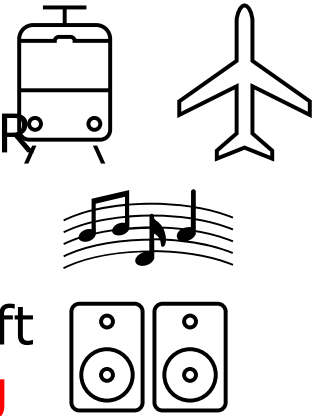
Audiovisual media
CJEU – C-411/21 – Instituto do Cinema e do Audiovisual

- CJEU decided on 27.10.2022 that Art. 56 TFEU does not preclude national legislation introducing a fee intended to finance the promotion and dissemination of cinematographic and audiovisual works, provided that any effects of that fee on the freedom to provide services for the production of such works are too uncertain and indirect to constitute a restriction within the meaning of that provision.
- Interesting follow-up issues (not decided by the CJEU due to referring court not mentioning them): The European Commission argued that the subscription fee forms part of an aid scheme for audiovisual works within the meaning of Article 54 of Commission Regulation (EU) No 651/2014* and must be assessed also in light of that. Furthermore, it argued that the subscription fee is in conformity with the AVMSD, the provisions of which allow Member States to impose financial contributions on media service providers established on their own territory if the funds collected are intended to support the production of European works.

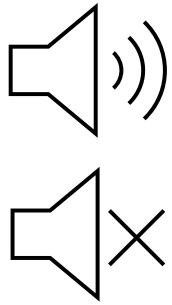
** Commission Regulation (EU) No 651/2014 – also known as General Block Exemption Regulation – seeks to exempt Member States from their obligations to notify state aid and ask for approval by the Commission in regard to certain companies, as long as the criteria are fulfilled.*

Copyright
CJEU – joined Cases C-775/21 and C-826/21 – Blue Air Aviation and UPFR

- **Case facts:**
- The requests have been made in two sets of proceedings from Romania between the airline Blue Air Aviation SA and the rail transport company UPFR, on the one hand and the respective copyright collective management organisations on the other concerning the companies' obligations to pay for the broadcasting of background musical works on board of passenger aircraft and for the provision on board of trains of physical facilities capable of being used to carry out communication to the public (cttp) of musical works.



- In essence, these cases are (again) about the interpretation of cttp as in Art. 3(1) of Directive 2001/29/EC:



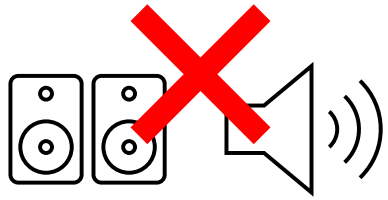
1. Does the broadcasting, in a context of passenger transport, of a musical work as background music constitute a cttp?
2. Is (already) the (sole) fact of having sound equipment and software enabling the broadcasting of background music a cttp?
3. Can Member States foresee in their legislation a rebuttable presumption that in such situation there is a cttp?

Copyright
CJEU – joined Cases C-775/21 and C-826/21 – Blue Air Aviation and UPFR

- In its judgment of 20.4.2023 the CJEU answered as follows:

1. Is the broadcasting, in a means of passenger transport, of a musical work as background music constitutes a communication to the public?

- Yes since, in so doing, that operator intervenes, in full knowledge of the consequences of its conduct, to give its customers access to a protected work, in particular where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work.

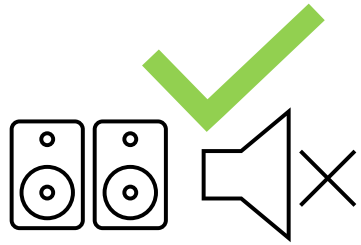


- Although the concept of 'public' includes a certain de minimis threshold, which excludes from that concept groups of persons which are too small, or insignificant, the Court has also emphasised that, in order to determine that number, account must be taken, in particular, of the number of persons who may have access to the same work at the same time, but also of how many of them may access it in succession.

Copyright
CJEU – joined Cases C-775/21 and C-826/21 – Blue Air Aviation and UPFR

- In its judgment of 20.4.2023 the CJEU answered as follows:

2. Is (already) the (sole) fact of having, on board a means of transport, sound equipment and, where appropriate, software enabling the broadcasting of background music a communication to the public?

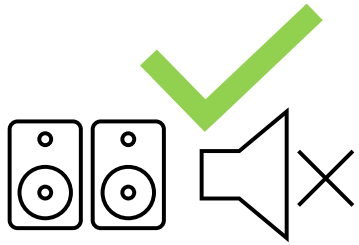


- No. If the mere fact that the use of sound equipment and software is necessary in order for the public to be able actually to enjoy the work resulted automatically in the intervention of the operator of that system being classified as an 'act of communication', any provision of physical facilities for enabling a communication, including where the presence of such facilities is required by the national legislation governing the activity of the transport operator, would constitute such an act.
- The Court has previously ruled that the operators of a pub, a hotel or a spa establishment or the operator of a rehabilitation centre perform acts of communication when they deliberately transmit protected works to their customers (via TV or radio sets), but the mere installation of sound equipment in a means of transport the Court regards as not comparable to such intentional acts by service providers.

Copyright
CJEU – joined Cases C-775/21 and C-826/21 – Blue Air Aviation and UPFR

- In its judgment of 20.4.2023 the CJEU answered as follows:

3. Can Member States foresee in their legislation a rebuttable presumption that in such situation there is a communication to the public?



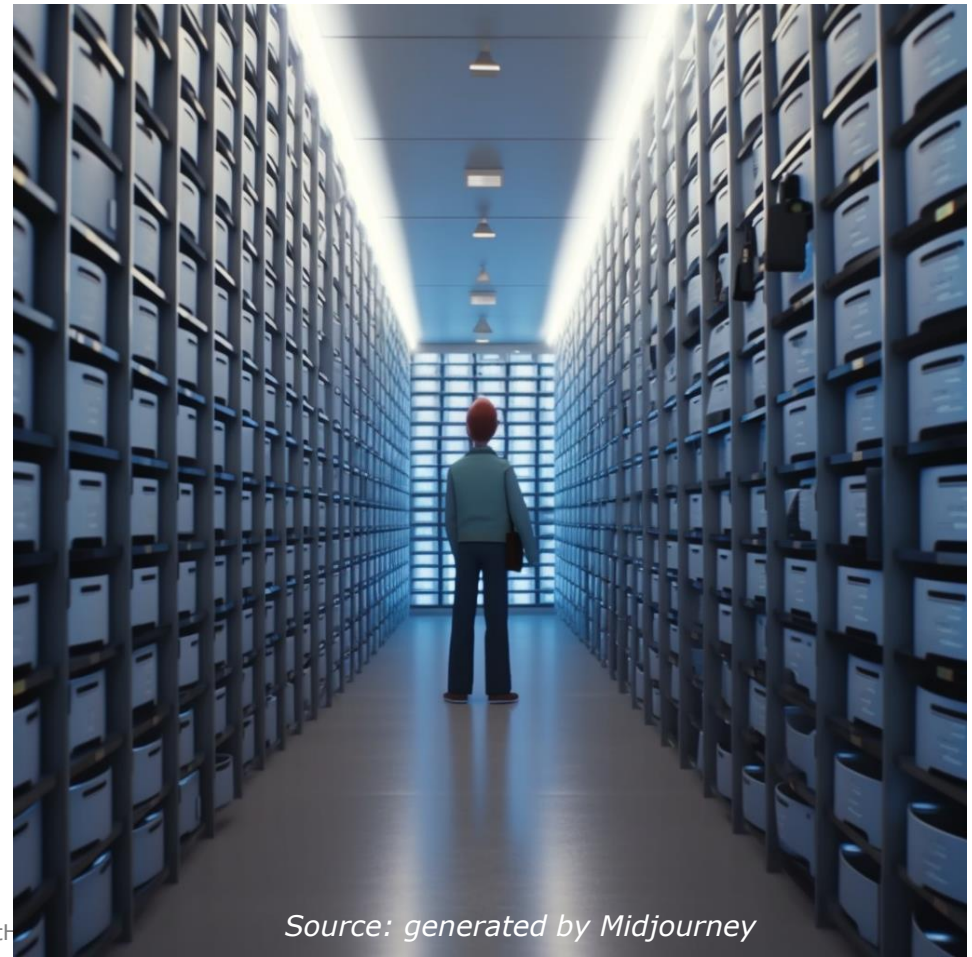
- No. It follows from the objective of Directive 2001/29/EC to avoid legislative differences and legal uncertainty surrounding the protection of copyright, that national legislation, as interpreted by the national courts, which establishes a rebuttable presumption that musical works are communicated to the public because of the presence of sound systems in means of transport must be precluded.
- Such legislation/interpretation may have the consequence of requiring payment of remuneration for the mere installation of those sound systems, even in the absence of any act of communication to the public, contrary to the objectives of Art. 3(1) Directive 2001/29/EC and Art. 8(2) of Directive 2006/115/EC.

Data retention from two different perspectives (and what image AI has of it…)

DATA RETENTION

- For telco operators:

  Interferences with their freedom to conduct businesses due to obligations requiring resources / financial investments.
  → C-339/21



Source: generated by Midjourney

- For data subjects:

  Interferences with their privacy rights due to the storage of their personal data and transfer to e.g. public authorities.
  → C-793/19 and C-794/19

Data retention – Telecommunication operators
CJEU – C-339/21 – Colt Technology Services and Others

- **Case facts:**
- In Italy, telecommunications operators are obliged to carry out interception measures on telecommunications (voice communications, computerised and telematic communications and data traffic) at the request of the judicial authorities in exchange for the payment of fixed fees. The amounts they receive for this were amended by an interministerial decree of 28.12.2017 which stipulated that the reimbursement of the costs related to these surveillance measures should be reduced by at least 50%.
- The telecommunication operators concerned (Colt Technology Services SpA, Wind Tre SpA, Telecom Italia SpA and Vodafone Italia SpA) brought an action before the Italian courts to annul this decree, arguing that the amounts provided for did not fully cover the costs incurred.
- The Italian Council of State, before which appeals were lodged against the court decisions dismissing the action, wanted to know from the CJEU whether Union law requires that the costs actually incurred by the operators in the course of carrying out such surveillance operations are fully reimbursed.

Data retention – Telecommunication operators
CJEU – C-339/21 – Colt Technology Services and Others

- In its judgment of 16.2.2023, the CJEU answered this question in the negative. Union law does not preclude national legislation which does not require full reimbursement of the costs actually incurred by providers of electronic communications services in enabling the lawful interception of electronic communications by the competent national authorities, provided that such legislation is non-discriminatory, proportionate and transparent.
- The CJEU states that the general authorisation for the provision of electronic communications networks or services under the European Electronic Communications Code (EECC) may be made subject to certain conditions by Member States. It follows that the Union legislature has neither required nor precluded the reimbursement by the Member States of the costs incurred by undertakings enabling the lawful interception of telecommunications. The Member States therefore have a margin of discretion.
- According to the CJEU, Italy has made use of this margin in compliance with the principles of non-discrimination (uniform fixed renumeration for all telco services in Italy), proportionality (taking into account technological developments) and transparency (charges are set by means of a formal administrative act which is published and freely available for consultation).

Data retention – privacy rights
CJEU – joint cases C-793/19 (SpaceNet) and C-794/19 – (Telekom Deutschland)

- **Case facts:**
- Case concerns, once again, the German rules on data retention. Telecommunications providers SpaceNet AG and Telekom Deutschland GmbH brought action against the obligation imposed on them to retain traffic and location data relating to their customers' telecommunications.
- In its judgment of 20.9.2022, the CJEU declared the German rules unlawful stating that Art. 15(1) of e-Privacy Directive 2002/58/EC, read in the light of Artt. 7, 8, 11 and 52(1) of the Charter, must be interpreted as meaning that it precludes national legislative measures which provide, on a preventative basis, for the purposes of combating serious crime and preventing serious threats to public security, for the general and indiscriminate retention of traffic and location data.
  - Following its previous case-law, CJEU highlighted once again that it is necessary, within a democratic society, that retention is the exception and not the rule and that such data should not be retained systematically and continuously. That conclusion applies even having regard to the objectives of combating serious crime and preventing serious threats to public security and to the importance that must be attached to these aims.

Data retention – privacy rights
CJEU – joint cases C-793/19 (SpaceNet) and C-794/19 – (Telekom Deutschland)

- However, the CJEU also held that it does not preclude legislative measures that:

- allow, for the purposes of safeguarding national security, recourse to an instruction requiring providers to retain, generally and indiscriminately, such data in situations where the MS is confronted with a serious threat that is shown to be genuine and present or foreseeable, where the decision imposing such an instruction is subject to effective review, either by a court or by an independent administrative body whose decision is binding, the aim of that review being to verify that one of those situations exists and that the conditions and safeguards which must be laid down are observed, and where that instruction may be given only for a period that is limited in time to what is strictly necessary, but which may be extended if that threat persists;
- provide for the targeted retention of such data which is limited, on the basis of objective and non-discriminatory factors, according to the categories of persons concerned or using a geographical criterion, for a period that is limited in time to what is strictly necessary, but which may be extended;
- provide for the general and indiscriminate retention of IP addresses assigned to the source of an internet connection for a period that is limited in time to what is strictly necessary, or of data relating to the civil identity of users of electronic communications systems;
- allow, for the purposes of combating serious crime and even more so for safeguarding national security, recourse to an instruction requiring providers of electronic communications services, by means of a decision of the competent authority that is subject to effective judicial review, to undertake, for a specified period of time, the expedited retention of traffic and location data in the possession of those service providers.

- → is it "done" now? Not very likely…

Data protection
CJEU – C-460/20 – Google

Case facts: Case is about two German individuals seeking from Google, first, that articles in which they are identified are de-referenced from the results of a search carried out based on their names and, second, that photographs representing them, displayed in the form of preview images ('thumbnails'), are removed from the results of an image search.

- **Background**: The articles criticized the investment model the two applicants implemented in companies they are involved in, insinuating dubious business practices. They were published on a website, according to the imprint seated in New York, and illustrated by photographs of the applicants driving a luxury car, in a helicopter, in front of an airplane and in a convertible car.
- The website owner claimed to be aiming "to contribute consistently towards fraud prevention in the economy and society by means of active investigation and constant transparency". The applicants, on the other hand, accused him of attempting to 'blackmail' companies by first publishing negative reports and then offering to delete them in exchange for a sum of money.
- Google refused delisting referring to the professional context of the articles and arguing that it was unaware of the alleged inaccuracy of the information contained in those articles.

Data protection
CJEU – C-460/20 – Google

- In its judgment of 8.12.2022 the CJEU had to essentially deal with two questions:

1. Is it relevant for the required balancing of interests within Art. 17(3) GDPR whether there was a reasonable possibility for the applicant to first seek legal protection against the original publication and thus to prove to Google the inaccuracy of the linked article?
   - The referring court had declared that it was inclined to order the data subject to at least provisionally seek legal redress if it was reasonable to do so, since, unlike Google, he or she at least knew about the accuracy or inaccuracy of the content. The Court wanted to make this reasonability test dependent on factors such as whether legal action can be taken against the content provider in the EU or whether the content provider is known at all.
2. Is the context (i.e. the reporting) of the original publication of the image (on the third party website) to be taken into account in the balancing of interests even if the request for removal is only directed at the thumbnail, which links to the original context but does not display any context itself?
   - The referring court noted that the fact that thumbnails are technically a link and that it is common knowledge that they have been filtered out of third party publications speaks in favour of taking the context into account. On the other hand, the context of the publication is not shown in the image search, unlike in the general Google search, and the user, who is only interested in the display of the image from the outset, usually has no reason to trace the origin and context.

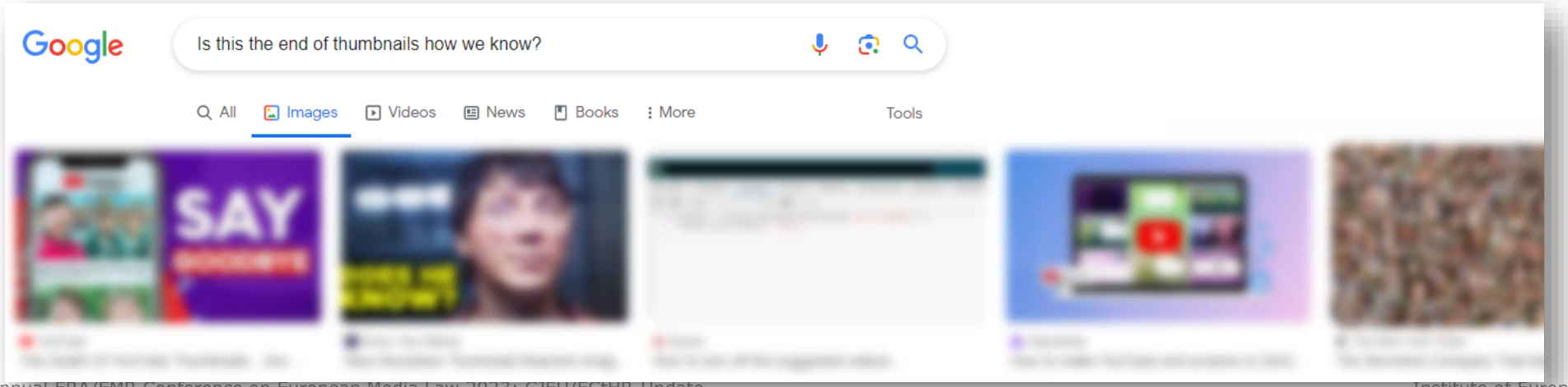
Data protection
CJEU – C-460/20 – Google

- In its judgment of 8.12.2022 the CJEU answered as follows:

1. No, the de-referencing is not subject to the condition that the question of the accuracy of the referenced content has been resolved, at least provisionally, in an action brought by that person against the content provider.
   - The applicant was only obliged to provide evidence to the extent that this was reasonable. To demand recourse to the courts would be an unreasonable burden. However, the CJEU also states that in the absence of such a court decision, the search engine operator is not obliged to grant such a delisting request, unless the evidence submitted by the person concerned clearly shows otherwise, and that freedom of expression takes precedence in case of doubt.
2. Account must be taken of the informative value of those photographs regardless of the context of their publication on the internet page from which they are taken, but taking into consideration any text element which accompanies directly the display of those photographs in the search results and which is capable of casting light on the informative value of those photographs.
   - In a consistent continuation of its case law (Google Spain), the CJEU clarifies that the display of search results is an independent processing operation of the search engine operator. This means that even if the original text were (judicially) judged to be lawful, this would not influence the evaluation of the separate thumbnail.

Data protection
CJEU – C-460/20 – Google

- Follow-up already: German Federal Court of Justice, Judgment of 23.5.2023:
  - On the basis of the CJEU's decision, the appeal remains unsuccessful with regard to the delisting request for Google's general search: The plaintiffs failed to provide Google with the evidence incumbent upon them that the information contained therein is obviously incorrect.
  - With regard to the thumbnails, however, the plaintiffs' appeal was successful and the Federal Court of Justice obliged Google to delist the thumbnails in the form objected to. Displaying the plaintiffs' photos, which are not meaningful in themselves, as thumbnails without any context was not justified.



Data protection
CJEU – C-300/21 – Österreichische Post

Article 82

Right to compensation and liability

1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

- **Case facts:**
  - From 2017, Austrian address broker Österreichische Post collected information on the political affinities of the Austrian population using an algorithm based on social and demographic criteria and defining 'target group addresses'. The data generated were sold to various organisations to enable them to send targeted advertising.
  - In the course of this activity, Österreichische Post assigned the applicant a high degree of affinity with a certain Austrian political party. That data was not communicated to third parties, but the applicant felt offended by the fact being affiliated with that party alone causing "great upset, a loss of confidence and a feeling of exposure".
- The Austrian Supreme Court asked the CJEU:

1. Does the award of compensation under Art. 82 GDPR also require that an applicant suffered harm, or is the infringement of provisions of the GDPR in itself sufficient for compensation?
2. Does compensation depend on EU-law requirements besides effectiveness and equivalence?
3. Is it compatible with EU law to require for a compensation for non-material damage an infringement of at least some weight that goes beyond the upset caused?

Data protection
CJEU – C-300/21 – Österreichische Post

- In its judgment of 4.5.2023, the CJEU answered as follows:

1. The mere infringement of the provisions of the GDPR is not sufficient to confer a right to compensation.
   - The CJEU assumes three conditions necessary to give rise to the right to compensation: processing of personal data that infringes the GDPR, damage suffered by the data subject, and a causal link between them.
2. For determining the amount of damages payable, national courts must apply the domestic rules of each Member State relating to the extent of financial compensation, provided that the principles of equivalence and effectiveness of EU law are complied with.
   - The GDPR does not define the concept of 'damage' but confines itself to expressly stating that not only 'material damage' but also 'non-material damage' may give rise to a right to compensation, without any reference to any threshold of seriousness. Such threshold would risk undermining the coherence of the rules.
3. Art. 82(1) precludes a national rule or practice which makes compensation for non-material damage subject to the condition that the damage suffered by the data subject has reached a certain degree of seriousness.
   - Financial compensation must be regarded as 'full and effective' if it allows the damage actually suffered to be compensated in its entirety, without there being any need to require the payment of punitive damages.

Data protection
CJEU – C-154/21 – Österreichische Post

- **Case facts:** And again, Österreichische Post, in the context of a request for access under Art. 15 GDPR from another individual. Österreichische Post upon request merely stated that it uses data, to the extent permissible by law, in the course of its activities as a publisher of telephone directories and that it offers that personal data to trading partners for marketing purposes. It also referred to its privacy statement but did not disclose any specific information.

- CJEU clarified in its judgment of 12.1.2023 that Art. 15 GDPR entails, where his or her data have been or will be disclosed to recipients, an obligation on the part of the controller to provide the data subject with the actual identity of those recipients, unless it is impossible to identify those recipients or the controller demonstrates that the data subject's requests for access are manifestly unfounded or excessive within the meaning of Art. 12(5), in which cases the controller may indicate to the data subject only the categories of recipients in question.

Data protection
CJEU – T-709/21 – WhatsApp Ireland/European Data Protection Board

- Briefly: Order of the General Court of 7.12.2022:
- **Case facts:** WhatsApp Ireland Ltd, seeks the annulment of Binding Decision 1/2021 of the European Data Protection Board (EDPB) on the draft decision regarding WhatsApp drawn up by the Irish Data Protection Commission (DPC) after it unsuccessfully fought the final decision (€ 225 Mio. fine) of the DPC before the Irish courts.
- The General court dismissed the action as inadmissible: Although an action under Art. 263 TFEU could in principle be brought against measures of the EDPB, because it, despite its composition of representatives of Member State authorities, was to be classified as a "body of the Union" and had its own legal personality, WhatsApp was not directly affected by the contested decision but rather the DPC only. A legal effect on WhatsApp occurs if at all and only when a decision is taken by the DPC which has final discretionary powers with regard to certain aspects (in particular the specific amount of the fine) despite binding requirements.
- But: **Appeal Case before the Court of Justice C-97/23 P**

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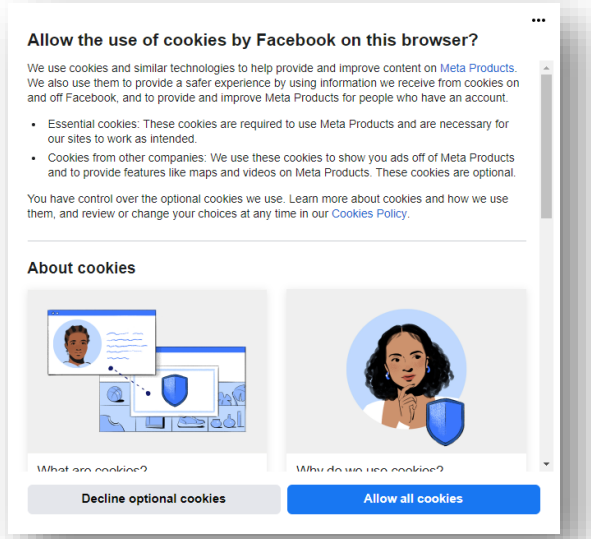
Data protection
CJEU – C-252/21 – Meta platforms and others

- **Case facts:** In essence, the questions concern, on the one hand, the competence of a national competition authority to examine, as a principal issue or as an incidental question, the conduct of an undertaking in light of the GDPR and, on the other hand, the interpretation of those provisions with regard to the processing of sensitive personal data, the relevant conditions for the lawfulness of personal data processing and the consent given freely to an undertaking in a dominant position. In short: May a competition authority base a market abuse decision on data protection violations and to what extent must it thereby take into account the view of the (national or lead?) data protection authority?
- Opinion of AG Rantos delivered on 20.9.2022 contains some highly interesting sections which shed some light on the relationship between competition and data protection law as well as on cross-sectoral and cross-border cooperation between different supervisory authorities. In addition, it deals with some common practices of social media networks.



Data protection
CJEU – C-252/21 – Meta platforms and others

Opinion of AG Rantos delivered on 20.9.2022:

- A competition authority, within the framework of its powers under competition rules, may examine, as an incidental question, the compliance of the practices investigated with the GDPR, while taking into account any decision or investigation of the competent (!) data protection authority, informing and, where appropriate, consulting that authority;
- Processing sensitive personal data may include processing carried out by a social network consisting in the collection of the user's data from third party websites or apps and linking the data to the user account allowing a profiling;
- The practice(s) consisting in (i) the collection of data from other group services or third-party websites and apps, (ii) the linking of such data with the user's social media account and (iii) the use of said data must be separately justified;
- the mere fact that an undertaking enjoys a dominant position in the domestic market for online social networks for private users cannot, on its own, render invalid the consent of users. However, that fact does play a role in the assessment of a freely given consent taking into account, where appropriate, the existence of a clear imbalance of power between service provider and users.

Data protection
CJEU – C-33/21 – Österreichische Datenschutzbehörde

- **Case facts:** A police officer was heard by a parliamentary committee of inquiry examining alleged influence exerted on the Federal Office for the Protection of the Constitution and for Counterterrorism and, despite the practice adopted in respect of several other witnesses, and notwithstanding the request for anonymity submitted by him, the committee revealed his identity by publishing the full version of the minutes of the hearing on the parliament's website.
- **Main questions**: Do the activities of a committee of inquiry of the Parliament of a Member State fall within the scope of GDPR, particularly when the inquiry concerns matters relating to national security? If so, can the provisions of the GDPR relating to the right to lodge a complaint with a national supervisory authority be applied directly, despite a constitutional principle that precludes external interference in the Parliament's activities?
- **Opinion of AG Szpunar of 11.5.2023** (in brief): Yes, such a solution would be consistent not only with the intentions of the EU legislature which established the GDPR as a lex generalis on the protection of personal data, but also with the underlying reasons for the provision of Article 16 TFEU, the scope of which extends to the supervisory activities of the Member States, such as those at issue.

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CJEU – C-604/22 – IAB Europe

- **Context**: On 2.2.2022, the Belgian DPA found that the Transparency and Consent Framework (TCF), developed by IAB Europe, fails to comply with the GDPR. The TCF is a mechanism that facilitates the management of users' preferences for online personalised advertising, and plays a pivotal role in the so-called Real-Time Bidding which, by means of an automatic action running in the background, decides whether and which advertising is displayed to a user when visiting a website or app. It is a tool with widespread use in the online sector enabling that not every website provider needs to obtain consent separately, but consent is rather attached to a consent string following the user.

- The Belgian Market Court, in essence, asks the CJEU if this consent string is personal data and, if yes, for whom (IAB Europe or the website operators?) and if a standard-setting sectoral organization such as IAB Europe must be classified as a controller.

What else to look out for….

- Case C-446/21 – Maximilian Schrems v Facebook Ireland Ltd. concerning personalised advertising under GDPR;
- Case C-590/22 – AT, BT v PS GbR, VG, MB, DH, WB, GS concerning compensation for non-material damage under GDPR;
- C-757/22 – Meta Platforms Ireland concerning the power of application of consumer protection associations under the GDPR;
- C-606/21 – Doctipharma concerning the term 'information society service';
- And…

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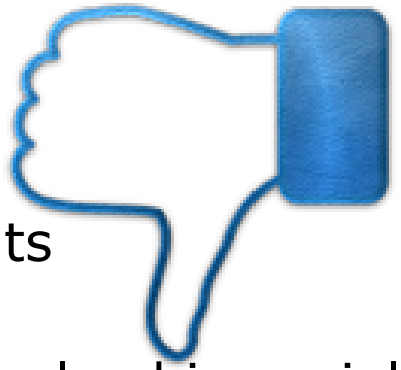
Article 10
ECtHR – No. 45581/15 – Sanchez / France

- **Case facts:**
  - The applicant, at the time a local councillor (right-wing affiliation) standing for election to Parliament, was convicted for discriminatory hate speech due to his failure to take prompt action to delete comments posted by third parties on the "wall" of his Facebook account.
  - With regard to questions of the shared liability of the various actors involved in social media, the French criminal courts applied a "cascading liability" regime foreseen by law convicting the authors of the posts together with the applicant as "producer".



- **ECtHR** (15.5.2023): No violation of Art. 10 ECHR
  - The Court considered the shared liability foreseen in French law as sufficiently precise to enable the applicant to regulate his conduct in the circumstances.
  - The Court considered the comments, which had been posted in the specific context of an election as hate speech, when interpreted and analysed in terms of their immediate impact.

Article 10
ECtHR – No. 45581/15 – Sanchez / France

- The Court considered interference with the legitimate aim of protecting the reputation or rights of others as well as preventing disorder or crime justified:
  - As the applicant had decided to make his Facebook "wall" publicly accessible and "authorised his friends to post comments", he could not have been unaware, in view of the local tensions and ongoing election campaign around that time, that his choice was clearly not without certain potentially serious consequences.
- The Court concluded, taking account of the State's margin of appreciation, that the decisions of the domestic courts had been based on relevant and sufficient grounds, with regard both to the applicant's liability, as a politician, for the unlawful comments posted by the third parties, who had themselves been identified and prosecuted as accomplices, and to the applicant's criminal conviction.
- The interference in question could thus be regarded as "necessary in a democratic society".

Article 10
ECtHR – No. 6091/17 – Saure / Germany

- **Case facts:**
  - The applicant, a journalist for the German newspaper publication Bild, requested the domestic Foreign Intelligence Service to allow him to get physical access and to consult in person the files, as well as to make copies of the documents, it held regarding a former Prime Minister of the Land of Schleswig-Holstein who had died in a hotel in Switzerland in 1987.
  - Request was dismissed in so far as it concerned the consultation of the files in person but he was, however, provided with a summary of the declassified information.
- **ECtHR** (8.11.2022): No violation of Art. 10
- The refusal had pursued legitimate aims of the protection of national security and preventing the disclosure of information received in confidence.
  - The Court highlighted the wide margin of appreciation in the area of national security and that classified files of an intelligence service might in principle legitimately be subject to additional access restrictions, given that the desired physical access to the files would possibly or even likely also reveal information about internal functioning and working methods. In particular, the applicant had had access to adversarial proceedings.
  - Furthermore, the authorities had disclosed information about the content of the impugned files, which the applicant had not alleged to be incorrect, it had been incumbent on him to substantiate why physical access to the files, had been instrumental for the exercise of his right to freedom of expression.

Article 10
ECtHR – No. 21884/18 – Halet / Luxembourg

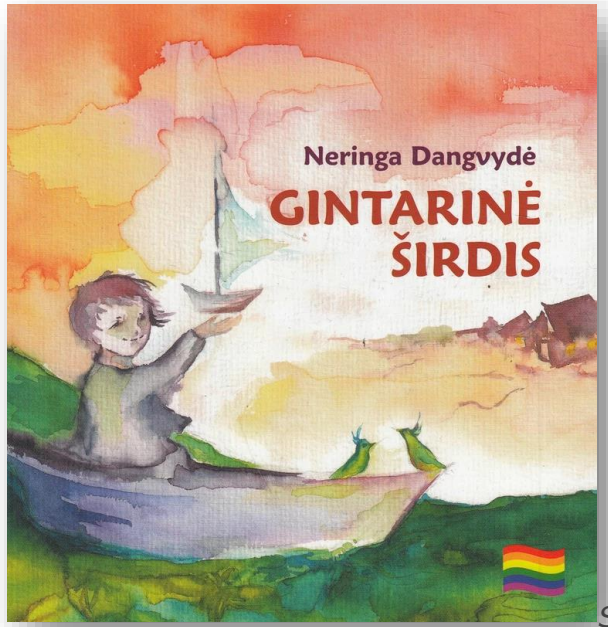
- **Case facts:**
  - The applicant, former employee of an accountancy firm, Raphaël Halet, faced a criminal-law fine of EUR 1,000 for disclosing to the media confidential documents from a private-sector employer concerning the tax practices of multinational companies (*Luxleaks*).
- **ECtHR** (14.2.2023): Violation of Art. 10
  - Consolidation of the Court's previous case-law on the protection of whistleblowers and fine-tuning of criteria established in Guja judgment;
  - No abstract and general definition of the concept of whistleblower but dependent on the circumstances and context of each case;
  - Criteria applied:
    - Channel selected to make the disclosure was acceptable (even) in the absence of illegal conduct by the employer
    - Authenticity of the disclosed documents
    - Applicant's good faith

Article 10
ECtHR – No. 21884/18 – Halet / Luxembourg

- Necessary balancing of competing interests at stake by the Grand Chamber, as the domestic courts' balancing exercise did not satisfy the requirements identified
  - Overly restrictive interpretation of the public interest of the disclosed information, which had made an essential contribution to a pre-existing debate of national and European importance;
  - Only the detriment caused to the employer had been taken into account by the domestic courts;
  - Public interest in the disclosure outweighed all of the detrimental effects, including the theft of data, the breach of professional secrecy and the harm to the private interests of the employer's customers;
  - Criminal conviction had a disproportionate nature.

Article 10
ECtHR – No. 61435/19 – Macatė / Lithuania

- **Case facts**:
  - Temporary suspension of distribution of children's fairy tale book depicting same-sex relationships and its subsequent labelling as harmful to children under the age of 14.
  - The publisher, a University funded by the Lithuanian Ministry of Culture, inter alia found that two fairy tales depicting same-sex couples contained information which was harmful to minors, as provided for in Lithuanian law.
  - The applicant, an openly homosexual professional writer and a specialist in children's literature took action.



Source: https://www.facebook.com/people/Gintarin%C4%97-%C5%A1irdis/100077817454520/

- **ECtHR** (23.01.2023): Violation of Art. 10
  - The book, in fact, neither promoted same-sex relationships at the expense of different-sex relationships nor "insulted", "degraded" or "belittled" the latter;
  - Measures did not pursue any legitimate aim seeking to limit children's access to information depicting same-sex relationships as essentially equivalent to different-sex relationships
  - Measures were incompatible with notions of equality, pluralism and tolerance inherent in a democratic society.

Article 34
ECtHR – 52132/19, 62085/19, 62358/19 – Croatian Radio-Television / Croatia

- **Case facts:**
  - The applicant is the national radio and television broadcaster. Having discovered that an employee, had been paying fees on its behalf to 176 individuals for external translation services they had never performed, the applicant brought more than a hundred civil actions for "unjust enrichment" against those individuals. In approximately half of those proceedings, the second instance courts ruled against it. In essence, the case concerns divergent decisions of domestic courts in twenty sets of civil proceedings. In certain cases, the Constitutional Court declared the applicant's constitutional complaints in each case inadmissible for lack of standing holding that it was not sufficiently independent of the State as to be considered a bearer of constitutional rights.
- **ECtHR** (2.3.2023): Applicant is entitled to appeal under Art. 34
  - The main question was whether the applicant qualified as a "non-governmental organisation" within the meaning of Article 34 entitling it thus to lodge an individual application. The Court replied in the affirmative and made statements on the (indeed, independent) set-up of public broadcasting in Croatia.

Some further interesting ECtHR case law

- No. 8964/18, Axel Springer SE / Germany, concerning a decision ordering a company to publish a rectification in respect of a newspaper article about a political official's connection to the German Democratic Republic's ruling party. No violation of Art. 10.
- No. 63539/19, Zemmour / France, concerning criminal conviction for inciting discrimination and religious hatred against the French Muslim community for remarks made during a television broadcast and in connection with the 2015 terrorist attacks. No violation of Art. 10.
- No. 52808/09, Sergey Sorokin / Russia, concerning unjustified search of journalist's home and seizure of his electronic devices in absence of procedural safeguards against interference with confidentiality of journalistic sources. Violation of Art. 10.
- No. 46396/14, Udovychenko / Ukraine, concerning civil sanctioning of eyewitness for statement of fact made in good faith to media, on circumstances of a road accident of public interest, through application of "presumption of falsity". Violation of Art. 10.
- Nos. 589517/18 and 1308/19, Canal 8 / France, concerning heavy financial penalties imposed on C8 by French media authority on account of the content of sequences broadcast prejudicial to the image of women and likely to stigmatize homosexuals.

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