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ANDRÁS KOLTAY – ANDREJ ŠKOLKAY (EDS)

COMPARATIVE MEDIA LAW PRACTICE

MEDIA REGULATORY AUTHORITIES IN THE VISEGRAD COUNTRIES

VOLUME I
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National Media and Infocommunications Authority • Hungary • Institute for Media Studies

Comparative Media Law Practice

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Media Regulatory Authorities in the Visegrad Countries

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Czech Republic and Slovakia

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Slovakia
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Introduction

This is the first comparative analytical report on how administrative judiciary-administrative law courts or senates, higher regional courts, and partly constitutional courts deal with regulatory challenges related to various, content-based types of administrative-legal sanctions issued by the electronic / digital media regulators in the Czech Republic, Hungary, Poland and Slovakia. The selection of these four countries and their electronic / digital media regulatory systems stems from their recent and sometimes rather distant common history combined with geographical factor (V-4 or Visegrad Group). It is scientifically naturally very interesting to find similarities, but especially differences, in legal argumentation and legal-regulatory development among such a group of countries. In fact, even local administrative law judges themselves are very much interested in examples from these neighbouring countries. The whole research project was enabled by funding from the Hungarian Academy of Sciences.

As these studies document, these are actually rather challenging regulatory issues which usually take years to come to conclusions or final verdicts. Yet there is no such country-specific or comparative study. Sure, one can find many studies on electronic media law and regulation, however, those studies mostly use civic or criminal law regulatory-judicial examples, but rarely concentrate on more systematic or in-depth approach, and even less often focus on administrative law content related aspects. Moreover, it is hard to find full texts of controversial broadcast items—yet sometimes either media regulator or court(s), or sometimes even civic organisations, or all three public legal and normative assessors can in fact be wrong in their assessment of professionalism of work of journalists / media. Therefore, in some cases, we included full transcript of the most arguable or the most interesting news and current affairs in broadcasting. For similar reasons, we have included extensive, although simplified transcripts of courts' verdicts.

The authors focused on the regulatory areas of human dignity, balanced coverage, commercial communication, hate speech, right of reply, and protection of minors. These are arguably the key media regulatory issues. Already here we could find substantial differences among four countries. For example, whilst the Hungarian case law covers each of the before mentioned regulatory areas in Slovakia, we did not find any case that would deal directly with hate speech related to electronic / digital media and administrative law. In the Czech Republic, no hate speech case connected with media was found either (in administrative law nor in criminal law). Cases related with right to reply in the Czech Republic and Slovakia are decided by civil courts in civil proceedings. Thus, the manner of judicial review is quite different in this area. In Poland, the right of reply was replaced by the right to disclaimer that is out of competences of the National Broadcasting Council. Also there were no cases concerning the balanced coverage.

Our *ad hoc* research group has been interested in finding the key normative and legal values motivating judges (or rather administrative courts or administrative law senates) in their regulatory rulings (usually in connection with appeals of broadcasters against decision of the media regulators or lower regional courts) on broadcast (and maybe soon online media) regulatory issues. However, appeals or media regulators' rulings of technical nature, eg, not granting licence or ones related to transfer of ownership, were out of our research scope.

Of course, by definition, fundamental rights are actually competing rights. Thus, can we identify freedom of speech or other basic human rights (eg, personality rights or human dignity) as a key driving force behind rulings either media regulators or administrative courts? If preference was given to fundamental human values other than freedom of speech, which were these? What does 'balanced coverage' actually mean for media regulators on the one hand, and for the courts on the other? What kind of moral and legal justification was used for a given legal-normative preference? Have there actually been value-based conflicts between courts and the regulator?

Another interesting question is that of the consistency of the rulings. Do courts refer in their rulings to their previous ones, especially when there are two or three different specialised senates? Were various senates / courts consistent in their rulings? This may seem to be a useless research question, but in fact, it will be shown that various senates of the court, even the same senate of the court, have been inconsistent in their rulings.

Which international legal sources have been used to support these rulings and verdicts, eg, European Court of Human Rights (ECtHR), or also possibly Court of Justice of the European Union (CJEU)? Which international legal sources were not used to support these rulings and verdicts, and why? Have there been any common trait in rulings / verdicts? Could these traits be seen as long-term, or rather short-term ones? If there are no similarities, why not? Is there any known, important difference in key principles of media regulation in comparison with other EU Member States, especially within V-4?

Which principles mentioned above bring the biggest regulatory challenges? Is the regulation of the electronic / digital media too complicated, demanding or strict to broadcasters, or is it OK, comparatively speaking? Do broadcasters complain, either officially or off the record, with respect to principles of media regulation? Can their complaints be seen as legitimate in some areas? What else could help in improving the current state of affairs? How could we characterise the cooperation between the staff (office) and the Board of the media regulator? Do the regulatory boards of the media authorities accept all regulatory suggestions of the staffs (offices)? If not, in which area can one notice the biggest or most important divergences? Which arguments of the office count usually? What is the role of the professional, ideological, and education backgrounds of the members of the media regulator—does it have any impact on how they see imposing a regulation? Is there any foreign impact or inspiration, either from the European Platform of Regulatory Agencies (EPRA) or from other bodies? Do we see any areas of administrative law procedures which could be improved? How? How can we characterise or assess direct or indirect intervention of the Parliament and the Ministry of Finance or other external bodies in the work of the media regulator? Do broadcasters complain, either officially or off the record, with respect to the professional competences or work of board members? Have the appeals of the broadcasters against sanctions usually been well-argued? Is there any external professional or civic informal, at least *ad hoc*, supervision or criticism of the work of the media regulator? If yes, how could we evaluate it, eg, commentaries in the media, reports by NGOs)?

How professionally competent is judiciary seen in general, and in this area of administrative law in particular? Have argumentation used in the administrative courts rulings been persuasive enough? Which cases are seen as the most difficult ones to decide for the judiciary? Is there any long-term, value-based difference / tendency between various levels of courts? Indeed, it seems that the Constitutional Courts in Slovakia and Hungary show long-term,

more liberal values, following the ECtHR rulings. In Poland, courts focus above all on the provisions of Polish law, and only in some of the cases refer to the judgments of the ECtHR. In the majority of the judgments, courts merely state that the freedom of speech does not have an absolute nature, and its limits are imposed by other freedoms. In the majority of the judgments, courts share the view of the National Broadcasting Council.

In the Czech Republic, it is the Supreme Administrative Court that seems to be the dominant player, because its decisions are very rarely revoked by the Constitutional Court in media cases. The Czech Supreme Administrative Court seems to be more liberal in balanced coverage cases, while more protective in cases dealing with protection of minors.

Further research questions we were interested: Is there any platform at which the courts and the regulator could discuss issues of common interest? What is the annual percentage of accepted / rejected rulings focused at content broadcast, issued by the media regulator in the years 2010–2014? Can we see any areas of judiciary work which could be improved? If yes, how? What else could help improve the current state of affairs?

Of course, some questions above were too ambitious to be answered in this research, nevertheless, they show how interesting and important this type of research can be. We focused our analysis primarily on the period between 2010 (or back to 2007, if there were not enough cases) and 2014. It is a problem that many regulatory and court cases actually last a few years until the final verdict is issued, therefore, it was impossible to follow strict differentiation with respect to the time span. Finally, this report is certainly imperfect; yet there is a hope that it will serve as a starting point for a more refined research in the future in this increasingly important regulatory area. This follow-up research is needed, indeed.

The Editors

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Czech Republic

Ondřej Moravec

I. General Introduction

This study focuses on the analysis of decision-making practice of administrative courts examining legitimacy and accuracy of decisions issued by the Council for Radio and Television Broadcasting (Rada pro rozhlasové a televizní vysílání, RRTV) that is by law authorised to supervise radio and television broadcasting. Particular attention will be given to the question to what extent the human rights arguments are reflected in the decisions of the RRTV and subsequently of administrative courts, and to what extent the Council decisions are accepted by administrative courts.

To this end, the available decisions of administrative courts that examined legitimacy and accuracy of the RRTV decisions have been analysed in detail. The analysis is structured into particular thematic issues forming the subject matter of the content regulation of the Act on Radio and Television Broadcasting (including human dignity, hate speech, balanced news coverage, commercial communications, and protection of minors). As part of these particular issues, the relevant legal provisions were confronted with the decision-making practice of administrative courts, and the arguments applied in the review of the decisions of the RRTV were observed as well as to what extent such arguments are applied. It was observed in how many cases administrative courts accepted the RRTV decision, and in how many cases they reversed it. Certain generalising tendencies were subsequently identified and derived from the arguments used in administrative court decisions, with an emphasis on the source of these arguments and the degree of their consistency. Conclusions of an analysis of the particular themes are always accompanied with case studies that present the RRTV arguments in detail, and confront them with judicial decisions as well as with broadcasters' arguments.

Since it turned out as early as during the initial stage of data collection that the RRTV decisions were frequently cancelled for procedural and formal reasons, a fairly large part of the study is devoted to procedural rules of administrative bodies and courts. The emphasis placed on the strict adherence to procedural rules may be interpreted as undesirable preference of form to content. But this may also be a legal reflection of the fact that Czech laws vest extensive sanction powers in the RRTV. The Supreme Administrative Court (SAC) repeatedly inferred (and not only in media cases) that this competence fell in the category of sanctioning, which was why procedures on these sanctions should comply with the standards laid down by Article 6(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with regard to criminal sanctioning as well as by the rich case-law of European Court of Human Rights (ECtHR).

In our opinion, strong emphasis on form and compliance with procedural rules may also be interpreted as respect to the right of an individual (here the broadcaster) to a fair procedure. A high share of the RRTV decisions that was cancelled for formal and procedural reasons may also be understood, in our opinion, as a consequence of several parallel factors, viz, the method of the RRTV appointment that makes it a political body of its sort; one-sided preference of content by the RRTV and suppression of the formal aspect; and last, but not least, the complicated, disconnected and fairly non-transparent regulation of administrative sanctioning in the Czech Republic whose (low) quality resulted in *a posteriori* formulation of many procedural standards by the SAC. Consequently, the procedural framework of the execution of powers of the RRTV in the Czech Republic forms

a non-omissible part of media legislation. The legal doctrine also deals with institutional issues relating to the administrative regulation.[1]

In our view, the high degree of observance of compliance with procedural rules by administrative courts is closely connected with the question to what extent the RRTV's administrative discretion is replaced with respect to the actual content. The facts of the administrative infringements that are sanctioned by the RRTV are characterised by a fairly high frequency of use of vague terms (objective and balanced broadcasting, protection of the proper physical, mental, and moral development of minors, etc.) and a large space for administrative discretion when imposing sanctions (a great variance between the lower and upper sanction limit).

Even though administrative courts are not subject to any restrictions as to the examination of this RRTV discretion, we can observe a certain restraint with which they actually enter into the RRTV's administrative discretion. The degree of this restraint also largely depends on the character of the issue concerned as well as on the extent in which freedom of expression has been affected, and on the character of the colliding interest. While when interpreting the term 'objective and balanced broadcasting', the SAC requires an *ad hoc* assessment whether a sanction cannot breach freedom of expression and the right to information guaranteed by the Constitution, in the commercial speech and protection of minors, it basically accepts the general preference of the protection of rights and interests that legitimise any restriction of freedom of expression.

It is namely the actual degree of interference of administrative courts in the decision-making of the RRTV that may significantly help us find an answer to the question which of the said institutions is a dominant actor when determining the content regulation of radio and television broadcasting. Although the Constitutional Court (CC) is formally the ultimate authority in the context of the national law, its actual intervention in media legislation as well as in decisions of the RRTV and administrative courts on media content regulation is absolutely minimal, as is shown in this study. But we also have to realise that the minimum intervention by the CC is also conditioned by the degree at which argumentation with human rights is applied in decisions of administrative courts. We can articulate a hypothesis that the more the human rights arguments are applied in procedures before general courts, the fewer reasons there are for any intervention by the CC. Accordingly, the relation between the RRTV and administrative courts may be defined as follows: If the RRTV respects the boundaries created by older administrative court decisions in other cases when exercising its powers, administrative courts have no reason to enter into the RRTV's administrative discretion in individual cases. The degree at which the RRTV can enforce its ideas regarding the content regulation of radio and television broadcasting therefore depends on the degree of its willingness to accept the boundaries created by the case-law of administrative courts.

To fully understand the functioning of the legal regulation of media content, it is therefore necessary to understand the degree to which individual state authorities (the RRTV) may affect the actual application of the law as well as the rules of interaction between these authorities. With this analysis, we strive to contribute to the understanding of this issue.

Since this analysis is a part of a wider comparative study including all Visegrad Four countries (Hungary, Poland, Slovakia, and Czech Republic), it also includes a part devoted to the right of reply for the purpose of potential comparisons even though this statute is not

1 O Pouperová, *Regulace médií*. Prague, Leges, 2010.

included in the powers of the RRTV and the right of reply is resolved by civil courts. The methodology used in examination of this theme was therefore adjusted accordingly. Identical characteristics were also reviewed in this case (the degree and manner of application of human rights arguments, the degree of consideration of older decisions and decisions of international courts, case-law consistency), and case studies were presented, but judicial arguments could not be confronted with the arguments of the RRTV. Instead, we dealt with the issue to what extent a person seeking the publication of a reply could sue out the reply, and to what extent broadcasters (or publishers) were able to defend their decision not to publish the reply. Hence, we again examined (similarly to the other themes and topics) to what extent the judiciary enters into the media content regulation with its decisions.

II. Introduction to the Legal System

The system of law (legal order) in the Czech Republic is arranged in a manner typical of other countries in continental Europe. Its internal structure is based on the Roman law traditions. Constitutional laws are of the ultimate legal force, together forming the constitutional order. The key elements of the constitutional order include the Constitution of the Czech Republic regulating the *frame of government* and the Chart of Fundamental Rights and Freedoms being the fundamental bill of rights.

Article 10 of the Constitution incorporates the promulgated international treaties in the legal order whose ratification was approved by Parliament and that are binding for the Czech Republic. Under this Article, if a treaty provides something other than that which a statute provides, the international treaty will apply preferentially. This defined principle of the application preference of international treaties draws in the national law namely the ECHR, including the related case-law of the ECtHR in Strasbourg. That means that it no longer has a character of a mere inspirational guideline in the interpretation of similar provisions of the Charter of Fundamental Rights and Freedoms, and acquires a fairly high normative force. Therefore, also national courts of general jurisdiction are forced to apply judgments of the ECtHR in their decisions, especially if such judgments are claimed by a party to the proceedings.

According to Article 83 of the Constitution, the CC is the judicial body responsible for the protection of constitutionality. The Czech Republic applies a model of specialised concentrated protection of constitutionality. That means that the CC has exclusive powers to assess conformity of laws and regulations of a lower legal force with the constitutional order. If a conflict of any legal provision or a part thereof with the Constitution is established, the CC has the right to cancel the colliding provision. If a general court finds a legal provision unconstitutional, it must interrupt the proceedings and turn to the CC with an application for cancellation of this provision. An individual has the right to seek cancellation of an unconstitutional law solely in connection with a constitutional complaint against a specific decision of a general court issued in his/her case. The majority of the CC agenda deals with decisions on constitutional complaints of individuals against general court decisions.

However, in many of its decisions, the CC appeals to courts of general jurisdiction that the protection of fundamental rights guaranteed by the Constitution is not its monopoly, and that also general courts must interpret and construe legal provisions in conformity with the Constitution, ie, in particular in compliance with the provisions of the Charter

of Fundamental Rights and Freedoms protecting the fundamental rights of an individual guaranteed by the Constitution. The requirement is based on Article 4 of the Constitution under which the *fundamental rights and freedoms enjoy the protection of judicial bodies.*

General courts are arranged in a hierarchical structure with four levels. Judicial procedures use two-tier or three-tier system. District courts are at the lowest level, issuing decisions as courts of the first instance in most cases relating to the civil and criminal law. Regional courts act as appellate courts in these cases. They also decide as courts of the first instance in certain specific civil and criminal cases (serious crimes). In this case, high courts act as appellate courts. The Supreme Court (SC) decides on appellate reviews in civil and criminal cases.

The system of administrative judiciary is excluded from the judicial system. It is a two-tier system. An individual may seek protection with an administrative action against a decision of an administrative body, against its inactivity and another interference not having a character of an administrative decision. In the first instance, actions are resolved by specialised panels of administrative courts. A cassation complaint is a remedy against their decisions, and this complaint is submitted to the SAC. The Supreme Administrative Court should unify the case-law of administrative courts in its decisions on cassation complaints.

Administrative courts decide in the full jurisdiction of the Czech Republic, ie, they examine not only the lawfulness but also the objective accuracy of administrative body decisions, and their reviews cover both legal issues and the facts as established by administrative bodies. The key legal branches are mostly codified in comprehensive codes. The new Civil Code (Act No 89/2012 Sb.) became effective on 1 January 2014. It is the central private-law regulation, including the commercial law (business corporations are specially regulated by Act No 90/2012 Sb., on Business Corporations). The new Criminal Code (Act No 40/2009 Sb.) has been in effect since 1 January 2010. Criminal liability of legal persons was introduced with the adoption of Act No 418/2011 Sb. (effective since 1 January 2012).

On the contrary, procedural regulations (Criminal Procedure Code and Civil Procedure Code) were enacted in the 1960s despite being amended several times over the past 25 years. The administrative judiciary is governed by a relatively new law (Code of Administrative Procedure, Act No 150/2002 Sb.) which satisfies the requirements based on Article 6 of the ECHR.

The administrative law is an absolutely fragmented branch lacking a comprehensive code. Any introduction of a new code is not even considered with regard to the diversity of the regulated issues and the traditional departmentalism resisting any codification. Decisions of public administration bodies are governed by a relatively unified (except for tax issues) regulation of the Rules of Administrative Procedure (Act No 500/2004 Sb.) that are accompanied by many particular exceptions in special regulations.

Prosecution of administrative infringements is governed by Act No 200/1990 Sb., both with respect to the substantive and procedural aspects. Administrative liability is strictly limited to natural persons (unlike criminal liability). Legal persons are liable for so-called other administrative infringements. Sanctions (mostly fines) are imposed by administrative bodies in accordance with the general rules of administrative procedure. There is no comprehensive procedural regulation on administrative sanctioning which would respect standards required by the ECHR, and it must be substituted by decisions of the SAC in specific cases that partially fill in the gaps. The absence of a procedural regulation of administrative sanctioning has been criticised for a long time and repeatedly, but there is no suggestion that any legislative change would be introduced in this area.

This absence is also reflected in the decision-making of the RRTV whose numerous decisions were cancelled by administrative courts for procedural reasons. Unclear and incomplete rules of procedure on administrative sanctions are undoubtedly among the reasons behind this fact.

III. Key Principles of Electronic Media Regulation

A. Scope of Regulation

The legal regulation of the mass media in Czech law comprises a system of laws and regulations whose scope is defined by individual media types. Its key regulations include the Printing Act (Act No 46/2000 Sb. (Coll.), as amended, which became effective on 14 March 2000, and the Act on Radio and Television Broadcasting (Act No 231/2001 Sb. (Coll.), as amended, which became effective on 4 July 2001. In 2010, these two statutes were supplemented with the Act on On-Demand Audiovisual Media Services (Act No 132/2010 Sb. (Coll.), effective from 1 June 2010; ODAMSA).

The Act on Radio and Television Broadcasting (the Broadcasting Act, BA) became effective on 4 July 2001 when it superseded the previous Act No 468/1991 Sb. (Coll.) effective between 22 November 1991 and 4 July 2001. The Broadcasting Act was amended several times (28 amendments). Some of these amendments were rather technical in nature, reflecting, eg, amendments to general legislation (Act on Civil Service, adoption of the Rules of Administrative Procedure, amendments to the Criminal Act) or modifications of other media laws (Act on Czech Television, Act on Electronic Communications, adoption of the Audio-vision Act). The amendments implemented by the acts specified below can be regarded as major amendments to the BA:

- 341/2004 Sb. (Coll.), effective from 2 June 2004;
- 235/2006 Sb. (Coll.), effective from 31 May 2006;
- 132/2010 Sb. (Coll.), effective from 1 June 2010.

These amendments repeatedly amended the scope of the BA, in particular to include television broadcasting via the Internet or the provision of services which resemble television broadcasting via the Internet (streaming, webcasting).

As of the date of this study, the scope of the BA was defined in its Section 3(1). Hence, the Act applies to (1) broadcasters operating on the basis of special legislation (statutory broadcaster);[2] (2) broadcasters operating on the basis of a licence granted under the BA;[3] (3) re-broadcasters operating on the basis of authorisation under the BA.[4]

Under Section 2(1)a of the BA, radio and television broadcasting means the 'provision of programme units and other broadcasts—arranged within a programme, including services directly related to the programme—by a broadcaster to the public via electronic communications (1)a in a form protected or unprotected by conditional access; (1)b for the purpose of simultaneous listening/viewing of the programme units and other broadcasts.'

2 This means Czech Television as the public service television.
3 This means private (commercial) broadcasters.
4 This means re-broadcasting service providers.

The broadcaster is by law defined as 'a legal or natural person that prepares a programme, including services directly related to the programme, determines the method of organising radio and television broadcasting, bears editorial responsibility for this broadcasting, and uses a unique audio or visual identification which guarantees that there will be no confusion in respect of the programme and services directly related thereto, to distribute the programme and the services directly related thereto by their own means or through third persons.'

Section 2(3)a of the BA is also essential to define the scope of the BA, under which *provision of communication services focused on the delivery of information or other communications on the basis of individual requests* is not regarded as radio and television broadcasting. Provision of non-linear media services is regulated by the ODAMSA. Pursuant to Section 2(1)a of the ODAMSA, the audiovisual service is taken to mean an information society service which is under the editorial responsibility of an on-demand audiovisual media service provider, the principal objective of which is the provision of programmes to the public in order to inform, entertain, or educate, which allows for the viewing of programmes at a moment chosen by the user, and at his individual request, on the basis of a catalogue of programmes established by the on-demand audiovisual media service provider.

It follows from the above that the BA regulates services based on the principle of simultaneous viewing where a viewer watches a programme unit broadcast by the broadcaster at the given moment. An on-demand audiovisual media service, in contrast, means that the viewer (user) chooses a certain programme unit from a catalogue prepared by the service provider, ie, the viewer chooses at what time he/she will watch the programme. The scope of individual laws and regulations is based on the principle of technical neutrality where it is important what service is provided as opposed to the technical means used to distribute the information. A focus on content is the common characteristic of both services. This means that content provision is (in conformity with European Union law) strictly separated from the provision of electronic communications networks through which the content is distributed.[5]

The presence of editorial responsibility of the provider is another common element in both services. It is the broadcaster or the provider of the non-linear service who ultimately determines the programme offered (broadcast or made available in the catalogue of programmes). All other services based on the creation of an environment filled with the content delivered by service users do not fall within this regulation. They include various network repositories, services such as YouTube or social networks whose providers are not considered as content providers with editorial responsibility.

The position of providers of content which are not of purely audiovisual nature is thus questionable. Such services include news portals as well as individual blogs or websites where audiovisual elements intermingle with texts. Media services focusing on text (typically blogs) fall outside the scope of the ODAMSA even though audiovisual sequences are used in them as a complementary element. However, those services (typically news portals) that work with audiovisual sequences to a significant extent are also disputable because of the development of technology and the improved connection of users.

We can increasingly encounter the use of these elements in the Czech environment, even in the form of live broadcasts, which makes these services undistinguishable for users from

5 Electronic communications networks are regulated by Act No 127/2005 Sb. (Coll.) on Electronic Communications.

television broadcasting. It is difficult to qualify these services from a legal perspective because individual hypertext links cannot be apparently regarded as a catalogue of programmes within the meaning of the ODAMSA. Czech courts have not resolved this issue yet, and so no clear answer can be given for the time being.

i. Technical Regulation

The Broadcasting Act creates a legal framework for the dual system of television broadcasting in the Czech Republic as it also lays down the conditions under which private entities may be granted a licence for radio and television broadcasting alongside (the state broadcaster) Czech Television established by special law. The licence is granted by the RRTV in a licensing procedure.

Digitisation of television broadcasting has resulted in extension of the availability on the frequency spectrum, and so at present the number of available licences, in the current social and economic conditions, exceeds the number of potential broadcasters.

The licence is granted in an open licensing procedure. According to law, there is no legal title to the licence. The television broadcasting licence authorises the broadcaster to television broadcasting for a period of twelve years. Broadcasters have the authority to rebroadcast with the proper authorisation. There is a legal title to authorisation if the authorisation terms and conditions specified in Sections 27 and 28 of the BA are met. The provider of on-demand audiovisual media services must register with the RRTV.

ii. Content Regulation

Content regulation of television broadcasting is specified in Section 31 et seq of the BA. The fundamental principle is laid down in Section 31(1) of the BA under which the broadcaster is entitled to broadcast programmes in a free and independent manner. Any intervention in the contents of the programmes is only admissible on the basis of law and within the limits thereof.

The principle of objectivity and balance of the programmes broadcast is enshrined in Sections 31(2)–(4) of the BA. The broadcaster must:

- provide objective and balanced information necessary for opinions to be freely formed. Any opinions or evaluating commentaries shall be separated from information which has the nature of news;
- ensure that principles of objectivity and balance are complied with in news and political programme units and that, in particular, no one-sided advantage is—within the broadcast programme as a whole—given to any political party or movement, or to their views, or the views of any groups of the public, taking account of their real position within political and social life; and
- prepare its programme structure so as to provide, in its broadcasting, a well-balanced portfolio offered to all the population with respect to their age, gender, colour of the skin, faith, religion, political or other opinions, ethnic, national or social origin, and membership of a minority.

Other content-related limits of radio and television broadcasting are specified in Section 32 of the BA under which the broadcaster is required to:

- ensure that the broadcast programme units do not promote war or show brutal or otherwise inhumane behaviour in a manner which would involve its trivialisation, apology, or approval;
- ensure that the broadcast programme units do not arouse hatred for reasons relating to gender, race, colour of the skin, language, faith and religion, political or other opinions, national or social origin, membership of a national or ethnic minority, property, birth or other status;
- ensure that the broadcast programme units do not contain subliminal communications;
- not include in the broadcasting any programme units that may seriously affect the physical, mental, or moral development of minors in particular those involving pornography and gross violence as an end itself;
- avoid showing, without justification, dying people or people exposed to severe physical or mental suffering, in a manner detrimental to human dignity;
- avoid including in the programme during the period from 6 amto 10 pm any programme units and announcements which might endanger the physical, mental, or moral development of minors; this obligation shall not apply to broadcasters where broadcasting to the end user is available under a written contract concluded with a person aged over 18 years, and is accompanied by the provision of a technical measure which allows that person to restrict minors' access to broadcasting;
- ensure that its programmes do not include programme units that could promote prejudicial stereotypes of ethnic, religious, or racial minorities;
- ensure that its programmes do not include programme units and advertisements that contain vulgarisms or swearing, except for in arts programmes where it is justified in the context; such programme units or advertisements may only be broadcast between 10 pm and 6 am of the following day.

The obligations of the broadcaster relating to the broadcasting of commercial communications (advertising, sponsoring, teleshopping) are defined separately. The act also restricts the broadcaster's freedom of speech with respect to content (in particular hidden advertising) and form (recognisable or duly separated advertising respectively). The Broadcasting Act also prescribes the duty of television broadcasters to adhere to the determined proportion of European production. Persons whose dignity, honour or privacy could be affected by any announcement containing any factual information are granted the right to a reply which can be applied in court (if the broadcaster does not react).

Any breach of the obligations relating to broadcasting content may in some cases be subject to a fine which the RRTV is authorised to impose for an administrative infringement. In certain cases, the RRTV is not authorised to impose a fine but only to notify the broadcaster of a breach of the law.

The ODAMSA contains a much more liberal definition of the provision of non-linear media services. According to Section 6(2) of the ODAMSA, an on-demand audiovisual media service provider shall ensure that the on-demand audiovisual media service does not contain any communication intentionally manipulated in order to affect the subconscious of a natural person without consciously being perceived by that person, and that it does not incite hatred on grounds of sex, race, colour, language, faith and religion, political or other opinion, national or social origin, nationality or ethnicity, property, birth, or other status.

According to Section 6(3) of the ODAMSA, an on-demand audiovisual media service provider shall ensure that an on-demand audiovisual media service, the contents of which might seriously impair the physical, mental, or moral development of minors, in particular

by containing pornography and gross gratuitous violence, is made available only in such a way that it ensures that minors will not normally see or hear the content of such an on-demand audiovisual media service.

The broadcasters' obligations relating to the distribution of commercial communications are defined separately where, analogically to the normal broadcasting, the principle of easy recognisability of commercial communications is highlighted. Hidden commercial communications are expressly prohibited. The right to a reply is not specified in the ODAMSA, ie, the persons affected cannot sue the publication for denying them a reply.

In the light of the foregoing list, it is clear that the regulation of television broadcasting is much stricter than that of non-linear media services. This difference is very hard to justify considering the competitive relationship between the two media types. The historical argument of a limited frequency spectrum can be used only to a very limited extent. Advocates of stricter regulation of television broadcasting mostly point to the stronger and more persuasive potential of television broadcasting[6] whereas the author of this study previously expressed scepticism as to sustainability of this model.[7]

According to a poll carried out among students of the Media Clinic taught at the Law Faculty of Masaryk University in Brno,[8] the hypothesis that the legitimacy of stricter regulation of television broadcasting is weakened by the lost dominant position of television broadcasting and arrival of the new media was confirmed only partially. Although the majority of respondents said that television was a medium like any other medium, the opinion that the stricter regulation of television broadcasting was justifiable clearly prevailed.

B. Media Types

Current legislation differentiates the following media types. Press is regulated by the relatively liberal Printing Act based on the registration principle. As for the specific instruments of the media law, the press is affected by the right to a reply and additional announcement, and protection of sources is also expressly protected.

Radio and television broadcasting is subject to the strictest regulation both in terms of market access and subsequent operation; relatively strict supervision is exercised by the RRTV, and there is a developed mechanism of administrative sanctions.

On-demand audiovisual media services are somewhere on the borderline between press and broadcasting; their access to the market is based on the registration principle; the catalogue of obligations is narrower than for broadcasting, but the institutionalised administrative supervision exercised by the RRTV is maintained. Until the law is applied in practice, it is difficult to determine the extent to which the RRTV will reflect the established patterns in the new area of its competences.

The category of non-regulated publication activities in the online environment includes blogs, e-zines, personal websites, etc. Only general regulations such as the Civil Code, Criminal Code or the Act on Advertising are applied.

6 Pouperová, *Regulace médií* (n 1).

7 O Moravec, *Mediální právo v informační společnosti* (Prague, Leges, 2013).

8 This was really just a poll among a very low number of respondents. The poll did not have the ambition to replace a questionnaire survey. Its results are solely used to illustrate the topics discussed in the given area.

Although the strictly technical dividing criteria were abandoned with the adoption of the ODAMSA, or additional criteria were provided (the existence of a catalogue of programmes and subsequent programme selection by the service recipient, and the institution of editorial responsibility), the existing regulation remains based on the idea that a certain service is defined as press, broadcasting, or an on-demand media service, and is registered and operated as such. The scope of rights and obligations of a service is determined by this status.

However, the varied nature of the new media is hardly compatible with this concept. The same broadcaster may offer only text services in one and the same place on one day, and include a series of live broadcasts from events of public interest on another day, and subsequently store such recordings and offer them in a catalogue of programmes.

C. System of Authorisations and Licensing

The application of the licensing system (the granting of licences to broadcast or to provide a service) persists in the Czech Republic for radio and television broadcasting. Although both these media are subject to the same legal regulation, its practical application is different due to technical distinctions. While television broadcasting is barely concerned with the problem of limited frequency spectrum due to digitisation, the number of applicants for licences remains higher than the number of available frequencies in the case of analogue radio broadcasting. However, it remains valid that there is no legal title to a licence both for radio and television broadcasting. When it is granted a licence, the broadcaster receives authorisation to broadcast, and the broadcaster has the obligation to use the licence and do so. Any interruption in broadcasting without prior notification or any long-lasting interruption in broadcasting constitutes a reason for the licence to be withdrawn under the applicable legislation.

The registration principle is applied in re-broadcasting. The re-broadcaster compiles its own programme offer (comprising programmes broadcast by other entities) which is distributed to service recipients. Hence, although the re-broadcaster does not produce the programme itself, it is obliged to ensure that the distributed programmes (or programme units broadcast within the programmes distributed by the re-broadcaster) meet the requirements imposed by the content-related regulation. The right to re-broadcast is established by registration. There is a legal title to this registration (authorisation).

The registration principle is applied in the case of on-demand audiovisual media services. Under this principle, the service provider must register with the RRTV, but the right to operate the service is not granted by the fulfilment of the duty to register. Any breach of the duty to register is subject to sanctions as an administrative infringement.

D. Characteristics of Media Legislation

Media legislation of the Czech Republic is based on the principle of the particular regulation of individual media types which complements general legislation (Civil Code, Criminal Code). The publication of the periodical press, radio, and television broadcasting, and provision of non-linear media services are each subject to separate regulation. This system makes it possible to adapt the legal regulation to the given media type, and react to its specifics accordingly. However, the absence of a general part of the media law which would

be common for all media types raises doubts as to the justifiability of the different degrees of rigidity of individual legal provisions and regulations. In certain cases, there are question marks over the constitutional conformity of these differences, in particular in cases where individual media types compete with each other.

These doubts become even more pronounced with the ongoing convergence process where the differences between individual media types are fading away. The digitisation of television broadcasting, newly emerging media, and the availability of high-speed Internet enable Internet broadcasting of both radio and television (IPTV) as well as text media which resembles the press. It is in fact almost impossible to distinguish individual media types by technical criteria. The Broadcasting Act has therefore essentially abandoned the technical criterion (by defining the term 'broadcasting' on the basis of the simultaneity criterion only).

In contrast, the Printing Act continues using the technical criteria when it defines its scope by stating that it applies to *printed material.* There has consequently been a discussion as to whether the Printing Act can also be applied to websites (Internet magazines, blogs) which are not printed materials from a technical point of view. These discussions mainly revolved around the question of whether the right to a reply can be applied in the new media environment. This discussion still remains open, but it seems that currently the prevalent opinion is that websites cannot be regarded as printed material.

During the preparation of this study, the option of introducing more significant changes to media legislation has been discussed. Such changes are expected to focus particularly on the public service media (Czech Television, Czech Radio), their position and management, but a discussion on modifying the regulation of radio and television broadcasting in general has also begun in relation to these changes. These discussions have mainly focused on the basically different position of television broadcasters as compared to other types of media. Nonetheless, commercial media providers have voiced a relatively strong opinion that no new Broadcasting Act is needed, and that an amendment to the existing statutory provision would be sufficient for practical purposes.[9]

E. Characteristics of the Council for Radio and Television Broadcasting

The Council for Radio and Television Broadcasting is an administrative body, ie, a body exercising state administration within the scope of its competences. The position of the RRTV [10] in the system of state bodies of the Czech Republic, its establishment and appointment is regulated by the Act on Radio and Television Broadcasting. The Council is an independent administrative authority. It is placed outside the system of state administration bodies; it is independent of the executive power, and reports to the Chamber of Deputies. Some authors regard the phenomenon of independent administrative bodies as a promising path of legal regulation as it enables impartial interventions by the state, and accentuates the expertise of decision-making, thus strengthening the efficiency of state interventions.[11]

9 Presentation of Pavel Kubina, Head of Legal Department at FTV Prima, at the 'Media Regulation II' conference (2014).

10 For detailed information on the Council's status, see, M Bartoň, 'Postavení a charakteristika Rady pro rozhlasové a televizní vysílání' *Správní právo* 1–2 (2004) 14.

11 T Ježek, 'Nezávislé správní orgány – žádoucí směr inovace Ústavy ČR' J Kysela (ed), *Deset let Ústavy ČR* (Prague, Eurolex Bohemia, 2003) 347–51.

The independence of the RRTV has an institutional aspect (the RRTV is not subordinated to any other administrative body), a personal aspect (Council members cannot receive any instructions on how to perform their office), a creational aspect (Council members are appointed by the Chamber of Deputies of the Parliament of the Czech Republic, and are not dependent on the government), and a financial aspect (financial remuneration of Council members is defined directly by the law).

The method of appointing the RRTV (election by the Chamber of Deputies) necessarily means that Council members basically represent the political lines represented in the Chamber of Deputies. Hence, the RRTV is not built on the principle of career officers. The Council Office plays an irreplaceable role, with its task being to create the conditions for the proper functioning of the RRTV. Despite the undisputable importance of the Council Office, we must consistently distinguish between the two bodies because the decision-making powers are exclusively vested in the RRTV by law.

The Council for Radio and Television Broadcasting is a collegiate body where decisions are adopted by a majority of votes. Even if sanctions are imposed, the wording of the resolution adopted by the RRTV is decisive. The written counterpart of the decision executed by the Council Office must be identical with this resolution. If there is any (even minor) deviation in the content, the decision is not lawfully adopted. However, courts have to date not clearly determined whether or not the entire decision (including the reasoning) or only its binding part should be adopted as the RRTV decision.

This legal situation places great demands on each Council member to expertly perform his/her office because he/she must ensure that the RRTV decisions accord both with the BA and with the general legislation applicable to administrative proceedings. The failure to meet these requirements has in many cases (see Point IV) been a reason for the invalidation of many RRTV decisions. An analysis of the case-law of administrative courts has shown that many administrative decisions issued by the RRTV have been overturned mainly for procedural reasons. Many such decisions contained systemic errors, ie, they were issued on the basis of an established practice which was subsequently found illegal. This reflects a certain habit: When an established RRTV practice is branded as unlawful for formal reasons, this defect is then reflected in all decisions which have the same procedural defect.

These statements can be evidenced by the fact that the extended panel of the SAC, whose task is to unite the case-law of the individual panels of the SAC, has intervened in this area *solely for procedural reasons*. Such interventions include the following cases:

- due identification of the action in the binding part of the decision;
- the moment of starting the time limit within which a sanction may be imposed;
- the obligation of the RRTV to produce evidence by watching a programme during an oral hearing in the presence of the broadcaster;
- essentials of the notification of the breach of the law;
- applicability of the notification of the breach of the law in similar cases.

IV. Procedure before the Council for Radio and Television Broadcasting

A. Overview of Administrative Proceedings before the Council for Radio and Television Broadcasting

The Council for Radio and Television Broadcasting is an independent administrative authority. As such, it has the authority to exercise state powers within the scope of its competence, which is currently defined by the BA, the ODAMSA, and partly also by the Act on Advertising. Apart from being an independent administrative authority, and regardless of the method of its appointment, the RRTV has the obligation to exercise the powers vested within its competence only in cases defined by law and in the manner defined by law, just like other public bodies. When exercising its powers, the RRTV proceeds in accordance with the Rules of Administrative Procedure.[12]

B. Stages of Proceedings

The proceedings before the RRTV consist of one stage, which means that no appeal or similar legal remedy is possible against an RRTV decision. If the broadcaster believes that the final decision is illegal or incorrect, it can lodge a complaint against such a decision with the administrative court. The Broadcasting Act expressly stipulates that an administrative action has a suspensive effect. The court must decide on the complaint within ninety days.[13] However, this is merely a disciplinary deadline which is not adhered to very strictly in practice.[14] Still, if the time period within which the administrative court is required to decide is determined, it has a positive impact on the duration of the proceedings because this mainly affects cases which must be dealt with preferentially, and not in the order in which they were submitted to the court.

The form of the proceedings before the RRTV is materially influenced by the fact that the proceedings to determine whether sanctions should be applied are regarded (based on the case-law of the SAC) as proceedings on a criminal charge within the meaning of Article 6(3) of the ECHR, ie, the broadcasters have all the rights specified in this article of the Convention.[15]

C. Proceedings Imposing Fines

The proceedings imposing fines represent the crucial part of the agenda relating to the regulation of the television broadcasting content. By imposing fines for infringements committed by radio and television broadcasters, the RRTV sanctions the inclusion of programmes which are at variance with the BA.

12 Act No 500/2004 Sb. (Coll.).

13 Section 61(5) of the BA.

14 To be evidenced with statistics.

15 With reference to the judgment of the ECtHR: *Engel and Others v the Netherlands*, App No 5100/71, judgment of 8 June 1976; judgment of the SAC 4 As 10/2006 of 18 April 2007. For details, see, P Molek, *Právo na spravedlivý proces* (Prague, Wolters Kluwer, 2012) 60–62.

i. The Relationship between the Council and the Council Office

The decision-making power is by law vested exclusively in the RRTV. The bureaucratic apparatus is involved in the preparation of documents for decisions and written forms of decisions, but not in the decision-making process as such. Therefore, the RRTV, whose members are elected by the Chamber of Deputies of the Parliament of the Czech Republic, has the same obligations as any other body, in particular with regard to the legal quality of its decisions and regardless of the manner in which the Council is appointed (see Chapter 1).

Bureaucratic support for the RRTV's operations is provided by the Council Office established on the basis of Section 11(2) of the BA under which the tasks related to professional, organisational, and technical support for the activities of the RRTV shall be carried out by the Council Office. The Council Office is a body of the RRTV. The head of the Council Office is appointed and removed by the RRTV. The head of the Office Council reports to the Council Chairperson. Details of the Office's operations are regulated by the organisational guidelines of the Office which are not any generally binding regulations but an internal regulation of the RRTV.

The relation between the Council and the Council Office has subsequently been regulated by case-law. The extended panel of the SAC accentuated the aspect of independence and personal performance of the office of Council members:

> The legislator clearly determined that Council members must perform their office in person and should not receive any instructions for the performance thereof. Since the Council for Radio and Television Broadcasting has the powers to decide on serious issues of a constitutional and legal character, and in particular to restrict the freedom of speech with its decisions, it is absolutely crucial that Council members make decisions in person within the Council for Radio and Television Broadcasting proceedings. After all, this is also supported by the historical argument when the statements of reasons relating to the media laws show that it is absolutely crucial that media members perform their mandate in person from the perspective of state supervision of the mass media. After all, independence and autonomy in decision-making is one of the reasons why there is a range of incompatibility of offices and other restrictions in the case of Council members (see Sections 7(9), 7(11)–(13) of the BA). For instance, the need for personal decision-making of Council members arises in connection the Council for Radio and Television Broadcasting's power to supervise the adherence to the principles of objectivity and balance in political-journalistic programmes.[16]

Based on the requirements for the personal and independent performance of office of the Council member, the extended panel of the SAC has concluded that the Council members deciding in administrative proceedings imposing a sanction on a broadcaster must personally watch the programme concerned either during or outside an oral hearing, but in the presence of the party to the proceedings. With this conclusion, the SAC turned away from the clear tendency of its previous case-law under which the personal watching of the programme by a Council member could be replaced with a programme analysis prepared by the Council Office.[17] Only the second panel held an opposite opinion to the extended

16 Resolution of the extended panel of the SAC 7 As 57/2010 of 3 April 2010, [27].

17 *Cf* judgments 4 As 36/2007-121 of 29 May 2008, 4 As 35/2007-120 of 30 May 2008, 4 As 37/2008 of 30 June 2008, or 4 As 38/2007-122 of 10 July 2008. The sixth panel used this case-law in judgments 6 As 16/2008 of 22 January 2009 or 6 As 20/2008-83 of 22 January 2009.

panel's decision.[18] Therefore, the extended panel regards the analytical report prepared by the Council Office with respect to the administrative proceedings as a service summary material 'which is only mediated, and contains evaluating or critical elements'.[19]

Since the decision-making power is by law vested exclusively in Council members and not in the Office, the decisions must be taken directly by the RRTV, which adopts resolutions at its meetings. A written counterpart of the decision subsequently prepared by the Council Office should not be different from the wording adopted in the RRTV resolution even in insignificant details. In the past, the Office modified the wording of the binding part of the decision in several cases so as to comply with the formal legal requirements. Both the Metropolitan Court in Prague (MC)[20] and the SAC[21] branded this procedure as illegal. The unlawfulness thus established resulted in the overturning of the RRTV decision without the need to look into its material aspects.

Although the findings contained in the Council Office analysis are not binding for the RRTV decisions, the RRTV regularly bases its administrative practice on these findings, and uses them. The Metropolitan Court in Prague even concluded that with the requirement for the reviewability of an administrative decision in mind, RRTV also has the obligation to justify its different evaluation of a programme if it intends to deviate from the conclusions contained in the analysis.

Although the MC stated that

> The Council for Radio and Television Broadcasting is not bound by the evaluation or recommendation specified in the analysis submitted to the Council by the Council Office, it should always (especially in cases where it declares that it has an absolutely opposite factual and legal conclusion) completely specify in the conclusions of the grounds for the decision why the manner of a programme's preparation should not be regarded as legitimate subject-matter criticism of a certain enforced intention because it collides with other interests protected in the given territory (it may pose a negative impact from the perspective of environmental protection) but rather as a biased and one-sided presentation of opinions which induces a negative approach of the viewer to the given intention, hence the viewer is manipulated. The conclusion on the bias of the opinions evaluating the impact of construction from the perspective of an intervention in the existing ecosystem in the affected territory and their manipulative effects on the viewer should not be based only on the fact that it mostly presents critical stances, but it must be recognisable from the consideration regarding the accomplishment of the elements of an infringement pursuant to Section 31(2) of the Act whether the expression of critical stances is evaluated as misleading for the viewer because they were presented by absolutely unqualified persons, persons pretending such qualification, or because their critical statements are at variance with other objectively evidenced findings and hence are untrue and biased. The perspective of the focus of the type of the programme and the object of the specific programme must also be considered as well as the particular view from which the planned golf course construction was evaluated.[22]

18 Judgment 2 As 59/2008-80 of 26 November 2008.
19 Decision of the extended panel 7 As 57/2010, [25].
20 Decision 10 A 52/2010 of 28 June 2010.
21 Decision of the SAC 1 As 101/2012 of 7 February 2013.
22 Judgment of the MC 10 A 52/2010 of 28 June 2010.

However, this does not mean that the Council and the Council Office have an absolutely loose relation. For instance, courts regard the Council Office as an integral part of the RRTV for the purposes of setting the start of the time limits within which the RRTV may impose sanctions on broadcasters. Therefore, if the law connects the start of a time limit within which a sanction may be imposed with the RRTV's knowledge about a potential law violation, the start of the time limit cannot be based on individual RRTV meetings. According to the CC, the 'Council for Radio and Television Broadcasting is primarily an administrative body which issues collective decisions, but the duration of administrative time limits cannot be based solely on its meetings. For such purposes, Council for Radio and Television Broadcasting has an executive body (the Office of Council). Adherence to the time limits would not be possible without its activities. However, it is impossible to neglect the acts of the Council Office when determining the start of the time limits.'[23]

Administrative courts respect this conclusion of the CC without exception. The moment when the Council Office as the executive body of the RRTV can become familiarised with facts justifying the conclusion that an administrative infringement has been committed is thus regarded as the moment when the RRTV becomes knowledgeable of such facts. Typically, this includes cases of viewer initiatives processed by the Council Office and subsequently submitted to the RRTV for an assessment. Hence, the duration of the time limit for imposing a sanction cannot be linked to the moment when the material in question is discussed by the RRTV alone. It also simultaneously applies that even for a collegiate administrative body such as the RRTV, the adoption of a resolution at a council meeting is not decisive, but it is only the delivery of a written counterpart of the decision to the party to the proceedings pursuant to Section 19 of the Rules of Administrative Procedure.[24]

Therefore, the relationship between the Council and the Council Office is fairly precisely described in case-law of administrative courts. There is no ignoring a certain tension with regard to the RRTV's position. On the one hand, the RRTV is an independent administrative authority placed outside the system of administrative authorities subjected to the government. This independence takes specific forms which makes the RRTV in some ways an extraordinary body—its representative mandate, the ban on giving instructions to a Council member, and the strict requirement for its members to performance their office in person. Its exclusive status has been justified by the constitutional and legal character of the matter on which the RRTV decides (restricting the freedom of speech). On the other hand, the element of professionalism has been highlighted as it is applied in relation to the parties to the proceedings (see below), which increases the requirements on the execution of state administration by the RRTV.

ii. Relation Between the Council and Parties to the Proceedings

The requirement for professionalism when exercising state administration is in particular applied in respect of the parties to the proceedings who are constitutionally guaranteed the fundamental right, by virtue of their procedural position, that the proceedings before the RRTV be held in accordance with the principles of a fair hearing. An analysis of the case-law

23 Judgment of the MC, 4th CP 946/09 of 11 January 2010.
24 Judgment of the SAC 7 As 11/2010-134 of 16 April 2010.

of the administrative courts shows that the procedural steps of the RRTV regularly lead to disputes between the RRTV and parties to the proceedings. In certain cases, arguments as to the procedural aspects even overshadow the core of the matter, ie, the issues of content regulation of the freedom of speech. It is worth emphasizing that the agenda of the extended panel of the SAC which has the powers to unite legal opinions within the SAC (see the next Point) consists almost entirely of procedural issues.[25]

First, there is the requirement for the reviewability of a decision or its reasoning. The Council must state both the reasons for its decision regarding both the accomplishment of elements of an administrative infringement and the sanctions imposed. In practice, the disputes between the RRTV and broadcasters have particularly focused on the way in which the RRTV interprets vague terms such as 'objective and balanced broadcasting', 'endangering the moral development of minors' or 'pornography'. It is not only about giving content to these vague terms but also about which administrative body is competent to decide on the content of these terms.

The Supreme Administrative Court states the following in connection with the term 'pornography':

> The Council for Radio and Television Broadcasting has the competence to define the content and extent of the vague legal term 'pornography' in its decision-making practice pursuant to Sections 32(1)e and 60(3)c of Act No 231/2001 Sb. (Coll.) on Radio and Television Broadcasting, and to clearly specify the criteria for distinguishing between a programme with erotic elements tolerated by law and pornography which is inadmissible in television broadcasting. When making this definition, the administrative body is given space for its own considerations which must be in conformity with Article 22(1) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (or Article 27(1) of Directive of the European Parliament and Council 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services), Articles 56 and 62 of the Treaty on the Functioning of the European Union, Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (No 209/1992 Sb. (Coll.)), and Article 17 of the Charter of Fundamental Rights and Freedoms, to focus on establishing a fair balance between the freedom of speech and free provision of services on the internal market of the European Union, and protection of the physical, mental and moral development of children and youth (minors) in connection with watching such television programmes.[26]

Thus, the SAC ascribes a key role, when giving content to this vague term, to the RRTV. The Council gives its own autonomous consideration to this term, and does not have to obtain the opinions of experts from other non-legal fields for this purpose.[27] The administrative courts then play something of a supervisory role, with the powers to assess whether a decision is reviewable:

25 An exception was indicated by the judicial reflection of the so-called *Kuřim* case where the proceedings were commenced before the extended panel, but ended without any judgment on the merits because it involved different cases which should be assessed by individual panels adjudicating on cassation appeals.

26 Judgment of the SAC 5 As 15/2011 of 29 March 2012.

27 And judgments of the SAC 6 As 14/2004 and 8 As 62/2005.

> Therefore, it is the task of the administrative body to interpret and construct the term 'pornography' used in the Broadcasting Act, and apply it in specific cases. By using this vague legal term, the legislator created space for the applicant to closely define this term in its administrative practice with regard to the specific circumstances of individual issues under assessment. But this does not mean the use of administrative consideration, which is a situation where an administrative body has the option of choice when applying a statutory provision with respect to multiple solutions prescribed by the law, but it means the interpretation and application of a vague legal term which accomplishes the element of an administrative infringement. However, the steps of the administrative body in the interpretation of a vague legal term are, to a certain extent, analogical to administrative considerations. First, the applicant must justify its decision including the interpretation of the term pornography in a proper and logical manner. According to the established case-law of the Supreme Administrative Court, the interpretation of a vague legal term made by the administrative body is subject to a court review. An administrative court primarily assesses whether the action established is sufficiently supported by the facts established, whether the administrative body correctly subordinated it under a vague legal term, whether the interpretation and application of the vague legal term by the administrative body is in conformity with the law and whether the administrative body's consideration is not at variance with logical principles. If the administrative body's decision lacks these attributes, it is not reviewable for a lack of reasons.

However, the SAC also determines its own content-related limits of the term 'pornography' when it says that

> the term 'pornography' pursuant to Sections 32(1)e 60(3)c of Act No 231/2001 Sb. (Coll.) on Radio and Television Broadcasting, cannot be on the one hand restricted only to programmes containing child pornography or pornography displaying violence, manifestations of disrespect to human beings, or a sexual intercourse with an animal, the broadcasting of which would be a criminal offence in the case of specific natural persons (now Sections 191 and 192 of the Criminal Code of 2009), but on the other hand it should not be such a wide category that would include programmes which can only endanger, but not seriously interfere with the physical, mental, or moral development of children and youth, and which can be broadcast at certain times or under certain conditions specified in Section 32(1)g of the Act on Radio and Television Broadcasting.[28]

The requirement for reviewability can also be applied in decisions on sanctions. The Council for Radio and Television Broadcasting imposes sanctions within the limit prescribed by law which can be up to several orders of magnitude, but the BA does not contain any more structured system of the facts of administrative infringements which would be internally differentiated by the type of their social harmfulness. For instance, the RRTV may impose a fine between 20,000 koruna and 10 million koruna for the breach of the broadcaster's obligations relating to the protection of children and youth. This is an extremely wide range. It endangers not only the broadcaster (who faces proceedings when an extraordinarily high sanction may be imposed for even less serious acts) but also is a burden for the RRTV because it demands that the part of the decision which assesses the amount of the fine be especially persuasive.

28 Judgment of the SAC 5 As 15/2011 (n 26).

iii. Self-Regulation

The power to impose sanctions for the breach of the obligations of the broadcaster is vested exclusively in the RRTV, which is an administrative body. The amendment to the BA (No 132/2010 Sb. (Coll.), which is part of the ODAMSA, institutionalised certain self-regulating mechanisms.

Pursuant to Section 5x of the BA, the

> Council shall cooperate within the range of its competence with Czech legal persons whose activities include self-regulation in any of the fields to which this Act or specific legislation apply, such self-regulation involving active participation of broadcasters, re-broadcasters or on-demand audiovisual media service providers (hereinafter referred to as self-regulatory bodies), provided that such cooperation is requested in writing by such a self-regulatory body, especially in developing effective self-regulatory systems and in implementing measures supporting media literacy; publish a list of the cooperating self-regulatory bodies (hereinafter referred to as list of self-regulatory bodies), using methods that facilitate remote access.

Pursuant to Section 61(3) of the BA, the RRTV has the obligation, when determining the amount of the sanction for breaching the BA, to consider the opinion of a relevant self-regulatory body held on the list of self-regulatory bodies, provided that such an opinion is received by the Council within 10 working days from the date of commencement of administrative offence proceedings.

Association of Television Organisations (Asociace televizních organizací, ATO)[29] is the self-regulatory body in television broadcasting. Its members include both state broadcasters (Czech Television) and some commercial broadcasters (FTV Prima). The Association has worked out its own Code of Ethics; it adopts standpoints on initiatives submitted by broadcasters and communicates with the RRTV.

The case-law of administrative courts still does not contain any support for the potential conclusion that any failure to take into account the opinion of a self-regulatory body or deviation from its opinion would render a decision on imposing a sanction illegitimate.

D. Other Proceedings Conducted by the Council for Radio and Television Broadcasting

In addition to the proceedings on imposing fines for administrative infringements, the RRTV conducts proceedings relating to market access. These include proceedings connected with licensing and registration (authorisation). In administrative proceedings, the RRTV decides on awarding and withdrawing licences and on permitting any amendments thereto. The proceedings on licences for analogue broadcasting[30] are characterised by a higher number of parties where a positive decision in favour of one party (ie, the granting of a licence) automatically has a negative impact on other parties, whose application is subsequently

29 www.ato.cz.

30 This agenda virtually concerns solely radio broadcasting after digitisation of television broadcasting.

dismissed. The licensing procedure is initiated by the RRTV or by the applicant for the licence with the announcement of the licensing procedure. The Council conducts joint licensing procedures on all applications submitted. The programme structure proposed by licence applicants is discussed during a public hearing (Section 16 of the BA).

The procedure for granting satellite and cable broadcasting licences and to broadcast via special transmission systems and to grant terrestrial digital radio licenses or licenses to broadcast television via transmitters is a standard administrative procedure in which the licence applicant is the only party. The former licensing procedure, which was a competition of several applicants for available frequencies, has now been abolished, as the previous limitation arising from the relative lack of broadcasting frequencies no longer applies. Since television broadcasting was digitised, the procedure has changed, and now only verifies whether the applicant meets the statutory requirements, in particular the requirement for the licence applicant not to have debts, and to be of good character.

The registration (authorisation) procedure is much easier as the RRTV only verifies whether or not the registration / authorisation application of the rebroadcaster meets the essential standards prescribed by law.

E. Breach of the Law Notice in the System of Administrative Sanctions

i. Statutory Provisions

The institute or concept of the *notice of a breach of the law* is defined in Part VII of the BA which lays down the *sanction provisions*. However, it is marginal from the perspective of legal theory whether this is a sanction in the strict sense of the word at all. This is apparent from Section 59 of the BA alone because this concept is entitled *Corrective Action*. This means that it stresses the preventive rather than repressive nature of such notices. Section 59 of the BA reads as follows:

> (1) If a broadcaster or rebroadcaster breaches any obligations set out herein or any conditions stipulated in the licence granted to such a broadcaster or rebroadcaster, the Council shall warn such a (re) broadcaster of the breach and shall grant such a (re)broadcaster a grace period to take corrective action.
> (2) The length of the grace period for corrective action as referred to in the preceding paragraph shall be adequate to the nature of the obligation so breached.
> (3) If corrective action is taken within the prescribed period, the Council shall not impose any penalty.
> (4) Provisions of Paragraphs 1–3 above shall not apply if the broadcaster or rebroadcaster breaches the obligations referred to in Sections 32(1)c, d, and e, Section 63(1), and Section 64(1) in a particularly serious manner.

ii. General Characteristics of the Concept

This is a highly specific concept in the context of the Czech system of administrative sanctions, and it can basically be found only in the media law. In our opinion, this unique character is one of the reasons why its application has been connected with significant difficulties

in interpretation, accompanied by argumentation conflicts between the broadcasters and the RRTV. The case-law of the SAC has been fairly ambivalent in the long term, which is apparent from the fact that the extended panel of the SAC has been repeatedly activated to unify the different opinions of the individual three-member panels of the SAC (judgments of the SAC 8 As 85/2012 and 6 As 26/2010). The interpretation difficulties have been even further intensified by the fact that the provision in question is a result of the initiative of an MP (it was not part of the government bill), ie, it was not accompanied by an explanatory memorandum during the legislative process (as noted by the sixth panel of the SAC in its Resolution 6 As 26/2010-66 of 17 March 2011).

No matter how strongly the area of television broadcasting is harmonised with the EU legislation, the concept of the breach of a law notice is not based on the EU legislation. It is a purely Czech invention whose conformity with the EU law has even been subject to extensive debates (see below).

According to the statutory provision on the breach of the law notice, it is a result of administrative activities of the RRTV. Specifically, it is an individual administrative act resulting from the decision-making process of an administrative authority on specific rights or interests of a specific broadcaster protected by law (for general information on the concept of an individual administrative act).[31] However, this is not an administrative act with the form of an administrative decision issued during an administrative procedure.

The breach of a law notice is not a sanction in the strict sense of the word, and is not even a moral sanction. In this sense, it is different from the general concept of an *admonition* which is a type of sanction regulated by the Act on Administrative Infringements. The admonition is basically a 'legally fixed means of moral compulsion'.[32] A notice as such is not regarded as a sanction by the case-law of administrative courts because by itself it does not lead to any legal consequences for the addressee.

> The Supreme Administrative Court believes that the meaning behind Section 59 of the Broadcasting Act is undoubtedly to ensure that a broadcaster is not sanctioned for delict acts of which it was not aware. Generally speaking, this concept embodies the preventive function of administrative sanctions. The legislator gives space for a voluntary corrective action of the broadcaster's wrongful acts. The law does not specify the character of the 'notice' (or warning) nor does it determine to what extent such notice should be specified. According to the Supreme Administrative Court, the 'notice' must be in such cases perceived in the material sense of the word, ie, as a delivery of information on the broadcaster's violation of the statutory duties and the risk of sanctions' (judgment of the Supreme Administrative Court 6 As 20/2008 of 22 January 2009).

The notice (as well as admonition) contains a strong element of prevention which does not, however, reach the level of moral compulsion (unlike admonition). The Council for Radio and Television Broadcasting is basically obliged (except for cases specified in Section 59(3) of the BA) to notify (warn) the broadcaster of a breach of the law at first and to provide a grace period for corrective actions, and then only impose a sanction if no corrective action is taken. The necessity of the existence of the prior notice constitutes a strong motivation for the broadcasters

31 See, P Průcha, *Správní právo – obecná část* (Brno, Doplněk, 2012) 278–81.
32 ibid, 400.

to seek a judicial review of the notice at two levels, viz, whether the notice was issued in accordance with the law (ie, whether the broadcaster breached the law at all), and whether the notice is relevant with respect to the acts for which the broadcaster has been sanctioned.

iii. Judicial Reviewability of the Notice

The older case-law of administrative courts clearly shows that the breach of the law notice is not judicially reviewable as such. In its judgment 8 Ca 212/2008 of 4 September 2008, the MC arrived at the conclusion that it is impossible to lodge a separate action against the notice, not even pursuant to Section 65 of the Code of Administrative Justice because it is not a decision, and not even pursuant to Section 82 of the Code of Administrative Justice because it is not an interference, instruction or compulsion (enforcement). In the reasons given for the cited judgment, the MC states, referring to Section 75(2), second sentence of the Code of Administrative Justice, that the lawfulness of the notice may be subject to a review in a subsequent procedure on a monetary sanction imposed by the RRTV because only the awarded penalty constitutes an interference in the broadcaster's legal sphere. If the notice is not followed by a sanction imposed for a repeated breach of the same legal duty of the broadcaster, the notice alone has no consequences for the broadcaster according to the MC.

In its judgment of 6 August 2009 (6 As 46/2008), the SAC agreed with the findings of the MC.

> Therefore, the contested notice does not have the character of a judicially reviewable administrative decision and is not even interference within the meaning of Section 82 of the Code of Administrative Justice. Pursuant to Section 82 of the Code of Administrative Justice, only such a wrongful act is subject to an administrative complaint which is directed against the complainant or as a result of which direct interference was made against the complainant if such interference or its consequences persist or if there is a risk that it will be repeated. Interference means an unlawful attack by an authority on the complainant's rights and such an attack as such cannot be the expression (result) of the due decision-making powers of such authorities and must be beyond the usual review or another procedure. . . . Hence, interference means a factual act, not a written notice or communication prepared by administrative authorities.

The Supreme Administrative Court therefore refers the broadcaster seeking a judicial review of the lawfulness of the breach of the law notice to later proceedings, in the course of which an administrative court will review the decision to impose a fine, where the RRTV will infer performance of its notification duty from the notice whose lawfulness the broadcaster intends to challenge. The court will review the lawfulness of the previous notice of violation of the law when reviewing the lawfulness of the decision imposing the fine.

In its judgment 4 As 17/2008-119 of 17 September 2008, the SAC took a stand almost immediately after the judgment of the MC (8 Ca 212/2008-61), stating that 'the lawfulness of a previous notice cannot be additionally challenged in a procedure regarding an appeal against a later decision with which the Council imposed a sanction on the broadcaster.' According to the SAC, the 'notice is a product of an absolutely separate procedure independent of the procedure where the sanction was imposed.' Thus, the fourth panel of the SAC expressly ruled out any review of the notice as a foundation for the later decision imposing the sanction

(mentioned by the sixth panel). This controversy in the legal opinion of the sixth and fourth panels of the SAC has not been unambiguously resolved to date.

iv. Applicability of Previous Notice—Summary of Case-Law Development

The case-law relating to the conditions which must be fulfilled for a specific breach of the law notice to be used as evidence of the fulfilment of the condition to impose a sanction pursuant to Section 59(3) of the BA has evolved quite considerably.

The older case-law of the SAC shows that a breach of the law notice need not necessarily be connected with identical facts relating to the broadcaster's acts. With one-time violations (typically the broadcasting of a programme unit violating the BA), it would in practice mean that such violations would not be punishable if the broadcaster did not repeat the programme whose unsoundness had been previously stressed by the RRTV. Thus the issue does not concern identical facts but identical legal qualifications.

However, this opinion represents the opposite extreme because the function of the previous notice would be exhausted at the moment when the broadcaster for the first time accomplishes certain elements of an administrative infringement (delict) pursuant to the BA, and any other breaches of the same duty would result in a sanction.

Such boundless effects of the notice were later corrected by the SAC which stated that the notice of the breach of the law should be objective and to the point and must have a time relation to the acts for which a fine is to be imposed:

> the notification duty pursuant to Section 59(1) of the Broadcasting Act is rather connected with the breach of the statutory duty than with a specific fact. It is up to the judicial review to determine whether the administrative authority (defendant) did not depart from the limits of the prior notification duty, ie, whether the relation between the notice and the specific sanctioned fact is not too 'subtle' or whether there is any at all. The Supreme Administrative Court does not believe that it would be possible to articulate a specific temporal (or even material) border beyond which there is no connection between the notice and the fact. (Judgment of the SAC 6 As 20/2008 of 22 January 2009; the SAC took the same stand in its judgments of 14 May 2008 (6 As 43/2007-90), of 15 May 2008 (6 As 70/2007-104), and of 30 May 2008 (4 As 35/2007-120).)

In its judgment 3 As 12/2010 of 10 November 2010, the third panel of the SAC adopted a different legal standpoint when it noted:

> If the broadcaster failed to perform the duty imposed by Section 48(4)a of Act No 231/2001 Sb. (Coll.) on Radio and Television Broadcasting, and committed a delict by broadcasting a sponsored message which was subsequently assessed by the Council for Radio and Television Broadcasting as advertising, it is necessary for the accomplishment of the purpose of Section 59(1) of the cited act that the broadcaster be notified of the breach of its duty in any such event prior to imposition of a sanction pursuant to Section 60(1)l of Act No 231/2001 Sb. (Coll.) even though otherwise the precedential notice is sufficient.

The reasons provided for this decision show that the third panel of the SAC was well aware of the current case-law of the SAC under which a precedential notice was sufficient.

The third panel expressly quotes judgments 6 As 21/2007 of 14 May 2008, 4 As 35/2007 of 30 May 2008, 6 As 30/2008 of 22 January 2009, 6 As 20/2008 of 22 January 2009, and 6 As 17/2009 of 10 February 2010. The third panel knowingly did not submit the case to an extended panel because it noted that the facts of the dispute were of such a character that the case under assessment could be distinguished from the cases where the SAC had issued decisions in the past. This difference consisted in the character of the duty violated by the broadcaster or in the manner of construction of the facts of an administrative infringement pursuant to Section 48(4) of the BA:

> While in the previous cases referred to above, the administrative infringement mostly concerned aspects specified in Section 32(1)g of Act No 231/2001 Sb. (Coll.), ie, the broadcasting of a programme unit which could endanger the physical, mental, or moral development of children and young people (with the type of programmes such as *VyVolení*, *Big Brother*, etc.) and the Council assessed the infringement so-to-speak 'in one step' (ie, the programme could/could not endanger the development of children and young people), the Council will at first, in the heard case, assess it as a prejudicial issue whether the stated sponsored message is or is not advertising within the meaning of Section 2(1)n of Act No 231/2001 Sb. (Coll.), and only if it concludes that it is advertising, it may decide that this advert (from the material perspective) was not appropriately separated from other parts of the programme.
>
> Thus, it may be presumed in the case of violations of Section 32(1)g of Act No 231/2001 Sb. (Coll.) that the broadcaster was aware of (potential) unsoundness of the broadcast programme for the development of children and young people (minors), and the previous notice made in relation to another fact can therefore be assessed as sufficient for accomplishing the purpose of Section 59(1) of Act No 231/2001 Sb. (Coll.) as interpreted above. However, if Section 48(4)a of Act No 231/2001 Sb. (Coll.) was violated through the broadcasting of a sponsored message, such a presumption is impossible because the broadcaster cannot reliably foresee the manner in which the Council will assess the sponsored message in question, ie, if it agrees with its designation as sponsoring or if it qualifies it as advertising. It is precisely this 'two-step' character of the decision on liability for an infringement pursuant to Section 48(4)a of Act No 231/2001 Sb. (Coll.) committed through the broadcasting of a sponsored message that made the Supreme Administrative Court note that it is necessary to accomplish the purpose of Section 59(1) of Act No 231/2001 Sb. (Coll.) that the broadcaster is always notified (warned) of the breach of the duty enshrined in Section 48(4)a of Act No 231/2001 Sb. (Coll.), ie, always in relation to each specific sponsored message. A sanction may then be imposed only if the broadcaster fails to abandon the broadcasting of the sponsored message despite being notified that the Council assesses such message as advertising.

This means that the third panel of the SAC did not argue with the legal opinion of the sixth panel of the SAC but only concluded that a different legal assessment is necessary in relation to the specific facts of an administrative infringement.

However, the sixth panel disputed the legal opinion of the third panel described above, which came to the conclusion that it may even be marginal in many cases to assess the issue of whether the broadcasting of a certain programme unit cannot pose a risk for the proper mental, physical, or moral development of minors. On the other hand, the criteria under which it is possible to distinguish a sponsored message from advertising are sufficiently specified in the case-law of the SAC, so the sixth panel did not find any reason why the sanctioning of

non-separated advertising should be subject to different rules than the sanctioning of other infringements of broadcasters (see the resolution referring the case to the extended panel, 6 As 26/2010-66 of 17 March 2011). The sixth panel branded the arguments used by the third panel as being at variance with the EU legislation because it would result in a situation where breaching the ban on non-separated advertising would not always be effectively and efficiently sanctioned.

v. Legal Opinion of Extended Panel of the Supreme Administrative Court

In its Resolution 6 As 26/2010-101 of 3 April 2014, the extended panel carried out a comprehensive analysis of the concept of the notice of the breach of the law in the context of constitutional principles on which the legal regulation of radio and television broadcasting is based. According to the extended panel, supervision of the execution of radio and television broadcasting also includes

> supervision over the broadcasting content, ie, activities aimed at supervision to ensure that broadcasters avoid broadcasting content which is prohibited by the law. It must be noted that the Council here supervises an extraordinarily sensitive area affecting the crucial fundamental rights and freedoms of individuals and certain crucial values protected by the Constitution, primarily the freedom of expression, as well as privacy, family life, good name protection, etc. (Paragraph 26)

Issues covered by EU legislation were not neglected by the extended panel either. According to the SAC, EU legislation establishes certain *substantive limits of the freedom of expression* (specifically Directive of the European Parliament and of the Council 89/552/EEC of 3 October 1989 as amended by Directive of the European Parliament and of the Council of 30 June 1997, and Directive of the European Parliament and of the Council 2007/65/EC of 11 December 2007 and replaced by Directive of the European Parliament and of the Council 2007/65/ES of 11 December 2007). According to the SAC, procedural issues, rules of administrative sanctioning and other issues not regulated by these directives are to be resolved by the Member States. According to the extended panel, the Council's duty to first notify the broadcaster of violation of the law is not at variance with EU legislation.

> The interpretation of the limitation of the freedom of expression conforming to the Constitution must therefore be primarily based on the fact that there must always be a constitutionally legitimate reason for any specific limitation which reflects the reasons strictly defined pursuant to Article 17(4) of the Charter and that the given limitation is, in particular as to its content, extent and intensity, proportionate to the law or the constitutional value protected by it. (Paragraph 27).

Using the provisions of Section 59(4) of the BA, the SAC also distinguished simple breaches of the BA from qualified breaches (as specified in Section 59(4) of the BA) because the legislator clearly determined that as for simple breaches, only a breach of the law which continues despite the broadcaster being notified thereof should be sanctioned:

> According to the laws of the Czech Republic, the general conditions of liability for an administrative infringement related to television broadcasting also includes a condition (related to less serious

> cases) that liability for an administrative infringement in television broadcasting is established only after the offender is given prior notice (warning) of the wrongful act.
> It is at the legislator's discretion to categorise violations of duties pursuant to the Broadcasting Act into two categories and to sanction only 'qualified' breaches without the prior rectification attempt; and furthermore, this regulation corresponds to the character, importance, and conditions of possible limitations of the fundamental right which is mostly affected by this regulation (freedom of expression or speech). With this regulation [in addition to 'licence discipline' as defined in the facts of Sections 63(1)a, 63(1)c, and 64(1)a of the Broadcasting Act], the legislator made it clear that the administrative sanction imposed by the regulator (financial and non-financial sanction, as the case may be) for non-permitted application of the freedom of expression is possible without the prior provision allowing for a corrective action only in cases where other important rights guaranteed by the Constitution or values protected by the Constitution are so seriously affected (and also repeatedly) that such a severe intervention in the freedom of expression is justified even without the prior application of more moderate means. The facts defined in Sections 32(1)c, 32(1)d, and 32(1)e as well as in Sections 63(1) b and 64(1)b of the Broadcasting Act concern abuses of the freedom of expression which contravene the most fundamental constitutional principles, use grossly unfair methods of affecting the viewer or listener or can seriously deprave the development of minors, ie, commonly more vulnerable individuals. With 'simple' breaches of duties pursuant to the Broadcasting Act, the legislator concluded that a corrective action must be attempted first and only if it fails, should sanctions be imposed.

Using this basis, the SAC concluded that the precedential notice (ie, notice connected with the breached legal duty and not directly with the specific acts of the broadcaster) will be sufficient to meet the condition of the existence of the previous notice, but for the notice to perform the intended preventive function, its text must clearly state the specific violation of the law. On the one hand, the SAC (in agreement with its current case-law) reiterated the opinion that it was not permissible that the broadcaster's wrongful acts not be punishable unless they are repeated, but on the other hand, the Court warned against a too restrictive approach:

> A too restrictive approach would risk the preliminary self-censorship of broadcasters fearing the regulator's sanctions, ie, it would be at variance with the ban on censorship pursuant to Article 17(3) of the Charter. For instance, if a notice that erotic scenes [which should not be confused with the broadcasting of pornography which can be sanctioned without prior notice if certain other conditions are met under Section 32(1)e of the Broadcasting Act in combination with Section 59(4)] broadcast in a specific film between 6 am and 10 pm could deprave the physical, mental, or moral development of minors (eg, for being too explicit) should apply to any other erotic scenes in other similar films, the broadcaster, fearing a sanction for breaching the duties pursuant to Section 32(1) e of the Broadcasting Act, could be too self-restrictive. As a result, the broadcaster could limit creative freedom in an undesirable manner because even the restriction of access to creative works of a certain character (here those containing erotic scenes) on the market, also including television broadcasting, is also a limitation, even though indirect.

Therefore, the extended panel of the SAC came to the conclusion that the

> notice pursuant to Section 59(1) of Act No 231/2001 Sb. (Coll.), the Broadcasting Act, must contain sufficiently specific description of the broadcaster's acts and which duties have been breached and it

> must give a specific time limit for a corrective action. Except for cases specified in Section 59(4) of the Broadcasting Act, a prior notice pursuant to Section 59(1) of the Broadcasting Act is a necessary precondition of sanctions imposed for any similar acts. Only if the broadcaster receives such a notice may it be sanctioned for repeated acts displaying material elements of the acts of whose unlawfulness it has been notified.

The said decision of the extended panel of the SAC shows that the interpretation of the terms 'similar acts' and 'repeated acts displaying material elements of the acts of whose unlawfulness it has been notified' is crucial here. However, the extended panel's decision does not give any clear answer to the disputed issue.

vi. Reflection on the Extended Panel's Legal Opinion in the Current Case-Law of the Supreme Administrative Court

The situation remains ambiguous even after the decision issued by the extended panel of the SAC. Individual panels also had different opinions on how to apply the findings of the extended panel. The eighth panel noted that the RRTV should always issue a breach of the law notice, even if any further sanction is basically ruled out (one-time breaches):

> In accordance with the resolution of the extended panel of 3 April 2012 (6 As 26/2010-101), the Council for Radio and Television Broadcasting has the right to impose a fine for the violation of Section 31 of Act No 231/2001 Sb. (Coll.), Broadcasting Act, only following a prior notice of wrongful acts which are, in all material respects, similar to the acts for which a sanction should be imposed, even though in relation to news programmes, this interpretation leads to the denial of the meaning of the cited provision, and it will normally be impossible for the Council to perform its duty to first notify the broadcaster of the unsoundness of a news programme, considering that news reports are typically broadcast only once. (Judgment of Supreme Administrative Court 8 As 18/2011 of 30 May 2012).

The eighth panel based its opinion on the reasons contained in the decision of the extended panel, referring to the clear wording of Section 59 of the BA which orders the RRTV to issue a notice regardless of whether or not the character of the duty breached by the broadcaster admitted a corrective action at all (typically one-time reports). The eighth panel reached the same conclusion in other decisions (8 As 73/2010 of 30 May 2012, 8 As 78/2010 of 30 May 2012 and 8 As 26/2012 of 18 June 2012).

On the other hand, the sixth panel inferred from the decision of the extended panel that a precedential notice was sufficient to perform the notification duty when it noted in its judgment 6 As 26/2010 of 30 May 2012 that the notification duty had also been performed in a situation where the RRTV had notified the broadcaster of a violation of the law which was, in material respects, similar to acts for which the RRTV had been imposing a sanction. The sixth panel reached the same conclusion in its other decisions (6 As 1/2012 of 30 May 2012, 6 As 24/2011 of 14 June 2012, and 6 As 25/2011 of 27 June 2012).

In quick succession, the extended panel of the SAC was activated and noted in its Resolution 8 As 85/2012 of 14 July 2014 that the

> notice issued by the Council for Radio and Television Broadcasting pursuant to Section 59(1) of Act No 231/2001 Sb. (Coll.), the Broadcasting Act, is a qualified foundation for imposing a sanction for any subsequent breaches of the broadcaster's duties laid down by this law or of the licence conditions if it contains similar facts which would, on a subsequent occasion, constitute the same elements of an administrative infringement as were present in the fact of whose unlawfulness the broadcaster was notified.

In this decision, the extended panel reiterated that

> the primary purpose of a notice is preventive. Therefore, the notice must be perceived in the material sense of the word, ie, as the delivery of information that the broadcaster has breached a duty laid down by the law in a certain specific manner and that the broadcaster faces sanctions for any repeated breaches of this duty.

The decision described above states the requirements to be satisfied in a specific notice of the breach of the law so it can be used as a foundation for any future establishment as to whether or not the broadcaster has been notified of the violation of the law in a relevant manner:

> The Council must always perform a careful ad hoc assessment as to whether the relation between the notice and the specific sanctioned facts is too 'subtle' or whether there is any relation at all. Considering the highly variable and little standardised content of television and radio broadcasting, it is impossible to determine the border where there is any such relation and where it is insufficient for all cases in general. This is why the notice in which the Council urges the broadcaster to a corrective action must always sufficiently and specifically and irreplaceably describe the character of the broadcaster's wrongful acts and identify those specific elements of it which make the Council conclude that a certain duty under the Broadcasting Act has been breached. The notice must also contain reviewable considerations of which duty has been breached by the broadcaster.

The constitutional conformity of the interpretation of Section 59 of the BA has already been reviewed by the CC. In its judgments I. ÚS 671/13 of 29 July 2013 and I. ÚS 1408/09 of 25 November 2009, the CC expressly noted that it found the legal conclusions of the SAC to be convincing and to be in conformity with the Constitution.

vii. Breach of the Law Notice Viewed with the Broadcaster's Eyes

Broadcasters alone regard the issuance of the breach of the law notice as an infringement of their rights. The fact that the RRTV publishes a press release that it will notify a certain broadcaster of violation of the law is perceived as a certain harm to their reputation. This is also why the broadcasters want to have an option to express their view prior to the issuance of the breach of the law notice as they do in the case of a procedure on imposing a sanction. However, the concept of the breach of the law notice is generally perceived as an effective tool of the RRTV's preventive influence.[33] It plays an important role in the specification of value

33 Kubina, Presentation (n 9).

concepts used by the BA in the provisions regulating the broadcasting content. However, the difficulties of interpretation connected with a specific solution contained in the BA are an apparent minus. They have resulted in many RRTV decisions having to be cancelled for procedural reasons without the courts dealing with the content aspects of the case at all.

V. The Judicial System with Special Reference to Electronic Media Regulation

A. The System of Administrative Courts

The judicial review of administrative decisions issued by the Council for Radio and Television Broadcasting in the Czech Republic is undertaken by specialised panels of normal courts of general jurisdiction. No independent administrative courts have been established for this purpose. In the first instance, the lawfulness of the acts made by state administration bodies is reviewed by regional courts. The Metropolitan Court in Prague is the court competent to review the decisions adopted by the RRTV (its jurisdiction is determined by the place of the registered office of the RRTV, ie, Prague).

The decisions of the MC regarding actions against the decisions of the RRTV are further reviewed by the SAC which is, unlike the Metropolitan Court, a fully specialised court in the administrative judiciary.

Only individual constitutional complaints determined by the CC are admissible against the judgments issued by the SAC. The Constitutional Court is set apart from the usual system of general courts, and is not competent to review the lawfulness and correctness of decisions issued by general courts. In procedures on constitutional complaints, the CC examines whether the decision of a general court violated the claimant's fundamental rights guaranteed by the Constitution.

Relatively strong interventions of the CC in the decisions adopted by the RRTV or by courts of general jurisdiction can be expected in the regulation of radio and television broadcasting since these decisions by definition concern interventions in the broadcaster's freedom of expression, which is subject to constitutional protection. However, as we can see in the analysed decisions issued in individual areas under study, the CC interferes with the decision-making practice of general courts only in rare cases and if it does so, such interventions are done rather for procedural reasons where the CC notes a violation of the fundamental right to a fair hearing guaranteed by the Constitution. It is also worth mentioning that in the monitored period, the CC did not issue a single decision noting the violation of freedom of expression (see below).

B. Types of Judicial Procedures

Judicial reviews of the lawfulness of the execution of state administration are governed by a separate procedural regulation contained in Act No 150/2002 Sb. (Coll.), the Code of Administrative Justice. The rules regulate three types of action that are available to the parties to a procedure before an administrative body if they believe that they have been

negatively affected by the unlawful execution of public administration. The action against an administrative decision[34] is the most common type used in practice to seek judicial protection by anyone who claims that their rights have been prejudiced directly or due to the violation of their rights in the proceeding by an act of the administrative authority whereby the person's rights, or obligations are created, changed, nullified or bindingly determined.

An administrative decision is reviewed in the full jurisdiction, which means that the court reviewing the administrative decision has the right to review even the facts of the case (not only its legal aspect) and is thus not bound by the facts of the case as established by the administrative body. The administrative court has the right to produce evidence in the procedure on an action and reassess the facts established by the administrative body. However, the court issues its decisions on the basis of the facts and the legal situation existing at the time of the decision-making of the administrative body.[35] In an action against the decision, the claimant may seek that the court nullify the contested decision issued by the administrative authority. Hence, the court is not entitled to amend the contested decision of the administrative body. However, the administrative body to which the case is referred back for further proceedings after the cancellation of the contested decision is bound by the court's legal opinion.[36]

The procedure on the decision against an administrative decision is bound by the disposition principle. The court deals with the accuracy and lawfulness of the contested decision with respect to the counts applied by the claimant within two months of the date on which the contested decision is delivered. Therefore, the counts of the action largely predetermine the judgment reviewing the decision of the administrative body. The court is not entitled to deal with the aspects of the contested decision which are not challenged in the action even if the court does not agree with the contested decision.

This approach to the judicial review of the contested decision, focusing solely on the review of the reasons for unlawfulness stated by the claimant, consequently enables that even objectively unlawful decisions or decisions suffering from faults for which another decision was annulled can hold up in the judicial review. The requirement regarding professionalism of broadcasters is accentuated in the area under study because it is up to the broadcasters to identify all of the reasons for unlawfulness of a decision issued by the RRTV in a potential action.

At the same time, the said aspect must also be considered when assessing the unity and consistency of judicial decisions. Differences in individual court decisions regarding cases with similar facts and legal aspects do not have to be the result of what in a negative assessment would be defined as the ambivalent judicial practice but of the different definition of the counts of an action. In our opinion, such diversity cannot be viewed *a priori* negatively because it does not indicate any dysfunction of the system of judicial review of administrative decisions. We believe that the ideal aim is not to have absolutely consistent decision-making but to create opportunities to seek an effective judicial protection-free decision.

Actions against administrative decisions are a means of protection against all decisions issued by the RRTV including the decisions imposing sanctions. Such actions comprise a clear majority of the court agenda regarding the regulation of radio and television broadcasting.

34 Section 65 of the Code of Administrative Justice (CAJ).
35 Section 75(1) of the CAJ.
36 Section 78(5) of the CAJ.

Actions against unlawful interference are another type of action offered to broadcasters by the Code of Administrative Justice.[37] An action against unlawful interference may be used to seek judicial protection by anyone who claims that he or she has been directly prejudiced in their rights by unlawful interference, instruction or enforcement (hereinafter 'interference') from an administrative authority which is not a decision and was aimed directly against the person or as a consequence of it the person was directly acted against.

Hence, an action against unlawful interference is applied to seek protection against interferences of public bodies which are not decisions (which can be contested by an action against decision, see above) but which directly prejudice the claimant's rights. The action against unlawful interference was used by broadcasters to seek judicial review regarding the notification of a violation of the law which the RRTV is authorised to issue if it establishes that the *broadcaster breached the obligations set out by law or any conditions stipulated by the licence granted.* The Council also sets a grace period to take corrective action.[38]

The notification of the violation of the law has no immediate negative consequences for the broadcaster since it does not constitute any obligation, nor does it reduce the broadcaster's rights. For this reason, the SAC (and also the MC) steadily issues decisions that the notification of the violation of the law is not an administrative decision within the meaning of Section 65 of the Code of Administrative Justice, and it is therefore impossible to sue for its cancellation. However, the notification of the violation of the law is also not a legally insignificant act because the existence of a prior notification is a condition for imposing sanctions for repeated violations of one and the same obligation. Therefore, broadcasters have a legitimate and strongly manifested interest in seeking either the cancellation of the notification of the violation of the law by the court or that the court note that the notification was unlawful thus obliging the RRTV not to consider the notification in its subsequent administrative activities.

The current practice of national courts is predetermined by a conclusion made by the MC under which

> the notification of the Council for Television and Radio Broadcasting regarding the violation of the law pursuant to Section 59 of Act No 231/2001 Sb. (Coll.) (the Broadcasting Act) cannot be separately contested by an action pursuant to the Code of Administrative Justice, not even pursuant to Section 65 of the Code of Administrative Justice (because it is not an administrative decision) or Section 82 of the Code of Administrative Justice (because it is not an intervention, instruction or enforcement).[39]

The correctness of this opinion of the MC was acknowledged by the SAC.[40] The Supreme Administrative Court reiterated similar conclusions in the monitored period in its judgment 6 Aps 3/2012 of 29 August 2012 where it summarised its own previous decisions, and insisted on the conclusion that the notification of the violation of the law was not separately reviewable. These conclusions of the SAC were also accepted by the CC (Resolution IV ÚS 1720/11 of 2 August 2011).

37 Section 82 ff of the CAJ.
38 Section 59(1) of the BA.
39 Judgment of the MC, 8 Ca 212/2008 of 4 September 2008.
40 Judgment of the SAC, 6 As 46/2008 of 6 August 2009.

However, the MC also opened a way for the lawfulness of a prior notification of the violation of the law to be reviewed in a procedure focusing on the judicial review of a RRTV decision imposing a penalty, which considered the existence of this notification of the violation of the law as the fulfilment of the previous notification duty of the RRTV: 'Since this is an act undertaken within a sanction procedure, only the procedure specified in Section 75(2), second sentence of the Code of Administrative Justice may be used as a defence, ie, in the procedure on an action against the decision imposing sanctions.'[41]

However, this conclusion was disputed in a judgment of the SAC (4 As 17/2008 of 17 September 2008), which found that the lawfulness of the notification cannot be reviewed in the procedure on imposing sanctions and regarding another fact. The said judgment has yet to be displaced by another legal opinion. However, the arguments used in judgment 6 Aps 3/2012 cited above indicates that there is apparently room for the correction of this legal opinion because the sixth panel *obiter dictum*

> expresses the opinion that (as is also indicated by the recent case-law of the SAC) the notifications of the violation of the law are reviewable in court within the meaning of Section 75(2) of the Code of Administrative Justice in combination with the decision for which they were used as a basis. However, the sixth panel of the SAC does not regard it as necessary to submit the case for assessment to an extended panel of the SAC because this opinion is expressed only 'obiter dictum' without the impact on the substantive assessment of the cassation appeal.

Therefore, the notification of the violation of the law is not reviewable even on the basis of an action against an unlawful decision (Section 65 of the Code of Administrative Justice) or action against unlawful interference (Section 82 of the Code of Administrative Justice).

C. Remedies—Cassation Appeal

The cassation appeal is a remedial measure against a judgment issued by the MC. The cassation appeal is considered and determined by the SAC. In the Code of Justice, the cassation appeal is intended as an extraordinary remedial measure which is admissible solely in the case of a different assessment of a legal issue dealt with by a regional court (here the MC). The cassation appeal may be lodged within two weeks of the delivery of the judgment of the MC. The cassation appeal may be lodged either by the broadcaster (claimant) or by the RRTV (defendant).

As is apparent from its denomination, *the cassation appeal,* the SAC could originally only revoke the judgment of the regional court contested by the cassation appeal and refer the case back for further proceedings (cassation principle) or dismiss the cassation appeal. However, effective from 1 January 2012 (amendment to the Code of Administrative Justice 303/2011 Sb.), the SAC has the right to cancel both the judgment issued by the regional court (the MC) and the decision of the administrative body contested by the action.[42] The cassation appeal is always dealt with by a panel of three judges. The agenda assignment is governed by the work plan.

41 Judgment of the MC, 8 Ca 212/2008.
42 Section 110(2) of the CAJ.

D. Consistency of the Case-Law of Administrative Courts

The consistency of the case-law of administrative courts (not only in the monitored area) is ensured by an institutionalised mechanism of case-law unification at the level of the SAC. Under Section 17 of the Code of Administrative Justice, if a panel of the Supreme Administrative Court has in its decision-making arrived at a legal opinion that is different from the legal opinion expressed in a previous decision of the Supreme Administrative Court, it will refer the case to an extended panel for a decision. When referring the case, the panel must justify its different legal opinion.

The provision cited above constitutes a very strong precedential binding effect of decisions of the SAC because if a Supreme Administrative Court panel wants to depart from the previously expressed opinion of the SAC, it cannot do so without initiating a procedure aimed at unifying the case-law of the SAC. The effectiveness of this mechanism is reinforced by the fact that it is a directly enforceable right of parties to the judicial proceedings because if this duty is not respected, the CC notes the violation of the right to a lawful judge, as guaranteed by the Constitution.[43] Hence, it is not a matter of the arbitrariness of the three-member panel which decides on the cassation appeal if the case is submitted to the extended panel.

Case-law unification through the proceedings before the extended panel was initially a tool of communication between individual panels of the SAC. It is also interesting to note that even individual judges often perceive the proceedings before the extended panel as an argumentation fight between individual panels and as a matter of prestige.[44]

At the end of the 2010s, this procedure was opened to the parties to the proceedings who thus have the option to participate in the process of case-law unification.[45] The process of case-law unification also increases the effectiveness of argumentation using the older case-law of the SAC. Although the legal system of the Czech Republic is not based on binding precedents, the case-law of supreme courts has gained in importance because the panel of the SAC deciding on a cassation appeal cannot ignore a different legal opinion expressed in an older decision of the SAC or reject it by noting that it is not bound by it. The panel of three judges is indeed not bound by this opinion, but if it arrives at a different opinion, it should not do so on its own but refer the case to the extended panel. The three-member panel is then bound by the decision of the extended panel. However, it can initiate a procedure before the extended panel on a repeated basis if it concludes that there are arguments which were neglected in the previous decision.

Not even regional courts (including the MC) deciding on administrative actions against decisions of administrative bodies are formally bound by the decisions of the extended panel. However, they are obliged to bear in mind the conclusions contained in the decision of the extended panel (and in any other decision of the SAC) in the reasons for their decision. If they do not do so, it is highly probable that their decision will be overturned by the SAC.

43 Judgments of the CC IV. ÚS 613/06 of 18 April 2007, IV. ÚS 2170/08 of 12 May 2009, or IV. ÚS 738/09 of 11 September 2009.

44 Personal interview with Filip Rigel, Assistant to the President of the SAC panel, and member of the extended panel, as well as leading expert in the administrative judiciary.

45 M Bobek and Z Kühn Zdeněk (ed), *Judikatura a právní argumentace* (2nd edn, Prague, Auditorium, 2013) 128; O Moravec, 'Sjednocování judikatury pohledem účastníka řízení – řízení před rozšířeným senátem Nejvyššího správního soudu' *Jurisprudence* 6 (2008) 11.

However, the regional court must endeavour to persuade the SAC with its arguments about the correctness of its opinion despite the older and different view of the SAC.

Therefore, the unification procedure is quite frequently used in practice. In the area under study, it has been applied in the followed cases:

The interpretation and construction of the concept of *showing, without justification,* persons exposed to severe physical or mental suffering in a manner detrimental to human dignity	7 As 2/2010 of 26 July 2011	Referred back without a meritorious decision (the issue must be assessed by a three-member panel)
Requirements as to the notification of the violation of the law	6 As 26/2010 of 3 April 2012	No absolute and clear conclusion
The duty of the RRTV to produce evidence by showing the programme	7 As 57/2010 of 3 April 2012	Departure from the prevailing case-law (the panel submitting the case was allowed)
The start of the time limit for imposing sanctions	7 As 95/2011 of 25 June 2013	Referred back without a meritorious decision (the alleged conflict in the case-law of the SAC has been removed);
Effects of the notification of the violation of the law	8 As 85/2012 of 14 June 2014	The current practice of the SAC was acknowledged
Requirements for an administrative decision	8 As 141/2012 of 14 June 2015	Departure from the prevailing case-law (the panel submitting the case was allowed)

The above table shows that all of the cases (but one: Resolution 7 As 2/2010 of 26 July 2011) involved procedural issues having no immediate relation to the exercise of freedom of expression. The only case relating to a meritorious issue was referred back without any response of the extended panel with the justification that every broadcast programme must be assessed on an individual basis. Therefore, it seems (and we have to consider the limited number of cases) that the issues relating directly to the content of radio and television broadcasting do not depend on the interpretation of individual legal provisions but rather on the need to assess each case on an individual basis.

In the resolution of the extended panel (7 As 2/2010 of 26 July 2011) which was intended to deal with the different views of the seventh and eighth panels, the SAC stated that

> on the one hand, both panels applied the meaning of the freedom of expression as one of the fundamental political freedoms, and recognized the irreplaceable role of the media in a democratic society, but on the other hand, they also considered the option to limit this freedom in extraordinary cases even if it collides with other fundamental rights, in this case the right to human dignity. Hence, both panels applied the same test based particularly on the case-law of the ECtHR relating to Article 10 of the Convention to assess the admissibility of a specific limitation of freedom of expression. Therefore, both panels examined whether or not the specific facts relating to Czech Television on the one hand, and to CET 21 spol. s r.o. on the other hand involved the limitation of freedom of expression which is necessary in a democratic society, ie, whether this limitation was based on an urgent social need, whether it was adequate to the goal pursued, and whether the reasons given for this limitation were relevant and sufficient. When balancing thefreedom of expression with the protection of human dignity when showing dying persons or persons exposed to severe physical or mental suffering, both panels focused on the statutory condition under which the broadcasting of such images may be limited only if such broadcasting is without justification.
> Therefore, the seventh and eighth panels do not have different legal opinions as to the evaluation of the specific facts in the case of Czech Television and CET 21 spol. s r. o. The only difference is

in their final conclusion (Ref No 7 As 2/2010-118) resulting from the evaluation of these specific facts. While the eighth panel assessed the specific acts of CET 21 spol. Section r. o. as constituting all the elements of an administrative infringement according to Section 60(1)a of the Broadcasting Act, the seventh panel believes that Czech Television did not commit any infringement by its acts.

This means that it is meta-legal factors that come into focus rather than the methods of interpretation of the law, in particular the value system of specific judges and their philosophical and world-view ideas. Although the mechanism of unification of the case-law of the SAC through the extended panel is to a certain extent limited, it clearly becomes a tool contributing to the internal consistency of the case-law of the SAC and administrative courts in general. The case-law also becomes more foreseeable for the parties to the proceedings, and more effective with respect to exercising judicial powers.

E. Intervention of the Constitutional Court in the Decision-Making of Administrative Courts

In the legal environment of the Czech Republic, the CC stands out as a specialised judicial body having the exclusive power to review the conformity of the acts of public bodies with the constitutional order. The Constitutional Court has the authority to examine both the constitutional conformity of the generally binding provisions (laws) and the acts of the application of the law in individual cases (court decisions). Both natural and legal persons have the right to submit a complaint to the CC if they believe that a decision taken by a state body has violated their individual rights and freedoms guaranteed by the Constitution.

In the Czech Republic, freedom of expression is protected by the Charter of Fundamental Rights and Freedoms (Article 17):

(1) The freedom of expression and the right to information are guaranteed.
(2) Everyone has the right to express his/her opinion in speech, in writing, in the press, in pictures, or in any other form, as well as freely to seek, receive, and disseminate ideas and information irrespective of the frontiers of the State.
(3) Censorship is not permitted.
(4) The freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures necessary in a democratic society for protecting the rights and freedoms of others, security of the State, public security, public health, and morals.
(5) State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information on their activities. Conditions therefore and the implementation thereof shall be provided for by law.

The constitutional protection of freedom of expression opens up a fairly wide space for the intervention of the CC in the case-law of general courts because any imposition of a fine for an administrative infringement committed through the content of television broadcasting is basically an intervention in freedom of expression.

However, despite the information provided above, the CC intervenes in the decision-making practice of administrative courts in rare cases only. Only one obliging judgment was

reported in the monitored period in which the CC annulled a previous decision of the SAC. The Constitutional Court's judgment I. ÚS 671/13 of 29 July 2013 annulled the judgment of the SAC when it concluded that the SAC had violated the claimant's right to a fair hearing when it had failed to deal with the claimant's objection that the claimant's procedural rights had been prejudiced by the RRTV which had not ordered an oral hearing. According to the CC, the SAC was incorrect in not considering the claimant's objection that the members of the RRTV had not watched the recording of the programme in question justifying it with a statement that the objection had not been submitted within the limit for lodging an action.

The Constitutional Court agreed with the claimant that this objection had been part of a more general objection that an oral hearing had not been ordered in the administrative procedure.

> If the claimant objected against the absence of an oral hearing in a procedure before an administrative body, and stated in this respect that such an oral hearing had been ordered in previous similar proceedings where the claimant could comment on individual criticised violations, it does not mean that it would not be able to later successfully claim within this objection that such an oral hearing should have contained due production of evidence as understood by the case-law of the Supreme Administrative Court or its extended panel. The opposite procedure must then be regarded as a strictly formalistic approach interfering with the procedural rights of a party to an administrative procedure.

This means that not even the CC (and not even the claimant in the constitutional complaint) used freedom of expression as an argument in this case.

In addition to the judgment cited above, the official database of decisions of the CC[46] contains one dismissing judgment relating to the granting of licences in connection with the digitisation of television broadcasting,[47] and ten more resolutions in which the CC rejects constitutional complaints regarding the content of television broadcasting due to apparent groundlessness.

The case-law of administrative courts and the administrative practice of the RRTV in the monitored period were also significantly influenced by a series of decisions relating to the Act on Advertising (No 40/1995 Sb.). In its judgment IV. ÚS 946/09 of 11 January 2010, the CC interpreted the provision regulating the start of the time limit within which the RRTV has the right to impose a sanction. The Constitutional Court reiterated this opinion in five other judgments issued during the course of 2010. The Supreme Administrative Court subsequently accepted the CC's legal opinion even in the proceedings regarding administrative infringements pursuant to the BA (judgment of the SAC 7 As 11/2010 of 16 April 2010, 6 As 15/2011 of 27 July 2011, and the Resolution of the extended panel 7 As 95/2011 of 25 June 2013).

Since the CC had to face constitutional complaints against the judgments of the SAC relating to radio and television broadcasting in the monitored period and as it did not correct the opinion of the SAC in any of these cases from the perspective of freedom of expression, we can assume that the CC does not feel the need to intervene and that it regards the protection of the broadcasters' freedom of expression provided by the general courts to be sufficient.

It should be noted that the SAC often uses constitutional argumentation in its key decisions (see the individual case studies), in particular in the decisions issued by the extended panel.

46 http://nalus.usoud.cz.

47 Judgment Pl. ÚS 8/09 of 30 October 2012.

It does so even where it does not decide on the merits of a case (7 As 2/2010 cited above) or where it decides on procedural issues (see the detailed argumentation in Resolution 6 As 26/2010).

F. Application of the Case-Law of the European Court of Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms[48] has recently gained in importance, namely the application of the case-law of the ECtHR. Although this case-law does not represent any formally binding source of law in the Czech Republic (unlike the Convention), national courts must take it into account in their decision-making, ie, they must consider the conclusions contained in the ECtHR decisions.[49]

Article 10 of the Convention becomes a source of law in the Czech Republic via Article 10 of the Constitution of the Czech Republic:

1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.
2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The case-law of the CC (judgment I. ÚS 310/05 of 15 November 2006) shows that national courts must consider not only the wording of the Convention but also specific decisions issued by the ECtHR:

> The immediate applicability of international agreements also includes the duty of Czech courts and other public bodies to take into their considerations the interpretation of these agreements by the respective international tribunals as the bodies authoritatively designated to comment on the interpretation of international agreements. This naturally applies also to the interpretation of the European Convention by the European Court of Human Rights (ECtHR) where the relevance of the ECtHR decisions in the Czech law is of constitutional quality. . . .
>
> For the reasons specified above, public bodies have a general obligation to take into account the ECtHR interpretation of the European Convention. The European Court of Human Rights decisions are important interpretation guidance for the application of the Convention. Public bodies, in particular courts, are therefore obligated to consider the ECtHR case-law both in the cases against the Czech Republic and in the cases relating to another party to the Convention (state) if such cases are by nature important for the interpretation of the Convention in the context of the Czech Republic. This especially applies to the situations where this case-law is used as an argument

48 Published in the *Collection of Laws* under No 209/1992 Sb. (Coll.).

49 For details, see, Bobek and Kühn, *Judikatura* (n 45) 307–33.

by a party to the proceedings before a Czech court of general jurisdiction. If the general court does not express its view of this argumentation, it commits an error which may consequently result in the violation of the fundamental right to judicial protection pursuant to Article 36(1) of the Charter, Article 6(1) of the European Convention or the respective fundamental right of the Convention concerned. In all cases, Article 1(2) of the Constitution is also affected.

It follows from the above that in situations where the ECtHR case-law is used as an argument by the party to the proceedings, the court must duly take into account this argumentation. Not only the CC, but also general courts are obliged to take the ECtHR case-law into consideration. Reviewing the case-law of the SAC (see other chapters), it is apparent that arguments using the ECtHR case-law are frequently used in the decisions of the SAC.

VI. Protection of Human Dignity

A. Legal Provision—Section 32(1)f of the Act on Radio and Television Broadcasting

According to Section 32(1)f of the Act on Radio and Television Broadcasting, the broadcaster must *avoid showing, without justification, dying people, or people exposed to severe physical or mental suffering, doing so in a manner detrimental to human dignity.*

Breaches of this obligation are classed as an administrative infringement for which the broadcaster may face a fine ranging between 5,000 and 2.5 million koruna (Section 60(1)a of the Act on Radio and Television Broadcasting).

B. Statistics

Confirmed Total	Confirmed	Reversed total	Reversed
1	33 per cent	2	67 per cent

Note: During the reported period, the MC issued only three decisions on a judicial review of the RRTV's decision for breaches of Section 32(1)f of the BA.

C. Answers to Research Questions

Human dignity is the crucial value in determining the decision-making practice of administrative courts. In addition, the courts also consider freedom of expression and the right of the public to receive information. Freedom of expression is given preference where the violation of the principle of human dignity is not without justification, ie, the representation of human suffering and erosion of human dignity must be legitimised by the fulfilment of a higher goal. Thus, in this case, freedom of expression is not protected *per se,* but has rather an instrumental character. Hence, the right of the public to complete and true information has the strongest impact.

This legal situation is determined by the legal and political decision of the legislator, which gives broadcasters the option to publish even scenes showing dying persons or persons exposed to suffering detrimental to human dignity. Nonetheless, such representation must not be without justification. It may be concluded from the analysed case-law of the SAC that to show a dying person or a person exposed to severe physical suffering is not without justification in the event that the information of this type is necessary to provide true information about an event and its context (causes, consequences, accompanying events, etc.). This may include extreme information or information beyond the scope of normal representation or in extraordinary situations. The manner of representation must not be detrimental to human dignity, ie, it should endeavour to protect it as much as possible in the light of the nature of the broadcast information.[50] Also, it must be emphasised that the protection of human dignity is not exhausted by the powers and competences of the RRTV. On the contrary, the core of this value's protection is in private law where the person affected may seek judicial protection in an action for the protection of personal rights. The decision-making powers are vested in courts.

The number of court decisions does not make it possible to draw a valid conclusion regarding the consistency of the decision-making practice. Nonetheless, even the low number of cases demonstrates the existence of plurality of opinions resulting from the character of the case and the legislative technique applied. From a theoretical perspective, the term 'avoid showing, without justification' used in Section 32(1)f of the BA in an ambiguous concept whose content must be essentially drawn from the application practice.[51] Assessments as to whether the dying persons or persons exposed to severe physical or mental suffering in a manner detrimental to human dignity were shown without justification, or whether there were legitimate reasons for such representation depend on the specific facts of the given case without the possibility to determine general rules. The test of proportionality generally used by the CC of the Czech Republic to resolve a conflict of two fundamental rights or a fundamental right and the right of a protected value may be an appropriate tool to resolve the collision between freedom of expression and the right to the protection of human dignity of the persons shown.[52]

Although the number of cases heard in court is very low, there was a clash of opinions between two panels of the SAC. Both panels dealt with the broadcasting of information of an extremely serious case of child abuse by close relatives (the so-called *Kuřim* case). However, each panel dealt with different reports by different broadcasters. The extended panel addressed by the seventh panel of the SAC concluded that it was not competent to resolve this clash of opinions because each panel dealt with a different case (report), and because the different opinion on whether or not the given report *showed* persons exposed to severe suffering in a manner that is detrimental to human dignity *without justification* was a natural consequence of this fact. One positive point worth emphasising is that a unification procedure was developed to resolve the inconsistency which proved to be a functional tool inhibiting any

50 For details, see the judgment of the SAC.

51 For details on this issue, see, P Mates, *Správní uvážení: analogie, neurčité pojmy a uvážená ve správním právu* (Pilsen, Aleš Čeněk, 2014) 56 ff.

52 For details, see, P Ondřejek, *Princip proporcionality a jeho role při interpretaci základních práv a svobod* (Prague, Leges, 2012); P Holländer, *Filosofie práva* (2nd edn, Pilsen, Aleš Čeněk, 2012); D Kosař, 'Kolize základních práv v judicature Ústavního soudu ČR' *Jurisprudence* 1 (2008) 3–19.

arbitrary departure from the previously expressed legal opinion of the SAC. However, the limits of this mechanism also became evident. It is clear, then, that the individual assessment of the case depends not only on legal argumentation but also on the values adopted by the judge resolving the specific case.[53]

This also evidences the existence of interaction between individual panels of the SAC. The seventh panel which was the second to decide was aware of the existence of the previous decision issued by the eighth panel, and even if it did not agree with its standpoints, it felt it was necessary to settle its arguments and the panel submitted the cases for assessment to the extended panel in the end.

International and supranational sources of law were used as a tool to deal with the conflict between the broadcaster's freedom of expression and the right to the protection of dignity of the person affected. The Supreme Administrative Court acts within the limits created by the case-law of the ECtHR. In this respect, it primarily used the general rules under which freedom of expression can be limited within the meaning of the case-law of the ECtHR. There are no references to sources in the EU law.

D. General Trends

From the quantitative perspective, this area does not represent the core of the agenda of the RRTV. The protection of human dignity is secured by the statutory ban on *showing, without justification, dying persons or persons exposed to severe physical or mental suffering in a manner detrimental to human dignity.* Therefore, the facts of the administrative infringement protect only a particular part of the complex and wide concept of human dignity—the law expressly prohibits that broadcasters benefit from the suffering of others. Human dignity is also indirectly protected by the statutory ban on including pornographic content in broadcasting (Section 32(1)e of the BA).

The analysed case-law of administrative court is not sufficient to develop a coherent doctrine. In addition to the core of the matter (which sometimes stays in the background), administrative courts focus their attention rather on formal and procedural matters. They were forced to deal, in greater detail, with the issue of the actual reviewability of the RRTV's administrative decisions or with the issue of the point when the broadcaster's liability for the infringement ceases to exist.

In particular, the decisions of the SAC regarding the *Kuřim* case strongly accentuate the interest in the protection of human dignity of persons whose suffering is shown. In one of its decisions, the SAC expressly rejected the broadcaster's opinion that the RRTV was not competent to protect the right to privacy, which should be applied instead in civil judicial proceedings. However, the SAC does not have a unified view of this issue. Another panel of the SAC finds it necessary to differentiate the protection of the general public interest from the interests of private individuals. The sign of internal inconsistency of the case-law of the SAC was the subject of the proceedings before an extended panel which, however, concluded that this was about the assessment of specific cases with specific facts, and so it was up to the individual three-member panels to assess which of the fundamental rights in collision should be preferred.

53 Here the research will be complemented by an interview with SAC Judges.

Not even academic legal sources are in agreement on this issue. Kateřina Šimáčková (formerly a SAC Judge, now a CC Judge, and has taught constitutional law at the Law Faculty of Masaryk University in Brno for many years) holds the view that even the administrative judiciary must take these rights into account, and that they must be given adequate protection, in particular if it concerns persons who cannot defend themselves (typically children as it was in the *Kuřim* case or in the case of bullying in *Veselí nad Veličkou*).[54] On the other hand, the author of this report has, in the past, pointed to the risks connected with the procedure proposed by Šimáčková—the procedure before the RRTV (or even before administrative courts) does not resolve the procedural position of the injured person whose rights have been defended, without giving the option to this person to take part in the procedure. There is also a risk of 'usurpation of the RRTV's controlling power', which is related to the manner of its appointment.[55]

However, regardless of this controversy, it is undisputable that Section 32(1)f of the BA provides protection of human dignity of persons shown in broadcasting. The interest in the protection of human dignity collides with the broadcaster's freedom of expression and if the scenes are broadcast without justification, the protection of human dignity must be preferred to freedom of expression.

The analysed case-law indicates that the interest of the audience or the right of the public to information regarding matters of rightful public interest may also be the decisive factor. The interest of the audience is weighed on both sides of the balance. If the public interest is served by true and accurate news, we cannot speak of the representation of a person exposed to suffering without justification even if it is detrimental to human dignity (cf the above-cited judgment of the SAC, 7 As 2/2010). On the other hand, if it is in the interest of the audience that they not be exposed to certain scenes (in particular if the case simultaneously regards the protection of minors), the broadcaster's freedom of expression is eclipsed (cf the above-cited judgment of the SAC, 6 As 3/2011).

E. Case Studies

i. Kuřim Case—Czech Television and TV Nova

- Report on Czech Television's programme, *Events,* 10 January 2008 at 7 pm;
- Fine of 100,000 koruna;
- judgment of the MC of 2 June 2009, Ref No 10 Ca 312/2008-36; action dismissed;
- judgment of the SAC of 9 September 2011, 7 As 2/2010-126, judgment of the MC;
- judgment of the MC of 22 November 2011, A 318/20111-141-151.

The subject matter of the procedure involved a report broadcast on the main news programme of the public television. The report focused on the *Kuřim* case. This concerned an unprecedented case of the abuse of small boys by close relatives (their mother and her sister). When revealed, the case received extraordinary attention in the media of all types.

54 K Šimáčková, 'Voyeurismus ve veřejném zájmu. Televizní zpravodajství a ochrana soukromí dětí a madistvých' V Šimíček (ed), *Právo na soukromí* (Brno, Masarykova univerzita, 2011) 158–67.

55 Moravec, *Mediální právo* (n 7).

The Council for Radio and Television Broadcasting imposed a fine of 100,000 koruna on Czech Television. In the reasons of its administrative decision, the RRTV found that the scenes showing the abused boy were included in the report without justification: 'The party to the proceeding abused the footage showing the boy at the moment of his suffering as a tool to draw the attention of viewers to a specific programme even though it did not actually have anything to do with his case. This repeated, redundant and absolutely purposeful presentation expresses the absence of respect for a specific human being.' The Council insisted on its opinion even during the judicial proceeding stating that 'the footage in question had no informative value for the content of the reports concerned' because the report did not focus on the abuse as such but on the capture of one of the accomplices.

The Supreme Administrative Court dealt with the case on the basis of the cassation appeal lodged by the broadcaster (judgment 7 As 2/2010-126 of 9 September 2011) in a situation where another panel of the SAC considered a similar case shortly before, and dismissed the television broadcaster's cassation appeal in the judgment 8 As 33/2010-128 of 13 April 2010. The eighth panel of the SAC (judgment 8 As 33/2010-128 of 13 April 2010) dismissed the cassation appeal lodged by a private broadcaster against the judgment issued by the MC under which the action brought against the administrative decision of the RRTV was dismissed.

According to the SAC, 'one of the basic obligations of a broadcaster is to avoid showing dying persons or persons exposed to severe physical or mental suffering in a manner that is detrimental to human dignity.' According to the Court, this is a legitimate limitation of freedom of expression or the right to information guaranteed by Article 17 of the Charter and Article 19 of the International Covenant on Civil and Political Rights or Article 10 of the ECHR. The Supreme Administrative Court also pointed to the fact that the said obligation

> represents the settlement of the conflict between freedom of speech and everyone's fundamental right to maintain human dignity guaranteed in the Czech Republic by Article 10(1) of the Charter. Should the representation of a person exposed to severe physical or mental suffering in a manner detrimental to human dignity be without justification, the legislator made it clear in the Broadcasting Act that it legitimately preferred the provision of the right to maintain human dignity.

As far as the concept 'without justification' is concerned, the SAC stated that

> as the Metropolitan Court rightly held, the justification for broadcasting sensitive scenes cannot be based on the consideration of the broadcaster alone. Indeed, the concept 'without justification' must be assessed strictly objectively. The inclusion of sensitive scenes in a broadcast can be justified in particular in cases where, if not broadcast, they would exclude or significantly limit the informative value of a programme.

Specifically, the SAC agreed with the opinion of the MC which concluded that it was no longer necessary to include the scenes presenting the abuse in the broadcast again to inform the public about one of the persons involved in the child abuse case.

The Supreme Administrative Court did not agree with the broadcaster's objection that the protection of the personal rights of the persons affected should be secured by private law pursuant to the Civil Code and not through the means of administrative sanctions. The Supreme Administrative Court noted that 'the Supreme Administrative Court did not have any doubts regarding the legitimacy of the public regulation of unjustified broadcasting of scenes showing

persons exposed to severe physical or mental suffering in a manner detrimental to human dignity alongside their private law regulation.' Consequently, the SAC noted that 'any broadcasting of such scenes, without justification, is not covered by freedom of expression, which in this specific case should be subordinate to the fundamental right to maintaining human dignity.'

In the proceedings regarding the cassation appeal lodged by Czech Television, the seventh panel arrived at another conclusion than the eighth panel. Pursuant to Section 17 of the Rules of Administrative Procedure, the seventh panel submitted the case for assessment to an extended panel which, however, concluded (in the resolution 7 As 2/2010-113 of 26 July 2011) that it should be the seventh panel alone which should issue a decision on the disputed issue. The Supreme Administrative Court did not find that the individual panels had different opinions on a general legal issue. The difference was in the assessment of specific facts, which were different in each proceeding and which should be assessed by the panel deciding on the specific cassation appeal. The extended panel also pointed to the fact that the seventh and eighth panels based their decisions on a similar constitutional test of the collision of two fundamental rights and considered the same procedures and that they shared the same view of how the case-law of the ECtHR relating to Article 10 of the Convention should be reflected.

Hence, the eighth panel of the SAC concluded that the nature of the event reported by the media must be considered in order to assess whether or not it was *without justification*. If it is an extreme and extraordinary event and of an unexpected nature, the broadcaster is given greater space to properly present the extremeness and extraordinariness of the situation. The Supreme Administrative Court also used a comparison between a normal traffic accident (which happen normally and are part of normal life) and the 11 September 2001 attack on the World Trade Center in New York, which was an absolutely extraordinary and extreme situation whose coverage required the use of extraordinary scenes.

> Such presentations are necessary to depict the extreme, unique, extraordinary, horrifying, and tragic nature of the reported event. Without publication, the information on this event would have been significantly distorted because, if the event were true, the extraordinary frightfulness of the said event must be represented. Without this drastic information content, the situation could be disparaged or mitigated compared to what really happened.

Therefore, the eighth panel of the SAC annulled the decision of the MC which dismissed the action brought by Czech Television against the decision issued by the RRTV. Consequently, the Metropolitan Court cancelled the decision contested by the action in its judgment of 22 November 2011.

ii. The Most Amazing Videos of the World

The Council for Radio and Television Broadcasting imposed a 400,000 koruna fine on a broadcaster for having broadcast the programme *The Most Amazing Videos of the World II* which reportedly contained

> drastic, detailed, repeated, and long-lasting scenes from real events which, without justification, show primarily severe physical suffering of people in a manner detrimental to human dignity, and which can endanger the mental development of minors, which represented a violation of the

> obligation to avoid showing, without justification, dying persons or persons exposed to physical or mental suffering in a manner detrimental to human dignity.

The broadcast constituted two elements of an administrative infringement (also including the protection of minors).

The Metropolitan Court in Prague which dealt with the broadcaster's action (judgments 10A 5/2010-63 of 22 April 2010 and 10A 5/2010-152-160 of 13 December 2010) considered the issue of the protection of human dignity when establishing whether scenes *showing, without justification, persons exposed to physical or mental suffering detrimental to human dignity* had been broadcast. Therefore, it initially dealt with the protection of the human dignity of the persons whose suffering was presented. The protection of human dignity collides with the broadcaster's freedom of expression and the right of viewers to receive information on matters of legitimate public interest.

The broadcaster's defence included (among other things) the objection that the programme showed the biological essence of a man and that the scenes broadcast were not much different from the situations one could encounter in normal life (eg, during traffic accidents). The Metropolitan Court in Prague agreed with the RRTV's conclusions, but did not provide any detailed reasoning. The Supreme Administrative Court criticised this insufficient reasoning and thus annulled the first judgment of the MC (in its judgment 6 As 3/2011-119 of 15 December 2012) and referred the case back to another procedure. The second decision of the MC (of similar content, 10A 5/2010-152-160 of 13 December 2010) was accepted by the SAC.

The administrative courts did not deal with the broadcaster's freedom of expression or the content of the right of the public to information in detail. There are absolutely no references to the case-law of the ECtHR or the Court of Justice of the European Union, nor was the previous case-law of national courts applied. It follows from the summary parts of the court decisions that the claimant had not included these aspects in the procedure at all.

iii. Bullying in Velká nad Veličkou

- Report on the *Events* programme about bullying in *Velká nad Veličkou*;
- Czech Television (ČT 1);
- fine of 100,000 koruna;
- judgment of the MC, 6 A 41/2011-140 of 6 September 2011;
- administrative decision annulled; no cassation appeal was lodged.

The Council for Radio and Television Broadcasting imposed a 100,000 koruna fine on Czech Television for a report dealing with bullying in the municipality of *Velká nad Veličkou*. The report contained naturalistic presentations of a boy who had faced drastic physical and verbal attacks eroding his human dignity. The broadcaster defocused the presentations of the boy, and the report contained statements by the boy's grandmother. The Council for Radio and Television Broadcasting arrived at the conclusion that the presentations of the humiliated boy had been an end in itself, ie, they were aired without justification.

In an administrative action, the broadcaster objected that the report had to be broadcast in this version because it had been necessary to capture a true picture of the degree of suffering to which the bullied boy had been exposed.

The Metropolitan Court in Prague concluded that the RRTV's administrative decision was not reviewable. Its reasons make it impossible to determine whether or not there had been actual reasons for broadcasting the report in this form. The Council for Radio and Television Broadcasting must deal with the broadcaster's individual objections in more detail.

Although the administrative decision was cancelled rather for formal reasons (without the Court taking its own stance as to whether the presentations in question were included in the report without justification or not), nonetheless, one can conclude from the Court's reasoning that the RRTV should, in its decision-making practice, deal with the weight and nature of the reasons for *showing physical and mental suffering in a manner detrimental to human dignity* in more detail. It may be presumed that if the broadcaster's reasons are found to be relevant and sufficient, the broadcaster's liability for the administrative infringement is excluded. It can also be assumed that the viewer's interest in receiving complete and true information must be taken into account because it was a news programme.

The human and legal argumentation and references to the existing case-law are not included in the decision, which is attributable to the fact that the administrative decision was cancelled due to lack of reviewability. Should there be any review on the merits, a parallel to the *Kuřim* case would suggest itself.

VII. Balanced Coverage

A. Legal Basis

The broadcaster's obligation to provide objective and balanced information is enshrined in Sections 31(2) and 31(3) of Act No 231/2001 Sb. (Coll.), on Radio and Television Broadcasting. Under this provision,

(1) a broadcaster shall provide objective and balanced information necessary for opinions to be freely formed; any opinions or evaluating commentaries shall be separated from information with the nature of news;

(2) broadcaster shall ensure that the principles of objectivity and balance are complied with in news and political programme units and that, in particular, no one-sided advantage is—within the broadcast programme as a whole—given to any political party or movement, or to their views, or to the views of any groups of the public, taking account of their real position within the political and social life of the country.

B. Statistics

Confirmed Total	Confirmed	Reversed total	Reversed
2	11 per cent	16	89 per cent

The statistics relate to the system of judicial review. Only unique cases are included, ie, the repeated decisions of the RRTV which were cancelled by the administrative court, while cases that were returned for further proceedings are not counted. The time period includes all cases

resolved by the MC during the period under consideration. However, no distinction has been drawn as to whether the MC dealt with the case prior to the period under consideration. The figures do not reflect the cases resolved by the MC prior to the period under consideration but where the SAC issued a final judgment; the findings of the SAC are reflected in the discussion below.

A cancelled (vacated) decision is a decision which was not upheld in the judicial review, and where it is irrelevant whether it was cancelled by the MC or the SAC.

C. Detailed Information

The Metropolitan Court in Prague has annulled eleven out of 18 unique decisions of the RRTV. The Council has lodged a cassation appeal in four cases, two of which were successful, and the SAC referred the case back to another procedure. The Council decision was annulled in the end in one of these cases and the case was referred back to another procedure whereas the MC has not issued any verdict in the other case yet.

The broadcaster challenged six out of seven dismissing judgments of the MC with a cassation appeal. The decision of the MC was annulled in three cases which were referred back to another procedure within which the MC, bound by the legal opinion of the SAC, cancelled the challenged decision. In two other cases, the SAC used its power to vacate the decision of the MC as well as the challenged decision. The broadcaster's cassation appeal was dismissed in one case. The decision of the RRTV was upheld in two out of eighteen reported cases.

D. Answers to Research Questions

Freedom of expression (speech) undoubtedly represents a very strong value whose importance has been highlighted in particular by the case-law of the SAC. Freedom of expression is applied both as an active component—the broadcaster's freedom of expression; and as a passive component—the right of the public to information regarding matters of general public interest.[56] This dimension of freedom of expression (the right of the public to information) can also be applied on the other scale pan because the public interest in the broadcasting of true, accurate and complete information is one of the reasons constituting the statutory broadcaster's obligation to provide objective and balanced information.

The wording of the BA does not clearly state which specific interests and values should be protected by the obligation to provide objective and balanced information. 'The concepts "objective and balanced information" are ambiguous legal concepts. The content of an ambiguous legal concept is so variable that it cannot be clearly and satisfactorily formulated with simple linguistic means in all potential situations. Its content must always be re-discovered and re-formulated considering all facts and acts.'[57] In its older decisions, the SAC concludes that

56 ibid, 30.

57 Pouperová, *Regulace médií* (n 1) 191.

> an ambiguous legal concept includes phenomena or facts which cannot be absolutely defined in terms of law. Their content and scope can vary, eg, depending on the time and place where a statutory provision is applied. Thus, the legislator provides space for the administrative body to assess whether or not a specific case can be subordinated to the ambiguous legal concept. . . . The ambiguous legal concept and its scope must be explained first, and only then can the evaluation as to whether the facts of a specific concept can be included in the framework created by the ambiguous legal concept be made.[58]

According to the SAC, the components of objectivity include truthfulness and accuracy, completeness and the unbiasedness of information.[59] It follows from the analysed decisions of administrative courts issued in the reported period that the RRTV has also worked with this definition of the concept of '*objective and balanced'* in its decisions.

The decisions of administrative courts issued in the reported period define the concepts of 'objective and balanced' using the knowledge of the theory of mass communication and media studies. The Supreme Administrative Court established that the key aspects of objectivity included *correctness* (accuracy of information), *transparency* (reference to sources), and *relevance* (absence of the journalist's own evaluation). Imbalance then means *a hidden form of party adherence where certain opinions are suppressed in a certain controversial situation to the benefit of the opinions of others.* The analysed decisions document that the SAC is determined to require that this interpretation be respected by the RRTV. Paradoxically enough, the definition of these concepts based on the knowledge of media and communication studies was brought by the judgments of the SAC and not by the RRTV decisions. The Council acts rather as a standard administrative authority than a regulator of discussion on matters of general public interest. There are virtually no political cases. This raises the question of whether there is any point in the RRTV's independence from the government.

The case-law of the SAC has not determined yet what the object of the administrative infringement is. According to the theory of law, the object of an administrative infringement is a social relation or legal value protected by a standard of criminal law.[60] Determination of an individual object (ie, a specific social relation, interest, or legal value whose protection is defined by the respective statutory provision) is important for the correct qualification of the facts.[61] It also enables the correct assessment of the degree of social harmfulness of an act because it corresponds to the degree to which the object of the administrative infringement has been affected. Considering the broadcaster's obligation to provide objective and balanced information, it is also appropriate to clarify whether it is the information value (especially in news) that is the object of quality or whether it is the democratic arrangement of the political system which is the object of protection.

The objects of protection should not include the personality rights of persons affected by the broadcast information. The persons affected may seek judicial protection by means of a civil action for personality protection or publication of a reply in the event that the

58 Judgment of the SAC, 4 As 81/2006-108.
59 Judgment of the SAC, 5 As 11/2007-63 of 20 December 2007.
60 H Prášková, *Základy odpovědnosti za správní delikty* (Prague, CH Beck, 2013) 233–37.
61 ibid, 236.

broadcast contained an announcement affecting the honour, dignity or privacy of a certain individual or the good name or reputation of a certain legal entity (Section 35 et seq of the BA). Even the SAC points to the mutual irreplaceability of these institutes. It is also worth mentioning that on the other hand, the representatives of broadcasters point out that the administrative proceeding before the RRTV creates in certain cases another line for the provision of protection of personality rights of the persons affected.[62]

Hence, the broadcaster's freedom of expression is protected if it is not expressed at variance with the interests of the addressees of the announcement. However, the protectionist approach is applied only moderately. The success rate of the RRTV when defending its decisions before administrative courts is very low.

When dealing with the collision between the broadcaster's freedom of expression and the public interest protected by the legal obligation to provide objective and balanced information, we need to consider the specific facts of each case. Hence, the method of *ad hoc balancing* is applied. The Council for Radio and Television Broadcasting and administrative courts respectively must examine in each and individual case whether the administrative sanction imposed can interfere with the broadcaster's freedom of expression.

The reasoning accompanying the judgments of the SAC displays a certain plurality of values, or the different value-based views of individual panels. However, this plurality is not to the detriment of the case-law consistency, which is reflected by the fact that individual panels mutually refer to their previous decisions.

The panels use the arguments from the case-law of the CC and the ECtHR to a relatively high degree, compared to in other areas. However, these arguments tend to be illustrative in nature, which is attributable to the fact that the ECtHR deals with administrative regulation only marginally. The Supreme Administrative Court expressly rejected the application of the case-law developed in relation to private-law disputes to the public-law area.

E. Tendencies and Trends

The case-law of the SAC in the monitored area is based on relatively intensive protection of freedom of expression. Both its active component (the broadcaster's freedom of expression) and its passive component (the right of the public to information) are considered. The Supreme Administrative Court has gradually clarified in its case-law the ambiguous concepts 'objectivity and balance', also considering the question of whether the given programme unit is a journalistic or news programme, which is essential for filling these concepts with a certain meaning. In its considerations, the SAC uses knowledge from the theory of mass communication or media, in particularly when determining the expectations imposed on the media (see the so-called normative theory of the media). The Supreme Administrative Court regards accuracy, transparency, and relevance as the key news-related values.

The Council for Radio and Television Broadcasting does not separately sanction any failure to adhere to the statutory requirement to separate news coverage and journalistic reporting programmes (or news and commentaries), but according to the case-law of the SAC, the

62 Kubina, Presentation (n 9).

position of the broadcaster which erodes the differences between these genres worsens in any potential judicial proceedings. The Supreme Administrative Court has expressly held that freedom of expression cannot be regarded as a *carte blanche* for broadcasters to provide any information. More leeway is given in print journalism where the SAC does not require compliance with the requirement for relevance. In contrast, a broadcaster can violate its obligations regarding news values solely by including an evaluating commentary without it being an excess related to freedom of expression (see judgment 7 As 36/2012).

The case-law of the SAC emphasises that public regulation should not serve to protect the personality rights of the persons affected. Public protection pursues the public interest, highlighting the interest of the audience (see the news values formulated by the SAC) which may in some cases be in a symbiotic relationship with the broadcaster's freedom of expression (plurality of information) while in other cases, it may be in conflict with freedom of expression (protection of the public against manipulation). The principles of a legally consistent state and the protection of an individual (the liberal component of the legally consistent state) are linked to the principles of democracy (the concerns about the manipulative effects of the media formulated by Vladimír Čermák).

Concerning the method of resolving the conflict between freedom of expression and news values, the SAC refers to the need to *examine the fulfilment of the requirement for the necessity of restricting freedom of speech in each and every specific case.*

F. Case Studies

i. 168 hodin—Church Restitutions

- Broadcaster: Czech Television;
- programme: *168 hodin*;
- judgment of the SAC (7 As 23/2010) of 5 May 2010.

On 4 May 2008, Czech Television aired its journalistic reporting programme, *168 hours,* which contained a report on church restitutions. For this report, a fine of 400,000 koruna was imposed on Czech Television for the breach of Section 31(3) of the BA. According to the RRTV, the principles of objectivity and balance were violated by a one-sided report on church restitutions which reportedly conveyed the impression that the restitutions embodied an economic and political power rather than being reparations for damage caused to churches in the past. According to the RRTV, the report was irrelevant, biased, and slanted, detrimental to churches and taking a negative approach to them. The breach of the statutory requirement was found in the editorial commentaries and overall approach to the report concerned.

Following an action brought by the broadcaster, the MC annulled the RRTV decision in a judgment of 3 December 2009. In addition to the formal reasoning referring to the non-reviewability of the decision (because the written counterpart of the decision was different from the resolution adopted by the RRTV), the Metropolitan Court reproached the RRTV for breaching freedom of expression. According to the Court, the RRTV did not distinguish between statements related to facts and value judgments, where only statements related

to facts can be subjected to the evidence of truth. The Council for Radio and Television Broadcasting lodged a cassation appeal against the judgment issued by the MC.

The Supreme Administrative Court dismissed the cassation appeal. In its reasoning, the Court stated that Czech Television as a public service broadcaster may refer to freedom of expression when exercising its mission. Freedom of expression also includes the right to criticism where

> not even the inappositeness of the critic's opinion with respect to its logic and his/her bias allow one to conclude that he/she has gone beyond 'fair' expression. Only if the criticism concerns things or acts of persons active in governance-related matters and lacks any factual basis and for which no reasoning can be found (sweeping criticism), must it be regarded as going beyond fair expression. But the entire expression taking the form of a literary, journalistic or another structure must be evaluated. A statement or sentence taken out of the context should never be assessed. The media's right to free speech protects not only the choice of subject matter but also the type and manner of its preparation. Only if this notion of free speech (expression) comes into conflict with other legal values protected by the constitutional order or with laws issued for the purpose for which freedom of speech can be limited within the meaning of Article 17(4) of the Charter (ie, the rights and freedoms of others, the security of the State, public security, public health, and morals), can the purpose of the specific programme, its manner and preparation as well as the effects achieved or anticipated by the programme be examined. However, all of the limits of free speech implemented by law should not relativize the freedom of speech (expression). Indeed, these restricting laws must be interpreted with respect to the freedom of speech and, if necessary, also in a restrictive manner in order to ensure reasonable protection of the actual freedom of speech.
>
> The legal regulation limiting freedom of expression requires that the presence of the condition of the necessity to restrict this fundamental right should be examined in each and every specific case. Should the claimant impose sanctions for failure to perform obligations pursuant to Section 31(3) of the Broadcasting Act, ie, for not respecting the principles of objectivity and balance, in particular for one-sided favouring of political parties, movements or individual public groups, it must do so with regard to the purpose and nature of the fundamental right to freedom of speech (expression), which did not happen in this case.

The Supreme Administrative Court also dealt with the conditions of limiting the freedom of speech (expression). The Supreme Administrative Court identified the following rights or values as conflicting and where the broadcaster's freedom of expression can be restricted to ensure their protection: 'rights and freedoms of others, in particular with regard to the protection of efficient functioning of political democracy.' Referring to its older judgment (4 As 81/2006-108 of 29 August 2007), the Court stated that

> cautious steps must be taken when defining the line between outspoken and critical management of a report and a biased and prejudiced approach on the one hand, and impermissible influencing and confusion of the viewer on the other. The report must be assessed as a whole, ie, both in its visual and audio aspects, and these must be evaluated together with the verbal announcement without taking individual announcements out of context. It should provide all of the information necessary for the viewer to form an objective and unbiased opinion. Here it does not matter

> whether the information is provided in a critical manner if all stakeholders are given space in the report to express their opinions on its subject. It is also important that the report should not give untruthful information.

The Council for Radio and Television Broadcasting was not authorised to evaluate the quality of the report and its depth but only its conformity with the law. At the end of its reasoning, the SAC stated, referring to the conclusions of the judgment 4 As 69/2007-65 of 22 May 2008, that 'objectivity and balance of the communicated information is not identical with the protection of entities prior to the intervention in their personality sphere or good reputation which is protected by means of the private law.'

a. Commentary—Agenda of the Judgment

- Freedom of expression, right to criticism, public regulation;
- protection of rights of others in respect of the functioning of political democracy;
- bias, prejudice, confusing the viewer;
- requirement to collect all information;
- *audiatur et altera pars;*
- prohibition of untruthful information.

b. Additional Context

Collection judgment; the judgment of the SAC 7 As 56/2011 of 2 June 2011 (collision of trains) refers to it. However, analogical argumentation was rejected in this case and the RRTV's decision was annulled due to the extinction of the right.

ii. Televizní noviny—Conflicts with Russian-Speaking Minority

The Radio for Radio and Television Broadcasting imposed a 50,000 koruna fine on the television broadcaster for the breach of Section 31(3) of the BA due to a report entitled *An increasing number of people in Karlovy Vary district come into conflict with businessmen from Russia*. The report covered two unrelated disputes in the west of Bohemia. The Council for Radio and Television Broadcasting concluded that the report had presented

> incomplete, insufficient and unexplained information about two unrelated events from the Karlovy Vary region aimed at illustrating and evidencing that the Russian minority was favoured by local authorities; the report was prepared in a simplistic and manipulative manner which constitutes a breach of the obligation to ensure the principles of objectivity and balance in news and political journalism programmes.

In the judicial proceedings, the applicant argued that the RRTV's decision had violated freedom of expression—because the report's mission was to inform the public about

disputable steps of administrative bodies in cases where such conflicts arise—and that the RRTV's sanction competence should not be used to protect the personality rights of the persons on whom the report focuses.

The Metropolitan Court in Prague concluded that the RRTV 'has interpreted the concept of "objectivity and balance" whose principles within the meaning of Section 31(3) of the Media Act were found by the court to have been violated; and the court also considered the existing case-law connected to the requirement to respect these principles in relation to news and political journalism programmes.' In the conclusion of its judgment, the MC states that the RRTV 'rightly did not deny the applicant's rights guaranteed by the Constitution, but stressed that even criticism should contain true information, which was not the case in the report in question. If the applicant wants to point to serious social problems, it must be in an objective way or else the reference cannot fulfil its purpose.'

The Supreme Administrative Court which decided upon the cassation appeal of the broadcaster dealt extensively with the interpretation of the requirement for objectivity and balance in news programmes. The Court based its assessment on work from the theory of mass communication and theory of media.[63]

Above all, the SAC distinguished between news and journalistic programmes—news should *quickly bring factual information on a current event.* On the other hand, journalistic announcements should *comment on and evaluate the information.* Therefore, it is in the public interest that the news and journalistic statements be separated from each other.

> If the broadcaster does not differentiate between news reporting and journalism and gives the viewer (listener) only some kind of hybrid commented news on the one hand and actual commentaries on the other hand, it strongly reinforces the manipulative potential of its broadcasting and limits space for qualified shaping of opinions on whose constructive conflict a democratic society is built (see Vladimír Čermák, *Otázka demokracie* (Prague, Academia, 1992) 26). Commented news is even more dangerous as it impacts stealthily and subtly, because the viewer (listener) does not expect any opinion to be contained in such a statement and often accepts it automatically as his/her own together with the given information (if there is any information contained in the statement at all).

The Supreme Administrative Court identified *correctness and accuracy* (of information), *transparency* (reference to sources) and *relevance* (absence of personal evaluation by the journalist) as the key aspects. Imbalance means a hidden form of party adherence where certain opinions are suppressed in a certain controversial situation for the benefit of the opinions of others.

Using these standpoints, the SAC stated that the 'applicant must be primarily reproached for the selection of a topic which it was absolutely inappropriate to include in a news programme.' According to the SAC, it was basically impossible to treat this topic within the defined space and provide the viewer with complete and complex information. 'Hence, the defence arguing with a limited stoppage cannot be successful because this topic should

63 J Bartošek, Žurnalistika (Olomouc, Filosofická fakulta Univerzity Palackého, 1997); M Kunczik, *Základy masové komunikace* (Prague, Karolinum, 1995); W Schulz and I Reifová, *Analýza obsahu mediálních sdělení* (Prague, Karolinum, 2004).

not have been included in a news programme due to its complexity because it could not be consistently mediated in a report which is 1:40 minutes long.'

iii. Events—Godfathers

The Council for Radio and Television Broadcasting imposed an 100,000 koruna fine on Czech Television for airing a report in the main news programme, *Události.* According to the RRTV, the report contained unfounded, defamatory and misleading designations such as 'grey eminence' or 'ODS godfathers' and references to them in a report on a closely unspecified case which were put in a context which cannot be argued.

The Metropolitan Court in Prague annulled the decision challenged by the action. The Court agreed with the applicant's opinion which argued on the basis of the freedom of expression guaranteed by the Constitution and referred to the conclusions formulated by the CC (IV. ÚS 23/05), under which the presumption of criticism's constitutionality should apply. The Metropolitan Court in Prague also worked with the case-law of the ECtHR which describes differences between factual statements and value judgments, primarily with regard to the requirement that the broadcaster should evidence truthfulness of the statements broadcast (ECtHR judgments in the *Lingens v Austria* and *Oberschlick v Austria* cases). According to the MC, the broadcaster cannot be sanctioned for broadcasting value judgments. The Court also annulled the decision challenged by the action because the facts were insufficiently defined in the operative part of the decision which imposes sanctions.

The Supreme Administrative Court issued its decision on the basis of the cassation appeal brought by the RRTV. It annulled the judgment of the MC and referred the case back to another procedure because it did not agree with the conclusion that the facts were not sufficiently described in the decision.

As far as the core of the issue is concerned, ie, the question of whether or not the broadcaster violated its obligation to provide objective and balanced information by broadcasting the report, the SAC agreed with the conclusions of the MC.

The Supreme Administrative Court referred to the findings formulated by the SAC in the judgment 3 As 6/2010-71 of 26 May 2010 (case study 2), in particular with regard to the difference between news reporting and journalistic coverage. According to the SAC, news reporting should

> exclusively inform the public in an unbiased manner and only journalism should aim at influencing public opinion. Objectivity is the basic requirement imposed on news reporting which seeks to differentiate a piece of news from a commentary in a relevant, impartial and non-manipulating manner. Such a procedure is mainly characterised by verification of the truthfulness of an announcement. Hence, the concept 'objectivity' includes correctness (accuracy), transparency (reference to sources) and relevance (absence of personal evaluations). Imbalance then means a hidden form of party adherence where certain opinions are suppressed in a certain controversial situation to the benefit of the opinions of others. The principle of balance consists in the requirement for even representation of political alternatives in terms of their extent and arrangement of news reporting. News reporting will place noticeably greater

> emphasis on consistent adherence to the principles of objectivity and balance than journalistic programmes. The aspect of relevance will not necessarily be, by definition, applied in journalism at all. The degree of tolerance toward any transgressions of the statutory principles of objectivity and balance will vary depending on whether the programme provides news reporting or is a journalistic broadcast.

The Supreme Administrative Court also concluded that the case-law cited by the MC (both the case-law of the CC and the ECtHR) could not be applied to the given case as it is not a private law dispute.

> Freedom of expression cannot be understood as carte blanche for broadcasters to submit any information to the public regardless of the sub-constitutional public regulation of radio and television broadcasting. Under the existing legal regulation, the applicant has the right to express its opinion on social affairs but this right should be primarily exercised in journalistic programmes, not in news reporting. In news reporting, relevance and the use of neutral expressions, if possible, should be emphasised.

Thus, the SAC concluded that the use of value judgements in news reporting could lead to the violation of the principle of objectivity because there is basically no space for evaluations in news coverage. However, in the case subject to assessment, the SAC stated that the expressions used were rather descriptive than evaluating which is why the obligation to provide objective and balanced information was not violated.

iv. Televizní noviny—Tram Drivers

A television broadcaster was fined for broadcasting a report included in the main news programme, *Televizní noviny*. The report stated that tram drivers in Prague often disrespected control signalling and went through a red light. According to the RRTV, the principles of objectivity and balance were violated because the report was based on one-sided criticism of tram drivers *while the issue in question was not sufficiently explained to the viewer, and the viewer could not develop his/her own free opinion*. According to the RRTV, the report did not mention important aspects such as the weight of the tram and the related stopping distance, a different system of traffic signalling, etc. The Council for Radio and Television Broadcasting concluded that Section 31(2) of the BA had been breached.

The administrative courts dealt with this case repeatedly because the decision of the RRTV was at first overturned for formal reasons (insufficient description of the fact in the operative part of the decision, judgment of the SAC, 4 As 9/2009-68 of 12 August 2009). In their decisions, administrative courts (both the MC and the SAC) also dealt with the relation between the general obligation to provide objective and balanced information pursuant to Section 31(2) of the BA and the obligation to seek to the fulfilment of the principles of objectivity and balance in news and journalistic coverage and not to prefer the opinions of one public group (Section 31(3) of the BA). While the broadcaster claimed that the provisions of Section 31(3) of the BA were a special legal standard whose application to news and political journalism programmes is excluded by applicability of Section 31(2) of the BA, the RRTV

held the opinion that both legal obligations should apply to the broadcasting of news and political journalism programmes.

In its judgment 3 As 7/2011-118 of 30 May 2012, the SAC supported the conclusions of the RRTV, and stated that 'it is not sufficient to adhere to the principle of objectivity and balance pursuant to para. 2 in news and political journalism programmes, but it must be reflected in the preservation of free competition of political forces in the society.' However, in such a case it is necessary that the RRTV assess the relevant programme in a qualified and reviewable manner and state why it believes that the given programme was news or political journalism reporting.

VIII. Hate Speech

A. Definition

The term 'hate speech' is not directly defined by Czech laws, but it is used in the legal doctrine. The doctrine understands this term as a disputable manner of effectuation of the freedom of expression which requires certain public law regulation, even through the standards of criminal law. For Michal Bartoň, hate speech is speech

> containing ideas and opinions targeted against certain groups of people, usually racial, ethnic, religious or sexual minorities (typically racism, anti-Semitism, xenophobia, homophobia, etc.). Sanctions for hate speech are based on the philosophy that such speech affects the actual principle of equality of individuals, here equality in dignity. The defence of the option to make hate speech is on the other hand based on the concept of equality of speakers with regard to the right to communicate one's opinion or to equality of opinions as such.[64]

Štěpán Výborný regards the issue of *hate speech* as part of general *hate crimes*. In his opinion, hate speech is

> speech including the elements of hatred against a group which the speech addresses or which is based on such hatred. Hate elements of such speech are based on negative stereotypes of the speaker in respect of certain groups in society which are offended, attacked or humiliated in the speaker's expressions, which demand the limitation of their rights or appeal to violent acts toward them or otherwise trample their human dignity. The words said do not affect only a specific addressee but the entire group with which the victim identifies (or was—even wrongly—identified).[65]

The more general term 'hate crime' is understood by the legal doctrine as 'an illegal act accomplishing the elements of the facts of a crime which was motivated by the offender's a priori hatred arising from the victim's belonging to a certain race, nationality, ethnic group, religion, class, or social group.'[66]

64 M Bartoň, *Svoboda projevu: principy, garance, meze* (Prague, Leges, 2010) 221.
65 Š Výborný, *Nenávistný internet versus právo* (Prague, Wolters Kluwer, 2013) 22.
66 J Herczeg, *Trestné činy z nenávisti* (Prague, Aspi, 2008) 11.

B. Hate Speech in Constitutional Order and Constitutional Court Case-Law

At the constitutional level, the prohibition of hate speech constitutes a legitimate limitation of the freedom of speech (expression). According to Article 17(4) of the Charter of Fundamental Rights and Freedoms, the freedom of speech and the right to seek information may be limited by law 'in the case of measures necessary in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morals.' Using this basis, hate speech may be limited solely for the purpose of protecting the rights and freedoms of others (typically in cases of speech whose content affects the human dignity of a member of a certain group) or public security in the case of acts which do not remain only at the verbal level because they cause hatred or even incite to violence against members of a certain group. Bartoň also points to the protection of state security, specifically its democratic arrangement, against extremists: 'What if they came to power and started effectuating their ideas.'[67]

In its decisions (cf in particular judgment IV. ÚS 2011/10 of 28 November 2011), the CC openly advocates the principles of defending democracy

> whose legal application is justified with regard to the historical experience with Nazi and Communist totalitarianism not only in our country but also in the European context. If the opponents of democracy and the values on which democracy is based are ready to attack, the democratic regime must also be ready to defend itself against these attacks in necessary cases, even by limiting fundamental rights.
>
> The Constitutional Court emphasises that despite the undisputed guarantee of fundamental rights for everyone, it is the democratic state's right and duty to use reasonable means to defend itself and the society it represents against destructive attacks by movements and individuals denying and questioning the fundamental democratic values. A democracy which unconditionally rejected the use of state power against its rivals would open the gate not only to anarchy but also to totalitarianism. The right of a minority to express its political views should not be confused with the right to propagate evil with any means; the duty of a democratic legal state (not bound by any exclusive ideology) to apply state power within the limits and in a manner laid down by law should not be confused with resignation from facing up to manifestations of evil and hatred even with means which may seem to be harsh for the persons disseminating such expressions.
>
> Necessity and adequacy are the most important factors when evaluating the defence mechanisms which a legal state is entitled to use against those whose primary aim is to liquidate democracy. It must also be emphasised that any limitation of fundamental rights may only be imposed in extreme cases. The freedom of expression, as a matter of fact, does not relate only to the information and thoughts which are accepted positively or are regarded as not offensive or unimportant, but also to those which cause offence, shock or disturb.
>
> Limitation or even criminal sanction of certain expressions will also be necessary in a democratic society if they contain appeals to violence or to the denial, questioning, approval or justification of crimes against humanity (cf the so-called Auschwitz lie) or to support and propagate movements aimed at suppressing fundamental human rights and freedoms, in particular in relation to certain

67 Bartoň, *Svoboda* (n 64) 221.

minorities. As for hate speech, it is impossible to examine only their first-level content, since the entire context needs to be considered.

However, at any rate, the speech (expression) in question must be beyond the border of this protection, and not only hypothetically.

C. Hate Speech in the Case-Law of the European Court of Human Rights

The statutory limitation of hate speech is also accepted by the ECtHR. Its case-law even defines the positive obligation of the state to intervene against hate speech because 'negative stereotypes from which hate speech arises can affect the perception of the group identity and feelings of self-respect and self-confidence of group members, which is why they influence their private life, as protected by Article 8 of the Convention' (cf the ECtHR judgment in the *Aksu v Turkey* case).[68]

The European Court of Human Rights absolutely excludes some forms of speech from the regimen of Article 10 of the Convention of the Protection of Human Rights and Fundamental Rights and Freedoms when it denies their protection by describing them as the abuse of the right. The following forms of speech were thus excluded from the scope of the protection of the freedom of speech (expression):

- anti-Semitic speech (*Pavel Ivanov v Russia*, decision of 20 February 2007, App No 35222/04;
- speech referring to National Socialism (*Kühnen v Germany*, decision of the European Commission for Human Rights of 12 May 1988, No 12194/86);
- (Holocaust) revisionism (*Witzsch v Germany*, decision of 13 December 2005, App No 65831/01);
- racism (*Nordwood v UK*, decision of 16 November 2004, App No 23131/03);
- Communism (*Communist Party of Germany*, decision of 20 July 1957, App No 250/57).

However, the ECtHR has recently applied Article 17 of the Convention only exceptionally and examines complaints relating even to very controversial statements through the prism of Article 10, mostly noting that the freedom of speech (expression) has not been violated. 'A certain reserved stance to the a priori rejection of speech which could be branded as hate speech is undoubtedly also related to the difficulties associated with the actual first assessment as to the extent to which the statements concerned are offensive and constitute a serious attack on the rights of a certain group of people.'[69]

For instance, the ECtHR applied this view in the case *Soulas and others v France* (judgment of 10 July 2008, App No 15948/03; civil war as the only solution of disputes with immigrants), or *Vejdeland and others v Sweden* (judgment of 9 February 2012, App No 1813/07; homophobic statements).

68 App Nos 4149/04 and 41029/04. P Konůpka and J Wintr, 'Svoboda projevu a postihování tzv. hate speech' *Jurisprudence* 5 (2012) 33.

69 ibid.

D. Hate Speech and Criminal Law

In the Czech Republic, hate speech is sanctioned by the means of the criminal law. The Criminal Code (Act No 40/2009 Sb. (Coll.)) defines several offences sanctioned as hate speech. Section 355 of the Criminal Code defines the defamation of a nation, race, ethnicity, or another group of people:

(1) Whoever who publicly defames
   a) a nation, its language, a race or ethnic group, or
   b) a group of persons for their actual or assumed race, affiliation to an ethnic group, nationality, political conviction, religion or for being actually or presumably without religion, shall be sentenced up to two years in prison.

(2) An offender shall be sentenced up to three years in prison if he commits the crime specified in Paragraph (1)
   a) at least with two other persons, or
   b) through press, film, radio, television, a publicly accessible computer network or in any other similarly effective manner.

The facts of the incitement to hatred against a group of people or the limitation of their rights and freedoms are defined in Section 356 of the Criminal Code as follows:

(1) Whoever publicly incites hatred against another nation, race, ethnic group, religion, class, or another group of persons or the limitation/restriction of the rights and freedoms of their members will be sentenced to up to two years in prison.

(2) The same sentence will apply to anyone who abets or aids to commit the crime specified in Paragraph (1).

(3) An offender will be sentenced to six to three years in prison
   a) if he commits the crime specified in Paragraph (1) through press, film, radio, television, a publicly accessible computer network, or another similarly effective manner, or
   b) if he actively participates by such an act in the activities of a group, organisation, or association propagating discrimination, violence or racial, ethnic, class, religious, or other forms of hatred.

Verbal crimes related to the support and propagation of movements aimed at suppressing the rights and freedoms of people are also closely connected with the issue of *hate speech*.

Establishment, support and propagation of a movement directed at suppressing the rights and freedoms of the human (Section 403 of the Criminal Code):

(1) Whoever establishes, supports or propagates a movement which is demonstrably directed at suppressing the rights and freedoms of man or propagates racial, ethnic, national, religious, or class hatred or hatred against another group of people will be sentenced to one to five years in prison.

(2) An offender will be sentenced to three to ten years in prison
   a) if he commits the crime specified in Paragraph (1) through press, film, radio, television, a publicly accessible computer network, or in another similarly effective manner,
   b) if he commits such a crime as a member of an organised group;
   c) if he commits such a crime as a soldier, or
   d) if he commits such a crime in a situation where the state is in danger or in a state of war.

(3) Any preparation for such acts is a crime.

Expression of sympathy towards a movement aiming at the suppression of the rights and liberties of the human (Section 404 of the Criminal Code): 'A person who publicly expresses

sympathy towards a movement as introduced in Section 403(1) is liable to imprisonment for a term of six months to three years.'

Denying, casting doubt on, advocating, and justifying genocide (Section 405 of the Criminal Code): 'A person who publicly denies, casts doubt on, advocates or attempts to justify the Nazi, communist or other genocide or other crimes against humanity committed by the Nazis and communists is liable to imprisonment for a term of six months to three years.'

There is a common element in the above facts of crime, ie, the committing of a verbal crime from hatred through the mass media or in a similar manner (through press, film, radio, television, a publicly accessible computer network, or in a similarly effective manner) constitutes qualified facts of the said crimes. Hence, these facts increase the social harmfulness of these crimes and the resulting sanctions are therefore stricter.

According to the SC case-law, 'the existence of the material aspects of the cited crime is not affected by the existence of intention on the part of the offender to cause discussion about the said topic' (resolution of the Supreme Court 3 Tdo 475/2012-25 of 16 May 2012).

E. Hate Speech in Media Legislation

The general regulation of hate speech contained in the Criminal Code is followed by special regulation regarding the mass media contained in the BA. Other media acts (ODAMSA and Press Act) do not contain any such regulation.

Pursuant to Section 32(1)b of the BA, a broadcaster must ensure that the broadcast programme units do not promote war or show brutal or otherwise inhumane behaviour in a manner which would involve its trivialisation, apology or approval. For breaching this duty, the broadcaster faces a fine between 20,000 and 10 million koruna (Section 60(3)a of the BA).

Pursuant to Section 32(1)c of the BA, a broadcaster must ensure that the broadcast programme units do not arouse hatred for reasons relating to gender, race, colour of the skin, language, faith and religion, political or other opinions, national or social origin, membership of a national or ethnic minority, property, birth, or other status. For breaching this duty, the broadcaster faces a fine between 20,000 and 10 million koruna (Section 60(3) a of the BA). This is one of the exceptions when the RRTV may impose a fine without notifying the broadcaster thereof in advance (Section 59(4) of the BA). If the broadcaster repeatedly commits a particularly serious breach, the RRTV is even entitled to withdraw its broadcasting licence (Section 63 of the BA).

The *hate speech* issue is also related to the broadcaster's obligation to ensure that its programmes do not include programme units that could promote prejudicial stereotypes of ethnic, religious or racial minorities (Section 32(1)i of the BA). However, the RRTV has no right to impose a fine for the breach of this duty; it may only issue a notice (warning) pursuant to Section 59 of the BA.

F. Agenda of the Council for Radio and Television Broadcasting

During the monitored period (but also beforehand), the RRTV did not issue any decision imposing a fine on a broadcaster for the breach of any of the obligations specified above. It

can therefore be noted that broadcasters can ensure on their own that broadcasting does not contain such objectionable statements, ie, this is not an issue arousing any principal controversies in Czech media legislation. The statements made by individual broadcasters or their representatives or annual reports of the RRTV did not contain any facts to the contrary either. This is the reason why it was impossible to make any analysis of the case-law of administrative courts with respect to this issue.

However, in the years 2013 and 2014, the RRTV focused its attention on the issue of stereotypes relating to minorities and specific groups, which it subjected to continuous monitoring and subsequent analysis. However, not even these steps showed any systematic breach of duties by any of the broadcasters monitored.

In 2012, the media reported on a series of criminal events actually or artificially connected to the Roma ethnic group, which raised the question of whether or not the mass media were involved in shaping and maintaining stereotypes relating to the Roma minority. In reaction to this issue, the RRTV focused its monitoring on the broadcasting of news on criminal acts with identification of the Roma ethnicity.

In 2012, the RRTV was monitoring the news programme *Televizní noviny* broadcast by CET 21, spol. s r.o. (the most watched news programme in the Czech Republic). Based on this monitoring, the RRTV issued two warnings related to the breach of the duties set forth by the BA in Section 32(1)i. The breach of the law was seen in the fact that

> in the monitored period, the programme *Televizní noviny* presented virtually exclusively negative information in connection with the Roma ethnic group, primarily in connection with crimes, and identified the offenders with their ethnicity unlike the reports on the crimes committed by the majority population. The news programme depicted the Roma exclusively as a problematic minority from a criminal or social perspective; it branded the Roma as individuals with darker skin regardless of whether they actually were Roma, or whether the persons affected felt that they were Roma. They used verbal expressions invoking automatic associations with the problematical situation and Roma locations (Roma neighbourhoods, etc.) regardless of the actual state of affairs.[70]

The broadcaster was also warned about the breach of Section 32(1)c when it reported on a crime and stated that it had been committed by the Roma.

> They reported on the following demonstrations in Varnsdorf and branded the Roma as those who were responsible for the tense situation in the north of Bohemia. It provided no space to the Roma minority to express their views. The entire space given to the views of the locals was reserved for the representatives of the majority who expressed their fears of the Roma ethnic group. The programme unit repeatedly advertised information on the demonstrations which were branded as anti-Roma. Authors of reports manipulatively and purposefully used the information on the death of a woman who had been attacked by repeatedly associating it with the Roma attack while the fact was that the woman had died several days after the attack and her death had been natural and a consequence of a long-term serious illness.[71]

70 Annual Report of the RRTV for 2012, 47.
71 See above.

In its annual report for 2012, the RRTV notes that

> it has long noted that certain parts of the media have taken an insensitive approach to minority specifics, whether it be with regard to their ethnicity, race, handicap, or religion. The tendencies of the media (especially in the commercial sector) to simplify coverage of the problems of certain minorities, and to create prejudiced stereotypes of members of these minorities is a vice which cannot be overlooked. This is why the Council will in 2013 focus on the monitoring of broadcasting and the occurrence of the media content which contributes to the strengthening of prejudiced stereotypes or even incitement to hatred of certain minority groups.

Since the notice of violation of the law is not subject to separate judicial review and no monetary sanction was imposed, the lawfulness of these notices could not be assessed by administrative courts.

In 2013, the RRTV carried out monitoring of the broadcasting of two other nationwide broadcasters (Czech Television, FTV Prima, spol. s r.o.). The analysis noted that the Czech Television broadcasting did not give any cause to suggest a possible breach of the law. As far as the broadcasting of the private broadcaster FTV Prima, spol. s r.o. is concerned, the analysis stated that 'there were certain ethical and professional faults but the material evidence of an administrative infringement was not present from the Broadcasting Act's perspective.'[72]

Further monitoring (of all of the said broadcasters) was conducted in February and March 2014. According to this analysis, 'the Roma issue or issues of other ethnic or national minorities are virtually not present in the broadcasting of Czech Television. This is apparently the consequence of efforts not to add fuel to stereotypes such as associating the Roma with crimes and social problems—instead these issues are completely omitted.'[73] No disputable issues were found in the case of CET 21 spol. s r.o. Although certain information on criminal activities of members of the Roma ethnic group was reported by FTV Prima, spol. s r.o., it was on a programme entitled *Krimi zprávy* which focuses on the coverage of criminal activities. Only five out of more than 200 news items concerned the Roma ethnic group.[74]

The cited analysis identifies the reports broadcast by TV NOVA (operated by CET 21 spol. s r.o.) on issues regarding the Catholic Church as disputable because they had a negative tone. However, the analysis did not draw any specific conclusions with regard to a limited number of news items (3 cases).

In 2012, the RRTV recorded an anecdote about the Roma which 'drew on the stereotyped prejudice against the Roma and could incite to hatred due to membership of a national or ethnic minority.'[75] The Council stated that 'although this was a unique case, it was serious in its character', and issued a notice of violation of Section 32(1)c of the BA.[76]

72 Annual Report of the RRTV for 2013.
73 Broadcasting monitoring summary focused on the depiction of minorities and specific groups in February and March 2014, 7.
74 ibid.
75 Annual Report (n 72) 75.
76 ibid.

G. Discussion

The agenda analysed above shows that the issue of hate speech is given adequate attention in the Czech Republic. The broadcasting of so-called *hard-core hate speech* is apparently not defensible, ie, the broadcasting of manifestly extremist speech which would incite hatred toward certain groups of inhabitants. Not even the issue of media responsibility for reporting on activities of extremist groups was open to debate (eg, to what extent the media should pay attention to extreme views in a political discussion, etc.). It is virtually impossible to encounter the dissemination of *hard-core hate speech* in television broadcasting; the broadcasters manifestly avoid it. Such speech is basically confined to the environment of the internet media or social networks.

However, the issue of stereotypes relating to minority and specific group members remains open to debate. FTV Prima, spol. s r.o. lawyer Pavel Kubina points out that it is not admissible in a democratic legal state that the content regulator (RRTV) should enter a political discussion by 'deciding what should not be strengthened in the public because it is a stereotyped prejudice.'[77] On the other hand, the CC Judge Kateřina Šimáčková says that this is one of the most important areas where the RRTV should intervene compared to, eg, the sanctions for non-separated advertising (oral interview of 30 January 2015).

This controversy may be seen through a prism of a more general dispute regarding the relationship between the regulator and the broadcasters. We must bear in mind that despite its institutional independence, the RRTV is a state body and bearer of public authority which authoritatively intervenes in the freedom of speech (expression). The Libertarian view emphasising the protection of the freedom of speech as a negative freedom of an individual compared to the state must necessarily lead to the conclusion that public authority should not distinguish legitimate views from illegitimate stereotypes. From this perspective, law (and not even public law) is the appropriate normative system for driving speech which strengthens stereotypes out of the public space. In contrast, the view based on the concept of the social responsibility of the media implies a more significant intervention of the state (through its bodies) in the public discussion. This perspective is based on the persisting specific characteristics of television broadcasting.

We must also note the diversity of the values behind the limitation of the freedom of speech (expression). Any suppression of hate speech and hate crimes in general is commonly associated with the concept of a *militant democracy* based on the knowledge that it is possible to sustain a democratic system only if it is capable of effectively defending itself against efforts to remove democracy as such. The requirement for the protection of individual rights of the persons affected is only a second-level factor. Efforts to sanction statements strengthening stereotypes and prejudices are apparently and dominantly driven by the second group of values even though we can admit that statements based on prejudices and strengthening stereotypes may develop into incitement to hatred. However, this statement does not cast doubt on the strong emphasis on the protection of individual rights of the persons affected, which must be taken into account when examining whether or not the intervention in the freedom of speech is still proportionate to the goal pursued.

77 Kubina, Presentation (n 9).

IX. Commercial Speech

A. Commercial Speech as Form of Freedom of Speech

In media legislation, commercial speech is regulated by two laws. The Broadcasting Act regulation is supplemented by general advertising regulation in the Act on Advertising Regulation (No 40/1995 Sb. (Coll.) as amended). While the BA exclusively regulates the rights and duties of radio and television broadcasters, the Advertising Act has a much wider scope, and in its substance includes all forms and manners of advertising. The Advertising Act also defines the powers of the RRTV with respect to advertising disseminated through broadcasting.

Advertising and similar commercial speech represent a distinctive form of speech subject to separate regulation with respect to the freedom of expression (speech) and the freedom of the press. Even the dissemination of advertising can be regarded as a form of expression, albeit one with a specific purpose and meaning. We must remember that its primary purpose is not to enrich the debate on public goods, or the seeking of truth; it is not directly connected with the control of power elites, and the self-realisation element may be seen (if there is any) only at a secondary level.[78] The purpose of commercial speech consists in the support of the originator's business activity; the speech originator wants to attract the consumer public, present its business activities, and offer its products or services. Therefore, it is sometimes difficult to find a close relation between commercial speech and a general reason for special protection of the freedom of expression. There are therefore doubts as to whether commercial speech is protected by the Constitution at all, or whether its constitutional protection is not somewhat weakened.[79]

This differentiation is reflected even in the US which is normally perceived as a country with strong protection of the freedom of speech (expression). Commercial speech is, to a certain extent, perceived as a low-level speech excluded from the reach of the First Amendment.[80]

According to the SC, this is because certain utterances 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'[81] Even where a court awards protection to a commercial speech, such protection is weakened compared to other types of expression. The otherwise traditionally strong American protection of freedom of speech is thus not applied in commercial communications at all and the significantly weaker standard based on the rational-basis test is instead applied.[82] Only an apparently irrational or arbitrary measure does not pass this test.

Commercial speech is not a form of speech which would give rise to influential theories on freedom of speech (expression) whose authors pointed to the solid relation between a democratic social organisation and freedom of speech (expression). Hence, the

78 P Jäger and P Molek, *Svoboda projevu, demokracie rovnost a svoboda slova* (Prague, Auditorium, 2007) 32.
79 Bartoň, *Svoboda* (n 64) 90.
80 CE Wells, 'Právo svobody projevu ve Spojených státech amerických' Časopis pro právní vědu a praxi 4 (2001) 354.
81 *Chaplinski v New Hampshire*, 315 US 568, 572 (1948), cited ibid.
82 M Bartoň, 'K mezím svobody projevu v USA' *Právník* 1 (2003) 61.

constitutional protection of commercial speech may rather be regarded as a secondary consequence of the generally strong protection of the freedom of speech (expression). If there is any collision in the freedom of speech (expression) being commercial in its character and another colliding right or public good, the colliding public good or fundamental right will often prevail.[83] This prevalence seems to be so apparent that it is open to generalising regulation at the statutory level which is in conflict with the Constitution only in exceptional cases.

However, the absolute exclusion of commercial speech from the scope of freedom of expression remains problematic. In this respect, Bartoň points to the questionable line between protected and unprotected speech. It seems to be rather too convenient that some speech can be automatically branded as unprotected (with no value for the society) and thus it is deemed unnecessary to determine whether or not the disputed measure breaches the freedom of expression.[84] Moreover, the blending of private and public affairs raises a question as to whether advertising automatically has no social impact (or maybe benefit) or whether specific circumstances of each and every case are decisive also in this area. Modern marketing often works with current social issues in advertising,[85] and marketing methods penetrate beyond purely commercial segments. Even political advertising is sometimes mentioned, ie, advertising with no or weak constitutional protection paradoxically penetrates the sphere where freedom of expression is almost unlimited. Social networks are also a good breeding ground for viral marketing where a commercial communication attracts addressees to such an extent that they disseminate it among themselves.[86] Therefore, a commercial motive does not deprive certain expressions of constitutional protection, but this aspect plays a role when balancing freedom of expression and other colliding subjective rights and values protected by the Constitution.

B. Constitutional Protection of Commercial Communications in the Czech Republic

Article 17 of the Charter of Fundamental Rights and Freedoms does not expressly mention expressions which are commercial in their character. Hence, it does not expressly establish their protection, nor does it rule it out. The relevant case-law of the CC is not available either. Therefore, the mechanism of constitutional protection of commercial communications remains an open issue for the future. The systematic inclusion of freedom of expression among the political rights and freedoms in the Charter might indicate strong protection of politically engaged expressions compared to weakened or even no protection of purely commercial expressions.

83 *Chaplinski v New Hampshire* (n 81).

84 Bartoň, *Svoboda* (n 64) 59.

85 In this connection, ad campaigns of Benneton are often mentioned (cf Bartoň, *Svoboda* (n 64) 93); in the Czech environment, we can refer to the ad campaign of the Bernard Brewery (*My Way*) which often uses current political and social issues.

86 M Rolková, 'Marketingové využitie vzťahov na Facebooku' R Bačuvčík (ed), *Tradičně a nově v marketingové komunikaci* (Zlín, VeRBum, 2011) 209.

However, in one of the few decisions on this issue,[87] the CC adopted a fairly different approach. The dispute concerned the then popular commercial for the Fidorka biscuit where a little blond girl, wanting to get hold of a biscuit, uses her doll to hit an airbag in a car standing at the crossroad, and when the activated airbag pushes the fellow-passenger against the seat, the girl plucks the biscuit from her hands. The scene was accompanied with the slogan 'If you have to, you just have to.' The Council for Radio and Television Broadcasting found that the broadcasting of this commercial had violated Section 2(3) of the Advertising Regulation Act[88] which bans commercials (adverts) intended for persons under 15 years of age or which show persons under 15 years of age if they promote behaviour jeopardising their health, mental, or moral development. The Supreme Administrative Court[89] drew the conclusion that this advertising slot had promoted aggressiveness because if a close relation between the girl and her doll is presumed, the girl risked injury to the doll only in order to grasp the sweets. Children viewing this advert may not notice and understand this apparent hyperbole, the SAC concluded.

In the subsequent procedure on a constitutional complaint, the SAC objected that an advertising slot, as an expression of commercial character was not covered by the freedom of expression at all. Commenting on this objection, the CC noted that even an advertising slot is information, which is why its dissemination is subject to Article 17 of the Charter. The Constitutional Court also added that Article 17 of the Charter

> provides a framework definition of the legitimate public interest in limiting the freedom of disseminating information. According to the opinion of the Constitutional Court, the Act on Advertising Regulation is a statutory implementation of Article 17(4) of the Charter. In the case under assessment, it was about a conflict between the legitimate public interest in due and proper education of minors and the fundamental rights of children as mentioned by the Supreme Administrative Court on the one hand, and the freedom to disseminate information on the other hand. Were this conflict resolved for the benefit of the rights of children and the legitimate public interest in their due and proper education, then such a solution would be in conformity with the Constitution, and the constitutional complaint is thus apparently unjustified in this respect.[90]

Thus, the CC did not make its own review of the decisions of general courts to test whether freedom of expression was not side-lined without justification or even absolutely neglected in the conflict with another constitutional value. The Supreme Administrative Court did not deal with the constitutional level of the issue at all and even adopted a stance that advertising messages were not covered by freedom of expression. Although the CC did not agree with this view, it contented itself with the fact that the legislator had resolved the existing collision at the customary law level. It is impossible to draw any clear conclusion from the single CC decision which even has the character of a resolution. However, the degree of constitutional protection of expressions of commercial character seems to be fairly

87 Constitutional Court Resolution II. ÚS 396/05 of 27 October 2005.

88 Act No 40/1995 Sb. (Coll.) on Advertising Regulation and Amendment and Supplementation to Act No 468/1991 Sb. (Coll.).

89 Judgment of the SAC 6 As 16/2004-90 of 23 March 2005, 604/2005 Sb. NSS.

90 Constitutional Court Resolution II. ÚS 396/05 of 27 October 2005.

reduced. Even though this limitation does not exclude commercial speech from the scope of Article 17 of the Charter, it opens up a wider space for the legislator's political considerations and the decision-making practice of general courts. If they interpret the customary law in the correct manner,[91] there will be relatively little space for any intervention by the CC.

In the absence of the CC case-law, the practice of the ECtHR may play an important role. However, not even the ECtHR case-law is very rich and consistent. In its judgment in *Markt Intern and Beermann,*[92] the ECtHR admitted that commercial speech is protected by Article 10 of the Convention, but that the parties had a wide *margin of appreciation* as to whether this concerned abuse of freedom of expression in competition. With a close ratio of 8:7 votes, the ECtHR noted that the case under assessment had not breached Article 10 of the Convention. The European Court of Human Rights also declared a wide margin of appreciation for national authorities in the *Krone (No 3)* judgment[93] where the findings made in the context of the unfair competition law may also be fully applied to the area of advertising.[94] However, the Court also pointed to the importance of advertising for consumer awareness where advertising is a form of obtaining information on product and service qualities. Even though the ECtHR admitted that dissemination of true information might be legitimately limited under certain circumstances, such measures are subject to strict examination by the Court.[95]

Likewise, the ECtHR pointed out in the *Hertel*[96] judgment that the unfair competition law cannot be applied as a universal magic formula justifying the restriction of open communication about public goods. The judicial review focused on the activities of a Swiss scientist who repeatedly pointed to health risks associated with the use of microwave ovens.[97] His article aroused outrage among sellers of these appliances who believed the article was unfairly discouraging consumers from buying the products. The European Court of Human Rights found that the Swiss courts had breached freedom of expression because the topic of the article had been an object of justified public interest. However, not even this Court decision was adopted unambiguously; the dissenting judges pointing to the fact that national authorities have a better position to adequately evaluate the conflict of individual rights.[98]

The fairly varying decision-making practice of the Strasbourg court suggests that for the ECtHR, it is now crucial to decide on the distribution of competences between the Court and national authorities. The Court is now apparently ready to leave a relatively wide degree of assessment liberty to national courts. Any Court interventions are directed at the deviations from this assessment liberty, but no creation of a comprehensive doctrine is assumed to be created which could become a shared standard and be adopted as such by national authorities. Therefore, the case-law of the ECtHR can serve rather as a source of inspiration in the procedures before Czech courts and administrative authorities, which, however, does not set clear limits for national courts as it does in some other issues relating to freedom of expression.

91 P Molek, *Právo* (n 15) 281.
92 *Markt Intern Verlag GmbH and Klaus Beermann v Germany*, App No 10572/83, judgment of 20 November 1989.
93 *Krone Verlag GmbH & Co KG v Austria (No 3)*, App No 39069/97, judgment of 11 December 2003.
94 ibid, [30].
95 ibid, [31].
96 *Hertel v Switzerland*, App No 25181/94, judgment of 25 August 1998.
97 R Polčák, 'Svoboda projevu při hospodářské soutěži – rozhodnutí ESLP ve věci Hertel proti Švýcarsku' *Jurisprudence* 2 (2005) 52.
98 ibid.

In these cases, freedom of expression is limited under Article 17(4) of the Charter. Advertising regulation focuses primarily on consumer protection against false advertising and protection of competitors against advertising which may be regarded as unfair competition. Although commercial speech enjoys a relatively low degree of constitutional protection, it is impossible to admit absolute elimination of freedom of expression under the pretext of maintaining a sterile competitive environment. Although the commercial aspect does not disqualify certain speech from constitutional protection, the correct identification of the character of this speech is a necessary prerequisite for correctly resolving the collision between freedom of expression and another protected interest. Only then may the corresponding test of constitutional conformity be applied.[99]

C. Regulation of Broadcasting Act

The Broadcasting Act differentiates three types of commercial communications:
- advertising;
- sponsored messages (sponsoring), and
- teleshopping.

In the BA, advertising is defined as any public announcement broadcast in return for payment or a similar consideration, or broadcast for the broadcaster's self-promotion, in order to promote the supply of goods or provision of services, including immovable property, rights, and obligations in return for payment.[100]

Teleshopping means the direct offer of goods, including real property, rights and duties, or services, which offer is meant for the public and which is included in radio or television broadcasting in return for payment or other consideration.[101]

Sponsoring means any contribution made by a natural or legal person not engaged in the operation of television broadcasting, in the provision of an on-demand audiovisual media service or the production of audiovisual works, to the direct or indirect financing of a radio or television programme or programme unit with a view to promoting the sponsor's personal name or business name, trade mark, products, services, activities or public image.[102]

Under the BA, sponsoring is connected with the broadcaster's statutory duty to identify that a certain programme unit is sponsored. Typically, this duty is performed by broadcasting a sponsored message which fulfils both the informative and promoting function.

Commercial communications share some common elements—they are originated by a person different from the broadcaster, and they pursue other than editorial content. The broadcaster is responsible for the content of commercial communications to a limited extent: The veracity of information contained in a commercial communication shall be the responsibility of the party commissioning the commercial communication; where the party commissioning the commercial communication cannot be identified, responsibility shall lie

99 Otherwise, separation of commercial speech as speech enjoying weaker protection would have no sense. It would be sufficient if the commercial motive of a communication is taken into consideration as a relevant aspect of the proportionality test in its traditional form.

100 Section 2(1)n of the BA.

101 Section 2(1)r of the BA.

102 Section 2(1)s of the BA.

with the broadcaster.[103] Thus, the requirement for the broadcaster's independence does not apply to commercial communications, which is why such communications must be clearly identified for the viewer to be able to approach such communication with a certain wariness.

The broadcaster's duties applicable to the broadcasting of commercial communications are defined under Sections 48–53a of the BA. The Act expressly prohibits the broadcasting of certain types of commercial communications. Broadcasters are not allowed to broadcast:[104]

a) commercial communications that are not readily recognisable as such;
b) commercial communications that encourage behaviour prejudicial to health or to safety, or behaviour seriously prejudicial to the protection of the environment;
c) commercial communications in which newscasters, moderators, or editors of news and political programme units appear;
d) religious and atheist commercial communications;
e) political parties' and movements' commercial communications and those of independent candidates standing for the posts of deputies, senators, or members of a municipal or local council, or council of a higher-level self-government unit, unless otherwise provided in specific legislation;
f) commercial communications concerning medicinal products or medical treatment available only on medical prescription in the Czech Republic;
g) commercial communications about cigarettes and other tobacco products;
h) surreptitious commercial communications;
i) commercial communications containing subliminal messages;
j) commercial communications prejudicing respect for human dignity;
k) commercial communications attacking a faith or religion, or a political or other opinion;
l) commercial communications containing discrimination on grounds of sex, race, colour, language, faith and religion, political or other opinion, national or social origin, nationality or ethnicity, property, birth, or other status.

The broadcasters also have certain obligations as to the manner of including commercial communications in the broadcasting. Under Section 49(1) of the BA, a broadcaster must ensure that

a) advertising and teleshopping are readily recognisable as such; with a radio broadcaster, this shall be clearly distinguishable by audio means, and for a television broadcaster, it shall be clearly distinguishable by audio, visual or audiovisual means or by spatial means separated from other broadcasts;
b) isolated advertising and teleshopping spots are included in broadcasting only in exceptional cases, except for live transmissions of sports events; this shall not apply to radio broadcasting;
c) advertising and teleshopping for erotic services and erotic products is not included in broadcasting in the period from 6.00 am to 10.00 pm; this obligation shall not apply to broadcasters where broadcasting to the end user is available under a written contract concluded with a person aged over 18 years, and is accompanied by the provision of a technical measure which allows that person to restrict minors.
d) advertising and teleshopping is not included immediately prior to or immediately after the broadcasting of religious services.

103 Section 48(3) of the BA.
104 Section 48 of the BA.

The rules for broadcasting sponsored programmes are defined in Section 53 of the BA. Pursuant to Section 53 of the BA, the broadcaster of a sponsored programme must indicate the existence of the sponsorship, clearly indicate the sponsor's name and specify its principal activity. Notification of sponsorship shall not be broadcast in trailers for the programme unit, during the course of the programme unit, immediately before it or immediately after its end.

Separate regulation of *product placement* was introduced with effect from 1 June 2010. Under Section 2(2)b of the Act, product placement means any form of the inclusion of a product, a service, or the trade mark thereof, or reference to a product or service, so that it is featured within a programme unit in return for payment or for similar consideration.

Pursuant to Section 53a of the BA, product placement in programmes is admissible only in cinematographic works, films, and series made for television broadcasting or for on-demand audiovisual media services, in sports and entertainment programmes, provided that they are not children's programmes, or
where there is no payment but only the provision of certain goods or services free of charge, including, without limitation, production props and prizes for competitors, with a view to their use in a programme.

Programme units containing product placement must meet the following requirements:
a) their content and scheduling shall not be influenced in such a way as to affect the editorial responsibility and independence of the on-demand audiovisual media service provider,
b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services,
c) they shall not give undue prominence to the product in question.

Programme units containing product placement must also be identified as such in the manner prescribed by the BA.

D. Act on On-Demand Audiovisual Media Services

Special regulation contained in the Act on On-demand Audiovisual Media Services (Act No 132/2010 Sb. (Coll.)) will apply to non-linear media services. The Act works with the general term, *commercial communication*. The list of duties is shorter than in the case of radio and television broadcasting.

Pursuant to Section 8 of the ODAMSA, an on-demand audiovisual media service provider must ensure that audiovisual commercial communications:

a) are readily recognisable as such;
b) do not prejudice respect for human dignity;
c) do not contain or do not promote discrimination on grounds of sex, race, colour, language, faith and religion, political or other opinion, national or social origin, nationality or ethnicity, property, birth, or other status;
d) do not encourage behaviour prejudicial to health or to safety;
e) do not encourage behaviour seriously prejudicial to the protection of the environment.

The following are absolutely prohibited:

a) surreptitious audiovisual commercial communications;
b) audiovisual commercial communications for cigarettes or other tobacco products;
c) audiovisual commercial communications for medicinal products or medical treatment available only on prescription in the Czech Republic.

E. Agenda of the Council for Radio and Television Broadcasting

From the quantitative perspective, the RRTV decisions regarding commercial communications represent the most extensive agenda relating to the broadcasting content. However, if we take a closer look, we can see that the case-law of administrative courts is fairly monothematic. A clear majority of decisions applies to the issue of not separated advertising; there are only a few decisions on covert advertising or exceeded time limits on advertising. There have also been sanctions for product placement and for advertising which is difficult to recognise. The fines imposed ranged between 50,000 and 100,000 koruna, but fines in excess of 1 million koruna have also been imposed.

F. Statistics

Confirmed Total	Confirmed	Reversed total	Reversed
6	18 per cent	28	82 per cent

The said data take into account only the cases also assessed by the SAC. Decisions of the RRTV were cancelled by the MC in 71 cases, and the SAC did not review these judgments because the cassation appeal was either not submitted at all or it was withdrawn by the RRTV.

The decision of the RRTV was upheld in six cases. The Council for Radio and Television Broadcasting was successful with its cassation complaint in two cases. In fifteen cases, the SAC cancelled the dismissing judgment issued by the MC (including two cancellations of the RRTV decisions). The Council's cassation complaint against a Metropolitan Court judgment cancelling the RRTV's decision was dismissed in thirteen cases.

G. Answers to Research Questions

Freedom of expression (speech), as the key value in media legislation, is somewhat side-lined in the case of commercial communications. This may be due to the fact that in such cases, broadcasters use the freedom of expression as their argument only to a limited extent, so administrative courts do not usually even have an opportunity to deal with the constitutional protection of the freedom of commercial speech in a comprehensive and complex manner. It must be added that the crucial question as to the constitutional protection of commercial speech was positively answered in the past both by the CC and the SAC, and their findings have never been questioned in a relevant manner. Reduced protection of freedom of expression is thus reflected in the greater protection of the values colliding with the freedom of expression.

When making a more detailed analysis, we can see that the cases resolved in this respect are not absolutely homogenous and that the importance of the freedom of expression differs from case to case. Freedom of expression is given stronger protection in the assessment of covert advertising where the SAC points to the fact that it is impossible to insist on the absolute sterility of the presented messages (communications), or that it is impossible to absolutely force the identification of specific competitors and products out of the broadcasting without

causing harm to the information value and quality. This is not a surprising conclusion because if covert advertising is sanctioned, the broadcaster is basically punished for the editorial content or for the fact that there are elements of advertising present in the expression which is not identified as advertising, and that the recipient of the communication has no chance to discern it. This is primarily the view of the seventh panel of the SAC. The sixth panel of the SAC was, on the other hand, more paternalistic with respect to viewers and consumers when it also protected their rational consumer behaviour.

However, this scheme is no longer applied in the legal regulation of product placement based on the regulation of covert advertising, and both the RRTV and the administrative court based their decisions exclusively on the wording of the BA. Sanctioning for not separated advertising absolutely abstracts away from this value framework. Both the RRTV and the SAC did not react to the objections of the broadcasters who claimed that consumers could not have been misled because the commercial communication where it was ambiguous whether it was a sponsored message or advertising was clearly recognisable, and hence this was not a case of so-called non-distinguished advertising.

As for rights and values which are in conflict with the freedom of expression, the SAC expressly emphasises consumer rights where the consumer is misled by covert advertising or may be undesirably influenced in his/her consumer behaviour. A similar approach is taken to product placement where the 'comfort' of the viewer is considered (with regard to the inappropriate emphasis on commercial speech), although this is somewhat controversial from the perspective of constitutional conformity of such practice. Pursuant to Article 17 of the Charter of Fundamental Rights and Freedoms and Article 10 of the ECHR, freedom of expression may be limited only if it is necessary in a democratic society. From a constitutional perspective, it is, to say the least, questionable to limit freedom of expression or freedom of artistic production by examining whether or not a product was emphasised in an inappropriate manner only because the viewer is bothered by excessive advertising effects. Nonetheless, this issue has not been raised (in the only case subject to assessment, see the case study) yet, so the judgment of the SAC or the CC is not available yet.

According to the resolution of the extended panel of the SAC (6 As 26/2010) of 3 April 2012, the

> interpretation of any limitation of freedom of expression which would be in conformity with the Constitution must be based on the fact that there must be a constitutionally legitimate reason for any specific limitation reflecting the reasons strictly defined in accordance with Article 17(4) of the Charter, and that the content, extent and intensity of such limitation is proportionate to the right or constitutional value protected by it.

The sixth panel of the SAC is more open to interventions in the freedom of expression, also referring to EU legislation. In its resolution on submitting the case to the extended panel (6 As 26/2010), it points to the need to protect consumers against 'unfair practices of merchandisers, service providers, or electronic media operators. The ban on non-separated advertising is one of the EU rules aimed at consumer protection. A public sanction is the basic option used by the state to protect its consumers.' The sixth panel also refers to EU law when it states that 'the EU legislator wanted to make propagation content clearly recognisable for television viewers and to limit its broadcasting time.'

With this context in mind, we regard the manner used in the Czech Republic to sanction non-separated advertising as highly controversial. In these situations, the RRTV brands a commercial communication by the broadcaster as advertising within the meaning of the BA and subsequently imposes a sanction stating that said advert was not separated from the remaining broadcasting by audiovisual means. However, the RRTV also refuses to deal with the issue of whether or not this was advertising which was difficult to recognise (ie, whether or not the viewer could be misled), or whether or not advertising time was extended. Therefore, no matter how the SAC proclaims the need to review proportionality of intervention in the freedom of expression in each individual case, it factually abandons this value base in its decision-making practice.

The reported cases show relative consistency in the decision-making practice of the SAC and that any differences in opinions are effectively resolved through a specific mechanism. In the reasons for the decisions issued by administrative courts, we can see that the legal argumentation is based on the case-law of the SAC which is frequently cited. Still, the form of the final decisions largely depends on the assessment of specific commercial communications by specific administrative court panels because even an opposite court verdict can be convincingly justified in many cases. This is also apparent from several statements that a certain situation is marginal (see the case studies).

With this in mind, we do not regard the following statement by the sixth panel as convincing: 'It is possible to more easily distinguish between a sponsored message and advertising using the fairly clear decision-making practice of the Council and the Supreme Administrative Court' (compared to decisions regarding the protection of minors). The case-law of the SAC is clear in that there are standing criteria which are applied, but the final assessment is subjective to a certain extent because none of these criteria can be absolutized.

There are basically no arguments referring to the case-law of the ECtHR. Also, administrative courts work with EU legislation and the case-law of the European Court of Justice only moderately, in particular in decisions which have the aspiration to have stronger precedential effects.

H. Case Studies

i. Judgment of the Supreme Administrative Court, 7 As 68/2011 of 29 June 2011— Czech Television, Non-Separated Advertising, CK Intact Travel Agency

a. Facts of the Case

The Council for Radio and Television Broadcasting imposed a sanction on the broadcaster because of its broadcasting of a sponsorship message promoting the sponsor, travel agency CK Intact Velké Meziříčí. In its reasoning on the administrative decision, the RRTV described the spot in question as follows:

> In the picture of a rotating and approaching globe, there was the Intact logo-type in the lower left corner with a sub-text 'Sponsor of the Programme'. A column is sticking in the centre of Europe with direction signs in the form of flags. There was also a link to the website www.intact.cz. The

spot opens with the noise of a flying airplane and the following words: 'Intact—Language Courses Abroad for You and Your Children. In Thirty Countries! www.intact.cz.'

The Council for Radio and Television Broadcasting found that the spot under assessment constituted the elements of advertising, ie, it was not a sponsored message as claimed by the broadcaster. In its reasoning, the RRTV stated that the spot in question contained elements of advertising in particular with respect to the presence of references to the quality of the sponsor's product and invitation to product consumption. The spot is dynamic (featuring the rotating globe with direction signs sticking into the globe amid the sound of a flying airplane and with flags instead of the individual signs presenting the high number of language courses provided by the sponsor). This representation of the amount or extent of the product on offer can be regarded as emphasising its quality. The viewers' attention is further drawn by the statement 'Language Courses for You and Your Children' and 'in Thirty Countries.' According to the RRTV, such a representation aims not only at the 'mere' creation of a good name or its promotion, but particularly at capturing the viewer's attention by presenting the qualities of the product offered. The phrase 'for You and Your Children' can be regarded as an invitation to product consumption, which is an element of advertising and not an element permitted for sponsor identification.

Since the spot in question was not separated from the remaining broadcasting by audio-visual means, the RRTV assessed the broadcaster's acts as non-separated advertising and imposed a fine on the broadcaster in the amount of 50,000 koruna.

b. Appeal Brought by the Broadcaster and Assessment of the Case by the Metropolitan Court in Prague

The broadcaster filed an appeal against the decision on the fine, objecting that this case did not concern advertising but sponsor identification. The Metropolitan Court in Prague did not agree with the broadcaster's objection, and dismissed the action. In the reasons for the judgment (judgment 7 A 52/2010 of 19 January 2011), the Court stated that 'in this case, the communication did not exclusively target the provision of awareness of the sponsor's existence and of the services it renders but further specified the services as to their quantity and quality. Indeed, the sponsor's spot demonstrated a wide array of its marketing activities, and although these efforts may have aimed at drawing the viewers' attention to its existence in an original and easy-to-remember manner, they did not result in a sponsored message but in advertising.' Referring to the case-law of the SAC (judgment 7 As 75/2005 of 9 November 2006 and judgment 7 As 85/2005 of 30 November 2006), the MC determined the 'purpose to be accomplished by the spot under assessment' as the distinct criterion.

c. Case Assessment by the Supreme Administrative Court

The broadcaster lodged a cassation appeal against the judgment issued by the MC, reiterating its emphasis that 'the aim of the information contained in the spot was exclusively to raise awareness about the sponsor's existence through the information on the services provided

within the admissible limits of the creative arrangement of the spot and the sponsor's own representation.'

The Supreme Administrative Court based its decision-making on its previous decisions (in particular judgment 7 As 81/2005 of 9 November 2006), and consecutively dealt with the individual criteria used by the SAC to differentiate advertising from sponsoring. The Supreme Administrative Court identified the criterion of a distinct purpose of commercial communications (informative versus persuasive) as a major factor in the reasoning of its decision, adding that

> however, the different basic purposes basically constitute a fairly broad range and not only one distinct criterion, which cannot be used *ipso iure* to differentiate a sponsored message from advertising. The sponsored message will normally aim to create or raise the viewer's awareness about the sponsor's existence and its different qualities, skills or offers which are positive or useful for the viewer, while advertising normally communicates the efforts to make the viewer buy a certain product or service.

The Supreme Administrative Court also points to the unclear borderline between the two types of commercial communications:

> However, the case-law of administrative courts has consecutively shown what is, after all, self-evident after a closer examination of the advertising and marketing practice, ie, that the aforementioned ideally typical categories of sponsoring on the one hand and advertising on the other hand usually blend together. A representation broadcasted as advertising within the meaning of the definition set out in Section 2(1)n of the Broadcasting Act can be constructed solely as a story creating or raising the viewer's awareness about a producer (eg, a car-manufacturing group), the brand it uses (a car brand often partly or absolutely different from the manufacturer's trade or business name) or another characteristic designation, often protected by intellectual property law, under which the products or product groups are sold (eg, furniture ranges, chocolate bars). Sometimes, advertising even only points to certain life situations where it is appropriate to consider buying the goods or using the services of the advertiser, eg, it highlights risks to be insured against or destinations to be visited. On the other hand, the legal regulation of the sponsoring of radio or television programmes alone admits that a sponsored contribution can be provided and a sponsored message can be broadcasted next to the promotion of the name and surname of an individual or name of a legal entity, trade or business name, visual symbol (logo) or the sponsor's trademark or just the sponsor alone also to promote the sponsor's service, products or other outputs. Hence, this means (and the case-law has repeatedly accepted it) that a sponsored message containing a reference to a service, product or another output produced, directly or indirectly disseminated or commercialised by the sponsoring entity, cannot be regarded as prohibited.'

Many decisions of the sixth and seventh panel of the SAC showed that a sponsor did not necessarily have to be an enterprise (legal entity), but that it could also be a protected designation or product.

The spot dynamics was another distinct criterion highlighted by the SAC. According to the previous case-law of the SAC, such dynamics should show the inadmissibility of the persuasive character of the sponsored message. But even this criterion was later further specified, according to the reasoning of the SAC judgment, stating that the 'spot dynamics

will be relevant in the event that it (co-)creates an advertising communication, ie, it entails the persuasive process being a direct incentive for the viewer to buy a product. However, even a dynamic spot can be a mere sponsored message, in particular if it does not mention certain product qualities or characteristics or if the product is not mentioned at all next to the dynamic representation.' The Supreme Administrative Court subsequently gives an example of three specific Supreme Administrative Court judgments where a spot has not been found to be inadmissibly dynamic.

On the basis of the aforesaid, the SAC concluded that the given case had not been advertising but a sponsored message because the spot had not departed from the limits set forth by law with regard to sponsored messages.

d. Commentary and Comparison with Judgment 6 As 10/2011

The commented judgment is evidence of variability on the part of the SAC when determining the exact borderline between a sponsored message and advertising. By referring to many previous adjudications (not only of the seventh panel), the SAC convincingly points out that the constantly applied criteria do not necessarily have to result in absolutely unambiguous or at least foreseeable results because none of them is so prevailing that it produces a clear qualification of the commercial communication in question. At the same time, the commented judgment unveils a certain development in the case-law going beyond, in our opinion, the actual specification of the previous case-law. While the seventh panel relativizes the spot dynamics criterion, referring to other Supreme Administrative Court judgments, a completely different opinion can be found in older judgments.

For instance, this is the different view of a similar issue as expressed by the sixth panel of the SAC and regarding the broadcaster's objection that a dynamic character need not necessarily mean advertising (judgment 6 As 10/2011 of 31 August 2011): 'If the claimant points out that the advertising character cannot be inferred from the actual story ('a kind of a sci-fi spot'), this conclusion is not manifestly correct with regard to the judgment of the Supreme Administrative Court of 14 April 2010, Ref No 7 As 80/2009-96. It is quite the opposite: A dynamic arrangement of a communication mostly points to the fact that it is advertising.'

The dispute concerned a spot broadcasted by another broadcaster. It was a brief jungle scene presenting a biscuit producer. Child actors, acting as a child brotherhood, say that the 'Child Brotherhood Brings Diskito.' The Council for Radio and Television Broadcasting assigned an advertising character to this spot and imposed a fine of 1.5 million koruna on the broadcaster. The fine amount was determined by the frequency at which the sponsored message appeared in the broadcasting.

The Supreme Administrative Court agreed with the spot assessment by the RRTV, and dismissed the broadcaster's cassation appeal (this was one of the few cases where the RRTV has been successful in defending its decision before administrative courts). Also the sixth panel based its decision-making on the conclusions of the seventh panel (judgment 7 As 80/2009 of 14 April 2010) under which 'The spot dynamics will be relevant in the event that it (co-)creates an advertising communication, ie, it entails the persuasive process being a direct incentive for the viewer to buy a product. However, even a dynamic spot can be a mere sponsored message, in particular if it does not mention certain product qualities or

characteristics or if the product is not mentioned at all next to the dynamic representation.' But judgments issued at about the same period (within two months) demonstrate the rather different views of the sixth and the seventh panels as to the solidity of the borderline between the two types of commercial communications (see below).

Neither of the two commented judgments uses the arguments from the case-law of the European Court of Justice (or other sources of the EU law) even though this area has been fully harmonised. There is also the absence of any value-oriented argumentation both on the part of the court and on the part of the parties to the proceedings. Judicial decisions are therefore made fully in the scope of the legal regulation covered by the BA without materially reflecting its value-based enshrinement.

ii. Judgment of the Supreme Administrative Court, 8 As 66/2013 of 23 December 2013—CET 21, Non-Separated Advertising

a. Facts of the Case

The Council for Radio and Television Broadcasting imposed a fine of 50,000 koruna on the broadcaster for not having separated advertising from editorial content by optical and/or acoustic means. According to the RRTV, the sponsored message contained elements of advertising.

In the reasoning of the contested administrative decision, the claimant described the commercial communication in question as follows:

> The first shot shows a light blue screen with shapes symbolising ice. In the middle, there are four products—cosmetic products. There is the Nova TV logo in the upper left corner and the Fa MEN logo is right under it. A commentary to the commercial communication asks: 'Do you want to cool yourself?' And the answer is: 'With Fa MEN XTREME POLAR with air-conditioning effect, you can enjoy your summer with a cool head even under extreme conditions. Fa MEN XTREME POLAR. The sponsor of the programme.' And the "sponsor of the programme" notice appears in the lower left corner when the last sentence is said.

b. Case Assessment by the Metropolitan Court

In its judgment 9 A 71/2013-39 of 28 June 2013, the MC cancelled the RRTV decision after it had come to a conclusion that the case in question had not been advertising but a sponsored message to which the duty to separate it from the editorial content by optical and/or acoustic means does not apply.

c. Cassation Appeal of the Council for Radio and Television Broadcasting

In its cassation appeal, the RRTV points out that the spot in question contained an incentive to buy ('Do you want to cool yourself?') which is why it should be assessed as advertising. The Council expressly pointed to the fact that the Metropolitan Court 'ignores some basic media

knowledge, in particular the way the coding and de-coding of the media content by its recipient works, how it works, what the content analysis of media products unveils, the rules of marketing communication, etc. The Metropolitan Court focuses only on whether or not the spot contains an express incentive to buy a product at a certain price. The court neglects to consider that such content is not even part of duly separated advertising spots admitted by the broadcaster.'

d. Assessment by the Supreme Administrative Court

In the reasoning for its judgment, the SAC points to the previous judgments relating to this issue (judgments 7 As 51/2011, 7 As 81/2005, 6 As 44/2006, 7 As 30/2010, 7 As 58/2011, 7 As 51/2011, 7 As 85/2011). The Supreme Administrative Court concluded that 'the spot under assessment must be regarded as a sponsored message even though it is on the border between sponsoring and advertising.' In this respect, the SAC noted that

> the representation of Fa MEN XTREME POLAR products may be regarded as the central motif and main purpose of the spot subject to assessment, not the efforts to persuade viewers to buy these products. The quality or advantages of the products are not emphasised or highlighted to such a degree that it would be possible to make a categorical conclusion on the advertising character of the spot; there are not even any comparisons as to the quality or characteristics of other products. The spot does not communicate that the product is new, where it is possible to buy it, and what the price is. The spot does not contain any advertising story which would reinforce its dynamics. The spot's dynamics primarily focuses on reminding viewers of the existence of the sponsor, or the Fa MEN XTREME POLAR products. The spot lasts only about ten seconds and is rather a brief commercial communication.

The Supreme Administrative Court also states that the *spot is on the border between a sponsored message and advertising.*

e. Commentary

The Supreme Administrative Court's arguments are formally based on its previous judgments, but it should be noted that the questioned issue depends on the assessment of a specific dispute, ie, older judgments provide only a certain degree of guidance. The reiterated emphasis that the spot is *on the border between a sponsored message and advertising* supports the conclusion that there is no strict borderline between advertising and a sponsored message and that any assessment of boundary cases is basically a matter of administrative discretion. There is also an absence of any value-based or moral argumentation and the court does not base its conclusions on the case-law of the European Court of Justice or European Court of Human Rights.

iii. Judgment of the Supreme Administrative Court, 7 As 24/2010, of 24 June 2010— Covert advertising; Stanice O, a.s.

a. Facts of the Case

The Council for Radio and Television Broadcasting imposed a fine of 50,000 koruna on the broadcaster for a violation of Section 2(1)d of the Advertising Act prohibiting covert (hidden, surreptitious) advertising. According to the RRTV, the broadcaster reportedly committed an administrative infringement by broadcasting a programme containing an interview with a racing snowboarder who had a cap bearing the Red Bull sign, ie, the trademark of the snowboarder's sponsor. The Council for Radio and Television Broadcasting concluded that this was advertising and that it had not been duly identified.

b. Applied Legal Regulation

When the administrative infringement was committed, the issue of covert advertising in television broadcasting was regulated simultaneously by two regulations. According to Section 2(1)q of the BA in the wording in effect until 30 June 2009, covert advertising means a verbal or visual representation of goods, services, business or trade name, trademark or activities of the producer of goods or service provider given by the broadcaster in a programme which does not have the character of advertising and teleshopping if such representation intentionally pursues a promotional purpose and can mislead the public with regard to the character of this representation; such a representation is regarded as intentional if it is provided for a consideration. Section 48(1)g unconditionally bans covert advertising. According to Section 60(1)l, RRTV can impose a fine ranging between 5,000 and 2,5 million koruna if the broadcaster *fails to adhere to the duties set forth for the broadcasting of advertisements and commercials, teleshopping, and sponsored programmes.*

Furthermore, covert advertising is in general banned by Section 2(1)d of the Advertising Act. Under this provision, covert advertising *means advertising where it is difficult to differentiate that it is advertising, in particular because it is not designated as such.* The Council for Radio and Television Broadcasting is the body authorised to exercise supervision over adherence to the ban if it concerns advertising disseminated via radio or television broadcasting. The fine for disseminating covert advertising can amount to up to 5 million koruna.

The issue of the legal consequences of the simultaneous effect of both regulations was not addressed in the commented case because it was not raised by the RRTV which submitted the cassation appeal. Since the SAC is bound by the reasons of the cassation appeal, it based its decision on the assumption that if a broadcaster accomplishes the elements of an administrative infringement as defined in the Act on Advertising, it is liable for this infringement without any modifications arising from the BA.

c. Judgment of the Metropolitan Court in Prague and Cassation Appeal of the Council for Radio and Television Broadcasting

The Metropolitan Court in Prague cancelled the administrative decision of the RRTV for Radio and Television Broadcasting, stating that the reasons for which RRTV had drawn the conclusion that this case concerned advertising had not been sufficient. The Metropolitan Court in Prague noted that sportsmen normally gave interviews to the media in clothing with sponsor trademarks and no fines had been imposed for such acts.

The Council for Radio and Television Broadcasting lodged a cassation appeal against the judgment of the MC, objecting that it had sufficiently dealt with the issue of whether or not the brand representation in the broadcasting had pursued a promotional purpose. According to the RRTV, the 'broadcasting of an interview with a sportsman in the clothing bearing the sponsor's trademark may be subordinated to the term "advertising".'

d. Assessment of the Case by the Supreme Administrative Court

At first, the SAC reviewed the character of the sportsman's performance in the broadcasting, noting that

> it is widely known that snowboarding is a winter sport whose fans are generally regarded as a part of a certain informal community defined by certain characteristics, in particular a certain style of sports clothing and that this community is viewed as a group of dynamic, independent and rather non-conformist people. Hence, the image of a top-level snowboarder will often comply with the general notions of the character of the snowboarding community, if we can speak about it. It is also widely known that top-level snowboarders and individual races get financial support from producers of various goods or service providers, including those producing sports goods (Quicksilver) or selling goods with a certain specific image corresponding to the image of the snowboarding community. The producer of the widely known energy drink, Red Bull, is one such producer. Therefore, a top-level snowboarding racer with whom a broadcaster broadcasts an interview about the past race will apparently be presented as a member of the snowboarding community in such an interview. Such representation may certainly include the fact that he will wear clothing specific for this community and a sports cap typically used in this sport which will bear a sign of his sponsor or designation of a product sold by this sponsor.

Using these standpoints, the SAC formulated the general principles of interpreting the ban on covert advertising, using the constitutional principle of freedom of expression in its considerations when it pointed out that this was a fairly significant limitation of the freedom of expression:

> Any report in television broadcasting on a certain fact or event contains the possibility that a stimulus of an advertising character will penetrate to the viewer through the news. It is especially very likely in reports on sports or sportsmen, because sport, in particular at the top level, is currently an important mediator of advertising messages from their originators to the addressees. However, this fact as such cannot result in a strict interpretation of the provision banning covert advertising

> or covert sponsoring which would make broadcasters actively cover such designations or symbols on the clothing of the persons on whom they report, eg, by broadcasting an interview or even by not broadcasting the information at all not to risk the sanction due to an administrative infringement. As a matter of fact, we must always keep in mind even when interpreting the provisions on covert advertising that its ban is a limitation, and quite a significant limitation, of freedom of expression, which is protected as one of the most significant fundamental rights in Article of the Charter of Fundamental Rights and Freedoms. According to Paragraphs 1, 2, and 3, the freedom of expression and the right to information are guaranteed. Everyone has the right to express their opinion in speech, in writing, in the press, in pictures, or in any other form, as well as freely to seek, receive and disseminate ideas and information irrespective of the frontiers of the state. Censorship is not permitted. Paragraph 4 of the cited article sets forth very strict limits as to the possible limitations of this fundamental right when it says that 'the freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures necessary in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morals.' Although the freedom of expression is included among fundamental political rights, its material scope is absolutely universal. It includes the right to disseminate information of a political character as well as commercial information published for the purpose of generating profit. There is no need to discuss the reasons why the scope of the freedom of expression should be as wide as possible here; it would be enough to note that freedom of expression in general is one of the fundamental determinants of western civilisation and significantly contributed to its cultural dominance by stimulating discussions, innovations, search for new solutions, general awareness about reality and its various aspects. Even at the level of information of a commercial character, the freedom of expression may be limited only if it is necessary, ie, if it is absolutely needed to ensure certain values protected by the constitution and enumerated in Article 17(4) of the Charter of Fundamental Rights and Freedoms. Hence, the interpretation of the limited freedom of expression conforming to the Constitution must be based on the fact that there must be a legitimate reason for any specific limitation which would be based on Article 17(4) of the Charter of Fundamental Rights and Freedoms, and that the content, scope and intensity of the given limitation must be proportional to the value protected by it.

The Supreme Administrative Court also dealt with legitimacy of the reasons why the freedom of expression can be limited:

> In the matter in hand, a legitimate reason for banning covert advertising may be found. Covert advertising basically misleads the addressee of the advertising message with regard to the actual content of this communication. It covertly recommends consumption of a certain article (to purchase some goods or to use some service), but conceals the fact that the recommendation is given by those who are actually interested in this consumption because it generates profit. The legislator had this nature of covert advertising in mind when it is defined as a representation 'aiming at' supporting business activities, ie, a representation having the target (purpose) of generating commercial success of the entity in whose interest the advertising message is disseminated. Liability of legal entities for administrative infringements is basically objective pursuant to the Advertising Regulation Act, stating the grounds for liberation (see Section 8b(1) of the Advertising Regulation Act). However, this does not apply to the case where the actual violation of the duty defined in the respective facts consists in the acts caused. Whether or not this is true depends on the wording of the specific statutory provision.

> In the case of the prohibition of covert advertising, the subjective aspect in the form of intention is required. Advertising is covert ('hidden') within the meaning of the Advertising Regulation Act only if the subjective aspect is fulfilled during its dissemination, ie, if the broadcaster disseminates a certain communication and is aware that it has an advertising character. If the subjective aspect is not proved, liability for the administrative infringement cannot be considered in this case.

This leads to a conclusion summarising the interpretation of the Advertising Act prohibiting covert advertising in the manner conforming to the Constitution as follows:

> At first, it must objectively be a communication which can motivate the addressee to consume (purchase the goods or engage a service). If, during an interview with a top-level snowboarder, the camera shows his cap with a clearly distinct sign, Red Bull, it may certainly objectively reinforce the viewers' motivation to consume this drink because an average consumer may connect the well-known name of an energy drink to the community of dynamic, independent, and rather non-conformist snowboarders where these characteristics are regarded as positive and desirable, which is why he/she will buy the drink. It must also be a communication / message subjectively perceived by the entity disseminating the broadcasted programme as an advertising, yet hidden message. Hence, the disseminator must know that the message is, in the material extent, covert advertising in character, and must want to broadcast it or must know that it may be covert advertising in character and broadcast it even in the case that it is covert advertising in character. The condition that a message must have the character of covert advertising is based on the view of the provision banning covert advertising through the prism of Article 17 of the Charter of Fundamental Rights and Freedoms. As has already been said, a significant proportion of the information that people encounter in their normal life has or can have the character of advertising and this character is not (it is virtually impossible in practice) 'de-masked' as an advertising message by being, for instance, designated as such. However, dissemination of such information cannot be prohibited only due to this quality (cf, similar conclusions regarding so-called indirect advertising, Point 27 of the judgment of the European Court of Justice of 13 July 2004, Case C-492/02, application for preliminary decision submitted by Cour de cassation (France), Bacardi France SAS vs Télévision française 1 SA (TF1)). It is possible to prohibit only dissemination of such information where advertising content significantly prevails but remains covert at the same time. In the heard case, it means that the party to the proceedings may be sanctioned for an administrative infringement relating to the violation of the ban on covert advertising only if it is proved that the advertising message (the Red Bull sign on the cap) was consciously included in the programme 'beyond' the framework of the actual content of the message, ie, beyond the framework of the interview's content, absolutely without any context and exclusively with the aim of asserting a commercial effect on viewers, and that it was not 'de-masked' as advertising, eg, by mentioning that the sportsman is sponsored by the producer of Red Bull drinks, which is why he is wearing a cap with the drink's designation.

e. Commentary

The commented decision of the SAC is important especially due to the fact that a specific case was used to formulate the generalising criteria under which the RRTV can assess future cases, which also increases the legal certainty of broadcasters.

If the application of the provisions regulating broadcasting content cannot be foreseen, it raises legal uncertainty not only in broadcasters. This uncertainty may also lead to excessive prudence on the part of editors who will over-scrupulously strive not to broadcast any message which could be regarded as covert advertising for fear of potential sanctions. Such a situation would undoubtedly be to the detriment of the quality of information.

iv. Judgment of the Supreme Administrative Court, 6 As 16/2010, of 30 September 2010—Covert Advertising, Product Placement; FTV Prima, spol. s r.o.

a. Facts of the Case

The Council for Radio and Television Broadcasting imposed a fine of 1.1 million koruna on the broadcaster for broadcasting covert advertising for the Šíp daily newspaper in the reality show *Vyvolení*. The law was allegedly violated in 22 parts of the reality show. Covert advertising was seen in the representation of a copy of the newspaper whose designation and format was reminiscent of a tabloid newspaper published in the Czech Republic at that time. The Council for Radio and Television Broadcasting pointed to the fact that the newspaper's representation had not had any purpose other than advertising because the reality show participants had not had any newspaper available to them at all.

b. Broadcaster's Arguments

In its administrative appeal, the broadcaster voiced not only formal and procedural objections, but also noted that this was a case of product placement which was not expressly regulated by the BA in the decisive period from which the broadcaster inferred that product placement was basically possible. The broadcaster also pointed to cases of other broadcasters where the RRTV had not exercised its sanctioning power even though the cases had involved similar situations.

c. Assessment of the Case by the Metropolitan Court

The Metropolitan Court in Prague did not agree with the broadcaster's objections, noting that the RRTV assessed the case correctly pursuant to Section 2(1)q of the BA which regulated covert advertising. The Court upheld the RRTV's conclusions that the advertising purpose may also be pursued by brief shots lasting several seconds and by displaying a newspaper logo without any connection with the programme's action. According to the Court, the advertising effect is intensified by the fact that the stage property, unlike the original, had comprised one sheet only and that the logo had been displayed on both pages of the newspaper contrary to the established practice.

d. Assessment of the Case by the Supreme Administrative Court

Following the broadcaster's cassation appeal, the SAC attempted to determine whether or not the broadcaster could have had legitimate expectations based on the current administrative practice of the RRTV which had not sanctioned similar acts and whether the case involved prohibited covert advertising or permitted product placement. In addition, the broadcaster raised other procedural and formal objections. The Supreme Administrative Court dismissed the broadcaster's cassation appeal.

The Supreme Administrative Court found that the RRTV had been correct to assess the case pursuant to the legal regulation decisive at the time of the administrative infringement and to apply Section 2(1)q of the BA.

> Czech laws did not know the term 'product placement' before 31 May 2010, ie, before the amendment to the Broadcasting Act implemented through Act No 132/2010 Sb. (Coll.). They regulated only the prohibition of covert advertising embodied in Section 48(1)g of the Broadcasting Act. Hence, the defendant and the Metropolitan Court correctly assessed the facts pursuant to legislation valid at the time of the decision and pursuant to the criteria applicable to covert advertising (cf Section 2(1) q of the Broadcasting Act). The local court has already drawn the conclusion that it is possible to impose a sanction on the broadcaster for covert advertising only if three cumulative conditions are fulfilled: 1) the representation in the programme which does not have the character of advertising pursues a promotional purpose; 2) the representation intentionally pursues a promotional purpose, ie, the intentionality, intention or adequacy must be assessed; 3) the representation is capable of misleading the public as to its character (cf judgment of the Supreme Administrative Court of 31 March 2010, Ref No 6 As 47/2009-49, published under No 2076/2010 Sb. NSS). The Metropolitan Court dealt in detail with all of these criteria, and inferred that both the promotional purpose had been fulfilled (the displayed newspaper logo is often the central point of perception), as well as the advertising intent (inferred from the extensive frequency and systematic nature of the newspaper logo shots and from excessiveness of the representations) and the capability to mislead the viewer with regard to the character of the representation (based on the intensity of the effects on the viewer and on regularity and the systematic nature of the effects and partly inconsistent with the action and preparation; *cf* pp 28–29 of the judgment).

The Supreme Administrative Court subsequently dealt with the criteria used by the RRTV to review whether or not this constituted prohibited covert advertising because the broadcaster objected that these criteria were not directly based on law. The Supreme Administrative Court provided the following commentary:

> As far as the promotional purpose is concerned, the claimant objects that the defendant has, *praeter legem*, fabricated auxiliary criteria which have no logical ties to the sale of the product. Specifically, these are the extent of the representation, its context in the programme in question, the adequacy and manner of performing the representation, the intensity of its effects on the viewer, the method of preparing prerequisites, and the tools for the representations. In this respect, the Supreme Administrative Court refers to the interpretative communication of the Commission No 2004/C 102/02 on certain aspects of the provisions of Directive 89/552/EEC. In this communication, the Commission emphasises that the characteristics of covert advertising include the intention of the

> broadcaster of media services to provide a representation with a promotional purpose. Since it is fairly difficult for national regulatory authorities to infer such an intention, the European Commission considers it appropriate to apply the criterion of 'undue prominence' of the representation of the good, service, brand, or company name. The undue nature of such a representation may result from the 'recurring presence' of the brand, good or service in question or from the 'manner in which it is presented and appears'. The case-law of the Supreme Administrative Court also stresses that the promotional purpose (advertising objective) pursuant to Section 2(1)q of the Broadcasting Act may be, among other things, demonstrated by the 'undue prominence of the representation of a certain good, service, or brand.' The undue prominence results, among things, from the recurring representation or presence of the goods, services and brands or the method in which these goods, services or brands were presented (cf the above-mentioned judgment of the Supreme Administrative Court Ref No 6 As 47/2009-49). In the light of the foregoing, the criteria chosen by the defendant to demonstrate the promotional purpose seem to be absolutely apt.

At the end of its argumentation, the SAC expressly states the purpose pursued by the prohibition of covert advertising:

> The Supreme Administrative Court also finds it necessary to rebut the legal opinion presented by the claimant that only product placement supporting the sale of the product has the prohibited promotional purpose, not mere marketing support of the brand image. In its previous case-law, the Supreme Administrative Court already noted that visual covert advertising was a typical example of prohibited covert advertising, consisting in 'reinforcing or creating an emotional relationship of an average consumer to the consumer goods brand hidden in a news or entertainment programme' (cf the aforementioned judgment of the Supreme Administrative Court, Ref No 6 As 47/2009-49, Point 32). Prohibited covert advertising interferes with consumer protection and due competition as it usually creates or reinforces the consumer's emotional relationship to a product used in everyday life without the consumer being aware of it. The legal limitation of covert advertising aims at protecting average consumers in a situation where their rational consumer behaviour would be influenced by the emotional relationship developed without their knowing it through prohibited media promotion of a product or its brand. Covert advertising works most effectively if consumers can choose a similar product of everyday consumption differing from other products merely in the producer or brand.

e. Commentary

The commented judgment of the SAC evidences the relatively strong precedent effect of the SAC decisions, in particular some of its decisions. Such decisions may be branded as *leading cases* because they generally address a more complex issue which has not been addressed either at all or only *ad hoc* in individual cases without any aspirations for the decision to become general in the future.

In the commented decision, the SAC explicitly applied the conclusions of the seventh panel as applied in judgment 7 As 24/2010 without being forced to justify the conclusions in detail. And it also appears that different conclusions may be drawn even if the same starting points and the same algorithms are applied, especially with regard to the different facts of the cases concerned.

While in Case 7 As 24/2010, the sportsman was presented in an environment which is natural for him, the SAC found in the commented judgment that the situation had been arranged in order to present a certain brand, and the advertising effect of this representation had been concealed to the consumer.

Compared to judgment 7 As 24/2010, the sixth panel places greater emphasis on the good colliding with the freedom of expression, ie, protection of consumer rights. The seventh panel has in this respect noted only the latency of the advertising effect, ie, that covert advertising is in a way fraudulent misrepresentation: 'The addressee is latently recommended to consume a certain good (to buy the goods, draw services, etc.) but the fact that the recommendation is given by someone who is interested in this consumption because it generates profit is concealed.' On the other hand, the sixth panel, referring to its previous judgment (6 As 27/2009), claims that covert advertising also includes visual covert advertising which

> reinforces or creates an emotional relationship of the average consumer to the consumer goods brand hidden in a news or entertainment programme. Prohibited covert advertising interferes with consumer protection and due competition as it usually creates or reinforces the consumer's emotional relationship to a product used in everyday life without the consumer being aware of it.

While the first case protects the right to information and self-determination of the addressee of the message (who does not have any objective option to learn about the advertising character of the message and is therefore mislead), consumer protection acquires another dimension in the other case because the consumer is basically protected from himself/herself or from creating an emotional tie to a certain product through television broadcasting which would subsequently influence his/her consumer behaviour.

v. Judgment of the Supreme Administrative Court, 8 As 28/2013, of 20 October 2014—Product Placement; CET 21, spol. s r.o.

a. Facts of the Case and Assessment of the Case by the Council for Radio and Television Broadcasting

The broadcaster was fined 250,000 koruna for undue prominence of a product (a treatment for prostate difficulties) in a television series. The broadcaster was blamed for having breached Section 53a(2)c under which programme units containing product placement *shall not give undue prominence to the product in question.* In its decision, the RRTV found that the product had been presented in the programme unit forcedly, without any direct integration in the action, and was thus given undue prominence.

In the reasons for its decision, the RRTV stated that

> a scene without any dramaturgical and directorial justification (a dialogue about the product when preparing Christmas decoration) where viewers are provided with complete information on the product in question (the product helping mitigate urinating difficulties, a lamp as a gift) cannot be viewed as normal product placement pursuant to law because the product was given undue prominence.

> The placed product was the central motif of the scene and it was given excessive attention, ie, the scene did not mean to highlight Christmas preparations and wrapping of Christmas gifts.

According to the RRTV,

> the pack with the Prostenal product (and its name was legible on the pack) was placed in a visible place during the entire scene and expressly mentioned several times ('I see that you are wrapping the gifts') and taken in hand and examined; its content was clearly mentioned and excessive attention was also given to a small lamp which is part of the product's Christmas pack, and the purpose and quality of the product was verbally mentioned. The pack was being demonstrated even at the moment when the dialogue turned to other topics; there were detailed shots of the speaking persons as well as general shots over the room where the pack was visible. The enclosed lamp was used to light up the room. There were also shots of an inflatable Santa Claus in the background and a Prostenal pack in the foreground. The scene was centred on the placed product which constituted the central motif of the scene, not Christmas preparations, which were used only as a supplement in the background. The situation should have been the other way round had the product been placed in accordance with law. Therefore, the scene lacks any dramaturgical and directorial justification and provides viewers with clear information on the product in question.

b. Broadcaster's Arguments and Assessment of the Case by the Metropolitan Court

The broadcaster referred to the newness of the regulation on product placement with which television makers lack sufficient experience and to the lack of any guidance and support in the case-law and established administrative practice of the RRTV. Although the broadcaster admitted doubts regarding the rendering of the scene, it stated it was convinced that the broadcaster's duties had not been violated and that the scene had been included in a natural and justifiable manner.

The Metropolitan Court in Prague dismissed the appeal. With regard to the broadcaster's objections, the Court pointed to judgment of the SAC 6 As 16/2010 of 30 September 2010 in which the SAC states that

> the adoption of the On-Demand Audiovisual Media Services Act is the result of the transposition of Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directive 89/552/EEC, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. Directive 2007/65/EC of the European Parliament and of the Council continues to prohibit covert (surreptitious) audiovisual commercial communications but this ban should not apply to the so-called authorised product placement if the viewer is sufficiently informed about the product placement. The cited directive has created a category of admissible audiovisual communications in the form of product placement within the generally inadmissible surreptitious advertising audiovisual communications.

As for the applicant's objection that the consumer was not influenced by advertising, the MC notes that the provisions of Section 53a(2)c do not require viewer to be influenced by the advertising.

c. Assessment of the Case by the Supreme Administrative Court

The Supreme Administrative Court dismissed the broadcaster's cassation appeal.

> The Supreme Administrative Court agreed with the defendant's and Metropolitan Court's assessment. The description of the objectionable scene in the programme unit provided in the defendant's decision clearly shows that the placed product Prostenal was given undue prominence both with optical and acoustic means. The scene also contained general shots of the room with a visible product pack; there were also shots of an inflatable Santa Claus with a clearly visible pack and a legible name of the product in the foreground together with the lamp. In the scene, the actor also uses the lamp to light up the room. Attention is also drawn to the product in the conversation, referring to its purpose (the solution of difficulties urinating; 'This is for my brother so that he does not have to rush to the toilet when he is here') and the target user group (with the sentence: 'You know, we men are now at an age when we have to look after ourselves' said by an older man). It follows from the above that the product was not depicted 'naturally', in a natural environment. On the contrary, it was the central motif of the scene while Christmas preparations were only supplementary. The scene lacked any dramaturgical and directorial justification; it was included in the programme unit beyond the context of the story. Just like the defendant and the Metropolitan Court, the Supreme Administrative Court found that the programme unit had given undue prominence to the product placed, ie, the claimant had committed an administrative infringement pursuant to Section 53a(2)c of the Broadcasting Act.

d. Commentary

This was the first decision of Czech courts to apply the new legal regulation relating to product placement. The Council Recommendation Relating to the Application of New Product Placement Regulation was the only document specifying the relatively general legal regulation. In this recommendation, the Council articulated what it regarded as the undue prominence of a product, including in particular:

- unsubstantiated references to a product beyond the context of the story with the aim of drawing attention to the product and awakening interest in the product in viewers;
- emphasising and highly praising the product qualities;
- unnatural accumulation of occurrence of a single product;
- providing contact details (address, website, telephone number) of the product seller or service provider;
- emphasizing the product by visual means (product details without any apparent dramaturgical and directorial justification).

The issue of product placement is related to the issue of covert advertising, which was also used in the broadcaster's argumentation. The Supreme Administrative Court (in its judgment 6 As 16/2010) also applied the provisions on covert advertising in a situation where it concerned product placement at a time when product placement had yet to be expressly regulated. Nonetheless, the above judgment differs somewhat, in that it takes no account of the value base of covert advertising regulation as defined in the judgment 7 As 24/2010. In this judgment, the SAC explicitly avoided dealing with the issue of whether or not the

message (communication) subject to review could have an advertising effect, justifying its position by stating that this was not part of the facts of an administrative infringement. Thus, the information autonomy of the recipient of the message is absolutely disappearing from the view of the bodies of law application, which, however, raises the question of whether covert advertising and the undue prominence of a product are at all comparable, in particular with regard to the degree of their harmful effects on society.

Administrative courts rejected the broadcaster's arguments as to inappropriacy of the size of the fine. According to the SAC, the

> determination of the fine amount for an administrative infringement is subject to review only with respect to its adherence to the limits and aspects prescribed by law, its compliance with the rules of logical inference and with respect to the question of whether the premises of such inference were established in a due procedural manner (see, eg, judgment 5 Azs 47/2003-48 of 22 January 2004 and, by analogy, judgment 8 As 72/2009-114 of 13 April 2010). The Supreme Administrative Court did not find that the defendant would not adhere to the described limits when imposing the fine. The defendant considered all statutory criteria to determine the amount of the fine and described their evaluation in a logical and comprehensible manner. The content of the administrative file did not show any procedural errors or defects of the defendant either.

X. Protection of Minors

A. Legal Definition

In the valid legislation, the protection of minors against undesired media content is provided by two facts of administrative infringements, hence by two provisions regulating the content of radio and television broadcasting for this purpose.

Pursuant to Section 32(1)g of the BA, a broadcaster must avoid including in the programme during the period of 6 am to 10 pm any programme units and announcements which might endanger the physical, mental or moral development of minors; this obligation shall not apply to broadcasters where broadcasting to the end user is available under a written contract concluded with a person aged over 18 years, and is accompanied by the provision of a technical measure which allows that person to restrict minors' access to broadcasting. Pursuant to Section 32(1)e of the BA, a broadcaster must not include in the broadcasting any programme units that may seriously affect the physical, mental or moral development of minors by, in particular, involving pornography and gross violence as an end itself.

Both the RRTV and the related case-law of administrative courts apply these two provisions with different frequency. The sanctioning pursuant to Section 32(1)g of the BA is clearly prevalent while the application of the stricter provisions of Section 32(1)e of the BA is less frequent and is basically limited to the sanctioning of pornography.

B. The EU Law

The protection of children and minors against harmful content is also regulated by the EU law. The regulation has for a long time been concentrated in Directive 89/552/EEC of 3 October 1989, on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (Directive on Television without Frontiers). Article 22 of this Directive reads as follows:

> Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental, or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programmes which are likely to impair the physical, mental, or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.

The current EU regulation is contained in Directive of the European Parliament and Council 2010/13/EU (Audiovisual Media Services Directive). According to Article 12 of this Directive,

> Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audiovisual media services.

C. Constitutional Basis

The interest in the proper development of minors is generally accepted as a legitimate reason for limiting freedom of expression (speech) of a radio and television broadcaster and is also strongly reflected in the legal regulation on the provision of on-demand audiovisual media services. The explanatory report to the draft law on on-demand audiovisual media services says minors are a vulnerable group and the protection of vulnerable groups is one of the main motives behind the adoption of a new legal regulation.

The protection of children and childhood is a value to which society traditional ascribes extraordinary importance. This fact is constitutionally reflected in Article 32(1) of the Charter under which family and parenthood is protected by the law and that guarantees special protection of minors. The wording of Article 32(1) of the Charter may be regarded as an institutional guarantee underlining the importance of family and parenthood for the modern society.[105] The entire Article 32(1) of the Charter creates a legislative framework for 'a consistent legal protection of family as one of the key foundation stones of a society.'[106]

105 J Filip, *Vybrané kapitoly ke studiu ústavního práva* (Brno, Masarykova univerzita, 2001) 162.
106 K Klíma, *Komentář k Ústavě a Listině* (Pilsen, Aleš Čeněk, 2006) 865.

The Czech Republic must also yield special protection to minors under international conventions by which it is bound. A special position is enjoyed by the Convention on the Rights of the Child. Its Article 17 also mentions mass media and obliges States Parties to encourage:

- the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of Article 29 of the Convention;
- the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.

A particular regulation targeting television broadcasting is contained in the Convention on Transfrontier Television where Article 7(2) stipulates that 'All items of programme services which are likely to impair the physical, mental or moral development of children and adolescents shall not be scheduled when, because of the time of transmission and reception, they are likely to watch them.'

However, despite the undisputable constitutional dimension of the interest in the special protection of minors (meaning children and adolescents) and despite the existing international commitments assumed by the Czech Republic, a point that cannot be overlooked is that the interest in the protection of minors is not a separately protected purpose for which freedom of expression may be limited under Article 17(4) of the Charter. Accordingly, the question arises whether and under what circumstances the interest in the protection of minors may be used as a limit to freedom of expression.

The Supreme Administrative Court thoroughly dealt with the relation between freedom of expression of a television broadcaster and interest in the protection of minors with respect to the fines imposed on broadcasters by the RRTV for reality TV shows broadcast at an inappropriate time of the day. In its judgment 4 As 34/2007 of 30 April 2008, the SAC formulated a general thesis that in this case, it is

> a conflict of two values and legitimate interests protected by the law. On the one hand, it is the 'freedom of speech and dissemination of ideas or information that is the fundamental human right at the active level, hence in the dissemination of such ideas and information, and at the passive level, hence in the right to acquire such information.' On the other hand, there is the 'interest and wellbeing of the child protected by the law represented by the physical, mental and moral development of the child's personality, which should not be disturbed by exercising freedom of speech and dissemination of information within a certain space defined by the law.

The Supreme Administrative Court based its thesis on Article 10 of the ECHR, Article 7(2) of the European Convention on Transfrontier Television and Article 17(a) of the Convention on the Rights of the Child. The Supreme Administrative Court sees a national collision of two protected values and legitimate interests in Article 10(2) of the ECHR, and refers to the Act on Radio and Television Broadcasting.

Similar arguments may be found in another judgment of the SAC (6 As 70/2007-104 of 15 May 2008) where the Court contrasts the freedom of expression of a television broadcaster on the one hand with interest in the protection of minors on the other. The Supreme Administrative Court acknowledges the constitutional dimension of the protection of minors, referring both to Article 32(1) of the Charter and to the aforementioned sources of the international law. The Supreme Administrative Court also refers to the Audiovisual Media Services Directive, the EU Charter of Fundamental Rights (stating in Article 24(1)

that children shall have the right to such protection and care as is necessary for their well-being) and judgments of the ECtHR (*Handyside*[107] and *Müller*[108] cases). The Supreme Administrative Court assessed the clash between freedom of expression on the one hand, and the right of children to special protection on the other as a collision of two *legal interests of the same level;* and *it is up to the court to consider the significance of the colliding rights on the proportionality principle.* This consideration had the same result in both cases (and in many others), ie, priority was given to the interest in the protection of minors.

According to the cited case-law, the interest in the protection of proper development of minors is a legitimate reason to limit a television broadcaster's freedom of expression, primarily with regard to the wording of international conventions by which the Czech Republic is bound. We can also infer from the cited decision of the SAC that the aforementioned international documents may be used to bridge the fact that the interest in the protection of minors is not expressly mentioned in the limitation clause of Article 17(4) of the Charter.

Hence, the SAC is implicitly responsive to the idea of immanent limits to freedom of expression and admits the possible existence of reasons for the limitation of expression which are not expressly referred to in Article 17(4) of the Charter at least in the cases that concern rights and interests that have constitutional support in other parts of the Charter. These conclusions of the SAC successfully underwent the review of constitutionality and were also accepted by a part of the doctrine.[109]

Still, a prudent approach must be taken to such conclusions. Not even the undeniable intensity of the interest to prove as strong and effective protection of children against undesired effects as possible, and the importance of this interest for an individual and the society can bridge the fact that the protection of children was not expressly included among the legitimate reasons for limiting freedom of expression. Any expansion of the list of reasons in Article 17(4) of the Charter and acknowledgment of the existence of immanent limitations to freedom of expression significantly reduces the importance of the very existence of the special limitation clause. Therefore, Article 31(2) of the Charter cannot be regarded as sufficient constitutional support for admission of limited freedom of expression for the purpose of protecting proper development of minors.

Expansion of the reasons for limiting the freedom of expression on the basis of international conventions binding the Czech Republic is also very disputable. Paradoxically enough, international conventions on human rights are here used to reduce the achieved (substantive) standard of the human rights protection in the Czech Republic. In the decisions mentioned above, the SAC did not fully realize that the provisions of international conventions applied by the Court were self-enforceable. As such, these provisions do not even enjoy the application preference to normal laws, because they need the implementation by the national law in order to be applicable. That means that their statutory effect is reflected in Article 1(2) of the Constitution under which national courts must prefer such an interpretation of the national law that will be responsive to the obligations resulting for the Czech Republic from international law. However, the constitutional order of the Czech Republic represents an insurmountable limit to this responsiveness.

107 *Handyside v UK*, App No 5493/72, judgment of 7 December 1976.
108 *Müller v Switzerland*, App No 10737/84, judgment of 24 May 1998.
109 Šimáčková in J Kroupa, Jiří et al, *Mediální právo* (Brno, Masarykova univerzita, 2009) 49.

The interest in the protection of proper development of minors may become a legitimate reason to limit freedom of expression only if a specific limitation may be subordinated to any of the constitutionally approved reasons to limit freedom of speech. A possible example would primarily be the protection of morals.[110] However, it seems to be disputable if these measures are related to the rights and freedoms of others. Although one often speaks about the *rights of minors* to undisturbed development, it is questionable whether these *rights* really have the structure of a right, whether they really are tied to the persons of their bearers who dispose of such rights and use them at their discretion, etc. It is rather an objective value, ie, the society-wide interest to protect members of this potentially vulnerable group.

Therefore, the category of morality may be considered not only as moral standards that are generally accepted by the majority society, but also (if Article 32(1) of the Charter of Fundamental Rights and Freedoms is considered) in relation to the protection of childhood, parenthood and family. In other words, one of the moral standards protected by the Constitution includes the *need to protect children* as well as the right of parents to decide on their education and upbringing. Strictly speaking, the protection of parenthood prevents the shift of decision-making and responsibility for the development of children from parents to the state, which also applies to the provision of adequate protection of children against such programmes that are inappropriate with respect to their future development. Therefore, this protection cannot be fully passed to broadcasters and providers of audiovisual media services. The thesis that parents should have an option to reasonably rely on the fact that programmes that could jeopardise the healthy development of their children will not be broadcast at a time where their child may watch television broadcasting (on his/her own) seems to be adequate.

D. Statistics

Confirmed Total	Confirmed	Reversed total	Reversed
17	36 per cent	30	64 per cent

A total of 47 RRTV decisions were reviewed. The broadcaster's action was dismissed in 25 cases. The dismissing judgment of the Municipal Court in Prague was upheld by the SAC in seventeen cases. The judgment of the Municipal Court in Prague was cancelled in eight cases, including five cases cancelling also the contested the RRTV decision. The case was referred to a further procedure at the Municipal Court in three cases (including one case where this happened repeatedly). One administrative court judgment was cancelled by the SAC. None of the cases where the SAC cancelled the judgment of the Municipal Court and referred it to a further procedure ultimately resulted in the acknowledgement of the RRTV decision. In one case, the broadcaster did not file a cassation complaint against the judgment dismissing its action, but the SAC has already dealt with the RRTV's cassation complaint before when it cancelled the previous judgment of the Municipal Court which cancelled the RRTV decision. Hence, this would be a repeated cassation complaint that is not admissible.

110 J Ukrow in O Castendyk, EJ Dommering, A Scheuer, *European Media Law* (Alphen aan den Rijn, Kluwer Law International, 2008) 706.

The Municipal Court in Prague cancelled the RRTV decision in 22 cases. The Council filed a cassation complaint in two cases and was successful in one case. The Supreme Administrative Court cancelled the contested Municipal Court judgment, and the Municipal Court dismissed the broadcaster's action in the next procedure. The Council did not succeed in one case.
It is also worth mentioning that no cassation intervention has been registered from the part of the CC which would concern the administrative activities of the defendant. The only intervention was invoked by a breach of the broadcaster's right to a fair process from the part of the SAC and the Municipal Court in Prague. In its judgment I. ÚS 671/13 of 29 July 2013, the CC cancelled both judgments of administrative courts, which ultimately resulted in the cancellation of the RRTV decision. This was again for procedural reasons.

E. Answers to Research Questions

Although the broadcasters appealed to freedom of expression in some cases when they had been sanctioned for a breach of the BA provisions whose objective is to protect the proper development of minors, their arguments were not very successful. The decision of the RRTV was not cancelled in any of the analysed cases for the reasons that the administrative court would find that the broadcaster's freedom of expression guaranteed by the Constitution would have been infringed by the RRTV decision.

When the broadcasters used the argument of freedom of expression, the administrative courts admitted on the one hand that the freedom of expression had been affected, but had by no means found that the freedom of expression would have been infringed. They always justified any intervention in the freedom of speech by the protection of another value protected by the Constitution, ie, the protection of proper development of minors.

The public interest in the free flow of information was considered in the SAC's judgment 11 As 247/2010 of 5 December 2011 that ruled over a sanction for the broadcasting of disturbing images in the afternoon news programme, *Odpolední televizní noviny*. Here the SAC pointed out that 'This is a news programme that is not primarily intended for children and minors. Although minors could have watched the programme due to the broadcasting time, it is not a programme that would normally be attractive for this group of viewers (compared to fairy tales, adventure or action films, commercials, etc.).'

In its other judgments, the SAC also admitted the relevance of the question whether the sanctioning decision had affected the broadcasting of content related to the issues of public interest; but in no case did this value prevail over the interest in the protection of the proper development of minors.

The arguments emphasising the freedom of expression is naturally related to the presence (absence) of such arguments in the procedural filings of broadcasters. However, the reviewed case-law makes it impossible to clearly determine the cause and the consequence. However, having regard to the decision-making practice of administrative courts, it is possible to formulate a hypothesis that these arguments were not mostly applied because the likeliness that they would be successful was perceived as negligible.

Even though the interest in the protection of minors is not explicitly expressed as a constitutionally acceptable limit to freedom of expression and even though it is reflected only in one particular segment of the media market (radio and television broadcasting), the case law of administrative courts clearly prefers this interest to freedom of expression.

Furthermore, compared to the other monitored areas, the case-law of administrative courts lacks an appeal to the RRTV to assess each case individually and consider thoroughly whether the freedom of expression or the interest in the protection of minors should be preferred in the given case. It is namely because the interest in the protection of minors is considered to be a preferred value *en bloc*.

The reviewed case-law of the SAC thus seems to be very consistent with respect to values. Consequently, the dominance of the eighth panel of the SAC deciding on the broadcasters' cassation complaints is worth mentioning. It is because this panel decided on the cassation complaints filed by CET 21, spol. s r.o.[111] during the period under consideration. The eighth panel issued decisions in 72 per cent of cases, which makes it a clear leader in the decision-making in this area. Although this hegemony brings a high degree of consistency to the SAC's decision-making on the one hand (there has been no reported case of the need to initiate a procedure before the extended panel of the SAC due to a disagreement on the core of the issue), this also evokes doubts on the other as to whether it is appropriate that the case-law development should be in fact determined by a single three-member panel of the SAC. After the SAC changed its work plan and cancelled the principle of concentrating cases of one complainant at one and the same panel, the need to resolve this problem was eliminated.[112]

In the period under consideration, the SAC acted as the supreme authority. There are no references to the case-law of the CC that has never experienced the need to correct the decisions of the SAC from the constitutional perspective. At the same time, the SAC does not work with the case-law of the ECtHR or the EU Court of Justice either. These arguments were only exceptionally included in the procedural filings of broadcasters, and therefore, it is considered that the said international or supranational court institutions do not virtually deal with these issues.

In the area under review, the SAC gave considerable discretion to the RRTV that should mostly determine in what cases broadcasting content could have endangered the physical, mental, or moral development of minors. The terms used in Section 32(1)g of the BA are uncertain and vague. Definition of their specific content depends to a large extent on the application practice. Procedural rules (the Code of Administrative Procedure) enable administrative courts to adjust the process of filling the vague terms with content by an administrative body, which means that it may be the case law of administrative courts that will ultimately determine in which situations the essential elements of an administrative infringement pursuant to Section 32(1)g of the BA have been met. Nonetheless, the SAC consciously gives this discretion to the RRTV, and assumes this discretion only in cases that it assesses as an excess.

The Supreme Administrative Court assumed this discretion only once during the period under review when it in its judgment 3 As 12/2011-193 cancelled the judgment issued by the MC which dismissed the broadcaster's action against a decision imposing a fine of 1 million koruna for the broadcasting of the afternoon news programme *Odpolední televizní noviny* that contained a report on murder. According to the reasoning given by the SAC, the Court does not question the legal considerations of the RRTV in this case, but it did not agree with the manner which the RRTV used to describe the given report in its decision to

111 Interview with Rigel.

112 Controlled interview with Rigel.

impose a fine. 'The Supreme Administrative Court considers that the description of the facts contained in the contested administrative decision is not accurate because it significantly exaggerates certain attributes of the actually broadcast audiovisual programme.'

Certain caution may be traced in the reasons to the judgment of the SAC, or the fact that it does not intend to intervene in the actual considerations of the RRTV in the future and only wants to determine the limits of such considerations.

> The Supreme Administrative Court is aware that the perception of a broadcast programme will always remain subjective to some extent, and different evaluators may take a different view to its content. However, the Court considers that it is appropriate to provide as objective a view of the programme under assessment as possible; it must be considered with proper distance and without any emotional load. Any internal disenchantment from the content of the media communication should not be reflected in the assessment of its form. The content of the report in question, ie, the crime to which it referred, is definitely horrifying, but that in itself does not mean that the same attributes may be automatically ascribed to any programme that will report on this crime or whose content will relate to it.

F. Tendencies and Trends

The reviewed case-law is significantly characterised by the dispute to what extent it is the responsibility of broadcasters to ensure the protection of children against inappropriate content and to what extent this objective should be primarily pursued by parents who are best to assess which programme is suitable for their children and which not. Broadcasters often argue that although a programme (normally broadcast at evening hours but still in the protected period) may not be appropriate for small children, their presence around television screens cannot be anticipated during this broadcasting time. According to the broadcasters' arguments, the development of teenagers (adolescents) cannot be affected by such programmes. On the other hand, the RRTV emphasises that it is the broadcasters' obligation not to include programmes that could have a negative impact on the proper physical, mental, or moral development of children in the time period defined by law, and that the essential elements are met even if only potentiality of such an adverse effect is established. Therefore, it is not necessary to prove whether or not the proper development of even a single member of this protected group has been affected.

The case-law of administrative courts (see the Case Studies) categorically backed the arguments of the RRTV. It works with the doctrine of fragmentary viewing under which one must count even on incidental presence of a child viewer in front of the screen, and such a viewer does not watch the programme in its overall context but may be incidentally affected by any of the broadcast scenes. The case-law of administrative courts also developed a concept of legitimate expectations of parents that children will not be exposed to the scenes that could have an adverse impact on their development during the protected time periods. This rule is applied on subscription channels where parents have an option to block their children's access to these channels.

The legal regulation of radio and television broadcasting is thus in a sharp contrast with the (lack of) regulation of on-demand audiovisual media services and the Internet content as

such. Pursuant to Section 6(3) of the ODAMSA, an on-demand audiovisual media service provider shall ensure that an on-demand audiovisual media service, the contents of which might seriously impair the physical, mental or moral development of minors, in particular by containing pornography and gross gratuitous violence, is made available only in such a way that ensures that minors will not normally see or hear the content of such an on-demand audiovisual media service.

The regulation valid for non-linear media services is clearly more liberal than the regulation of television broadcasting. Under the EU law, it is prohibited to provide such audiovisual media services where there is a specific risk of serious impairment of the physical, mental, or moral development of minors. On the other hand, there is a lack of any essential element of the administrative infringement corresponding to the frequented elements or facts of the administrative infringement pursuant to Section 32(1)g of the BA which works merely with a theoretical possibility of impaired development of minors.

There is an important difference between the two mass media segments, ie, in the option of the provider of non-linear services to avoid the occurrence of the liability for an administrative infringement if it adopts measures that ensure that that minors will not normally see or hear the potentially inappropriate service.

The relatively vague formulation used in Section 6(3) of the ODAMSA (*in fine*) was specified in 2010 by the RRTV when it issued an explanatory position to this legal provision under which 'An on-demand audiovisual media service provider satisfies the obligation laid down in Section 6(3) of Act No 132/2010 Sb. on On-Demand Audiovisual Media Services by using a so-called qualified disclaimer that will limit the option that minors could normally see or hear the harmful content of the provided service.'

The Council regards the so-called qualified disclaimer as a sufficiently effective solution and a compromise between the traditional disclaimer and a difficult-to-implement version of other technical equipment. According to the RRTV's position, a qualified disclaimer must contain a general notice (on potential harmfulness of the content) in the scheme of the law and other provisions preventing that minors unwittingly get to the potentially harmful content, and can normally see or hear it. According to the RRTV, such additional provisions may include two yes/no buttons; the setting of a filter containing the duty to enter the date of birth or a filter generating a password sent to an email box.

The required security measures do not include only measures that directly prevent access of minors to the harmful content, but also measures that at least prevent easy and unwitting access of small children to such content. This is a fairly realistic approach which respects the pre-defined rules for availability of information on the internet. If we consider television broadcasting, it is possible to absolutely exclude a certain type of content (typically hard pornography) from broadcasting. However, any effort to achieve this objective in the segment of online media is unfeasible. Therefore, the aim of the legal regulation contained in the ODAMSA is to at least ensure that the protected group is not exposed to shocking or harmful content without any previous warning or notice.

It may be concluded that compared to the regulation of television broadcasting, the legal regulation of on-demand audiovidual media services makes a more straight difference whether it is really the interest in the proper development of minors that is the subject of protection or whether it is the protection of public morality in general. Although both categories logically blend in many aspects, this is a meaningful and also desirable differentiation. The general

protection of public morality (including the protection against dissemination of pornography) is then addressed by the criminal law.

According to the SAC,

> the essential elements (facts) of the administrative infringement pursuant to Section 32(1)g of the Broadcasting Act are met by a mere ability of the programmes and trailers in question (that are a potential bearer of the presentation of harmful behaviour) to impair the physical, mental, or moral development of minors. The elements of the administrative infringement may be met regardless of the fact whether the physical, mental, or moral development of a single child was actually impaired. In this case, the elements of the administrative infringement represent potentiality, not the real impact of the broadcast programme or trailer on the protected group of children or adolescents. These elements should be understood as statutory implementation of the state's obligation to protect children against the potentially harmful and disturbing effects of mass media communication, which is a form of state interference in the fundamental rights which is in accordance with the interest of the society as a whole and does not inadequately infringe the rights of the broadcaster. The administrative authority having the competence to exercise control over the broadcasting is not obligated to prove the real impairment of the physical, mental, or moral development of minors, but only to persuasively, rationally, and duly justify why it considers a certain presented conduct to be subordinate to the elements of an administrative infringement' (4 As 38/2007).

The case-law of administrative courts is also very consistent in the conclusion that the protected Section is basically homogenous, and in order to assess whether an administrative infringement has been committed, it is not decisive when exactly the harmful programme was broadcast. The broadcasters' arguments that a difference must be made between children and adolescents, and that the presence of small children at television screens cannot be anticipated during evening hours have never held up. The corrective of material harmfulness of a conduct has become a certain exclusion under which conduct that generally displays the formal elements of an administrative infringement does not have to be sanctioned if there are, in extraordinary cases, circumstances reducing harmfulness of the broadcaster's conduct. Nonetheless, this corrective has never been applied in practice.

G. Case Studies

i. Broadcasting of the News and Journalistic Programme Střepiny on 15 March 2009 from 9:20 pm

- Broadcaster: CET 21 spol. Section r.o.;
- sanction amount: 200,000 koruna;
- judgment of the Municipal Court in Prague, File No 10 A 55/2010-56 of 1 June 2010;
- judgment of the Supreme Administrative Court, File No 8 As 79/2010-84 of 15 March 2011.

On 15 March 2009 from 9:20 pm, the broadcaster broadcast the *Střepiny* programme on TV Nova which contained a report on self-harm showing realistic images of individual self-harm methods and hurt victims. According to the RRTV, the broadcasting of these scenes breached Section 32(1)g of the BA, and the RRTV imposed a fine of 200,000 koruna.

The broadcaster filed an administrative action against the RRTV decision, stating, among other things, that the aim of the report was to draw the public attention to a not very known problem. The Municipal Court dismissed the action. The Court found that

> the scenes described in the decision depict situations where their actors cause major pain to themselves. The assessment of these scenes as shocking and horrifying is a logical conclusion which is not getting out of bounds of administrative discretion. The scenes could impair or jeopardise the mental development of minors. Not even the fact that some of the disputable scenes were filtered and adapted that no one could see the actor's face will make any difference. The purpose of the report could have been accomplished by using a significantly lower number of illustrative scenes. If the claimant found that the report should contain the given number of illustrative scenes to meet its dramaturgical plan, it should have broadcast the report after 10 pm.

The claimant filed a cassation complaint against the Municipal Court judgment, emphasising that even though the essential elements of an administrative infringement could have been met, the broadcaster's conduct was not socially harmful in this case; *ergo* the substance of the administrative infringement was not fulfilled.

Although the SAC did not question the broadcaster's arguments, it dismissed the cassation complaint. It stated that the Court

> does not dispute that the purpose of the report was to point to a serious and less known problem in the society. However, that does not make any difference in the assessment of the broadcast scenes. The effort to point to the issue of self-harm, including the depiction of its consequences, does not deprive the broadcaster of its liability for the impairment of the interest in the proper physical, mental and moral development of children pursuant to Section 32(1)g of the Broadcasting Act. The Supreme Administrative Court endorses the finding of the defendant and the Municipal Court that the purpose of the report could have been accomplished by using significantly fewer illustrative scenes and photographs. The method that the claimant chose to present the issue of self-harm must be described as shocking and disturbing. Instead of warning and informing on a serious problem in the society, it could have caused a trauma, and not only to persons from the protected group. The manner in which this topic was presented was apparently inappropriate with regard to the given goal, broadcasting time, and composition of viewers who could have been present in front of the TV screen at the time of broadcasting. One can but agree with the Municipal Court that if the claimant found that the report should contain the given number of illustrative scenes to meet its dramaturgical plan, it should have broadcast at another time.

In the reasoning to its judgment, the SAC also dealt with homogeneity of the protected group. It rejected the broadcaster's objection that the RRTV was inconsistent in its interpretation of the term 'children and adolescents (minors)' when it said on the one hand that the term 'children' covered persons under 18 years of age while on the other hand, the RRTV used a separate term 'minors' (covering children and adolescents). According to the claimant, there is a difference between the category of a child and an adolescent in terms of their protection.

The Supreme Administrative Court stated that

> the defendant duly dealt with this term, and explained its meaning in the context of the case heard. The term 'minors' means all persons under 18 years of age without any other differentiation. This

> is fully in conformity with laws and regulations. If the defendant uses these terms (children and adolescents) separately in some parts, it is because of conclusiveness of its justification and due to the need to react to the claimant's statements. The defendant concluded that the entire protected group was endangered by the said report, also pointing to which part of the protected group was considered to be the most vulnerable one.

ii. Broadcasting of an Episode of CSI Miami

- Broadcaster: CET 21 spol. Section r.o.;
- sanction amount: 150,000 koruna;
- judgment of the Municipal Court in Prague, File No 9 A 74/2013 of 3 July 2013;
- judgment of the Supreme Administrative Court, File No 8 As 85/2013 of 20 October 2014.

The television broadcaster CET 21, spol. s r. o. aired an episode of the criminal series *CSI Miami* on TV Nova on 18 September 2012 at 5:30 pm. This episode contained scenes assessed by the RRTV as potentially impairing a child viewer. According to the RRTV, the episode contained naturalistic explicit scenes of victims of violence and their special treatment during a crime investigation. Their character was beyond the situations whose viewing by non-professionals is generally accepted and these scenes were taken out of context because they presented only a static result of violence isolated from the monstrous course of violence and the victim's suffering. Therefore, these scenes could have caused a mental shock, especially to child viewers, and reduced sensitivity of smaller children to their perception of violence and could have had a negative impact on their psyche or encourage their own aggressiveness. The programme's theme focused on bullying at school that is topical for a child viewer.

The claimant objected that the scenes that the RRTV had found disturbing had always been functional and supplemented the storyline. It pointed out that the time between 6 am and 10 pm should not be mechanically regarded as the time section when no violence or any other unwanted phenomena should be represented without considering the overall context of the programme. The broadcaster also pointed to the parental responsibility:

> The protection of the public interest cannot absolutely substitute family's responsibility for the education of their children. When assessing the potential impairment of the protected public interest with respect to programmes broadcast late in the afternoon, one must assess the potential negative impact in the sense of the cited legal provision that the programme could have on that part of the protected group that is in front of TV screens at the given time and that should be there with regard to responsibility of parents for education of their children. If the defendant claims that the programme could have had a negative impact on children under 12 years of age, such children should not be watching a detective story late in the afternoon, ie, from 5:32 pm, with regard to the family's regulation duty and without a family's corrective.

The Municipal Court in Prague did not agree with the broadcaster's objections and dismissed the action. Commenting on the purpose and meaning of the protected period, the Court stated:

> The time limit for the broadcasting when such programme presentations are prohibited was determined because children may appear in front of television screens during this time, and because such violent scenes could cause a mental shock, and result in emotional numbness in children. The Court agrees with the defendant, also due to the fact that if such programmes are watched by small children, it can reduce their sensitivity to the perception of violence, have a negative impact on their psyche, or encourage their own aggressiveness, and create the impression that one can get one's own back for bullying only by using even greater violence. When the claimant objected as to the statement on the unlawfulness by assessing the merits that the programme was aired late in the afternoon, and that the provisions of Section 32(1)g cannot be interpreted and construed that a programme that could impair groups of persons protected by the law cannot be broadcast in this section of time, and that the protection of the public interest cannot substitute a family's responsibility for the education of their children, then the Court states that the simple wording of Section 32(1)g defines the time section when it is prohibited to broadcast such programmes regardless of when exactly the programme was broadcast during this time period. The claimant's efforts to point to the family's obligation to adjust watching of such programmes by minors are therefore absolutely impertinent because it is not realistic in normal life to ensure permanent parental supervision of what broadcasters include in their programme in the decisive period, and to be, as a parent, constantly ready to explain violent scenes and adjust their meaning.

According to the Municipal Court in Prague, 'the parental expectations that the law protects these defined groups of persons, ie, minors, against broadcasting of such inappropriate programmes during the time period defined by the law are absolutely legitimate.'

The broadcaster filed a cassation complaint against the Municipal Court judgment which was dismissed by the SAC. In the reasons to its decision, the SAC provided a detailed statement regarding the temporal aspect and the issue whether it is legally significant when exactly (within the protected time period) the programme with disturbing content was broadcast.

> In a specific case, the temporal aspect may play a role with respect to the fulfilment of the substantive part of an administrative infringement. After all, this finding was formulated by the court in its judgment 8 As 79/2010-84 to which the claimant referred. It should be borne in mind that despite the broadcasting of a previously assessed programme shortly before 10 pm, the breach of Section 32(1)g of the Broadcasting Act was found in this case with regard to the quality and number of disputable scenes. In its judgment 7 Ca 336/2008-34, the Municipal Court also stated that the specific broadcasting time must be considered, ie, whether it was in the morning or early in the afternoon when parents reasonably expect (even without knowing about the statutory prohibition) that programmes containing scenes of a certain nature will not be included in the broadcasting. In the case under assessment, the programme was broadcast from 5:30 pm, ie, late in the afternoon, and this time is apparently not even close to 10 pm or early morning or morning hours. Therefore, the Supreme Administrative Court finds that the broadcasting time of the programme under assessment could not affect the conclusion regarding the fulfilment of the elements of the administrative infringement in question in the content of the case currently under review (cf judgment 8 As 80/2011-82 of 16 August 2012 or 8 As 111/2011-89).

iii. Broadcasting of the Film Kajínek *on 14 October 2012 from 8:20 pm*

- Broadcaster: CET 21 spol. Section r.o.;
- sanction amount: 250,000 koruna;
- judgment of the Municipal Court in Prague, File No 6 A 140/2013-50 of 14 November 2013;
- judgment of the Supreme Administrative Court, File No 8 As 113/2013 of 20 October 2014.

On 14 October 2012, the television broadcaster CET 21 spol. s.r.o. broadcast a feature film, *Kajínek,* on the mostly watched television channel TV NOVA. The film was a thriller inspired by real life of a man who received life sentence for being a hired killer. This case was in the public gaze in the Czech Republic because various doubts appeared during the criminal proceedings as to whether Jiří Kajínek actually committed the crime or whether other persons put the blame on him. These discussions were further intensified by Kajínek's escape from a strongly guarded prison and his later capture by the police.

According to the RRTV, this film should not have been broadcast before 10 pm because it contained frequent and realistic scenes showing persons exposed to severe physical and mental suffering due to psychological abnormality, sadism, and avarice (torturing by a man, torturing and raping of a woman, explicit violent scenes) that could cause a mental shock, especially to child as well as to adolescent viewers whose presence in front of television screens cannot be ruled out at this time, and they could contribute to their reduced sensitivity to perception of violence.

In its action, the broadcaster objected that the provisions of Section 32(1)g of the BA cannot be interpreted in a way that any content that could potentially impair any protected group should be generally excluded from the protected broadcasting time. According to the broadcaster, the protected group must be closely defined and the broadcasting time of the programme should be considered. The claimant expressly argued with the freedom of expression protected by Article 17 of the Charter of Fundamental Rights and Freedoms when it pointed out that the interpretation used by the RRTV 'would result in the fact that no information on similar negative social phenomena could be provided to the public such as corruption of politicians, clientelism, etc. before 10 pm, ie, at the time of the main news programme, because even negative information on other groups who are vested with powers for the benefit of the society could have a negative impact on the protected group as claimed in the action.' According to the broadcaster, such interpretation is in conflict with the constitutional prohibition of censorship. That means that the claimant brought the seriousness of the watched issue to the fore whose realistic depiction should not be sanctioned to protect minor viewers. The other objections of the broadcaster were of a formal and procedural character.

The Municipal Court in Prague did not agree with the objections of the broadcaster, pointing out that the film had been broadcast in prime time that

> is apparently not close to 10 pm. A major part of the programme was broadcast during the time limit protected by the law, and individual scenes that resulted in the conclusion about the programme's potentiality to impair the development of minors were shown during the first thirty minutes of the film. The broadcasting time from 8pm or 8:20pm in this case is the prime time when it cannot be assumed that the target group of protected viewers is not normally present in front of a television screen. Hence,

> this programme's broadcasting time could not have resulted in the finding that the administrative infringement in question had not been committed in the context of the currently assessed case, ie, the broadcasting time was a circumstance which the defendant did not forget to consider in its decision.

The Municipal Court in Prague neither agreed with the broadcaster's arguments pointing to the artistic value of the film.

> As far as the artistic presentation of individual scenes is concerned, it may be noted that if the whole film is taken into account, an adult viewer will apparently understand that it presents memories of individual characters, ie, that it is a retrospective explaining what happened before the main topic of the film. However, there were no other artistic stylisation means in the criticised scenes, perhaps except the opening scene (that was also sufficiently naturalistic).

The Municipal Court absolutely sided with the arguments of the RRTV using the findings of the case law of administrative courts under which

> the primary purpose of protection as stated in the sited statutory provision is the interest in the protection of minors. The Municipal Court in Prague (and the judgment mentioned by the defendant may be emphasised here (judgment 9 Ca 184/2009-44 of 3 February 2010) repeatedly noted that the so-called fragmentary watching of minors must be considered when assessing a programme, ie, that minors may appear in front of a television screen when watching a programme at any stage, and certain programme sequences are so dreadful that it is impossible to rely on a child's background, especially if the family and social background of children is considered.

According to the Municipal Court in Prague,

> it is also possible to agree with the defendant that the film genre (a crime thriller) did not want to provide any artistic reflection of socially serious issues (as was also mentioned in the official film distribution text). It is therefore impossible to conclude that a child (or adolescent) viewer would have any new historical or artistic knowledge after watching the film or individual scenes which would enable him/her any extensive reflection of the scenes watched.

The broadcaster filed a cassation complaint against the Municipal Court judgment. In addition to procedural objections (absence of prior notification of the breach of the law), the broadcaster maintained its position that it had not breached the duty laid down by Section 32(1)g of the BA and objected that the substance of an administrative infringement had not been fulfilled because the programme as a whole nor individual scenes were capable of impairing the development of minors.

The Supreme Administrative Court completely accepted the findings of the Municipal Court in Prague. In its reasons, the SAC explicitly distinguished this case from the case heard under File No 8 As 79/2010 where the SAC found that the substance of an administrative infringement had not been fulfilled. 'The disturbing scenes in this programme contained violent images of murders and raping that undoubtedly could, even in context of the entire story, impair the mental and moral development of minors. That is why the substance of the administrative infringement had been fulfilled.'

iv. Broadcasting of an Episode of Californication *on 9 March 2010 from 9:30 pm*

- Broadcaster: HBO Česká republika, spol. s r.o.;
- sanction amount: 100,000 koruna;
- judgment of the Municipal Court in Prague, File No 5 A 277/2010-39 of 6 April 2012;
- judgment of the Supreme Administrative Court, File No 3 As 64/2012 of 29 May 2013.

The retransmission broadcaster HBO Česká republika, spol. s r.o. broadcast *Californication III (10) Dogtown* on the HBO channel that contained 'open sexual dialogues at the vulgar level and in the form that can have a negative impact on the mental and moral development of children,' according to the RRTV. For this conduct, a penalty of 100,000 koruna was imposed on the broadcaster for a breach of Section 32(1)g of the BA.

In its action and subsequent cassation complaint, the broadcaster used both formal objections and an argument that since it operates a 'subscription channel, parents logically pay more attention to its content and may effectively control what their children watch. Furthermore, a clear majority of subscribers could have limited access of minors to the HBO channel at the time the given programme was broadcast.'

Commenting on this objection, the SAC stated that 'one can agree with the broadcaster's objections to a certain extent, but this does not mean, in the Supreme Administrative Court's opinion, that the degree of the broadcasters' responsibility for breaching the duty not to include programmes and trailers that could impair the physical, mental, or moral development of minors between 6 am and 10 pm is not diminished by this fact.'

The above arguments of the SAC complete the stable case-law doctrine under which the protection of minors in television broadcasting in the protected time limit between 6am and 10pm should be ensured by broadcasters regardless of the possibilities of parents to ensure that their children do not encounter disturbing content.

v. Broadcasting of Leo Night Show

- Broadcaster: PK 62, a.s.;
- sanction amount: 50,000 koruna;
- judgment of the Municipal Court in Prague, File No 11 Ca 139/2009 of 6 May 2010;
- judgment of the Supreme Administrative Court, File No 5 As 15/2011 of 29 March 2012.

Pursuant to the Act on Radio and Television Broadcasting, another fact of the administrative infringement that focuses on the proper development of minors sanctions the broadcasting of such programmes the watching of which impairs a minor viewer to such an extent that the broadcasting of such programmes is absolutely prohibited. Pursuant to Section 32(1) e of the BA, a broadcaster must not include in the broadcasting any programme units that may seriously affect the physical, mental, or moral development of minors by, in particular, involving pornography and gross violence as an end itself. Under Section 60(3)c of the BA, any breach of this obligation is an administrative infringement for which a broadcaster may face a fine between 20,000 and 10 million koruna.

Compared to the facts of an administrative infringement defined in Section 32(1)g of the BA, the programmes above must *seriously impair or affect* the development of minors, and

the law defines a typical manner of fulfilling these facts: The broadcasting of a programme involving pornography and gross violence as an end itself. Jörg Ukrow states that the EU regulation assumes that the broadcasting of pornography may always impair the development of minors and the capability of seriously impairing the development of minors in each individual case need not be proved.[113]

The practical application of these facts of an administrative infringement by the RRTV is inadequately less frequent than the application of the facts under Section 32(1)g of the BA. The last case involves a judgment of the Municipal Court in Prague (11 Ca 139/2009-76) of 6 May 2010 which cancelled the decision of the RRTV imposing a fine on the broadcaster of a paid television programme, LEO TV, for broadcasting the programme *LEO Night Live*, which 'could have impaired the physical, mental and especially moral development of children because they could have watched pornography' (judgment of the Municipal Court in Prague 11 Ca 139/2009). The broadcaster's objections mostly referred to the issues in what manner the settled case law of administrative court pursuant to Section 32(1)g of the BA can be applied to these facts of an administrative infringement.

The Municipal Court in Prague accepted the objection that the finding on the fulfilment of the facts of an administrative infringement pursuant to Section 32(1)e of the BA did not by itself justify the conclusion that this was a breach of a broadcaster's obligation is a particularly material manner which justifies the imposition of a fine without the broadcaster being notified of the breach of the law in advance. On the contrary, the Municipal Court in Prague did not agree with the claimant's position that objected that the RRTV abused the administrative discretion when it considered only the issue whether the programme broadcast 'could have resulted in serious impairment of the development of minors' without discovering whether this consequence could have actually occurred. The Municipal Court in Prague found that even with respect to these facts of an administrative infringement, it is 'at the administrative body's discretion to assess whether or not the facts have been fulfilled and in what constitutes the serious impairment with respect to specific conduct in this programme.' As far as the fulfilment of the term 'pornography' is concerned, the Municipal Court in Prague referred to a resolution issued by the CC that gave a very general definition of pornography. According to the Municipal Court in Prague, it cannot be ruled out that an administrative body acquires a professional assessment as to whether the term pornography has been fulfilled:

> This will happen at least in cases when a programme containing sexual issues does not contain violence, humiliation, sex with minors, etc. at the same time. The Court finds that in these cases where presentation of sexual behaviour is accompanied with violence, humiliation, or presentation of sex with children, it is the discretion of the administrative body to assess whether or not this is pornography. In other cases presenting sexual behaviour of adults and lacking the above elements, it is appropriate to support considerations whether or not this is pornography by an expert opinion of a sexologist because such cases may be assessed absolutely subjectively, also with regard to the aforementioned definitions of this term expressed by the Constitutional Court. In the view of the Court, when the broadcast programme did not contain the said elements in this case, it would be appropriate to have an expert assessment of its content to make a clear conclusion whether it was pornography or 'merely' an erotic programme.

113 Castendyk, Dommering, Scheuer, *European Media Law* (n 110) 708.

The cited issue brings up a question of what is pornography within the meaning of Section 32(1)e of the BA and in what manner one should assess whether or not the scenes broadcast by the broadcaster were pornography. The position of the Municipal Court in Prague may be summarised as follows: It is necessary to use the understanding of the term 'pornography' by general laws and regulations (especially in the criminal law). While in extreme (qualified) cases, the RRTV may assess this issue on its own, in other cases (apparently forming a major part with respect to quantity), it is appropriate to invite a court expert. Hence, it seems that the relation between an exception and a rule is the opposite compared to the facts pursuant to Section 32(1)g of the BA. According to the settled case law of administrative courts, the RRTV is basically entitled to assess these issues on its own and an expert opinion is appropriate only in marginal cases.

From the perspective of the society-wide morality, publicly available pornography is regarded as an unwanted phenomenon which must be resisted by the society. Dissemination of pornography is currently a criminal offence and if it is child pornography its possession is also sanctioned.

Pursuant to Section 191(1) of the Criminal Code, whoever produces, imports, exports, smuggles, offers, or makes publicly available, circulates, sells, or provides for another in any other manner photographic, film, computer, electronic, or another piece of pornography demonstrating violence or disrespect to a human being or describing, showing or representing a sexual intercourse with an animal in any other manner commits a criminal offence; and pursuant to Section 191(2) of the Criminal Code, it is also a crime to offer (solicit), yield, or provide access to a work of pornography to a child, or to exhibit or make a pornography work available in a place that is accessible to children. Pursuant to Section 192 of the Criminal Code, any management of child pornography starting with its production, over possession to dissemination is prosecutable.

With regard to the protection against pornography, the issue of what pornography is and why the society resists it is often raised. A work of pornography may be regarded as a work that exceptionally intensively and intrusively incites the sexual instinct, and at the same time goes beyond the recognised moral standards of the respective society, thus causing shame in the majority of its members.[114] According to a resolution of the CC (IV. ÚS 606/03) of 19 April 2004, the CC finds it constitutionally conformant that the actual term 'pornography' is not defined directly by the law but by the following case-law, and that the criminal prosecution of dissemination of pornography is a legitimate method to protect the public morality. The Constitutional Court also expressed its conviction that a work is pornography 'if it offends the sense for sexual decency in a hardly acceptable manner.' The Constitutional Court concluded that 'a test of the pornography nature of a work that should be applied by a general court consists in the assessment whether or not the overall impression from the work causes moral indignation to a person with normal feelings. If this perspective is taken, potential expert opinions on the "artistic character" of a work or its "enlightenment and socially beneficial nature" are indecisive for an assessment made by the general court.'

There are principally two reasons for the society's protection against pornography. The first group of arguments works with social morality while the other refers to rights and

114 Supreme Court judgment 7 Tdo 1077/2004 of 28 December 2004.

interests of specific individuals affected by the pornographic industry.[115] Both groups of arguments lead to a conclusion that any communication containing pornography is not only a matter of voluntary participation of both parties to the communication process, and that there are sufficiently strong reasons to interfere with the freedom of the voluntarily communicating parties (ie, the disseminator and recipient of pornography). The degree and manners of regulating access to pornography differ by the specific reason that dominates in the given argumentation.

XI. Right of Reply

A. Legal Nature of the Right of Reply

The right of reply enables natural and legal persons to seek gratuitous publication of a reaction to the statements published in the press or broadcasting subject to the fulfilment of statutory requirements, and to use the publisher's means to disseminate information against the publisher's will. The right of reply consists in the option of a person mentioned in the press or broadcasting to publish a reaction to the original statement subject to the fulfilment of statutory requirements at the publisher's expense. This is a private-law statute even though the Czech Press Act and the BA primarily contain legal standards of a public-law nature. The legislatively technical solution adopted by the legislator cannot change anything on the private-law character of the right of reply. After all, it is also interesting to note that a proposal was voiced during the discussion of the government bill that the right of reply be included in the Civil Code.[116]

Similarly to a corrigendum or an action for the protection of personal rights, the right of reply is a tool that may be used by an individual to defend against mass media interference in reputation, personal dignity or privacy. This is how Vladimír Plecitý understands the right of reply who considers it to be a possible remedial measure 'that is available to the person affected in case of any intrusion on his/her general personal right committed by the press or radio and television broadcasting.'[117] Marta Rahim characterises the right of reply as a 'specific press-related legal title sui generis of a non-financial character that may be asserted via a civil court.'[118] Ján Drgonec stresses the sanction element when he says: 'The right of reply is a legal statute of a sanction character; it is a reaction to a fault; a consequence of an unlawful publication of a claim determined by the law.'[119]

However, in addition to the effective protection of rights of the person affected, the right of reply contributes to plurality and credibility of information regarding issues of public interest in the periodical press or broadcasting. That is why the right of reply is sometimes examined in the context of the right of media access.[120] The right of reply contains the entitlement of the person affected to publish own statement free of charge and the corresponding obligation

115 Bartoň, *Svoboda* (n 64) 208.
116 *Cf.* presentation of MP Ivan Langer during the first reading of the draft Press Act held on 7 July 1999.
117 K Knap et al, *Ochrana osobnosti podle občanského práva* (Prague, Linde, 2004) 356.
118 M Rahim, 'Německé tiskové právo – stručný přehled institutu odpovědi' *Právní rozhledy* 6 (1999) 340.
119 J Drgonec, 'Povinne uverejňované prejavy v masmediách a právo mlčať' *Justičná revue* 10 (2008) 1317.
120 E Barendt, *Freedom of Speech* (Oxford, Oxford University Press, 2007) 425; or R Moon, 'Freedom of Expression and Property Rights' 52 *Saskatchewan Law Review* (1988) 253.

of the publisher to publish this statement subject to the fulfilment of statutory requirements. If the publisher fails to perform its obligation voluntarily, the person affected may seek such publication in court.

Despite the apparent similarity of the right of reply and the civil-law means for the protection of personal rights, the specifics of this statute must be seen, as it supplements the legal forms of remedies available to the person affected. Such person is often in the position of a weaker party compared to the publisher who has a privileged position resulting from the widely understood freedom of the press. Compared to the remedies offered to the person affected for the protection of personal rights by the Civil Code, the right of reply has a different mode of application. Unlike entitlements arising from the Civil Code (including the entitlement to satisfaction, whether non-monetary or monetary compensation) that are asserted by the person affected in court which should decide whether or not the right to the protection of personal rights was infringed, the right of reply should be primarily exercised at the publisher. If the publisher does not publish the reply, the person affected may seek his/her right in court. If this is the case, the dispute does not concern the fact whether or not personal rights of the person affected were infringed by the original statement, but the fact whether the right of reply was established and whether the person affected asserted the right of reply in accordance with the law.

We can track the historical roots of the right of reply in France in the nineteenth century. The current form of the right of reply was established in 1881. The French concept of the right of reply is fairly wide. It is possible to reply both to claims and value judgments affecting the aggrieved person in any manner. For the right of reply to be established, it is sufficient if the person affected is mentioned.[121] The issue of truthfulness of original claims is not relevant. In this form, the right of reply may also be asserted in case of artistic criticism, reviews, etc. The French model of the right of reply is not primarily a tool to protect personal rights against untrue accusations, but the right to express one's opinion on any information on one's own person through the press.[122]

A slightly different model was developed in Germany. The most apparent limitation is the restriction of the right of reply to claims. This excludes a reply to value judgments, including criticism. Another restriction involves a requirement that the person seeking the publication of a reply should be directly affected by the statement, not only mentioned.[123] However, not even in the Federal Republic of Germany, the right of reply is reduced to a simple tool for the protection of personal rights, but is understood in a wider context as the right based on the general right of an individual to self-determination.[124] The applicable regulation is based on the *audiatur et altera pars* principle in order to ensure equality of weapons and the same publication effect of the original statement and the reply.[125]

121 J Hayes, 'The Right to Reply: A Conflict of Fundamental Rights' 37(4) *Columbia Journal of Law and Social Problems* 573 (2004).

122 M Krivic and S Zatler, *Freedom of Press and Personal Rights* (Ljubljanja, The Peace Institute, 2000) 17–18.

123 ibid, 19.

124 Rahim, 'Německé tiskové právo' (n 118) 340.

125 P Wüllrich, *Das Persönichkeitsrecht des Einzelnen im Internet* (Jena, Jenaer Wissenschaftliche Verlagsgesellschaft mbH, 2006) 157.

B. The Right of Reply in International Context

In European countries, the right of reply may currently be considered as an integral part of the media law. Documents on international and EU law also contain frequent attempts to introduce at least a minimum standard. The first of these documents was the Resolution of the Committee of Ministers to Member States of the Council of Europe (74) 26 of 2 July 1974. The Committee of Ministers of the Council of Europe recommended to member states to adopt a legal regulation that would enable persons affected by statements published in the newspapers, radio, or television to gratuitously publish their own opinion on the published statement under equal terms. The right of reply, or a similar legal statute, is also assumed in the European Convention on Transfrontier Television[126] whose Article 8 imposes an obligation on member states to adopt a legal regulation providing the persons affected with the right of reply or a similar comparable instrument of protection.

For television broadcasting, Directive 89/552/EEC as amended by Directive 97/36/EC was of crucial importance as it guaranteed the right of reply at the European level. The Czech Republic implemented this directive in its national law in the Press Act of 2000[127] which also amended the BA. Under this directive, any natural or legal person whose legitimate rights, in particular dignity or reputation, have been infringed by the publication of untrue facts on a television programme, has the right to the publication of a reply or any similar remedy.

The United States of America took a much more half-hearted approach to the right of reply than the EU. In 1974, the US Supreme Court repealed a law of the State of Florida which imposed an obligation on a publisher to publish a reply.[128] The main reasons included an intrusion in the editing powers of the publisher consisting in the right to decide on content. The space given to a publisher is not unlimited, which is why it is impossible to request that the publisher publishes someone else's content to the detriment of its own content. Compared to broadcasting, the argument of a limited frequency spectrum which justifies a different approach to radio and television broadcasting cannot be used.[129]

C. Constitutional Aspects of the Right of Reply

The majority of European countries protect the right of reply by a simple law. The right of reply means an obligation of the publisher (or broadcaster) to publish a statement of the person affected at the publisher's (broadcaster's) own expense. The establishment of the obligation to publish a reply thus restricts freedom of the press, because the publisher must reserve a part of its funds to someone else's content, which intrudes upon its right to decide on the content of the published title. That is why it is important to deal with the constitutional conformity of the right of reply. For the statute of the right of reply to hold from the constitutional perspective, it must satisfy the conditions imposed on any restriction of the freedom of expression or the freedom of the press.

126 In the Czech Republic, it is published under No 57/2004 Sb.m.s.

127 Act No 46/2000 Sb.

128 *HeraldPublig Co. v Tornillo*, 418 US 241 (1974).

129 The US Supreme Court admitted the right of reply, though in a limited version, in broadcasting, see *Red Lion Broadcasting Co. v FCC*, 395 US 367 (1969).

In the decision *Ediciones Tiempo Section A v Spain*,[130] the then European Commission for Human Rights dealt with the conformity of the statute of the right of reply with the provisions of Article 10 of the ECHR. The Spanish magazine publisher believed its freedom of expression protected by Article 10 of the Convention had been affected by the decision of Spanish courts imposing a duty to publish a reply of a manager, Mr Garcia. The publisher claimed its freedom of expression had been infringed because it had been forced to publish information (ie, Garcia's reply) of which it had known that it was untrue. The European Commission for Human Rights noted that the purpose of the right of reply was to enable everyone to defend his or her honour and dignity against certain allegations published in the mass media. The Commission also characterised the right of reply as a guarantee of plurality of information that must be respected in a democratic society. The publisher's freedom of expression was not affected because nothing inhibited the publisher's possibility to dissociate itself from the reply. The European Commission for Human Rights also noted that Article 10 of the Convention could not have been breached even by a summary proceeding that preceded the issuance of the decision which examined whether the reply fulfilled formal requirements, not whether the original claim or the reply were true. With respect to this objection, the Commission replied to the claimant that a reply's effectiveness depends on its immediate publication, which is why the issue of its truthfulness could not be examined in detail prior to the publication of the reply.

The European Court of Human Rights also dealt with a dispute between the publisher of the *Paris Match* magazine and survivors of a French police prefect who had been shot dead in Corsica.[131] The weekly published photographs of a bloodied and mutilated body of the prefect. The survivors sought withdrawal of all magazines that took over the photographs from circulation. Instead, a national court of the first instance imposed a duty on the publisher to publish an announcement stating that the photograph of prefect Erignac's body had caused serious anxiety in Ms Erignac and her children. An appellate court subsequently reformulated this announcement and imposed a duty on the publisher to publish an announcement stating, among other things, that the photograph had been taken without the family's consent and that the family believed that any such publication represented an intrusion on their private life.

By a decision of five to two votes, the ECtHR stated that Article 10 of the Convention had not been breached in this specific case. The European Court of Human Rights sought a fair balance between two values protected by the Convention, ie, freedom of the press and the protection of privacy.[132] The Court found the sanction imposed on the publisher important because sanctions which would ultimately subdue the debate on issues of public interest (the 'chilling effect') should be avoided. The European Court of Human Rights appreciated the diligence that the French courts devoted to the adequacy of the sanction, in particular to the changed formulation of the announcement by the appellate court. According to the majority of panel members, the solution adopted by national courts was reasonable. On the contrary, dissenting Judges Loucaides and Vajicová emphasised in their positions the risk of subdued public discussion and loss of interest of the press in important and controversial issues. Judge

130 *Ediciones Tiempo v Spain*, App No 13010/87, decision of 12 July 1989.
131 *Hachette Filipacchi v France*, App No 71111/01, judgment of 14 June 2007.
132 [43] et seq of the cited decision.

Louciades stressed that the publication of the announcement represented acknowledgement of a mistake by the publisher while Judge Vajicová emphasised the risk of overburdening press with apologies and announcements, and the related reduced space for the actual editorial work.

The European Court of Human Rights used similar arguments in another decision in the *Karsai* case.[133] The Court stated that Article 10 of the Convention had been breached by Hungarian courts that imposed a duty on the claimant, a Hungarian historian, to publish a reply of his opponent. The European Court of Human Rights noted there was no doubt about an intrusion on the complainant's freedom of expression because he had been obligated to publish, at his own expense, a reply of a person whose personal dignity was affected in the claims. Since this case was an issue of public interest at that time, the ECtHR regarded the decisions of Hungarian courts as an unreasonable intrusion on the open debate on issues of society-wide importance and found that Article 10 of the Convention had been breached.

The arguments raised in these decisions of the bodies of the European mechanism of human rights protection reveal certain principal differences in the views of the right of reply as such. We can use the *audiatur et altera pars* principle of the existing and indisputable influence of the mass communication media on the public opinion and the persisting monopoly of institutionalised media to the access of the mass communication media. In this case, we will regard the right of reply as a remedy breaking through the ownership right of a press publisher or broadcaster by using the mass communication means controlled by the publisher / broadcaster against its will (or independently of this will) to disseminate third-party content.

The other option is that the right of reply is considered to be a statute having a liability character. If a press infringement is committed in the press publication or broadcasting, a special liability statute is activated next to the general civil-law means of protection, and the person affected may seek the publication of a reply on the basis of the original unlawful conduct of the publisher.

These concepts are apparently different in many material elements.[134] There will be a difference both in the constitutional view of the conflict of the fundamental rights that the right of reply embodies from the very beginning, and in the specific legal practice. When assessing the impact of the *Karsai* decision, one should primarily bear in mind that the obligation to publish a reply was imposed on a person who published his statements in the press, but who does not control this press. If everyone who publishes a statement affecting honour or reputation of another is the addressee of the right of reply, it is basically a different regulation compared to the regulations where the addressees of the right of reply include solely mass media providers. The findings of foreign courts as well as the findings of the ECtHR on international legal regulations must then be taken with certain prudence and circumspection.

The concept of the right of reply assuming mass media providers as the only addressees strongly emphasises the element of plurality of information[135] in addition to the protection of personal rights, as well as the public interest that the media publish information coming

133 *Karsai v Hungary*, App No 5380/07, judgment of 1 December 2009.

134 These differences are much deeper than the frequently mentioned difference between the German and the French models where a crucial difference is seen in whether it is admissible to reply also to value judgments or whether the right of reply was exclusively limited to claims.

135 See the Federal Constitutional Court in its decision BVerGE 125 (1998), cited according to Barendt, *Freedom of Speech* (n 120) 426–27.

from different sources.[136] Freedom of the press (which the publisher claims) is here given as a collision value against freedom of expression of the replying person.

If a person who is outside the institutionalised mass media[137] can also be the addressee of the right of reply, the connection of the right of reply with the right to the protection of personal rights is emphasised. To put it simply, we may say that in this case, the right of reply is a specific entitlement arising from the breach of the right to the protection of personal rights. The sanction perception of this instrument is then close to this concept.[138]

Any prejudice to freedom of the press means a violation of the publisher's editing authority. Its character is therefore materially different from the imposition of the obligation to publish an apology or to pay a monetary satisfaction for non-property harm caused in a dispute for the protection of personal rights. Compared to the right to a press correction, which means the publisher's obligation to publish a correction of untrue statements on the person affected, this is less intensive prejudice to freedom of the press because the establishment of the right of reply does not *ipso iure* mean any fault of the publisher.[139] The publication of a reply may be understood as a description of reality from the view of the person affected.

The constitutional criteria for the creation of the right of reply should therefore be more moderate than in case of claims resulting from the Civil Code provisions on the protection of personal rights. In this respect, the principle of subsidiarity and proportionality of the state intrusion in the debate on issues of public interest must be mentioned, which was formulated in the judgment of the CC, I. ÚS 367/03 of 15 March 2005. The Constitutional Court found it important that after the publication of an article by Jan Rejžek, Helena Vondráčková was given space to express her position in an interview, and the provision of this space was regarded as sufficient to eliminate the adverse consequences of this specific infringement of personal rights.

Hence, it must be concluded that from the constitutional perspective, the relation between the right of reply and the right to the protection of personal rights pursuant to Section 11 et seq of the Civil Code does not mean that in case of any infringement of rights, the person affected may choose one of the equal means, because not each statement that gives the rise to the right of reply must necessarily be an unlawful infringement that must be defended with an action for the protection of personal rights. Therefore, it can be presumed that the right of reply may often be the more moderate (and hence reasonable) intrusion on freedom of the press that can achieve the pursued goal. Availability of a less radical intrusion of the state on the public debate may in certain cases justify denial of protection by more resolute means, ie, instruments provided by the Civil Code (*de lege lata*), because such means may be considered as unreasonable. Although the cited CC judgment did not deal directly with the statute of the right of reply, the principles of subsidiarity and proportionality of the state intrusion on the debate on issues of public interest, it is crucial to consider the guidance for the resolution of the collision between freedom of expression and the right to personal dignity, reputation and human dignity as early as at the level of a procedure before courts of general jurisdiction.

136 See the above-cited decision of the European Commission of Human Rights, *Ediciones Tiempo v Spain* (n 130).

137 As in the case *Karsai v Hungary* (n 133).

138 Drgonec, 'Povinne uverejňované prejavy' (n 119) 1317.

139 F Fechner (ed), *Medienrecht* (11th edn, Tübingen, Mohr Siebeck, 2006) 97.

D. Legal Provisions

The applicable law regulates the statute of the right of reply in two laws. These are the Press Act governing the periodical press (Act No 46/2000 Sb., the Press Act, as amended) and the BA governing radio and television broadcasting (Act No 231/2001 Sb., on Radio and Television Broadcasting, as amended).

Section 35(1) of the BA stipulates that: If any announcement containing any factual information affecting the honour, dignity, or privacy of a natural person, or the good name or reputation of any legal person was made public in radio or television broadcasting, then such a natural person or legal person shall have the right to request that a reply be broadcast by the radio or television broadcaster. The radio or television broadcaster shall broadcast such a reply upon such a natural or legal person's request.

The reply shall be limited to a factual assertion by which any assertion referred to in Paragraph 1 above is rectified or by which any incomplete or otherwise distorting assertion is complemented or put more precisely. The reply shall be adequate to the extent of the announcement concerned; if the reply only applies to a part of such an announcement, the reply shall be adequate to the extent of such a part. The reply shall also indicate by whom the reply is made.

The application for the publication of a reply must be in writing. The application must clearly state in what respect the claim contained in the published statement affects honour, dignity or privacy of an individual, or good name or reputation of a legal person. The application must also contain a proposed wording of the reply. The application must be delivered to the broadcaster no later than thirty days from the date on which the contested statement was published in radio or television broadcasting, or else the right to the publication of a reply ceases to exist.

The broadcaster must publish the reply in the same programme in which the contested statement was published, and, if this is not possible, in the same valuable broadcasting time and in a manner so that the form of the new statement is equal and adequate to the contested statement. The broadcaster must publish the reply or an additional statement within eight days from the date on which it received the application for the publication of the reply.

If the broadcaster fails to publish the reply at all, or if it fails to adhere to the conditions for the publication of a reply, the obligation to publish the reply will be imposed by a court on application by the person that requested this publication. The application must be filed in court within fifteen days from the date on which the time limit determined for the publication of the reply expires, or else the right to seek the publication of a reply or an additional statement in court ceases to exist.

The broadcaster is not obligated to publish a reply if the publication of the proposed text constitutes a criminal offence or an administrative infringement, or if it is in conflict with good morals, or if the contested statement or its contested part is a citation of a third person intended for the public, or its true interpretation and was marked or presented as such.

The creation of the right of reply is initially conditioned with the publication of a statement containing the claim affecting honour, dignity, or privacy of a certain individual or the name or reputation of a certain legal entity. Hence, the legislator supported the German modification enabling one to seek the right of reply only in case of claims. In addition, such claims must affect honour, dignity, or privacy of an individual, or the good name or

reputation of a legal entity. Only a verbal statement may be replied, according to the CC. The publication of a photograph does not create the right of reply.[140]

When assessing the condition that a statement affects honour of an individual, the SC applies the same criteria as to the assessment of the rightfulness of an infringement of the right to the protection of personal rights.[141] The Supreme Court held a similar position in its judgment 30 Cdo 2711/2006 of 31 January 2007 when it noted that a press statement (although inaccurate and simplifying) regarding the business cooperation of the marked persons could not be in the given case regarded as a statement affecting honour or dignity that would justify the request for a reply. If the affected person is given space to express his/her opinion in the actual article where he/she dispels untrue claims, the purpose of the reply is fulfilled and the right to a reply is not created.[142] It may be inferred from the said SC decisions that even in a dispute for the publication of a reply, it is necessary to examine whether the original statement is true, and whether it is capable of adversely affecting the personal sphere of the person affected that it justifies prejudice to freedom of expression.

E. Statistics

Confirmed Total	Confirmed	Reversed total	Reversed
5	100 per cent	0	0 per cent

The statistics expresses the percentage at which the SC as a court dealing with appellate reviews upheld the decision of the appellate court. During the reported period, the SC was deciding in five cases of appellate reviews in a procedure concerning the action to impose an obligation to publish a reply. In three cases, the claimant sought the publication of a reply in television broadcasting, and in two cases, the reply concerned the periodical press. Since the regulation contained in the Press Act is identical with the regulation in the BA, and since the SC case-law did not infer any differences between the two regulations, all cases may be analysed without the need to make a difference whether the reply should be published in the press or in the broadcasting.

In three cases, the defendant (always a broadcaster) appealed against the decision of an appellate court that satisfied the action for publication of a reply (or upheld the judgment of the court of the first instance that satisfied the action). None of these appeals was successful—one appeal was dismissed, one was rejected, and one was partly dismissed and partly rejected (see the case studies).

The appellate review was lodged by the claimant in two cases (ie, the person seeking the publication of a reply in an action). Not even these appellate reviews were successful—one was dismissed, and one was partly dismissed and partly rejected.

This means that the SC accepted the contested decision of the High Court in Prague in all cases. In three cases, its decision imposed an obligation on the television broadcaster to publish a reply, and two cases were dismissing decisions, ie, approving the procedure of the broadcaster (or the publisher of the periodical press) not to publish the reply.

140 Supreme Court decision of 19 February 2002, File No 28 Cdo 169/2002.
141 The Supreme Court said so for the first time in its judgment 30 Cdo 861/2005 of 25 May 2006.
142 Supreme Court Resolution 30 Cdo 996/2007 of 30 April 2007.

F. Answers to Research Questions

The arguments of the SC are predetermined by the objections raised in the appellate review because the SC is bound by its scope and reasons in its decision-making. In one case, the SC was settling solely formal objections or the formal prerequisites for publishing a reply. In other cases, objections also concerned the assessment of the issue of fact of whether a statement creating the right of reply of the person affected was published.

Arguments with the fundamental rights (whether it is freedom of expression or another fundamental right) were used rather marginally and had a more or less declarative character. The Supreme Court decides on the majority of cases through a prism of the sub-constitutional right (specifically pursuant to the Press Act, the BA, or the Civil Code).

All of the analysed decisions of the SC show that it predominantly works with its own case-law to which it frequently refers. The Supreme Court also cites the decisions of the CC, but such citations rather reflect the general constitutional foundations for the position of the periodical press, or the collision between freedom of expression and the right to the protection of personal honour or privacy of the person affected.

There are no references to the case-law of the ECtHR even though they could be relevant. The EU law is applied only marginally (it must be emphasised that no relevant decisions of the EU Court of Justice are known) and even incorrectly when the Court refers to Directive 89/552/EEC in connection with the assertion of the right of reply in the periodical press even though the publication of the periodical press is not in the scope of the EU law at all. The reference to the recommendations contained in Resolution (74) 26 of the Committee of Ministers of the Council of Europe on the right of reply adopted on 2 July 1974 (judgment of the SC 30 Cdo 2348/2012 of 21 December 2012) is apt on the other hand.

Outwardly, the SC case-law seems to be internally consistent. However, it must be said that it is very hard to identify any stronger tendencies and trends with regard to the number of decisions and their content. The actual legal argumentation of the SC is mostly very brief; there are no arguments regarding human rights or are merely of a declarative character in the form of general standpoints that are not related to specific facts of the case heard. There is a clear difference in the argumentation consistency compared to the decisions of the SAC that are analysed in other parts of this study. Even though the SC refers to the findings of the CC, there is not even a sign of the proportionality test in individual cases in order to assess which of the colliding rights should be preferred. The Supreme Court deals with this collision solely using the means of the sub-constitutional law.

It is also worth mentioning that as a result of the work plan of the SC, all cases were heard by the thirtieth panel of the Court in the identical personnel composition (Pavel Pavlík, Pavel Vrcha, and Lubomír Ptáček). This agenda concentration reduces the risk of inconsistency of the SC case-law, but also a bit preserves the case-law development, which is a bit treacherous in the sensitive agenda such as the collision of freedom of expression and personal rights of the persons affected.

G. Case Studies

i. Supreme Court Judgment 30 Cdo 4403/2009 of 26 October 2011

- Reply in the periodical press;
- procedure on claimant's appellate review;
- the SC partly dismissed and partly rejected the appellate review.

The claimant (an individual not having a status of a person of public interest) sought the publication of a reply in reaction to a statement published in the tabloid daily Šíp. The article dealt with a private-law dispute on the use of a cooperative flat, and the claimant (although identified only with initials in the article) felt affected by the manner he was described in the article. In addition to the publication of a reply, the claimant sought monetary damage.

A court of the first instance dismissed the action in that part in which the claimant sought the publication of a reply while it partly satisfied the action for monetary damage (awarding the claimant 200,000 out of the 2 million koruna required). The court justified its verdict dismissing the action for the publication of a reply by stating that the proposed wording of the reply had not contained a statement dispelling and correcting the original claim published in the periodical press.

The High Court in Prague which decided on the appeal submitted by both parties to the proceedings upheld the judgment of the court of the first instance as to the dismissal of the action for the publication of a reply. The High Court in Prague completely agreed with the arguments of the court of the first instance. As for the award of the damage, it changed the original judgment, and dismissed the action in the full extent.

The claimant submitted an appellate review against the judgment of the appellate court. As for the part seeking the publication of a reply, the claimant argued that

> the content of the proposed reply was equal to what was contained in the article in question, and was adequate to the contested statement within the meaning of Section 13(1)a of the Press Act. If Sections 10 and 13 of the Press Act state that the affected person has the right of reply after publication of information harming this person in the press, the claimant's reply proposal was capable of contributing to an apology that was precisely specified. Courts should have moderated the content of the reply if they were not convinced that monetary compensation should be awarded with regard to the non-proprietary damage caused.

The Supreme Court did not agree with this argumentation and rejected the appellate review in this part because the claimant had not raised any issue of a material legal status.

In the reasoning of its decision, the SC basically paraphrased the text of the relevant provisions of the Press Act:

> Among other things, the court dealing with the appellate review points to the principle under which if the periodical press publishes a statement containing a claim affecting honour, dignity, or privacy of a certain individual, or the good name or reputation of a certain legal entity, this entity has the right to seek the publication of a reply from the publisher. The publisher must publish the reply upon this person's request (Section 10(1) of the Press Act). The reply must contain only

> the claims correcting the statements under the previous provision or supplementing or specifying an incomplete or distorting statement. The reply must be adequate to the extent of the contested statement and only if a part is contested, then to this part. The person making the reply must also be apparent from the reply (Section 10(2) of the Press Act).

The Court subsequently referred to the EU law (though a bit inappropriately because the EU law does not regulate the publication of the periodical press):

> The right of reply currently embedded in the Press Act was implemented in our laws in accordance with the requirements arising from Article 23 of Directive 89/552/EHS as amended by Directive 97/36/ES. It also respects the recommendations contained in Resolution (74) 26 of the Committee of Ministers of the Council of Europe on the right of reply adopted on 2 July 1974. The statute of the right of reply assumes subjectively felt damage to honour, dignity or reputation of the person affected. The assessment of the justness of the application for the publication of a reply sets increased demands both on the publisher and on the potential decision-making by the state. The right to seek the publication of a reply under the Press Act presupposes that: (a) a statement containing a claim affecting honour, dignity or privacy of a certain natural person or a good name or reputation of a certain legal person was published in the periodical press; (b) the requested reply is limited only to the claims correcting and dispelling the statement under the previous provision or supplementing or specifying an incomplete or distorting statement; (c) the reply must be adequate to the extent of the contested statement or only to its part if only a part is contested; (d) it must be apparent from the reply who makes it. (Evidence maintained.)

The Supreme Court concluded that the appellate court considered the above principles and thus issued a correct decision. For completeness' sake, the claimant's appellate review was not found reasonable even in the part seeking compensation for non-proprietary loss (here it was dismissed for inadmissibility).

ii. Supreme Court Judgment 30 Cdo 130/2010 of 30 November 2011

- Reply in television broadcasting;
- procedure on defendant's appellate review;
- the SC partly dismissed and partly rejected the appellate review.

In this action, the City of Ostrava was seeking the publication of a reply on the Czech Television programme *Reportéři ČT* that aired a report on the implementation of development projects in the City of Ostrava. In its proposed reply, the claimant reacted to the claims broadcast in the programme under which the city had allegedly sold land to a *selected investor without any tender procedure* and allowed construction of hypermarkets in the city and the fate of the locality had been examined both by the police and the courts.

The court of the first instance dismissed the action in full. The court inferred that

> the proposed reply is formulated in a manner that it is not a reply of the claimant, but a reply to the claimant, and this fact as such makes it impossible to satisfy the action because it is at variance

> with Section 35 of the Act. The action was also dismissed because the requested text of the reply that should have been sent to the defendant did not state clearly which programme was the subject matter of the dispute. And if this was mentioned in the proposed statement of the judgment, it was different from the previously requested reply, as well as the reply contains passages stating 'the said statement is not true', and not even this was mentioned in the request for a reply. The Court did not find it tried that the tender procedure would be announced by a Council resolution in 2005, and it also considered the fact that the text of the requested reply is five times longer than the contested part of the broadcast programme. By comparing the extent of the broadcast allegations and the extent of the proposed reply, the Court inferred this reply was unreasonable and pointed out that the proposed reply confirmed that commercial buildings should cover more than 36 per cent of K., and that a large part of the reply does not correspond to the contested information.

The claimant lodged an appeal against the judgment of the court of the first instance. This appeal was partly satisfied and the appellate court ordered that Czech Television should broadcast the claimant's reply. The appellate court emphasised that the claimant's reply was formally consistent with the statutory requirements.

iii. Supreme Court Judgment 30 Cdo 520/2011 of 26 April 2012

- Reply in television broadcasting;
- procedure on defendant's appellate review;
- the SC dismissed the appellate review.

The defendant (television broadcaster) published a report in its news programme in which the claimant, a former ski jumping representative and current MP, was branded as a military secret service agent under the Communist regime. The claimant sought the publication of a reply in which he resisted this allegation and denied any collaboration with the military secret service.

The court of the first instance dismissed the action. In the evidence procedure, the court found that although the respective file of the military secret service was chaotic, the claimant had been registered as a confidant, and the claimant did not even deny that after his trips abroad, he had provided discrediting information about emigrants. According to the court of the first instance, the defendant bore the burden of proof when it had proved truthfulness of the statements in the report.

The appellate court changed the judgment of the court of the first instance, and imposed a duty on the defendant to publish a reply in the proposed version. The appellate court found that

> the disputed report published a statement on the claimant containing claims affecting his honour and dignity whose truthfulness was not proved in the procedure. This regarded especially the dramatic description of the content of the file maintained by the military secret service for the claimant's name where he was registered as a confidant with a cover name 'P'. However, the report did not distinctly mention that the so-called confidants had not been engaged in conscious collaboration. In this respect, the Court referred to the judgment of the Constitutional Court of the Czech and Slovak Federative Republic of 26 November 1992, File No Pl. ÚS 1/92. The report was distorting

> because it mentioned 'discrediting information' provided by the claimant without stating any specific context. The file that was repeatedly shown on the screen did not contain any confidential or discrediting information except for the description of accommodation of sportsmen, restaurants, interpreters, and other persons catering for sportsmen at significant competitions. According to the appellate court, this very distortion of the file content and its materials was unjustified, and must be remedied through the publication of the reply proposed by the claimant. The appellate court added that the file did not contain any discrediting statements, and it had not been proved that the information on the emigrants mentioned in the file had been provided by the claimant because it had been obtained from a wide array of persons that could not be specifically identified. Such information was not even significant from the perspective of that time because it was rather a 'social gossip', and had no value for intelligence service, and it could even be available in the normal daily press published in the years 1984–1986.

The broadcaster submitted an appellate review against the appellate court's decision, referring to freedom of expression guaranteed by the Constitution. The broadcaster objected that it 'is authorised to inform the public about socially significant events such as collaboration of an MP with the Communist secret service.'

The Supreme Court dismissed the appellate review. In its reasoning, the Court stated that

> according to the contested decision, the appellate court factually based its decision on the principles laid down by Section 35 et seq of the Broadcasting Act and clearly, even though briefly, explained the reasons for its decision. This primarily regards the conclusion that the disputed report had published a statement on the claimant containing claims affecting his honour and dignity, and this report was distorting when it referred to 'discrediting information' provided by the claimant but did not specify such information, and furthermore, the file maintained by the military secret service did not contain any discrediting information at all. In the light of this, the Court finds this was clearly an unjustified infringement, and it should be remedied through the publication of a reply proposed by the claimant.

H. Tendencies and Trends

The cited decisions of the SC clearly show that the Court's decision-making practice resulted in a certain shift compared to the German model. The basic difference is in the assessment of the fulfilment of the terms and conditions under which the right of reply is created. The Supreme Court consistently applies the same criteria acquired for the assessment of disputes for the protection of personal rights. It uses the arguments from the CC case-law on the protection of personal rights and its own case-law. This eliminated the difference between the creation of the right of reply and instruments for the protection of personal rights provided by the Civil Code. The Supreme Court interprets the statutory condition of the creation of the right of reply consisting in the publication of a statement affecting personal honour in the same manner as the right for the protection of personal honour against unauthorised interference. With its decisions, the SC implicitly widened the prerequisites for the creation of the right of reply with another reason, ie, qualified untruthfulness of original statements which means that it is so intensive that it justifies interference in freedom of expression by

expressing unlawfulness of such execution of freedom of expression including reasonable sanctions.[143]

The obligation to publish a reply is thus reduced to the sanction imposed on a publisher for an administrative infringement described in the Press Act. The actual duration of the procedure imposing the duty to publish a reply may be regarded as disputable because it is adversely affected by the scope of the evidence procedure. Considering the case-law mentioned above, it is also necessary to deal with the issue whether the published statements were true. This reduces the effectiveness of the reply, and diminishes the difference between the right of reply and the right for the protection of personal rights.

143 Fechner, *Medienrecht* (n 139) 97.

Slovakia

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I. Introduction

This is the first analytical report on how administrative judiciary-administrative law senates of the Supreme Court of Slovakia (SC), the regional courts (RC) and partly the Constitutional Court (CC) deal with regulatory challenges related to various, content-based types of administrative-legal sanctions issued by the electronic / digital media regulator Rada pre vysielanie a retransmisiu (Council for Broadcasting and Retransmission, RVR) in Slovakia. As far as we know, there is no such study available at local or international level. Yet, as this study documents, these are actually rather challenging regulatory issues which usually take years to come to conclusions or final verdicts. Sure, one can find many studies on electronic media law and regulation, however, those studies mostly use civic or criminal law regulatory-judicial examples, but rarely concentrate on more systematic or in-depth approach, and even less often focus on administrative law content related aspects. Moreover, it is hard to find full texts of controversial broadcast items—yet sometimes either media regulators or courts, or both legal and normative assessors can in fact be wrong in their assessment of media / journalistic professionalism. Therefore, in some cases, we included full transcript of the most arguable or the most interesting news and current affairs in broadcasting. For similar reasons, we have included extensive, although simplified transcripts of courts' verdicts. Furthermore, it is difficult to find international comparative studies of this type; there are some studies covering telecommunications and similar fields,[1] but studies produced both by lawyers and non-lawyers are uncommon, while non-lawyers bring additional analytical perspective and curiosity resulting from missing background in law.

We focused on the regulatory areas of human dignity, balanced coverage, commercial communication, hate speech, right of reply, and protection of minors. Surprisingly, we did not find any RVR, RC, or SC case that would deal directly with hate speech. Furthermore, as a result of legislation, right of reply is out of scope of administrative senates. Nevertheless, we included this regulatory area into our study for its importance as well as for comparative reasons. It should be mentioned here that there are three areas in which Slovak regulation goes significantly beyond the scope of the Audiovisual Media Services Directive (AVMSD) of the European Union: regulation of objectivity and internal pluralism in broadcasting, protection of minors, and protection of human dignity. Especially objectivity in news and current affairs problems has become a key issue for the RVR as judiciary often returned contradictory verdicts in this regard. Numerically, though, the majority of those sanctions deals with commercial communications.

We have been interested in finding the key normative and legal values motivating judges (or rather administrative law senates) in their regulatory rulings (usually in connection with appeals of broadcasters against decision of the RVR or lower regional courts) on broadcast (and maybe soon online media) regulatory issues, however, appeals or RVR's rulings of technical nature, eg, not awarding licence or ones related to transfer of ownership were out of our scope. Of course, by definition, fundamental rights are actually competing rights. Thus, can we identify freedom of speech or other basic human rights (eg, personality rights or

1 See, eg, P Larouche and X Taton, *Enforcement and Judicial Review of Decisions of National Regulatory Authorities. Identification of Best Practices*. A CERRE Study. Brussels (21 April 2011), https://pure.uvt.nl/portal/files/1375355/Larouche_Enforcement_and_judicial_review__111208_publ.

human dignity) as a key driving force behind rulings either the RVR or administrative courts? If preference was given to fundamental human values other than freedom of speech, which were these? What does 'balanced coverage' actually mean for the RVR on the one hand, and for the courts on the other? What kind of moral and legal justification was used for a given legal-normative preference? Have there actually been value-based conflicts between courts and the regulator?

Another interesting question is that of the consistency of the rulings. Do courts refer in their rulings to their previous ones, especially when there are two or three different specialised senates? Were various senates/courts consistent in their rulings? This may seem to be a useless research question, but in fact, it will be shown that various senates of the SC, even the same senate of the SC, have been inconsistent in their rulings. Which international legal sources have been used to support these rulings and verdicts, eg, European Court of Human Rights (ECtHR), or also possibly Court of Justice of the EU (CJEU)? Which international legal sources were not used to support these rulings and verdicts and why? Have there been any common trait in rulings/verdicts? Could these traits be seen as long-term, or rather short-term ones? If there are no similarities, why not? Is there any known, important difference in key principles of media regulation in comparison with other EU Member States, especially within V-4 (Visegrad Group)? Which principles mentioned above bring the biggest regulatory challenges? Is the regulation of the electronic/digital media too complicated, demanding or strict to broadcasters, or is it OK, comparatively speaking? Do broadcasters complain, either officially or off the record, with respect to principles of media regulation? Can their complaints be seen as legitimate in some areas? What else could help in improving the current state of affairs? How could we characterise the cooperation between the staff (office) and the Board of the media regulator? Does the regulatory Board of the RVR accept all regulatory suggestions by the staff (office)? If not, in which area can one notice the biggest or most important divergences? Which arguments of the office count usually? What is the role of the professional, ideological, and education backgrounds of the members of the RVR—does it have any impact on how they see imposing a regulation? Is there any foreign impact or inspiration, either from the European Platform of Regulatory Agencies (EPRA) or from other bodies? Do we see any areas of administrative law procedures which could be improved? How? How can we characterise or assess direct or indirect intervention of the Parliament and the Ministry of Finance or other external bodies in the work of the media regulator? Do broadcasters complain, either officially or off the record, with respect to the professional competences or work of board members? Have the appeals of the broadcasters against sanctions usually been well-argued? Is there any external professional or civic informal, at least ad hoc, supervision or criticism of the work of the RVR? If yes, how could we evaluate it, eg, commentaries in the media, reports by NGOs)?

How professionally competent is judiciary seen in general, and in this area of administrative law in particular? Have argumentation used in the SC rulings been persuasive enough? Which cases are seen as the most difficult ones to decide for the judiciary? Is there any long-term, value-based difference / tendency between various levels of courts? Indeed, it seems that the CC in Slovakia shows long-term, more liberal values, following the ECtHR rulings. Is there any platform at which the courts and the regulator could discuss issues of common interest? What is the annual percentage of accepted/rejected rulings focused at content broadcast, issued by the media regulator, in the years 2010–2014? Can we see any

areas of judiciary work which could be improved? If yes, how? What else could help improve the current state of affairs?

Of course, some questions above may be too ambitious to be answered in this research, nevertheless, they show how interesting and important this type of research can be. We focused our analysis primarily on the period between 2010 (or back to 2007, if there were not enough cases) and 2014. It is a problem that many regulatory and court cases actually last a few years until the final verdict is issued, therefore, it was impossible to follow strict differentiation with respect to the time span. Finally, this report is certainly imperfect; yet there is a hope that it will serve as a starting point for a more refined research in the future in this increasingly important regulatory area. This follow-up research is needed, indeed. As the expert Slavomíra Salajová put it: 'Only the staff of the RVR is able to follow consistently all changing or developing regulatory issues.'[2]

II. The Legal-Judicial System

The Slovak legal system is based on the Roman civil law, with the historical influence of the Austrian and Hungarian tradition of law. The major feature of civil law systems is that the laws are organized into systematic written codes. Legislation is thus categorised by what is known as 'legal force'. Legal force refers to the properties of legal norms, one piece of legislation being subordinate to another (ie, one with greater legal force) or derived from one having greater legal force. In a situation involving legal norms with different legal force, the weaker norm may not contradict the stronger one, and the latter may override the former one. In terms of the levels of legal force, legislation may be hierarchically arranged as follows: Primary legislation of the EU constitutional laws (always primary) and laws (primary or derived from constitutional laws). Secondary legislation (also referred to as subordinate legislation) includes government regulations—always secondary, legal norms of central government bodies—always secondary, legal norms of bodies of self-governing units (authorities)—primary or secondary, and finally, legal norms issued in exceptional circumstances by authorities other than government bodies—always secondary.[3] The country's judicial branch consists of 'standard' courts (district-county courts, eight regional courts, and the SC), the CC, and the Specialized Criminal (Penal) Court. At present, there is an ongoing, slow process of emerging case law in Slovakia. This means that there is some presence of the application of a system of precedents, at least in the decision-making of the SC and especially of the CC, however, judges are officially independent. There is an explicit duty for general courts to take the relevant case law of the ECtHR into account in their decision-making. This duty has been re-affirmed in Finding IV. ÚS 107/2010 of the CC.

The role of the SC is significant as the most important arbiter in broadcast media regulatory issues and, to an extent, libel / defamation cases. The Supreme Court is also important as the final arbiter in the event of lower courts pass contradictory rulings, or rulings contrary to earlier relevant case law. However, it is more an issue of accident than of a deliberate process of seeking a unified framework for the relevant case law at the SC. This is despite the fact

2 At Bratislava Media and Protection of Minors Seminar, 10 December 2015.

3 https://e-justice.europa.eu/content_member_state_law-6-sk-en.do?member=1.

that in connection with the verdicts related to the RVR, the SC has a database which would allow to check rulings of the last few years. The Supreme Court is obliged by law to balance the quality of various rulings of lower courts. Therefore, it is surprising and, in fact, worrying that sometimes even Senates of the SC do not respect each other's rulings on regulatory issues. More importantly, Senates of the SC do not explain their ignorance of other Senates' rulings. It is also the case when an almost identical decision in a particular matter is available. In fact, there have been several cases in which various Senates of the SC ruled differently on almost identical media regulatory issues (8 Sžo 112/2010 and 3 Sžo 200/2010; 6 Sžo 55/2010 and 6 Sžo 112/2010; 3 Sž 15/2008 and 5 Sž 20/2010; 2Sž8 2010 and 3 Sž 6/2010; 3 Sž 18/2010 and 2 Sž 10/2010; 3 Sž 1/2010 and 8Sž2/2010), and at least in one case the same Senate of the SC decided differently at different times on virtually the same regulatory issue.

Some of the above-mentioned inconsistencies can be explained by drawbacks in legislation (eg, the lack of a transitional period between two acts), or by different demands of the plaintiff (the courts take into account only the merit of the action in court, and there is no consensus as to whether the courts should deal with issues *ex officio*). As expressed by the then Chairperson of the Administrative Collegium of the SC Ida Hanzelová,

> the issue of regulation of electronic media through the RVR decisions and court judgments is relatively new and develops rapidly, thus different views on the part of these authorities on the interpretation of certain terms can be expected. Inconsistent and ambiguous legislation has led to particular difficulties for the RVR decision-making process and the courts, which raises the need for partial interpretations of gradually evolving views and solutions. Although desirable, conditions have not existed recently for such specialization of judges.

The Chairperson also offered a written explanation on the differences found in some of the above-mentioned, seemingly contradictory rulings. However, the RVR offered its own analysis of all three cases explained by the Senate of the SC and it argued that in general:

> The Supreme Court statement focused on irrelevant differences in legal substance which do not in themselves justify a different legal approach under current legislation. Should the Supreme Court deem those differences to be of such significance to alter their ruling based on them, it would seem necessary to provide guidance to the regulator on how to proceed in future administrative procedures.[4]

The Constitutional Court stated that although the legal verdicts of general courts do not have the status of precedence which would be binding on other judges to decide similar cases identically, nevertheless, such contradictory conclusions in similar cases do not contribute to the fulfilment of the main principle of legal certainty, nor works towards trust in a just court process (Finding of the CC, 4 January 2007, III US 300/06; see also Finding of the CC 14 September 2006, No IV. US 49/06). Thus in Slovakia, relevant case law is not a source of the law, but it is *de facto* binding. Direct legally binding effects are acknowledged only in the findings of the CC.

4 A Školkay, M Hong, R Kutaš, 'Does Media Policy Promote Media Freedom and Independence? The Case of Slovakia' Case Study Report (2012) 16–17, http://www.mediadem.eliamep.gr/findings/.

In general, deciding complaint on breaking the fundamental right to court's protection, the CC examines only compatibility of impacts of interpretations and applications of legal documents with the Constitution ('zlučiteľnosti účinkov interpretácie a aplikácie zákonných predpisov s ústavou') or the European Convention on Human Rights (ECHR). The Constitutional Court especially focuses on whether conclusions of general courts are sufficiently justified, or they are not arbitrary or without any logic (*svojvoľné*) with direct impact on some of fundamental rights and freedoms (I. ÚS 19/02; I. ÚS 27/04; I. ÚS 74/05). The Constitutional Court decides on the conformity of laws, government regulations issued by the Government and generally binding legal regulations issued by ministries and other central bodies of state administration, territorial self-administration bodies, and local state administration bodies with the Constitution, laws, and other generally binding legal regulations, as well as on the compatibility of generally binding legal regulations with international treaties promulgated in a manner established for the promulgation of laws.

The Constitutional Court also decides on complaints filed against legally valid decisions of central or local state administration bodies, and territorial self-administration bodies violating fundamental rights and liberties of citizens, unless decisions on the protection of these rights and liberties are within the jurisdiction of another court. The Constitutional Court provides an interpretation of the Constitution and constitutional laws in disputed matters. It also has some other exclusive rights. The Constitutional Court is not part of the general court system, thus cannot be seen as being institutionally the direct superior body to the general lower court system. However, the CC can intervene in the decision-making of the general judicial system if general courts contravene the basic rights and freedoms of individuals as guaranteed by the Constitution, or international treaties on human rights and fundamental freedoms, international treaties whose execution does not require a law, and international treaties which directly establish rights or obligations of natural or legal persons and which have been ratified and promulgated in a manner laid down by law (Article 7(5) of the Constitution).

The Constitutional Court as a national court is obliged to apply international treaties guaranteeing human rights and fundamental freedoms as well. This can be the case if, eg, general courts do not maintain the principles of an orderly and just legal process, or if they make decisions in 'extreme contradiction to fact-findings or with the principles of justice or in an arbitrary way' (Finding of the CC I. ÚS 155/07 of 3 December 2008, Article 27). In such cases, general courts are obliged by Article 56(6) of the Act on the Constitutional Court to respect (and implement) the legal opinion of it. Due to 'arbitrariness', the CC cancelled 149 general court rulings (including many RC rulings and some SC rulings) in 2009 and 2010. However, from time to time, a fundamental legal disagreement (or actually disobedience on the part of the RC) was noted between the RC and the CC in one of the most controversial cases on protection of personality with respect to the amount of reimbursement of non-pecuniary damages.

In December 2011, the RC in Bratislava ignored a legally binding recommendation of the CC from June 2011 (I. ÚS 408/2010), in which the CC considered the amount of 33,000 euros awarded for non-pecuniary damages to the former Minister of Justice (in 2011, the Chairperson of the SC), Štefan Harabin, firstly by the lower court (19 C 139/2005), later confirmed by the RC (6 Co 392/2007) as inappropriately high. It should be noted here that the CC accepted that a public apology to Harabin on the part of the publisher was

legitimate. This case was also interesting from the point of view that Harabin objected to all members of the previously originally selected Senate of the RC, and partially succeeded in these objections (see SC 5 Nc 25/2008, 3 Nc 30/2008). We will discuss below a similar case of formal attitude of the SC in regulatory matter. The Constitutional Court attempts to apply constantly and consistently the most well-known findings and rulings of the ECtHR. The impact of the ECtHR is more important for the liberal decision-making of the CC than any other factor. However, the CC is also not fully consistent in its overall rulings and findings. The Constitutional Court (but also sometimes general courts) produces partially unstable, imbalanced, and arbitrary case law. It should be highlighted among findings of this study as well as of previous study[5] that the CC as well as the SC finds inspiration in the rulings and decisions of Czech courts, due to their common history and linguistic similarity, especially regarding the CC of the Czech Republic and Municipal Court of Prague.

The ECHR is a potential source of law with potential superiority over the law of Slovakia if it guarantees a higher (broader) scope of freedom of speech, right to information, or other basic rights. As mentioned, there is an explicit legal duty of general civic courts (interestingly, not criminal courts) to take into account the relevant case law of the ECtHR in their decision-making. This duty has been re-affirmed in Finding IV. ÚS 107/2010 of the CC. It should be noted that in Slovakia, the ECHR has priority to the law but it is not above the Constitution. It is true that the regional higher courts usually consider the case law of the ECtHR, but sometimes their interpretation can be erroneous (for instance on the issue of the right to privacy of politicians). In summary, the courts in Slovakia play an ambiguous role in issues related (not only) to confirming or reversing the decisions of the broadcast media regulator. Fortunately, at least the last internal resort—the CC—is progressive and follows the ECtHR rulings, although there are occasional but fundamental problems with inconsistencies among its various Senates' rulings. This unique position of the CC has been recognised in recent years by local lawyers. This is evidenced not only in the above analysis, but also in the increased number of complaints the CC has received in recent years. The ECtHR has had a relatively low but growing significance for media freedom in Slovakia.[6]

The general public and many legal experts share a critical view of the Slovak judiciary: The quality and speed of decision-making by courts or judges is seen as unsatisfactory. For example, the Chair of the SC Senate, Judge Darina Ličková summarized the well-known problems of the Slovak judiciary including the courts' decision-making delay (*prieťahy*), the low quality of judges and their rulings, the low quality execution of the post-court agenda, and the low quality of administrative staff.[7] As the then Head of the Department of the Civil Law of the Ministry of Justice Marek Števček put it, 'Today, when you find a lawyer, he would tell you even before the court proceeding that the final result very much depends on which judge will decide and at which court the case will be decided.'[8] Serious concern about the quality of judges and their rulings is rooted in the fact that only about 45 per cent of verdicts by lower courts were confirmed by higher appellate courts in 2011–2012.[9] The Supreme Court accepted twenty-

5 ibid, 17–18.
6 ibid.
7 D Ličková, 'Zlá vymáhateľnosť práva na súdoch' *Pravda* (20 February 2013).
8 In V Vavrová, 'Niektorým sudcom bude treba vymeniť hlavy' *Pravda* (19 December 2014) 4.
9 http://www.otvorenesudy.sk/hearings/search; Statistical Yearbooks of the Ministry of Justice, 2011, 2012.

three out of twenty-five extraordinary appeals by prosecutor general (92 per cent) in 2014. In the case of extraordinary appeals submitted by the prosecutor general in 2013, the rate of success was so far 83.5 per cent (Prosecutor General, Annual Report for 2014).

The first problem related to the narrow application of justice seems to be related to the low importance given to education in ethics and logical reasoning of lawyers. This can be seen in the importance given to these topics in the education of lawyers in the example of Comenius University Faculty of Law.[10] Law theory is usually taught in the first-year class. For them, obligatory-facultative topics which include philosophy, sociology, legal theory, and logic are included among a dozen of facultative subjects such as the history of law of the Empire of Incas. Ethics and law is also among facultative topics for second-year law students. One can understand the logic behind this approach—the higher level of study, the more specialised study, which is correct, of course. However, perhaps the most crucial aspect—logical thinking about justice in broader social and philosophical terms—slowly disappears from the last years of study of law.

Radoslav Procházka finds deeper social causes of this unsatisfactory state of affairs not only in the quality of the education of judges, but also in the process of their selection, the official and unofficial rules governing their career, and what he calls the 'autism of the Slovak judiciary'.[11] By this he means a 'closed system', namely a structure that is not open to external or internal criticism, with a negative impact on the ethics of the profession.[12] Since then, some changes have been introduced which should lead to better selection of the aspirant judges. There is a telling story to illustrate the problem of education of lawyers in Slovakia. The Czech Constitutional Court has decided in I. ÚS 110/14 (March 2014) that it is legal when the Czech Chamber of Advocates rejects the application (ie, not even to evaluate it further) from a lawyer who studied law at the Paneuropean University (previously Bratislava College of Law) in Bratislava. The case started in 2010, and the University was established in 2004. In other words, these were among the first graduates. It was interesting to read in the judgment that the law graduates from this university had been accepted initially into the Czech Chamber of Advocates by an administrative mistake. The Czech Chamber of Advocates defended its decision based on the low quality of graduates from the Paneuropean University.

The second problem related to narrow execution of justice is related to the issue of general attitude of perhaps majority of judges to justice as created by their peers. By this we mean fear to pursue justice regardless of possible consequences, the capacity to ignore client networks in judiciary and corruption offers or abuse of power.[13] The low level of public trust in the

10 http://www.flaw.uniba.sk/fileadmin/user_upload/editors/Pravnicka_fakulta/Studium/Studijny_program/PRV.14_15.pdf.

11 R Procházka, 'Autizmus slovenskej justície' *Výzvy slovenského súdnictva a možnosti zlepšenia existujúceho stavu*. Seminar Bulletin (Bratislava, Transparency International Slovensko, 2010) 18.

12 See, J Dubovcová, 'Umožňuje súčasny stav súdnictva zneužívanie disciplinárneho konania voči sudcom, zneužívanie výberovych konaní a dáva výkonnej moci oprávnenie zasiahnuť do súdnej moci?' *Výzvy slovenského súdnictva* (n 11).

13 See, Ľ Kostelanský, 'Sudcovia si navzájom prisudzujú vysoké odškodné' *Pravda* (6 February 2010); Ľ Kostelanský, 'Rozhodnutia súdu sa kupujú' *Hospodárske noviny* (2 July 2012) 4; E Mihočková, 'Šikanovanie v talári' (12 December 2011) http://plus7dni.pluska.sk/plus7dni/vsimli-sme-si/sikanovanie-vtalari.html; Z Wienk, 'In Case You Buy the State? NB: Courts, Prosecutors and Politics Included in the Price' (21 April 2011) http://slovakmatters.blogspot.sk/2011_04_01_archive.html; M Leško, 'Najvyšší súd: vôľa nevidieť *Trend* 22 (26 July 2012) 30–31.

Slovak judicial system has been relatively consistent during the past few years, and confirmed by various surveys. For example, according to the Special Eurobarometer 374, 60 per cent of Slovaks exhibits distrust towards the judiciary, which is well above the EU average of 32 per cent.[14] A research carried out in 2010 suggests that the courts were the most corrupt institutions in Slovakia, with 45 per cent of the interviewees holding such an opinion.[15] Earlier, in 2009, the courts shared the second place with state ministries in regard to the perceived level of corruption.[16] Whereas under Mikuláš Dzurinda's second government (2004–2006), a decrease of perceived judicial corruption was noted, under the first Robert Fico's government (2006–2010), the level of perceived judicial corruption stabilised.[17] Roman Džambazovič found that it decreased from 60 per cent in 2002 to 48 per cent in 2010.[18]

Regarding the independence of the judiciary, there is a disagreement about its level. On the one hand, Carlo Guarnieri and Daniela Piana[19] claim that there is relatively strong independence of the judiciary in Slovakia, on the other hand, the Global Competitiveness Report 2014 and the World Economic Forum data[20] suggest that the Slovak judiciary is both the least independent and efficient one among the twenty-eight EU Member States.[21] That being said, Slovak experience suggest a professional group with strong groups' independence from politician, but with a serious lack of substantial internal or external pressure to follow professional ethics, can actually have, in some cases at least, more negative impact on fair functioning of judiciary.[22] In late 2015, there was adopted a new binding internal self-regulator code of ethics—Principles of Judges Ethics,[23] which main difference with the previous one of 2011 is in enforceability of the new ethical regulation,—the previous one was just formal, without any body that could enforce it. In any case, it certainly should not be the case that inconsistency or even contradictions in rulings of disciplinary senates for judges was the norm.[24]

According to the opinion polls carried out in Spring 2013, the majority of population does not trust the judiciary. Some 30 per cent do not trust courts at all, and another 40 per cent tend rather not to trust judiciary. The main reason of distrust is that judges are not seen as impartial or independent (43 per cent). The length of courts' proceedings was the reason

14 See also, R Džambazovič, 'Verejné vnímanie korupcie v období po roku 1989' *Forum Historiae* 5(2) (2011) 140–41;M Bobek (ed), Central European Judges Under the European Influence: The Transformative Power of the EU Revisited, Bloomsbury Publishing, 2015.

15 G Šipoš, 'Barometer korupcie 2010 – každá deviata domácnosť bola požiadaná o úplatok' http://www.transparency.sk/gbk2010.

16 G Šipoš, 'Každý druhý Slovak vníma súdy ako skorumpované' *Výzvy slovenského súdnictva* (n 11) 9.

17 E Sičáková-Beblavá, G Šípoš, M Kurian, 'Korupcia a protikorupčná politika na Slovensku 1989–2010' *Forum Historiae* 5(2) (2011) 161–62.

18 R Džambazovič, 'Verejné vnímanie korupcie v období po roku 1989' *Forum Historiae* 5(2) (2011) 144.

19 C Guarnieri and D Piana, 'Judicial Independence and the Rule of Law: Exploring the European Experience' J Gripsrud and H Moe (eds), *The Culture of Judicial Independence* (Leiden, Martinus Nijhoff, 2011) 113–24.

20 See also the 2015 EU Justice Scoreboard (2015 EUJS), http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf, Figure 47.

21 S Spáč, '3 mýty o našom súdnictve: Sú naše súdy lepšie ako ich povesť?' http://transparency.blog.sme.sk/c/367746/3-myty-o-nasom-sudnictve-su-nase-sudy-lepsie-ako-ich-povest.html, Graph 1.

22 See V Prušová, 'Potrestaná sudkyňa: Harabin mal mimoriadny termín' http://www.sme.sk/c/4928869/potrestana-sudkyna-harabin-mal-mimoriadny-termin.html; http://www.pluska.sk/slovensko/spolocnost/sudkyna-benesova-zabranili-mi-rozhodnut.html.

23 See http://www.sudnarada.gov.sk/zasady-sudcovskej-etiky/.

24 See E Kováčechová and Z Čaputová, *Vybrané aspekty disciplinárneho súdnictva* (Pezinok, Via Iuris, 2012) 57.

of distrust for another 30 per cent. It is possible to identify the average length of courts' proceedings. While in 2005 it took almost 17 months to reach a verdict in civil cases, in 2013 it took slightly over 11 months. However, there was stagnation in this parameter in the years 2010–2013. Furthermore, the situation was more complicated in the capital city than in the rest of the country. A similar trend could be noticed in connection with business court cases. It took 21 months to reach a verdict in 2005, but about 14 months in 2009–2013. Again, it took much longer than average to get final verdict in the capital city than in the rest of the country. The most problematic situation and most negative trend were noticed in criminal cases when the Regional Court was a first instance court. In these cases, the average length of criminal proceedings was five times longer in 2013 than in 2005 (from 23.5 months to 111.2 months).[25]

Yet, paradoxically, the total number of unfinished judicial cases (of all types, including various administrative requests) increased in the same period in about half, from 440 unfinished cases per judge in 2010 to 613 unfinished cases in 2013. The major factor behind this negative development was an increase in court cases, from 1,133,987 in 2010 to 1,485,747 in 2013. Considering that there was also a slight decrease of number of judges, from 875 in 2010 to 856 in 2013, this meant an increase of average load per judge from 1,296 cases in 2010 to 1,736 in 2013.[26] The number of pending (expresses the number of cases that remains to be dealt with at the end of a period) civil, commercial, administrative, and other cases (First instance/per 100 inhabitants) has actually increased in period 2010–2013.[27] The time needed to resolve administrative cases (first instance) was about 700 days in both 2012 and 2013. This put Slovakia among the worst achievers in the EU.[28] The rate of resolving administrative cases was slightly over 80 per cent in 2013.[29] This was again below the EU average. The Supreme Court complained that it was not able to cope with its agenda in 2014 either, facing 17,990 new cases. By the end of 2014, it finished 15,729 cases, and there were 12,085 unresolved cases remaining.[30]

About 20 per cent respondents identified causes of distrust in poor legislation.[31] The low quality that often characterises the Slovak legislation is exemplified by the low transparency of the legislative process, the fact that changes in the law are commonly made as 'minor additions' to acts and regulations that have a different subject matter than that addressed by the actual changes made (eg, changes in media law happen to be introduced through general safety legislation), as well as fuzzy terminology and the provision of contradictory legal options in the legal framework.[32] The fact that legislation is sometimes problematic in itself leads to situations where courts become creators of new rules.[33] This is actually

25 http://www.justice.gov.sk/Stranky/Sudy/Statistika-priemerna-dlzka-konania.aspx.

26 http://www.justice.gov.sk/Stranky/Sudy/Statistika-OS-2009-2012.aspx; http://www.justice.gov.sk/Stranky/Sudy/Statistika-OS-2009-2012.aspx.

27 2015 EU Justice Scoreboard (n 20) Figure 10.

28 ibid, Figure 6.

29 ibid, Figure 9.

30 See, *Sme*, 20 January 2015, 2.

31 http://sudcovia.sk/sk/?option=com_content&view=article&id=1154:prieskum-pre-via-iuris-sudnictvo-na-tom-este-nebolo-horsie&catid=31:externe&Itemid=175.

32 See, J Andacký, 'Trikrát a vari aj dosť' *Trend*, XXII (2012) 48.

33 S Capíková, 'Medzi poriadkom a chaosom: právo v období post-komunistickej transformácie na Slovensku' *Czech Sociological Review* 41(4) (2005) 630.

very typical in the case of administrative judiciary. In addition, the RVR must from time to time provide guidance with respect to certain aspects of the regulation of audiovisual media services, ordinarily during elections and referendum campaigns.[34]

In its 2012 Manifesto,[35] the Government has pointed to the need of guaranteeing the 'proper functionality' of the judicial system, including by tackling delays in court rulings, and included raising the quality of the rule of law among its ten key tasks for the next four years. Increasing judges' independence was identified as a key mechanism in this regard. Indeed, the Parliament passed in 2014 a controversial Amendment to the Constitution which should increase independence of judges via screening aspirant judges by National Security Authority. However, despite all rhetoric, the results seem to be disappointing.

III. Electronic and Digital Media Regulations

The main body of regulation of electronic media in the Slovak legal system is contained in two statutes—the Act on Broadcasting and Retransmission (BA) and the Digital Broadcasting Act (DBA). The former entered into force in 2000 and replaced the older statute passed in 1991 as well as implemented the principles of the Council of Europe's (CoE) Convention on Transfrontier Television (CTT) and its EU's counterpart (Television without Frontiers Directive, TWFD) into Slovak legal system. The DBA entered into force in 2007 and its main purpose was to lay down the rules for digital broadcasting and to regulate the process of digital switchover. It also altered some of the basic provisions of the BA in the way that today there is no clear line between scopes of these acts and both acts have to be perceived as complementary.

The regulation of electronic media is divided into two main parts—technical regulation (or regulation of access) and content regulation. While both were initially conceived with broadcasting in mind, the implementation of the AVMSD in 2007 introduced a layered system with different extents of regulatory scope for different types of media. Technical part of regulation deals mainly with systems of authorization for each type of electronic media. The strictest authorization system is the licensing for terrestrial analogue broadcasting which now, following the digital TV switchover, means only radio broadcasting (there also is digital radio broadcasting). Licensing system for digital broadcasting is less severe. Retransmission services are being authorized through registration system only, while a mere notification is all that is required for on-demand audiovisual media services and internet TV broadcasting (webcasting). Providing radio-like services via internet is excluded from the regulation altogether.

34 See, Legislation on campaign in the media before Referendum in February 2015, http://www.rvr.sk/sk/spravy/index.php?aktualitaId=2856; Commentary on campaign in the media before elections to the EP in 2014, http://www.rvr.sk/sk/spravy/index.php?aktualitaId=1448; Commentary on campaign in the media before presidential elections in 2014, http://www.rvr.sk/sk/spravy/index.php?aktualitaId=2;68; Retransmission via the Internet and IPTV, 2013, http://www.rvr.sk/sk/spravy/index.php?aktualitaId=2138, Statement of the RVR withrespect to campaign in the media before elections to self-governing bodies, 2013, http://www.rvr.sk/sk/spravy/index.php?aktualitaId=2129; Reaction of the RVR to the public call by the Minister of Culture with respect to increasing vulgarity and lack of ethics in broadcasting, 2012, http://www.rvr.sk/sk/spravy/index.php?aktualitaId=1684; Commentary on campaign in the media before parliamentary elections in 2012, http://www.rvr.sk/sk/spravy/index.php?aktualitaId=1448; Commentary on campaign in the media before local elections in 2012, http://www.rvr.sk/sk/spravy/index.php?aktualitaId=1449.

35 http://www.vlada.gov.sk/programove-vyhlasenie-vlady-sr-na-roky-2012-2016.

Broadcasters are obliged to broadcast in accordance with the provisions of their license. Minor and short-termed diversions are subject to notification to the RVR. In order to make more significant changes in the broadcast, broadcasters need to formally change their license with the RVR's approval. Broadcasters are also subject to provisions regarding external plurality, ie, personal and ownership structures of the broadcasting corporations and establishment of programming networks with other broadcasters.

The main administrative requirement for retransmission in Slovakia is the possession of broadcaster's written consent for retransmission of its programmes via its channel. Unlike in most European countries, in Slovakia, the consent for retransmission is not just a private law matter, but also an administrative one, and its absence can prevent the operator from getting authorization from the media regulator. For on-demand media services and webcasting, there are only transparency obligations of basically the same extent as in the AVMSD.

A. Content Regulation

The main focus of interest for the regulator (based on the number of complaints) is protection of minors, and the most frequent topic it deals with is actually commercial communications. Content regulation is harmonized with the EU law to a considerable extent, with AVMSD being the most important legislation. Slovak legislation is considered to be in full compliance with the EU regulation and (with few exceptions—see the case study on the TWFD below) there does not seem to be any significant problem in its practical application either. AVMSD however does not bar Member States from introducing regulation beyond its scope (although the European Commission (EC) still reserves the competence to observe its compliance with EU Charter on Fundamental Rights). As mentioned, in this regard, there are three areas in which Slovak media regulation goes significantly beyond the scope of the AVMSD: Regulation of objectivity and internal pluralism in broadcasting, protection of minors, and protection of human dignity. As a result, these issues are quite often dealt before administrative courts and senates.

Many provisions of content regulation in the BA are based on provisions of the CTT. Although with the AVMSD entering into force, the CTT lost significance for members of the EU and EC discouraging them from implementing its provisions, provisions which were not in contradiction with the AVMSD remained in the BA. We are going to discuss the following issues in detail in separate chapters, however, some introductory comments might be useful here too.

B. Protection of Human Dignity

There is strong emphasis on protection of human dignity in Slovak electronic media regulation. Among all content regulation provisions it is placed first with the harshest sanctions for non-compliance with its provisions. The basic provision which was initially based on Article 7(1) of the CTT says that on-demand audiovisual media services and broadcastings may not interfere with human dignity and the fundamental rights of others (Paragraph 19(1)a of the BA). Despite its wide wording, Slovak SC ruled that the provision does not protect human dignity

as such, ie, human dignity in the ideal sense, and that there has to be an actual individual person involved for this provision to be applicable.[36] The provision is therefore used only in, broadly speaking, defamation cases, where the breach of personal rights occurs in the media. This notion was in turn questioned by a Slovak broadcaster who was claiming the invalidity of this provision in electronic media regulation on the grounds of its unconstitutionality. These types of cases, in his opinion, can be heard only as private law cases by general courts, and cannot be the subject of administrative regulation. The Slovak CC, however, did not share this view, and refused the broadcaster's complaints as being without merit.[37]

Aside from this general provision, which is applied quite frequently, there are more specific provisions aimed at protection of particular aspects of human dignity. It is explicitly forbidden to incite any form of hatred on the grounds of nationality, religion, ethnicity, etc., to propagate war, or to depict the cruel and inhuman behaviour in the way that might be considered its downplaying, justification or approval (Paragraph 19(1)b of the BA). There is also an absolute ban on depiction of real violence, where undue prominence is given to the actual process of dying, or where individuals are subject to physical or mental torment in a way that is considered an illegitimate violation of human dignity (Paragraph 19(1)d of the BA). The same provision further states that this ban also applies to cases where the individuals depicted gave their consent. Even though this is the only explicit reference to inconsequentiality of the protagonist's consent in relation to the potential violation of his dignity, both the media regulator and the SC maintain that the existence of such consent does not justify any kind of human dignity violation.[38]

Protection of minors from maltreatment in the media is also part of the human dignity protection rules. It was included into the regulation in reaction to a particular reality show format that dealt with interactions in the family. The provision forbids the depiction of minors that are exposed to physical or mental suffering (Paragraph 19(1)f of the BA). BA also contains an explicit ban on child pornography, along with pornography depicting pathological sexual practices. This provision was included into the BA during the implementation of the AVMSD, since pornography as such, although banned from broadcasting services since the TWF, is permitted for the new media services. Child pornography is, of course, absolutely illegal in Slovakia, but being regulated by Criminal Code, it was only the individual (natural person) who could be held responsible for any crime in connection with it (criminal liability of corporations did not exist in the Slovak legal system till the Summer of 2016). By explicit inclusion of its ban in the BA, the provider of the media service (ie, corporation) that carries such content can be punished as well.

C. Objectivity and Internal Pluralism

A substantial proportion of the yearly workload of the Slovak media regulator is dedicated to dealings with complaints about news objectivity. In the BA, there are two provisions aiming towards internal pluralism in electronic media, and both are limited to broadcasting.

36 Judgment 3 Sž 82/2008 of the SC of the Slovak Republic.
37 Resolution III. ÚS 88/2014-21 of the CC of the Slovak Republic.
38 eg, judgment 4 Sž 20/2012 of the SC of the Slovak Republic.

The first one, broader in scope, obliges the broadcaster to ensure plurality and versatility of opinions in its broadcasting as a whole. The second provision is restricted to news and current affairs programs, and requires the broadcaster to ensure their objectivity. The first of the two provisions is obviously quite difficult to control in the broad sense that its wording implies. However, in practice, it is almost invariably used as an obligation to provide space for various (usually contending) opinions on a given (often controversial) topic, albeit not necessarily in the same program. It is sufficient to include such opinions into other programs of the same broadcasting channel in reasonably similar extent and within reasonable time (usually days or weeks) from the initial broadcast.[39]

However, complaints and inquiries into the objectivity of the news and current affairs programmes on the grounds of the second provision are more frequent. This provision is apparently based on Article 7(3) of the CTT and the perception of its application is understandably sensitive. The main points the RVR is examining in these cases are whether the information is presented impartially (separation of editorial commentaries from facts is an explicit requirement of the provision) and whether opinions of all parties involved are included, if vicariously, in the program. There is, however, no financial sanction attached to this obligation, and in most cases when the absence of objectivity is found, the broadcaster is only given a warning. This softens the controversial nature of the obligation somewhat. The other and obviously more grievous form of punishment is the obligation to broadcast an announcement outlining the breach of law, but this sanction is applied quite seldom.

D. Protection of Minors

The legislation aimed at protection of minors from the harmful media content goes beyond AVMSD (eg, it is tackled in Sections 19, 20, 31a and b, 33, 35, 39a, 61, and 67 of the BA), and its main part is contained in a special regulation—a decree issued by the Ministry of Culture.[40] This regulation lays out the system of rating of the programs according to their suitability for various categories of children and the criteria by which the programs are divided into these categories. There are four main categories of ratings: Programs unsuitable for children under 7, 12, 15, and 18 years of age. Categories of 15 and 18 also have a watershed of 8 pm and 10 pm attached to them respectively. Although the television content rating regulation is part of the legislative competence of the Ministry of Culture, the compliance of the media providers with its provisions is overseen by the RVR. Aside from the rating system, the Paragraph 20(1) of the BA, in accordance with Article 27(1) AVMSD, obliges every broadcaster to ensure that no programs which might seriously impair the physical, mental, or moral development of minors, programs that involve pornography or gratuitous violence in particular, will be broadcasted within its service.

39 Decision No RL/17/2010 of the RVR.

40 Paragraph 12(2) of the Act No 343 of 20 June 2007 on the Conditions of registration, public distribution, and preservation of audiovisual works, multimedia works, and sound recordings of artistic performances (audiovisual law).

E. Advertising

The regulation of advertising goes very much along the lines of the rules set out in the AVMSD. Since the AVMSD does not deal with radio broadcasting, the Slovak media regulation goes beyond its scope in this respect; nevertheless, even these provisions are mainly based on the provisions of those in the AVMSD for the integrity of the system as a whole. Regulation of political advertising during election campaign forms a separate category. The new election law which entered into force in June 2015 somehow unified the political advertising rules for all media, which were previously fragmented and different for every type of elections. Yet there are still to some degree different rules for political advertisements and political discussions for different elections and for public service media (PSM) and private media.

F. System of Authorisation

As it was mentioned above, essentially, there are three types of authorization. In case of broadcasting (which excludes webcasting), there is a licensing system which is different for analogue terrestrial radio broadcasting on the one hand and all the other forms of broadcasting on the other. Analogue radio terrestrial frequencies are allocated in form of a competition (Paragraph 47 of the BA). The Council for Broadcasting and Retransmission launches an administrative procedure—in which whoever fulfils formal criteria is allowed to participate—then chooses the entity to which the right to use the frequency is granted. If this entity is not a broadcaster yet, ie, it has not been granted license to broadcast in the past, the frequency is granted with the broadcasting license. The statutory criteria for granting the frequency / license to one of the participants are generally considered vague and not particularly instructive, and since there are no further requirements that can be introduced by the RVR at the start of the administrative procedure to meet particular goals with the allocation of frequencies (eg, to have particular content broadcasted in the given area), the final deliberation takes basically the form of a so-called beauty contest. Analogue radio license can be granted for an 8-year period with one prolongation which is subject to the RVR's approval (Paragraph 52 of the BA). Because of the competitive character of the procedure, there is no legal entitlement to be granted this type of license.

Since the digital television switchover that has taken place between 2008 and 2011, the analogue terrestrial television frequencies can no longer be allocated. The procedure (Paragraph 47 of the BA—the same provisions as in the case of analogue radio) is still in force though, and theoretically, it can still be used in order to get license for cable or satellite broadcasting. In this case, however, it does not have competitive character and, although it is not explicitly laid down by the relevant provisions of the BA, it can be persuasively argued that there is legal entitlement to this type of license provided that the formal criteria are fulfilled. Analogue TV license can be granted for 12 year period, with the possibility of one prolongation for another 8 years, which is subject to the RVR's approval (Paragraph 52 of the BA). Since the DBA entered into force, this type of license became practically obsolete due to the fact that the digital license, which can be used for the same purpose, has fewer formal requirements and there is no time limit for the validity of the license.

License for digital broadcasting was introduced by the DBA. The system of digital terrestrial broadcasting is entirely different form its analogue counterpart. It is no longer the RVR who allocates the frequencies for broadcasting, but the Regulatory Authority for Electronic Communications and Postal Services (RU) who chooses the operator of the multiplex (a set of frequencies assigned for television or radio broadcasting) through tender. The Council for Broadcasting and Retransmission merely authorizes the company to be able to broadcast in Slovak jurisdiction, but the actual participation in digital terrestrial multiplex depends on an agreement between the broadcaster and the multiplex operator. It has already been stated that the requirements for the digital license are less strict than for the analogue one, and that this type of license is valid for an indefinite time period.

In order to provide retransmission service, a registration is needed (Paragraph 56 of the BA). It allows an operator to provide channels in the form of programme packages to the viewers. There is a legal entitlement for the operator to have the registration acknowledged by the RVR with the positive legislative fiction in case of the RVR's inactivity. For on-demand media services and Internet TV broadcasting, there is an obligation to notify the RVR on the day the service is being launched at the latest (Paragraph 63(a) of the BA).

G. Electronic / Digital Media Regulator

The main electronic media regulator in Slovakia is the RVR. There are some aspects of electronic / digital media regulation, which are under control of other authorities, such as the RU that regulates issues related to the frequency spectrum, or Slovak Trade Inspection that regulates some aspects of the advertising in electronic media, but the vast majority of the rules concerning electronic media regulation are contained within the BA and the DBA, and supervision over them is entrusted to the RVR.

The Council for Broadcasting and Retransmission is defined by the BA as a legal person which, when executing state administration in the field of broadcasting, retransmission and audio-visual media on-demand, has the status of state authority with national competence (Article 4(3)). From the viewpoint of the Slovak legal system, it means that the RVR is administrative authority *sui generis*. It is not part of the governmental administration and it is not supervised by the Government or a particular governmental authority. The Statute of the RVR explicitly mentions in its article 3 that the RVR is an 'independent organ', but it also defines the RVR, in the line with BA, as 'nation-wide organ of state administration'.

The nine RVR members are elected by the National Council of Slovakia (the Slovak Parliament) that also approves the regulator's annual report and dismisses members of the RVR in case of specifically defined breaches of conduct (Article 9(2) of the BA). The members of the RVR are elected for 6-year terms with one third of the members changing every two years. The head of the RVR is its chairperson. He/she represents the RVR publicly and presides over its meetings that usually take place twice a month. Day-to-day business of the RVR is carried out by the Office of the RVR that has approximately 30 employees. The main mission of the RVR, as defined by the BA, is to promote the public interest in exercising the right to information, freedom of speech, the right to access to cultural property, education, and to exercise state regulation in the field of broadcasting, retransmission and audio-visual

media on-demand (Article 4(1) of the BA). The actual obligations and competences of the RVR are laid down mainly in the BA and the DBA, but can also be found in other statutes.[41]

The activities of the regulator are commonly covered by the media, especially, by two specialised media portals. Especially sanctions (fines) issued by the RVR are very much read and those seen as controversial are widely covered. The journalists take inspiration from these two websites.[42]

The budget of the RVR in 2014 was 1,114,864 euro, the actual spending was just below this limit. The budget in 2013 was 1,142,605 euro, the actual spending was just below it. Considering that in 2012, the budget was lower by 47,500 euro, the finances and technical resources available to the RVR can be seen as relatively sufficient. However, under present conditions, the RVR cannot fulfil all its legal obligations. This can be seen as a result of a number of new revisions of BA. There is, as a result, insufficient monitoring of various broadcasting programmes.

H. Administrative Procedures

The great majority of the RVR's competences are exercised through administrative procedures. This is invariably true about those competences under which the rights and obligations of media providers are dealt with. The general rules of administrative procedure in the Slovak legal system are laid down in the Administrative Procedure Act (APA).[43] However, many procedures in the Slovak legal system have their specific rules to some extent and in some cases the application of APA can be excluded altogether. In the case of the procedures contained in the BA and DBA, the APA is generally applicable to all of them, except for explicitly specified parts of the APA listed in Paragraph 71 of the BA. General rules for the terms of taking the decisions by the RVR (these are altered within particular procedural rules), some general rules about appellations (also altered) and all general rules about the reopening of the case and the examination of the decision outside of the appellation procedure are thus excluded from the application in the BA and the DBA procedures.

There are two main types of administrative procedures through which the RVR takes the decisions—procedures of non-vindicatory and of vindicatory character. Non-vindicatory procedures are those in the area of regulation of access, such as authorization processes and all procedures related to them. The administrative procedures are initiated either by participants or by the RVR, depending on the type of the procedure (the particular way of initiation of the procedure is always explicitly stated in the BA or the DBA). The number of participants

41 See more on this in INDIREG Final Report. Annex, Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMSD (SMART 2009/0001), Annex II, Country Tables, Slovakia, http://www.indireg.eu/wp-content/uploads/Annex_II-_CountryTables_Slovakia.pdf.

42 See, http://www.omediach.com/radio/item/6093-radio-europa-2-dostalo-pokutu-za-vulgarnosti-v-pesnicke; http://www.omediach.com/tlacove-spravy/item/6087-tlacova-informacia-zo-zasadnutia-rvr-24-2-2015; http://www.omediach.com/tlacove-spravy/item/6002-tlacova-informacia-zo-zasadnutia-rvr-112-2015; http://medialne.etrend.sk/televizia/k-referendu-prislo-devat-staznosti-na-sajfu-tv-lux-ci-rtvs.html?utm_source=medialne&utm_medium=hp&utm_campaign=listing.

43 Act 71 of 29 June 1967 on Administrative proceedings.

may vary in accordance with the type of procedure or the circumstances of the case. In the licensing procedure for analogue TV, eg, the participants are all those who applied for a particular frequency in due time. In the procedure through which the license for digital TV can be granted, usually, there is only one participant. According to the APA, everyone who claims that his/her rights or obligations can be touched upon in administrative procedure is considered a participant until it is proved otherwise. In more complicated cases, the RVR is thus obliged to examine the extent of the number of participants during the whole procedure.

The vindicatory procedures are those where potential breaches of the law by media operators are dealt with. The initiator of this type of procedures is always the RVR, and the only participant in the procedure is invariably just the alleged perpetrator. Even in cases where the RVR is notified about a potential breach of law by complaint, the eventual subsequent administrative procedure is not initiated by the complainant but by the RVR itself, and the content of the complaint is not binding for the regulator in any way. Complaint procedures and administrative procedures against the media operator are hence separate processes, whereby the former is not an administrative procedure *per se,* and does not end with administrative decision—the complainant is only notified about the outcome, while the latter is an administrative procedure under the APA that culminates either with procedural administrative decision that halts the procedure if no breach of law is found, or material decision penalising the media operator in the case of positive finding.

The outcome of every administrative procedure is an administrative decision, and as such, it is subject to judicial review. At this moment, there are two admissible ways of seeking revision of the decision of the RVR. The first is the appellation, which can be used only if the right to appeal against the administrative decision is explicitly prescribed by law. This type of decision postpones validity of a decision for a certain time period (usually 15 days) in order to allow the participant to appeal. It means that these decisions are not legally valid at the time of appellation. Since the general rules for appellation of the APA are excluded from the application in the BA and the DBA procedures, appellation is possible only in instances where the BA or the DBA explicitly states so. The second instrument of review is the action against valid decisions of administrative agency. This, in turn, as its name reveals, can be used only against a decision that is already legally valid, and therefore fully enforceable.

The rules for both instruments are laid down in the Civil Judicial Code,[44] and both are dealt with by administrative sections of the general courts (see below), albeit through different processes. The system of judicial review of administrative decisions in Slovakia, however, changed profoundly in 1 July 2016, when the new Administrative Judicial Code[45] entered into force. Under the new system, there is only one instrument of review that is very similar to the second instrument described above. There will be thus no appellations against non-valid administrative decisions, only actions against those that are fully valid. It means that all administrative decisions will be valid upon deliverance to relevant participant without exception. Their enforceability, however, may be postponed by the aforementioned action if the law explicitly states it, or the reviewing court decides so in the preliminary ruling.

The implementation of media policy by the RVR is essentially a bureaucratic process. In controversial cases, there often are two alternative proposals for members to decide. This suggests an attempted unbiased approach to the RVR decision-making. The Council for

44 Act 99 of 4 December 1963 on civil procedure.
45 Act 162/2015 Col.

Broadcasting and Retransmission has—by and large—sufficient monitoring and sanctioning powers. In fact, there seems to be an over-regulation of the broadcasting sector. This is overtly claimed to be a result of EU directives, although it seems more likely to be a self-inflicted regulation (an illustrative example is the process of notification in the case of on-demand audiovisual services which is compulsory under the threat of a fine and the regulation on human dignity in the BA). There are also rare cases where the RVR members internally initiate legal action against the media. However, although there was an enormous increase in the agenda (mainly because of complaints) in the last decade, the standard monitoring of broadcasting by the RVR staff is still limited to a relatively low number of cases annually.

Broadcasters would like the RVR to increase its preventive (pro-active) role in electronic media regulation, ie, with increased recommendations and advice. There is also a call for consistency in the decision-making of the RVR, thus increasing the predictability of future decisions. In addition, television broadcasters were critical of the fact that almost all attention to monitoring by the RVR focused on television broadcasts, leaving radio broadcasters a freer hand (most complaints do, however, concern TV broadcasting). Finally, bureaucratic procedures should ideally include a more detailed explanation of why a certain appeal against a decision/ruling of the RVR was dismissed.[46] More recently, broadcasters wonder whether Slovak media regulator pays attention to regulatory issues which are not so important in other countries. There also are open questions why the media regulator deals differently with television and radio. Moreover, rights (competencies) of the media regulator seemed to be too broad, and plans of prescribed amount of collected fines were seen as unfair. More practically, inconsistencies in verdicts of administrative senates were seen as obstacles for keeping regulations. With respect to the media regulator, more *ad hoc* advice would be appreciated.[47]

The head of PSM in Slovakia, Václav Mika, raised serious doubts about the functioning of the RVR: '[T]he way in which the RVR functions has been criticised many times, there is a consensus among all the media. The approach of the RVR is like from another time.'[48] However, the Director General never explained, in spite of repeated requests, what exactly he meant by this statement.[49] Neither the Chairperson of the Association of Independent Television and Radio Stations (ANRS) in a personal interview of 27 January 2015 was able to provide further explanation on this issue. This fuzziness can be perhaps explained by comment by Kateřina Kalistová, the First Secretary of Ministry of Culture of the Czech Republic. Kalistová mentioned that also the Czech broadcasters demanded self-regulation with respect to protection of minors, but never introduced it.[50]

Salajová from the Creative Industry Forum has summarized problematic aspects of electronic / digital media regulation in Slovakia from the point of view of broadcasters and creative industries with respect to protection of minors.[51] In her view, there is unpredictability of law application and decision-making, use of vague terms such as low / middle / high frequency

46 Školkay, Hong, Kutaš, 'Media Policy' (n 4) 22.

47 Interview with Patrik Ziman, Chairman of the Association of Independent Radio and Television Stations, 27 January 2015, by Andrej Školkay.

48 In K Sudor, 'Šéf RTVS: Lampa už takto pokračovať nemôže' https://dennikn.sk/24109/sef-rtvs-lampa-uz-takto-pokracovat-nemoze/?ref=tit.

49 E-mails sent to gr@rtvs.sk on 16 and 26 January 2015.

50 At Media and Protection of Minors Seminar (n 2).

51 S Salajová, 'Aplikácia systému ochrany maloletých na Slovensku' presentation at Media and Protection of Minors Seminar (n 2).

(related to the unified labelling system, *jednotný system označovania,* JSO), lack of consistent explanatory rules and continual dialogue among executives, media regulators, and broadcasters. All this leads to deadlock among broadcasters, and finally, to resignation of broadcasters.

I. Types of Sanctions

There are five types of sanctions that may be imposed on a media operator by the RVR. The basic form of sanction is the *notification on a breach of law*, which in most cases would precede pecuniary fine. When the media operator breaches the particular provision of the BA or the DBA for the first time, Paragraph 64(2) of the BA requires the RVR to notify the media service provider about violation of law before the fine can be imposed. On the other hand, when the offence is repeated, the RVR is required to impose a fine on the media operator, and a mere notification is no longer an option. When there is obligation in the BA or the DBA that has no special sanction attached to it in case of its violation, the notification on a breach of law is the only sanction that the RVR may impose. The most common sanction is naturally a fine. There are various ranges of fines for different types of law violations and different types of media operators from 30 up to 165 969 euro. In addition to what has been stated above, there are certain types of law violations that do not require a previous notification on a breach of law, and the RVR may opt to impose fine right away. This is, eg, the case with the violation of some provisions on the protection of minors (Paragraphs 20(1)–(4) of the BA). In the case of breaching provisions on the protection of human dignity (Paragraph 19 of the BA), the RVR is explicitly required to do so. There is expected income from fines which the RVR must collect each year. For example, in 2013 the annual income from fines was expected to be 160,000 euro, and the additional income from fines was actually 426,250 euro. In 2014, the expected income from fines was 350,000 euro, and this was actually the final result. Theoretically, if the RVR does not collect enough money from fines as expected, the Ministry of Finance could lower the budget of the RVR. Indeed, there are annual consultations on budgetary issues. These result in mutual compromises and lowering the budgets to some extent. There is an additional statistical problem with fines—some of them actually come from the previous year. The highest fine issued by the RVR was in the case of reality show *Extreme Families*. The fine was 25,000 euro (the *Tonko* case, known after its main hero, is discussed below).[52]

In some cases, the broadcaster may be required to broadcast the *announcement on a breach of law,* if it is advisable and necessary for the public to be informed about such a breach of law according to the Paragraph 65 of the BA. This kind of punishment is applicable, eg, in the case of violations of provisions related to objectivity in news programs, fair elections broadcasting, the protection of minors and human dignity. The evaluation of advisability and necessity of imposing this sanction is, of course, at the discretion of the RVR, the same as the extent, form, and time of its broadcasting.

One step higher on the scale of harshness is the *detention of the broadcasting of a program.* It is applicable in the same cases as in the previous paragraph, but the violation of those provisions must be serious. This provision constitutes a considerable interference with the rights of the broadcaster, and since the BA entered into force, it was imposed only on one occasion. The ultimate sanction is the *revocation of the broadcasting license.* However, this is admissible only for a persistent, deliberate,

52 L Jelčová in A Sivá, 'Nadávajú, sťažujú sa, ale televízor nevypnú' *Sme*, 7 March 2015. Appendix, 8–9.

and serious breach of some provisions aiming to protect human dignity, and it has never been used so far. For illustration, we have compiled data on key sanctions in key sectors.

Table 1. National and local televisions, AVMS

Broadcaster / sanction	Commercial communication Paragraphs 31–35	Balanced coverage Paragraph 16(3)a or 16(3)b	Human digntiy / protection of minors Paragraphs 19–20
2011			
Private	'Warnings': 38	'Warnings': 9	'Warnings': 0
	Fines: 58/185,640	Fines: Number / Amount: 0/0	Fines: 16/96,840
PSM	'Warnings': 2	'Warnings': 5	'Warnings': 0
	Fines: 4/12,500	Fines: Number / Amount 0/0	Fines: 2/53,400
AVMS			Fines: 0 0
2012			
Private	'Warnings': 7	'Warnings': 14	'Warnings': 0
	Fines: 36/316,677	Fines: Number / Amount 0/0	Fines: 24/104,319
PSM	'Warnings': 1	'Warnings': 1	'Warnings': 0
	Fines: 0/0	Fines: Number / Amount 0/0	Fines: 0/0
AVMS			Fines: 2/600
2013			
Private	'Warnings': 10	'Warnings': 22	'Warnings':0
	Fines: 37/203,956	Fines: Number/Amount 0/0	Fines: 27/128,119
PSM	'Warnings': 0	'Warnings': 3	'Warnings': 0
	Fines :0/0	Fines: Number/Amount 0/0	Fines: 3/5,000
AVMS			Fines: 1/2,500
2014			
Private	'Warnings': 13	'Warnings': 25	'Warnings': 1
	Fines: 32/175,458	Fines: 13/24,299	Fines: 24/92,863
PSM	'Warnings': 0	'Warnings': 3	'Warnings': 0
	Fines: 1/3,319	Fines: 2/330	Fines: 1/2,000
AVMS			'Warnings':2 Fines: 3/2,500

Table 2. Radio broadcasters

Broadcaster / sanction	Commercial communication	Balanced coverage Paragraph 16(3)a or 16(3)b Paragraphs 31–35	Human digntiy / protection of minors Paragraphs 19–20
2011			
Private	'Warnings': 0	'Warnings': 0	'Warnings': 1
	Fines: 0/0	Fines: Number/Amount 1/100	Fines: 0/0
PSM	'Warnings': 0	'Warnings': 0	'Warnings': 0
	Fines: 2/5,500	Fines: Number/Amount 0/0	Fines: 0/0
2012			
Private	'Warnings': 7	'Warnings': 2	'Warnings': 0
	Fines: 3/3,994	Fines: Number/Amount 0/0	Fines: 1/100
PSM	'Warnings': 0	'Warnings': 1	'Warnings': 0
	Fines: 2/994	Fines: Number/Amount 0/0	Fines: 0/0
2013			
Private	'Warnings': 4	'Warnings': 4	'Warnings': 0
	Fines: 1/1,500	Fines: Number/Amount 0/0	Fines: 0/0
PSM	'Warnings': 0	'Warnings': 1	'Warnings': 0
	Fines: 0/0	Fines: Number/Amount 0/0	Fines: 0/0
2014			
Private	'Warnings': 3	'Warnings': 0	'Warnings': 1
	Fines: 0/0	Fines: Number/Amount 0/0	Fines: 0/0
PSM	'Warnings': 0	'Warnings': 1	'Warnings': 0
	Fines: 0/0	Fines: Number/Amount 0/0	Fines: 0/0

The above outlined statistics clearly shows that commercial broadcasters really are the main target of various sanctions. However, as correctly observed by Spokesperson of the RVR, Lucia Jelčová, these broadcasters have the largest audiences or the largest number of listeners, therefore, the higher number of complaints should not be surprising. On the other hand, the more frequent complaints on radio news and current affairs programmes in the case of PSM reflect the higher popularity of these programmes among listeners, too.[53]

J. The System of the Judiciary in Relation to Electronic Media Regulation

The examination of individual administrative acts in the sphere of electronic and partly digital media regulation in Slovakia belongs to the competence of administrative judiciary. Although there is no institutional division between administrative, general, and criminal judiciaries, their respective competences are clearly distinguished legislatively. Of the three levels of courts in Slovakia (district courts, regional courts, and the SC), the administrative justice is administered only in the RCs and the SC. In both cases, there are special administrative senates that consist of three judges.

53 ibid.

Generally, regional district courts are the courts of first instance, and the SC fulfils the role of the appellate court. In cases where legislation explicitly states so, the SC deals with appellations from administrative agencies directly. In this case, its judgment is final without the option of further appeal. With regard to the electronic media regulation, the regional district courts hear actions against fully valid decisions of the RVR, ie, the decisions against which there is no possibility to appeal or, indeed, the period given for appellation has passed. Against decisions, towards which the right of appeal is granted, the appeal goes directly to the SC. If the appeal is filed in due time (usually fifteen days), the decision does not gain full legal validity until it is dealt with by the court. From 1 July 2016 onward, however, the system outlined above, has been simplified to that extent that the regional district courts will try all cases as courts of first instance, and the SC will be invariably in the position of the appellate court.

In the sphere of electronic media, the SC and regional courts have essentially full jurisdiction over the decisions of the RVR, which means that they can uphold or change the decision, or revoke and return it to the RVR, or, in the case of the SC, this is done within the role of the appellate court, to the court of the first instance.

The special case is the CC. It is not considered to be a part of the system of Slovak judiciary, so it is not hierarchically superior to other courts. Yet, as it was mentioned, it is the ultimate judicial body in Slovak legal system, as it oversees the adherence of the actions of all authorities to the Slovak Constitution. From the point of view of electronic media regulation, it performs two important functions. Firstly, it checks the constitutionality of legislative acts, and secondly, it hears complaints claiming the unconstitutionality of the RVR's decisions or the court's judgments. Formally, the complaint is always aimed against the decision of the SC that upheld the decision of the RVR or the judgment of the RC, because in Slovak legal system, the constitutional complaint is admissible only when all other possibilities of legal reparation were exhausted.

IV. The Electronic / Digital Media System

The media plays an important role in liberal democratic societies. Walter Dean argues that 'the purpose of journalism is to provide citizens with the information they need to make the best possible decisions about their lives, communities, societies, and their governments.'[54] No doubt, among all media, the electronic / digital media plays the most important role in current liberal democratic societies.

Considering that Slovak media legislation as well as the regulatory practice of the RVR are rather strict on pluralism, it seems useful to discuss this issue further. The European Court of Human Rights (ECtHR) notes (eg, in the case of *Manole and Others v Moldova*, App No 13936/02) that general principles regarding pluralism in audiovisual media as the starting point are the fundamental truism: '[T]here can be no democracy without pluralism. One of the principal characteristics of democracy is the possibility it offers to resolve a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression.' 'It is of the essence of democracy to allow diverse political

54 http://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/purpose-journalism/.

programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself' (*Socialist Party and Others v Turkey*, 1998 [41], [45], and [47], Reports of Judgments and Decisions1998-III).

Furthermore, the ECtHR in *Manole* argued that the audiovisual media, such as radio and television, have a particularly important role in this respect. Because of their power to convey messages through sound and images, they have more immediate and powerful effect than that of the print media (*Jersild v Denmark*, 23 September 1994 [31], Series A no 298; *Pedersen and Baadsgaard v Denmark* [GC], App No 49017/99 [79], ECHR 2004XI). The function of television and radio as familiar sources of entertainment in the intimacy of the listener's or viewer's home further reinforces their impact (see *Murphy v Ireland*, App No 44179/98 [74], ECHR 2003IX, extracts). Moreover, particularly in remote regions, television and radio may be more easily accessible than other media.

Indeed, the most important day to day source of general public information and opinion in Slovakia are still television and radio broadcast. The daily print media were read daily by only about a third of the population ('read yesterday'), while at least occasionally more than two thirds (71 per cent) of the population read it in 2013. In contrast, television broadcasts were watched by 90 per cent of the population, while radio broadcasts were listened to by 70 per cent ('listened yesterday'), or 91 per cent ('listened last week').[55] With respect to trust, the most trusted was radio broadcasting, followed by television, and the least trusted was the press on almost equal footing with the Internet (57 per cent trusted the Internet, 59 per cent the press, 68 per cent television, and 77 per cent radio broadcasts) according to the 2010 survey.[56] Therefore, it is clear that proper regulation and fair and competent supervision of radio and television broadcasts is an important part of liberal democracy in Slovakia. Of course, it is a growing segment of online media. A very small part of this is regulated by the RVR on the basis of transposing the AVMSD onto the local legislation. The survey data on television broadcast popularity and market share (television watched yesterday, and market share data from yesterday / market share group data over 12 years) were, in early 2013 or in early 2014 (market share group data over 12 years), as follows: TV Markíza (57 per cent and 38 per cent / 23 per cent respectively), followed by TV JOJ (41 per cent and 26 per cent / 17 per cent), and the third was the first public television channel Jednotka (18 per cent and 10 per cent / 11 per cent). The less popular were family-female TV Doma (9 per cent and 5 per cent / 6 per cent), news television TA 3 (7 per cent and 2 per cent / 2 per cent), and TV for men Dajto as well as Plus (1 per cent each or 3 per cent / 4 per cent). Other television channels individually had marginal share on the market, although in total, their viewership was 17 per cent. Among the less popular—with around 1–3 per cent (market share of yesterday / watched yesterday) were also the Hungarian television channels RTL Klub, TV2, the Czech public television channel ČT1, Czech private television NOVA, and the second public quality channel Dvojka (MML—TGI , 2013, and PMT / TNS).[57]

55 MML–TGI, 'Národný prieskum spotreby, médií a životného štýlu' *Market & Media & Lifestyle*, Základné výsledky 1(2) 2013, http://www.median.sk/pdf/2013/ZS132SR.pdf.

56 http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=2187&nationID=26,&startdate=2010.11 &end date=2013.11.

57 http://medialne.etrend.sk/televizia-grafy-a-tabulky.html.

These data can be interpreted in a way that the most popular TV station is the first nation-wide, originally terrestrial, commercial broadcaster TV Markíza (which profited from the lack of private, nation-wide competition for a couple of years). This leader is followed by TV JOJ, which emerged from a network of regional stations with a dominant 'founder' in the East Slovak city of Košice. TV JOJ is more commercially orientated in its content, especially in its news. The first public television channel Jednotka has the third place, recently, its popularity shows some signs of revival, especially in the main news broadcast.

Twenty years ago, in 1994, the television market was quite different in Slovakia. The most watched channel was the public channel Jednotka (operating under a different brand name then) with more than half of the market share, followed by the second public channel, the Czech private channel NOVA, the Hungarian public channel TV1, the German Pro7, MTV Europe, and many other channels.[58] Popularity of a public channel did not reflect its quality. On the contrary, at that time, there was no nation-wide terrestrial television competition in Slovakia in a local language.

The survey data on radio popularity and market share (listened to yesterday, market share of yesterday / market share for group over 12 years, and listened to last week) were in early 2013 or in early 2014 (market share group over 12 years) the following: Rádio Expres (20 per cent, 22 per cent, 19 per cent, or 33 per cent, respectively), public channel Rádio Slovensko (16 per cent, 19 per cent, 17 per cent, and 27 per cent), youth and music radio Fun rádio (13 per cent, 15 per cent, 12 per cent, and 25 per cent), music radio Jemné melódie (8 per cent, 9 per cent, and 17 per cent), Rádio Europa 2 (7 per cent, 9 per cent, 7 per cent, and 17 per cent), regional public radio Rádio Regina (6 per cent, 7 per cent, 8 per cent, 6 per cent, and 13 per cent), and Rádio Viva (4 per cent, 5 per cent, and 9 per cent).[59] These data can be interpreted as Rádio Expres clearly was the market leader, followed by the public radio first channel, closely followed by Fun rádio and two other private stations. In other words, radio market was more diverse than television market.

Similarly to television broadcast, twenty years ago, in 1994, the popularity or market share of radio stations was different in Slovakia than in 2014. Twenty years ago, almost two thirds of market share was under the control of two radio stations, one fully public, Slovensko 1 (today's Rádio Slovensko), and one private broadcaster under the umbrella of public radio, Rock FM. The third was Fun Radio, followed by radio broadcast over phone lines (this was something like cold war communist 'voice' Internet), then followed by Slovensko 2 (today's Rádio Regina), and by Hungarian language radio stations.[60] The private radio broadcast as well as local television broadcast were allowed in Slovakia already in the years 1991/92 (first it was tolerated by the authorities, then it was legally allowed). As of late 2014, the public service media (PSM) company RTVS broadcast both radio and television programmes under unified legal structure.

There were nine specific radio broadcast units. Five of them were terrestrial radio units (Rádio Slovensko, Rádio Regina, Rádio Devín, Rádio_FM, and Rádio Patria), three of them were digital units (Rádio Klasika, Rádio Litera, and Rádio Junior), and there was a special broadcast abroad (Radio Slovakia International). All radio broadcast were available via satellite, public multiplex DVB-T, and on the Internet (either as podcast—archive—or as a live stream).

58 MI, *Mediálna ročenka 0*1, http://www.mi.sk/medialna%20rocenka/index.html, 180–81.
59 MML–TGI, 'Národný prieskum spotreby' (n 47) 8–10; http://medialne.etrend.sk/radia-grafy-a-tabulky.html.
60 MI, *Mediálna ročenka 01* (n 58) 182–83.

Public service television broadcast has two units. The first, called Jednotka, is a general information, education, and entertainment / sport channel. The second television unit, Dvojka, is focusing on the more educated viewers and specific groups of viewers such as ethnic and religious minorities, and socio-professional groups such as soldiers or fishermen. There was some limited, short-live attempt to establish a third sport channel, and there were some plans to expand PSM television with a TV channel for children as well.

It can be argued that there is a continuum of regulation and expectation on the social-political role of the media. The least regulated media is the print press. Although there are some expectations that news in the print media should somehow be different from commentaries, it is not seen as a grave sin if there is no sharp difference between these two types of items. The controversies can be dealt with via ethics or press law, or in some cases, via civic or criminal law, if necessary. The highest professional-ethical expectations, and thus the most demanding form of regulation, can be found in the case of PSM.

Indeed, the most problematic issue with respect to impartiality and balance was the case of the current affairs programme *Z prvej ruky*. This programme was broadcast (and continues to be broadcast) by the public service radio Slovenský rozhlas shortly after noon news on weekdays. It was a rather popular programme. This particular broadcast had two different ways of presenting a current affairs issue. During the first four days of the week, it usually presented the three most controversial issues discussed with politicians and other experts, while on Fridays, there were discussions only with political analysts and other experts but not politicians. Initially, the listeners could call live to broadcast, but this approach caused problems due to some unruly callers. Interestingly, this programme created the majority of controversies dealt with by the SC with respect to the issues of impartiality and balance. Not only the RVR, but also the Radio Council, later renamed to Council of Radio and Television Slovakia, had to intervene into controversies related to this particular programme. This particular programme was also discussed by the Parliamentary Committee on Culture and Media.

The most controversial issue was 'empty chair' issue. Although we are going to discuss this particular programme (broadcasted in February 2007, 2 Sžo 73/2010) in a legal debate later on, it is useful to present views of its producers here.[61] First, the general situation was that while representative of the governing parties did not show much enthusiasm in participating in this critical programme, opposition politicians were, not surprisingly, very much interested in being present. Second, the journalists participating at this particular radio programme did invite key persons, ministers. However, the Minister Jahnátek denied invitation. The radio journalists invited a representative of the Minister's political party. No one was interested. In the final broadcast, the normative approach applied by the journalists was that the missing representation of governmental viewpoint was not their fault. The participants included two journalists and one leftist activist (a university lecturer). Nevertheless, the journalists used both arguments of government and opposition in the debate.

The second most problematic aspect of missing balance and impartiality in news were some news reports broadcasted both by PSM (both television and radio) and private televisions (especially TV JOJ) in their main news programmes.

61 Interview with Juraj Hrabko, Journalist, formerly Slovak Radio, by Andrej Školkay (9 December 2014).

V. Rules of Procedure (Media Authority and Courts)

As mentioned, the RVR is guided by the general APA. In the view of the CC, the interpretation of legislation is a matter of each public administration body within the framework of constitutional and statutory laws. Each public administration body, including state bodies, defines independently a) which documents will be used in its decision-making; b) how it will interpret them in accordance with the rule of law. The CC referred here to Section 2(2) of the Constitution (IV. ÚS 324/2011-16). There is no separate Administrative Law Court in Slovakia (in contrast to, eg, the Czech Republic). Administrative law issues in broadcasting are handled in principle by either regional courts (but not district courts) and by the SC. The general media policy has been, obviously, set by the Parliament through the law. Yet, it is clear to determine that legal competency of the RVR to 'participate in the creation of legislation and other generally binding legal acts', or to have 'the right to suggest and join international treaties or covenants, as well as other international legal acts' (Section 5(2), the suggestions are addressed to the Parliament) is seen as a policy setting power only. Though these policy setting powers have been formally granted, they are rather weak. Therefore, a proper term for this power would be consultations. Yet it is true that in the past, it was the RVR (staff) that helped the Ministry of Culture in preparing to adjust Slovak media legislation to EC or EU standards during accession process.

The general administrative law heavily relies on standard legal norms. However, the general law courts have to follow the higher courts' case law, and the so called unifying decisions (when two different SC Senates or lower courts practically pass on fundamentally different decisions on the same issue).

The role of the case law is especially important to the administrative law courts. Jozefína Machajová explicitly argues that although the Slovak legal system is perceived as based not on the case law, in fact, case law plays an important role in the administrative courts.[62] Indeed, the SC publishes 3–5 times a year special selected and legally binding Collection of Statements of the SC and verdicts of general courts in administrative law matters (as well as in civil and penal law).[63]

Also, when it comes to media regulator, it is highly important and by definition challenging to balance among various legal principles (eg, freedom of speech and protection of personality). Furthermore, Machajová[64] mentions in her study on administrative law that the constitutional judiciary is as important as the administrative judiciary. The constitutional judiciary is equally relevant for both natural and legal persons. It should be noted again that the CC is a separate legal body which does not replace or substitute general courts (and there is the SC as well). In legal theory and practice, the CC is seen as having a special place in judiciary system.

According to the CC, administration bodies hold the responsibility of interpreting legislation. Public administration bodies as well as state bodies define a) the legal documents (*podklady*) which will be used for making the decision; b) how to interpret the documents in accordance with the law. The Constitutional Court here refers to the Section 2(2) of the Constitution (IV. ÚS 324/2011-16).

62 J Machajová et al, *Všeobecné správne právo* (Žilina, Eurokódex, 2012) 385.
63 See http://www.supcourt.gov.sk/rok-2015/.
64 Machajová et al, *Všeobecné správne právo* (n 63) 389.

The Supreme Court (6 Sž 6/2013, 12) made a general remark about the administrative courts—the subject of the court proceeding *is limited by the verdict of the decision challenged in the court* (*v správnom súdnictve je predmet konania vymedzený výrokom napadnutého rozhodnutia*). Furthermore, the administrative court is not allowed to change the decision of public administration authorities. The Administrative Court, ie, practically speaking, the SC Senates (which together create the special Administrative Collegium) or the regional courts, can cancel the previous decision of the RVR, and return the issue for further legal action only if a) the decision resulted from incorrect legal judgment of an issue by the administrative body; b) the verdict is based on facts which do not correspond to the documents in a file; c) there are not enough facts for a legal judgment; d) it is impossible to examine the verdict due to its incomprehensibility or lack of arguments; moreover, it is impossible to examine the verdict because of the incompleteness of file documents or the fact that the mentioned files have not been submitted yet; e) there was a deficiency in the decision of the administrative body that could have impacted the legality of the decision.

For example, the SC Senate verdicts 4 Sž 34/87 and 4 Sž 35/97 stated that the administrative body must deal with all aspects of the case mentioned in an appeal; if done otherwise, the missing argument can be the reason for the Court to cancel the decision due to the inability to examine the case because of the lack of evidence. In general, administrative bodies are bound by verdicts (legal opinions) of administrative courts. Yet these are sometimes fuzzy or contradictory in their attempts to set principles or guidelines. For example, the administrative senates of the SC attempted to develop categories of 'continuous delict' and 'new (autonomous) delict' (borrowed from criminal law theory) in the case of broadcasting. This attempt proved to be more confusing than helping in practical orientation on the matter.[65]

Administrative law court considers the following key aspects: a) whether the pieces of evidence which are presented to or by the administrative organ are reliable or not (criteria are based on the source and breakage of procedural rules); b) whether logically presented pieces of evidence lead towards the conclusions made by the administrative body; c) whether the administrative body applied correct legal norm (verdict of the SC 2 Sžo-KS 92/04). Administrative organs (state and public authorities) are obliged to act in close cooperation with the key participants, co-participants, and other participating subjects which are somehow connected to the administrative-legal dispute.

Administrative organs must always provide opportunities for the subjects to effectively defend their rights and interests. Participating subjects have the right to express their opinion, and propose suggestions regarding the decision (*podklad rozhodnutia*). Administrative bodies are obliged to help and guide the participating subjects. Purposefully, the participating subjects will have firm knowledge about legislation.

The Supreme Court set guidelines that administrative delicts for both natural and legal persons must follow the same principles of procedures as it is in the case of criminal delicts (*musí podliehať rovnakému režimu ako trestný postih za trestné činy*). This, in turn, in the view of the SC, gives all guarantees as it is in the case of raising criminal chargers. The Supreme Court justified this approach as follow: 'The borderline between criminal delicts which are punishable by (criminal) courts and delicts which are punishable by administrative organs,

65 See, L Kukliš, 'Analógia v správnom trestaní a judikatúra Najvyššieho súdu Slovenskej republiky' *Právny obzor* 97(5) (2014) 465–68.

are defined by the will of law-maker and not by natural-legal principles' (3 Sž 22/2013). Currently, the SC applies this principle of analogy (*argumentum per analogiam legis* or *analogiae legis)* on its own initiative. This actually prevents both sides—more practically speaking, the RVR—to raise any objections since this is mentioned only in the verdict.[66]

Thus, the application of approach *argumentum per analogiam legis* is theoretically and practically challenging in continental legal system in general, and in Slovakia in particular. It is true that it is justified as based on Article 6(1) of the ECHR, and often used in administrative judiciary (see verdicts of the SC 8 Sžo 28/2007, 8 Sž 18, 22, 23, 24/2011).[67] This is being supplemented in legal practice by the Recommendation (91)1 of the Committee of Ministers of the Council of Europe on Administrative Sanctions. There are mentioned eight legal principles which are indeed currently part of the Slovak legal system. However, it must be mentioned that the Slovak Constitution in Section 2(2) allows state organs to act only within the framework of the law. This legal limitation or rather constitutional ban on extra-legal action seems to be ignored by Slovak courts, including administrative collegium of the SC.[68] Neither the ECHR nor the Recommendation (91)1 seem to suggest possibility of allowing application of criminal law procedures in the case of issuing sanctions based on administrative law.[69] Moreover, there is a great difference between principles utilised in criminal law on the one hand, and direct application of criminal / delict procedures.[70] Finally, the SC previously accepted two punishments for breaching a law in the same programme (eg, 3 Sž 14/2008).[71]

Be that as it may, administrative organs must make decisions based on reliable factual evidence. They also have to form a consistent and coherent decision-making structure (in order to avoid significant differences). The Supreme Court decision No 3 Sž 4/2007 clearly states:

> According to Section 245(2) of the Civil Procedural Order, the decision of an administrative authority issued under the discretion permitted by law (administrative discretion), the court shall examine only whether such a decision came within the limits and viewpoints laid down by law.
> The court does not consider the effectiveness and appropriateness of the administrative decision. This is a mater of ethical evaluation of the facts on which the administrative discretion of the defendant does not apply. The defendant is a collective representative body designated by law to create objective judgment for similar situations. Creating judgment is not a factual circumstance, therefore, it cannot be replaced by an expert opinion as requested by the plaintiff.

When assessing the content suitability according to the criteria laid down by the unified labelling system, their extent, and intensity, the RVR approaches each case individually; it examines the whole programme content and the context in which the unsuitable contents were broadcasted. In this regard, Salajová criticised certain vagueness of this approach which 'is being presented like individual components, there is no clear guideline how to measure, it and the know-how is missing, too.'[72]

66 ibid, 465.
67 ibid, 460.
68 ibid, 459.
69 ibid, 461.
70 ibid, 463.
71 ibid, 464.
72 S Salajová, 'Aplikácia' (n 51).

Prior to issuing a sanction, the administrative organ in broadcasting matters (the RVR) should consider the following conditions for determining a penalty: (BA Section (64(3))—

1. Define the severity of the issue (the level of importance).
2. The consequences of breaching a duty (method, duration, and consequences of the failure),
   - the degree of negligence / fault and the extent (eg, whether it was a repeated breach of that obligation);
   - measuring the extent and the impact of broadcasting and retransmission, illegal profit (unjust enrichment), and the number of alternatively issued sanctions by the self-regulatory bodies.

In other words, it is a general list which refers to an unspecified circuit of infringements of BA's provisions.

In case of a broadcaster, there is an objective liability for an administrative offense without the possibility of exculpation. This has been especially challenging in case of political broadcasts. Obviously, each political subject has equal right (fulfilling stated conditions) for political broadcast or participation in political debates before elections. Yet it is ultimately the broadcaster who is responsible for the content of this broadcast. The administrative organs have to pay attention to coherent decision-making in identical or similar cases to avoid unjustified differences. The party and the stakeholder (*účastník konania a zúčastnená osoba)* have the rights to suggest all forms of evidence, and ask questions to witnesses and court experts during oral proceedings as well as at the local investigation place.

Administrative rules procedures clearly differentiate between breaking the law and consequences of breaking the law. The former defines the actual act of breaking the law, the latter implies the consequences in the scope of sanction (the amount of penalty). The administrative statement must be in accordance with legal document and the law. The statement must be issued by the corresponding body, fulfilling all the regulatory requirements. The administrative statement must include the verdict (*výrok*), recital (*odôvodnenie*), and legal guidance (*poučenie o odvolaní – rozklade*). Recital is not necessary only if all participating subjects have been fully satisfied by the decision.

The verdict includes the decision on the matter (v*ýrok obsahuje rozhodnutie vo veci*) and the legal document on which the decision was based. It may also indicate the duty of reimbursing the costs of administrative procedures. If the above-mentioned obligation is included, the administrative body gives a deadline for meeting conditions of the payment. This deadline is defined by the special law, and cannot be extended. In the justification of the decision, the administrative body sets out the facts which were the basis for the decision, and which considerations guided its assessment of the evidence. Furthermore, it explains application of the administrative discretion on laws which were the basis for the decision, and how it dealt with suggestions and objections of the parties and their opinions on the supporting documents.

Although the provision does not explicitly state that the operative part of the verdict must contain the matter, time, and destination of the proceedings which results in the administrative offense, it is clear that only the operative part of an administrative decision has the power to affect rights and obligations of the parties, and only it can gain the legal force. Therefore, a correctly worded statement is an essential element of the decision. Only the operative part provides the details whether and what obligation was breached / imposed; only by comparing the operative part it is possible to determine the existence of a barrier in the conclusive decision, elimination of the barrier *ne bis in idem* (double punishment for the

same act). It is important to determine the extent substantiation, and to ensure the proper rights of defence. Only the operative part of the decision, and not the reasoning, may be enforceable by an execution, etc. For these reasons, it is very important that the subject of the proceedings is defined in the operative part of the decision on an administrative offense. The administrative offense must be specified in the subject of the proceedings in a way that sanctioned offense is not interchangeable with other proceedings.

When reviewing the legality of the decision and the procedure of an administrative authority, the court's task is to assess whether the substantively competent administrative authority obtained sufficient factual documents to issue the decision, whether it identified the true state of matter, whether it acted in conjunction with the parties, whether the decision was made in accordance with laws and regulations, and contained the statutory requirements, and thus, whether the administrative decision was issued in line with the substantive and procedural regulations.

A court—when legally examining a decision of administrative authority—is not bound by facts as documented by administrative body. In general, the administrative court has three options; it may accept findings by administrative body, it may check again evidence already provided by administrative body, or it can examine the facts (*vykonať dokazovanie*). The administrative court can independently consider correctness and completeness of empirical findings carried out by the administrative body. In the case the court finds procedural or factual legal deficits, it may either ask the administrative body to remove, replace, or supplement them, or it can do it through its own decision.

The legality of the decision of the administrative authority is conditional upon the legality of the proceedings of the administrative authority prior to the issue of the contested decision. In the case of the decision issued by the administrative authority under the discretion permitted by law (administrative discretion), the court shall examine only whether such a decision came within the limits and viewpoints provided for by law. For example, warning as a form of sanction must have a preventive role. Therefore, it must include educative instructions. In other words, warning as a form of sanctions must state clear rules for a specific type of a program or topic, especially if breach of duties resulted as a consequence of elaboration or presentation (Verdict SC 4 Sž 27/02).

In contrast to general administrative law, there are some exceptions from this Act (71/1967 Zb) which should facilitate more complicated type of administrative procedures of the RVR. There are two types of administrative procedures, which can be related to a) sanctions and b) the typical administrative issues, such as awarding licenses and retransmission registration.

In the case of (possible) sanctions, the RVR acts *ex officio*. This means that, even when the official complaint is being submitted, the RVR—according to administrative law procedure—does not have to act further. The Council for Broadcasting and Retransmission considers any complaint as a piece of information, and therefore, may or may not decide to act based on the given information.[73] However, each official complaint must be assessed by the RVR in the compulsory voting. It may be declared unjustified, legally impossible to deal with (*nepreskúmateľný*), or relevant for closer legal examination under administrative procedure.[74] Yet, the administrative procedure is started *ex officio* by the RVR. A complaint

73 Ľ Kukliš, Ľuboš, *Regulácia elektronických médií* (Bratislava, Wolters Kluwer, 2015) 167–68.
74 ibid, 168.

is not legally deemed as its basis. There is no explicit statutory obligation for the RVR to pass any decision; the BA only mentions the disappearance of punishable administrative offenses (*zánik trestnosti správneho deliktu*). Yet, according to Ľuboš Kukliš,[75] then the general principle of the rule of law, that every legal procedure against a person has to be concluded by the decision, gets priority.

Decision-making is thus always based on voting. As mentioned before, there is a minimum threshold of seven members to consider voting a legal act, of which at least one member must be the Chair or a Vice-Chair of the RVR. The legally valid RVR decisions are obligatory for all of its members (even those who voted against a particular ruling). Legally valid decisions can be changed only through another voting, but with the legal limitations, following such cases (under condition that the law allows that). A resolution *(uznesenie*), in contrast to administrative decisions (*rozhodnutie*), can be changed. The legally valid RVR decision may have immediate legal effects, once it is delivered to the addressee. These cases may occur when the RVR explicitly mentions immediate legal effects of a particular decision. Generally, it can also happen in all cases when the BA does not allow appeal procedure, or after the termination of the appeal period. The first case is typical when the RVR grants frequencies or licenses in procedure with more than one applicants.[76] The Council for Broadcasting and Retransmission legal acts are *in personam*, meaning that their legal effects focus primarily on the addressee.[77]

Sometimes the procedural acts seem to be confusing for the lawyers, too. For example, the SC in its ruling 4 Sž 1/2010 explained that, in general, the administrative procedures and appeals belong to regional (and not local) courts. Exceptions are defined by the law. These exceptions can be higher court (the SC) or (lower) regional district courts. According to the BA, it can be, in addition to regional courts, or independently, only higher court. The Supreme Court further explained that the BA (Section 64) explicitly mentions that, in the case of temporarily stopping broadcast of a part or a full program, it is possible to appeal to the SC, and issue a fine and license revocation due to serious breach of duties. However, in the case of 'warning with respect to breach of the law and the duty to broadcast announcement about breaking the law', there is no explicitly defined appellate for the SC.

The Supreme Court acknowledged that sometimes fuzzy legal terminology had been used, and therefore it is hard to understand, eg, according to the SC (Ruling 5 Sžo 8/2012 SC), the BA legal framework in Sections 48 and 48(7), 49, along with 49(6) and 49(8). The written text was very ambiguous, and therefore can cause problems with interpretation. However, today's case law has sorted out this issue in a way that it allows the judicial review of both parts of verdict.

This issue (in which the SC was a bit confusing) dealt with decision to award a license to a specific applicant, and reject identical requests to all other potential applicants, in a separate legal documents (see also 5 Sž 10/2009). According to SC, the decision of award the license to one and to reject the others, should be perceived as unitary, and therefore cannot be separated. The Supreme Court accepted that the BA mentions (Section 49(6)) legal validity of a license from the day when the RVR has received written statement from an applicant

75 ibid, 169.
76 ibid, 168.
77 ibid, 171–72.

stating that he had accepted the license. Nevertheless, this decision should be perceived as a complex decision.

As mentioned, responsibility for political broadcasting (Section 64(1) of the Act 308/2000) is objective, therefore, it does not matter to what degree the broadcaster was culpable—whether the breach of law was intentional, or caused by negligence. It is sufficient that there is an act of breaching of the duties laid by the law (Verdict SC 4 Sž 145/02). Interestingly, the law on Election Campaign Act 181/2014 gives the responsibility for the content of political advertising exclusively to political parties (as it was in the previous law), while for decision to allow its broadcasting is with the broadcaster. This (previous) general regulation has already caused some problems in 2014/15 (under the previous BA law) when during the campaign before referendum on family related issues, initiated by the Christian activists, some TVs refused to broadcast ads produced by Christian activists, arguing that the other side (mostly gay-lesbian groups) were not interested in campaigning in the media. In other words, there would be no balance of points of views of both groups. Currently, supervision of rules on elections campaigns is split among regional state authorities, the Ministry of Interior, the State Election Committee as well as the RVR.

With regard to the RVR, it had to issue many non-binding guidelines with respect to needed clarifications related to broadcasting aspects of various campaigns in the past. These included Guidelines for legislation on campaign in the media before referendum in February 2015,[78] Commentary on campaign in the media before elections to the EP in 2014,[79] Commentary on campaign in the media before presidential elections in 2014,[80] Statement of the RVR with respect to campaign in the media before elections to self-governing bodies in 2013,[81] Commentary on campaign in the media before parliamentary elections in 2012,[82] and Commentary on campaign in the media before local elections in 2012.[83]

The Council for Broadcasting and Retransmission is bound by the law (Section 5) to cooperate (which obviously implicitly includes consultations) with the self-regulatory bodies in the area of broadcasting and retransmission. Providing of the AVMSD in creation of the efficient self-regulatory systems is also included, although all of these cooperation systems do not function. Yet these verdicts of the Advertising Bureau (AB) have rarely anything in common with broadcasters as such (which are subject to competency of the RVR decision-making) but rather with content of ads. The Advertising Bureau forwards complaints belonging not to its competency to the RVR. There are no self-regulatory bodies, except the AB. The Council claims that it is not informed about sanctions issued by self-regulatory bodies, while the Executive Director of the AB Eva Rajčáková argued that all minutes and verdicts issued by the AB are available on their website as well as disseminated via other communication tools.[84] In general, there is little overlap in regulatory rights and duties between the RVR and the AB respectively. The Advertising Bureau imposes sanctions on advertising agencies, while the RVR sanctions broadcasters. For information, the major issue

78 http://www.rvr.sk/sk/spravy/index.php?aktualitaId=2856.
79 http://www.rvr.sk/sk/spravy/index.php?aktualitaId=1448;http://www.rvr.sk/sk/spravy/index.php?aktualitaId=1448.
80 http://www.rvr.sk/sk/spravy/index.php?aktualitaId=2368.
81 http://www.rvr.sk/sk/spravy/index.php?aktualitaId=2129.
82 http://tp://www.rvr.sk/sk/spravy/index.php?aktualitaId=1448.
83 http://www.rvr.sk/sk/spravy/index.php?aktualitaId=1449.
84 Telephone interview on 5 March 2015 by Andrej Školkay.

of complaints related to commercials in the case of the AB were truthfulness of advertising, followed by incomprehensibility and multiple meaning of ads, as well as explicitly or implicitly sexual commercial messages and human dignity in general. The Advertising Bureau deals more and more with ads on the Internet, including Youtube videos, search engine results, PR articles, and spam. Moreover, the AB deals with complaints targeting its members and non-members as well. While in the case of its members, almost 100 per cent of its verdicts had been accepted, in the case of non-members, this ratio was about 50 per cent.

Be that as it may, the problem is that some issues may be tackled simultaneously by both bodies. Although the sanctions issued by the self-regulatory bodies should be considered when issuing fines (in particular Section 64), this system has not been applied in practice yet. There was an ad hoc consultation among the Chairpersons of the RVR, the Association of Independent Radio and Television Stations, and the International Press Institute in February 2014 about the expectations for the year 2014. It was expected, according to the plan approved by the Parliament, that the RVR would collect a total value of fines of 340,000 euro which was approximately the double of the annual average.[85] In general, the industry would prefer abolishing any regulation rather than to work on its improvement.

The report on investigation of the complaint is, legally speaking, not the basis for the decision; it is a working material of the Office of the RVR, which is exclusively informative, and the RVR is not bound by it in any way (there is identical legal opinion of the Supreme Administrative Court of the Czech Republic on this issue, see 2 As 58/2008-77). However, practically speaking, it is a rather relevant material for decision making. The role of the ECtHR and recently involvement of the Court of Justice of the EU (CJEU) into regulation of off-line and on-line media services should be mentioned too. The European Court of Human Rights sets some key principles which the administrative SC Senates and the RVR should take into consideration. In the traditional realm of television broadcasting, ECtHR issued an interesting judgment. In *Vest AS and Rogaland Pensjonistparti v Norway* (App No 21132/05, judgment of 11 December 2008), ECtHR argued that the position of a fine on a television station for having broadcast an advertisement by a small political party, in breach of the statutory prohibition of any televised political advertising, presented violation of Article X. This was indeed a surprising and important verdict. The important legal context was the ban of any political advertising. The European Court of Human Rights mentioned that it was prepared to accept that the lack of European consensus in this area spoke in favour of granting Member States greater discretion than it would normally be allowed in decisions with regard to restrictions on political debate.

The rationale for the statutory prohibition on television broadcasting of political advertising had been, as stated by the Supreme Court of Norway, the assumption that allowing the use of such a powerful and pervasive form and medium of expression was likely to reduce the quality of political debate generally. Complex issues could easily be distorted, and financially powerful groups would get greater opportunities for marketing their opinions, argued ECtHR. However, the Norwegian Pensioners Party did not come within the category of parties or groups that were the primary targets of the prohibition of political broadcast in Norway. On the contrary, it belonged to a category which the ban in principle had intended to protect. Furthermore, in contrast to the major political parties, which had been given

85 http://www.anrts.sk/wp/?p=636.

wide edited television coverage, the Pensioners Party had hardly been mentioned, stated the ECtHR. Therefore, paid advertising on television had been the sole means for the Pensioners Party to get its message across to the public through that type of medium. Having been denied this possibility under the law, the Pensioners Party had moreover been put at a disadvantage in comparison to the major parties. Finally, the specific advertising at issue, namely a short description of the Pensioners Party and a call to vote for it in the forthcoming elections, had not contained elements apt to lower the quality of political debate or offend various sensitivities.

In those circumstances, the fact that television had a more immediate and powerful effect than other media (this seems to be a questionable claim by the ECtHR) could not justify the prohibition and fine imposed on TV Vest. Therefore, there had not been a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition and the means deployed to achieve that aim, concluded the ECtHR. The restriction which the prohibition and the imposition of the fine had entailed on the applicants' exercise of their freedom of expression could not be regarded as having been necessary in a democratic society, notwithstanding the margin of appreciation available to the national authorities.

This is a highly surprising decision which justifies possible breach of broadcasting or election campaign law in any country in the future if there is a general ban on political broadcasting. Yet in Slovak context, this is irrelevant since political broadcasting is allowed, with exception of local and regional elections.

Furthermore, there is the ECtHR verdict that seems to suggest the opposite perspective on political advertising. The case of *Animal Defenders International v the United Kingdom* (App No 48876/08) was decided in 2013.[86] It started in 2005, when a non-governmental organisation began a campaign called 'My Mate's a Primate' which was directed against the keeping and exhibition of primates and their use in television advertising. As part of the campaign, the applicant wished to broadcast a twenty-second television advertisement. The proposed advertisement was submitted to the Broadcast Advertising Clearance Centre (BACC) for a review of its compliance with relevant laws and codes. The BACC declined to clear the advertisement. The objectives of the applicant were according to the BACC 'wholly or mainly of a political nature' so that Section 321(2) of the Communications Act of 2003 prohibited the broadcasting of the advertisement.

The Animal Defenders International maintained that the prohibition was disproportionate because it prohibited paid 'political' advertising by social advocacy groups outside of electoral periods. The UK Government argued that the prohibition was necessary to avoid the distortion of debates on matters of public interest by unequal access to influential media by financially powerful bodies and, thereby, to protect effective pluralism and the democratic process. The term 'political advertising' used herein included advertising on matters of broader public interest.

The ECtHR argued that nation-states are best placed to assess 'the particular difficulties in safeguarding the democratic order in their State', and 'must therefore be accorded some discretion as regards this country-specific and complex assessment which is of central relevance to the legislative choices at issue.' The ECtHR attached considerable weight to

86 See, http://hudoc.echr.coe.int/fre?i=001-119244#{%22itemid%22:[%22001-119244%22]}.

exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the UK. The ECtHR also considered that a range of alternative media were available to the NGO. This verdict was passed narrowly by nine votes to eight. Furthermore, eight judges issued their dissenting opinions in two separate statements, and one judge issued concurring opinion.

Also, the CJEU plays increasingly important role in regulation of some online services. The most important guideline seems to be that coming from joined cases C-509/09 and C-161/10. In these cases, the CJEU considered the scope of the jurisdiction of national courts to hear disputes concerning infringements of personality rights committed via an Internet site. The CJEU ruled that

> in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the member state in which the publisher of that content is established or before the courts of the member state in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each MS in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the member state of the court seised.

The above discussed issue may be highly relevant for broadcasting too. Currently, the majority of viewers in Slovakia was receiving TV signals either via satellite (51 per cent) or cable networks (39 per cent). This means that the Slovak viewers can access foreign programmes, and some foreign viewers, especially the Czech viewers who have little difficulty to understand the language, may watch Slovak broadcasting. In addition, many service providers broadcast live on the Internet, and archive their programmes (by law at least 30 days, and with exception of copyright protected works) on the Internet.

A. Analytical Summary

It is difficult to assess whether rules of administrative procedures are simple or complicated, efficient or not. This could be seen only by international comparison. An important finding (at least for the international audience) is that although the Slovak legal system is perceived as not based on the case law, in fact, the case law plays an important role especially in the administrative courts.

The above cited first verdict of the ECtHR does not seem to resonate within local administrative organs and, to a lesser degree, courts' practice. In other words, it would be extremely difficult to imagine that the RVR would ignore the valid law. It is more likely that the CC or perhaps the SC would accept, following the ECtHR case law, breaking the valid law in favour of freedom of speech. Yet it is true that Slovak legislation regulating political broadcasting is rather different, currently allowing even 'third subjects' after registering, to participate in election campaigns.

VI. Protection of Human Dignity

The Preamble of the Universal Declaration of Human Rights (UDHR) stipulates that the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.' Consequently, in Article 1 it states that: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' The UDHR does not create binding international human rights law in form. The Constitutional Court decided in 1997 that the UDHR does not belong to the legal system of Slovakia (II. ÚS 18/97, 25 March 1997). In other words, it cannot be used as a source of rights in the Slovak legal system. The Court justified this ruling on the basis that it has not been ratified and published in the Collection of Laws, according to Article 11 of the Constitution.

Yet human dignity is of central importance in human rights law. The dignity of the human person is not only a fundamental right in itself but constitutes the basis of fundamental rights in international law.[87] 'The essence of the whole corpus of international humanitarian law, as well as human rights law, lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person.'[88]Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights refer to inherent dignity of the human person.

According to Article 1 of the Charter of Fundamental Rights of the European Union, 'Human dignity is inviolable. It must be respected and protected.'Protocol No 13 of the ECHR, concerning the abolition of the death penalty in all circumstances, refers to the inherent dignity of all human beings. The claim of human dignity is that simply being human makes one worthy or deserving of respect. Human rights can thus be understood to specify certain forms of social respect—goods, services, opportunities, and protections owed to each person as a matter of rights—implied by this dignity. And the practice of human rights provides a powerful mechanism to realize in the social world the underlying dignity of the person. Human rights thus are based on but not reducible or equivalent to human dignity (or related notions like human needs, well-being, or flourishing). Human rights are one particular mechanism—a particular set of practices—for realizing a certain class of conceptions of human dignity. Therefore, human rights go beyond the inherent dignity of the human person to provide mechanisms for realizing a life of dignity (Donnelly, 2009).[89]

87 The Human Dignity Trust, 'Why the Human Dignity Trust?' http://www.humandignitytrust.org/pages/OUR%20WORK/Why%20Human%20Dignity.

88 *The Prosecutor v Anto Furundžija*, judgment, Case No IT-95-17/1-T, T.Ch. II, 10 December 1998, 183.

89 J Donnelly, 'Human Dignity and Human Rights' *Protecting Dignity: An Agenda for Human Rights*. Swiss Initiative to Commemorate the 60th Anniversary of the UDHR (2009).

The Constitution of the Slovak Republic follows the text of UDHR in Article 12(1) ('All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are and irreversible.'). Further, Article No. 19, Paragraph 1, lays down fundamental (human) right to protection of human dignity ('Everyone shall have the right to maintain and protect his or her dignity, honour, reputation and good name.')

According to Article 7 of the European Convention on Transfrontier Television (ECTT) all items of programme services, as concerns their presentation and content, shall respect the dignity of the human being and the fundamental rights of others. In particular, they shall not:

a) be indecent and in particular contain pornography;
b) give undue prominence to violence or be likely to incite to racial hatred.

A. Human Dignity and Broadcasting

The importance of specific protection of human dignity in media law can be explained by functions and characteristics of media. Media provide space for various opinions and communications (including offensive content), has significant influence on the audience and the whole of society, symbolizes the democratic system and provides a picture of the functioning of society.[90]

Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity, and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry [Official Journal L 378 of 27.12.2006] calls on Member States to take the necessary measures to ensure that human dignity is better protected across all audiovisual and on-line information services.

Article 4 of AVMSD allows Member States to take measures necessary for the prevention, investigation, detection and prosecution of criminal offences, including violations of human dignity concerning individual persons. Article 9 of the AVMSD imposes a duty on Member States to ensure that audiovisual commercial communications do not prejudice respect for human dignity.

At the national level whole Paragraph 19 of the BA is dedicated to protection of human dignity and humanity. First at all, a programme service and all of its parts must not impact on human dignity and the basic rights and freedoms of others through its processing and content. Consequently, in Section 2, the BA stipulates what must not be included in a programme service and all of its parts (eg, propagation of violence and war, extracts from works illustrating use of guns and environmental devastation, etc.).

B. What is Human Dignity?

The most horrific stories related to degradation of human beings' dignity come from memories of Auschwitz survivors. Probably the most famous book is Primo Levi's *If This is a Man*. The book starts with the poem asking its readers to consider if they could still define as

90 A Koltay, 'The Protection of Human Dignity in Hungarian Media Regulation' *German Law Journal* 14 (2013) 832.

a 'man' someone 'Who works in the mud / Who does not know peace / Who fights for a scrap of bread / Who dies because of a yes or a no.' This can be certainly seen as a very basic concept of human dignity. Similarly, the book *What Dante Never Saw*, written by Alfréd Wetzler (or Jozef Lánik), based on similar experience, described the degradation of human dignity in German concentration camps in the same way. It can be argued that since WWII, and based on the experiences described above, the concept of human dignity is of paramount importance in Europe.

Currently, it seems that in Europe and in many other countries, but probably not universally, human dignity is understood in a way that each individual has a unique value, and therefore respect towards each person does not depend on any peculiar personal feature or quality of that particular person.[91] Some argue that acknowledging other human beings is the core of the basic ethical law which can be found in all known religions.[92] This would mean that religions are the first moral systems directly associated with human dignity. This is maybe correct with respect to modern religions, but not necessarily with respect to the first pagan religions. Furthermore, considering that even the modern religions most relevant in Europe (Christianity, Islam, and Judaism) put a God first, and not a human being, this is an even more controversial statement. Anyway, Vasil Gluchman has raised an interesting question, claiming that not all moral subjects may have equal human dignity. Gluchman believes that somebody who actually denies another person human dignity does not himself deserve to be treated with the respect due to human dignity. Gluchman brings Dr Mengele in Auschwitz as an example.[93]

The fact is that human rights issues, especially those related to human dignity, may still be seen as controversial. This was clearly seen as two dissenting opinions of the judges of the CC of Slovakia related to the referendum initiative by Christian activists in late 2014. The two judges of the CC expressed their public concern that the CC did not consider human rights sufficiently broadly. In other words, how can one be sure what constitutes and what does not constitute human rights, and, by extension, human dignity, when the judges of the CC do not agree on this issue?

Indeed, Slovak philosophers Vladimír Seiler and Božena Seilerová explicitly mention in one of their studies on human dignity that rights and freedoms are given to an individual by a community.[94] They pointed out that the first historical natural rights conceptions of human society actually contradicted all modern constitutions of states that considered private property as natural and untouchable. Furthermore, they noted that natural rights conception can be used to justify any conception of positive law.[95] They concluded that human dignity is defined by relationships in a society. However, this statement has again been seen as controversial, although in a different situation. In 2009, during the presidential campaign, one of the candidates, Iveta Radičová claimed that 'what is seen as ethical and

91 G Collste, *Is Human Life Special? Religious and Philosophical Perspectives on the Principle of Human Dignity* (Bern–Berlin, Peter Lang, 2002) 15.

92 M Mráz, 'Humanistické aspekty ľudskej dôstojnosti' http://www.uski.sk/frames_files/ran/2004/cl040107.htm.

93 V Gluchman, 'Rozličné kontexty idey ľudskej dstojnosti' http://www.klemens.sav.sk/fiusav/doc/filozofia/2004/1/69-74.pdf.

94 V Seiler and B Seilerová, Ľuďská dôstojnosť – axióma ľudských práv (Kežmarok, Seiler–Seilerová, 2010) 69–70.

95 ibid, 73.

unethical is purely a matter of social contract.' This statement was so controversial in a public discourse that the presidential candidate Radičová had to issue an apology to a representative of the Catholic Church.

The legal concept of human dignity is thus not definite. The aforementioned legal sources do not contain any definition of human dignity, which therefore remains rather vague. Indeed, 'The concept of human dignity is very abstract and the legal texts never contain any proper definition. . . . An additional difficulty is that the concept of human dignity belongs to the realm of morals and morality in which sensitivities differ greatly. The terms used and the degree of precision of national legislation may vary widely, but there is evidence of a consensus on the fact that the respect of human dignity includes certain core notions, such as the prohibition of the exploitation of physical or mental suffering, the invasion of privacy or the treatment of a person as an object. As a consequence, the range of issues that can come under the heading of the protection of human dignity is very broad. It may encompass issues of racism, gender, sex, violence, privacy, etc.'[96] It seems that the term 'human dignity' is undefinable, but the value expressed by it should receive some protection. András Koltay states that, 'The law cannot define human dignity, cannot summarize all of its sub-elements, and cannot grasp its essence in a technical sense; however, the law can protect human dignity even in the absence of a detailed definition.'[97]

Slovak constitutional law distinguishes between human dignity and personal honour. Pursuant to Article 19(1) of the Constitution of the Slovak Republic, everyone has the right to the preservation of human dignity, personal honour, reputation and the protection of good name. 'Honour is characterized in the literature as an intangible value that an individual achieves by being integrated into society, and which maintains by his morally satisfactory life and behaviour. Dignity is equally immaterial in nature, and is more a result of the integration of a person in a social position by such work, managerial, management, professional, business, scientific, artistic values that are the result of the work of each individual.'[98] It seems that Slovak courts do not need legal definition of human dignity as they do not try to define it. They generally use an axiomatic approach, and usually adjudicate legal disputes without any reference to characteristics of the term offered by legal theory.

It should be mentioned that a foetus (an unborn child, if subsequently born alive) also has human dignity and right to its protection. According to the opinion of Advocate General Bot (Case C34/10), human dignity is a principle which must be applied not only to an existing human person, to a child who has been born, but also to the human body from the first stage in its development, ie, from fertilisation. Post-mortem protection of human dignity is guaranteed by civil law as well as administrative regulation. For example, the RVR in its decision from 14 September 2010 fined a broadcaster for violating human dignity of the deceased Polish president. Comparatively in the decision of 26 April 2011 (5 Sž 13/2011), a broadcaster was fined for footage of Georgian luger's death ahead of the opening of the 2010 Winter Olympics. Both decisions have been reviewed and upheld by the SC.

96 The issue of Human Dignity, Background Paper, EPRA/2000/07.

97 Koltay, 'The Protection of Human Dignity' (n 90) 823.

98 A Blaha, 'Rešpektovanie súkromia' S Koperdak (ed), *Práva a povinnosti médií v právnom systéme* Slovenskej republiky a v medzinárodnych právnych systémoch (Bratislava, ProMedia Slovakia, 1998) 6–10.

C. Three Levels of Human Dignity

There are three levels of human dignity and its protection we can distinguish: a) human dignity as a concept; b) human dignity of a certain group of individuals, and c) human dignity of an individual. Similarly, David Feldman writes about the different levels at which human dignity operates: 'the dignity attaching to the whole human species; the dignity of groups within the human species; and the dignity of human individuals.'[99] The first type of human dignity has objective character, the second has both objective and subjective characters, while the third one concerns the subjective aspect of dignity.

Human Dignity as a concept: The good example of protecting human dignity which is not linked with any person or group of people in particular was shown in the case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. Omega, a German company, had been operating an installation known as a 'laserdrome', for the practice of 'laser sport' in Bonn. The object of this game included hitting sensory tags placed on the jackets worn by players. On 14 September 1994, the Bonn police authority (Oberbürgermeisterin) issued an order against Omega, forbidding it to 'facilitate or allow in its . . . establishment games with the object of firing on human targets using a laser beam or other technical devices (such as infrared, for example), thereby, by recording shots hitting their targets, "playing at killing" people'. The dispute had proceeded inter alia to Federal Administrative Court (Bundesverwaltungsgericht) which had taken the view that the commercial exploitation of a 'killing game' constituted an affront to human dignity. At the case at issue Federal Administrative Court had dealt with the protection of the constitutional principle of human dignity. This value had been infringed: 'by the awakening or strengthening of an attitude in the player to deny the fundamental right of each person to be acknowledged and respected, such as the representation, as in this case, of fictitious acts of violence for the purposes of a game.' There had been no individual person or social group, whose dignity should have been affected. The value protected had been human dignity as a concept. However, this court had also referred a question to the CJEU concerning the compatibility of the order with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community. The CJEU decided that the order of 14 September 1994 cannot be regarded as a measure unjustifiably undermining the freedom to provide services. Furthermore, Community law does not preclude an economic activity consisting of the commercial exploitation of games that simulate acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy, based on the reason that this activity is an affront to human dignity.

Human Dignity of a Certain Group of Individuals: It is also possible to protect the human dignity of a group of people without pointing to the human dignity of its individual members. In 2005, Doğu Perinçek, a doctor of law and the Chairman of the Turkish Workers' Party, took part in a series of events in Lausanne (Canton of Vaud), Opfikon (Canton of Zürich) and Köniz (Canton of Berne) respectively, during which he publicly denied the genocide of the Armenian people by the Ottoman Empire in 1915 and the subsequent years, describing the idea of an Armenian genocide as an 'international lie'. The Swiss courts found him guilty

99 D Feldman, 'Human Dignity as a Legal Value – Part I' *Public Law* (1999, Winter) 682, 689.

of racial discrimination under the Swiss Criminal Code. The Federal Court in its judgment of 12 December 2007 (ATF 6B_398/2007) stated that the conviction of Perinçek is intended to 'protect the human dignity of the members of the Armenian community, who identify themselves through the memory of the 1915 genocide.' In December 2013 the ECtHR ruled (by 5 – 2) that Switzerland had violated Doğu Perinçek's right to freedom of expression. This decision does not deny the possibility to protect human dignity of group of people in general. However, Judges Guido Raimondi and András Sajó stated in their joint concurring opinion:

> Dignity as a ground for restriction of rights is ambiguous, even if dignity is often understood as a fundamental value for human rights protection. Of course, the dignity of an individual may be violated when the humanity of the group is denied or diminished. This is the case when their equal humanity is denied on the grounds of their belonging to a group that is alleged not to be part of humanity. However, we do not see how the dignity of members of the Armenian community is affected in the above sense by the denial of the existence of a master plan of extermination by Talaat Pasha and his cronies, unless such a statement can be understood as calling the genocide-related component of the Armenian identity a falsification.

The *Perinçek* case continued as Switzerland decided to request that the case be referred to the Grand Chamber for a new look at the issue. In this proceedings Armenia was involved as a third party. Although the case was decided in favour of Perinçek on 15 October 2015, the Grand Chamber recognised the communal identity and dignity of present-day Armenians.

Human Dignity of an Individual: There are many cases where the human dignity of an individual was protected by decision of state body applying public law. For example, on 6 February 2007, the Hannover Administrative Court (Verwaltungsgericht Hannover) rejected two appeals filed by the broadcaster RTL against decisions of the Commission for the Protection of Youth in the Media (Kommission für Jugendmedienschutz). One of the two programmes at issue reported on the rescue of a helpless old man. The programme repeatedly showed images secretly filmed by a private individual, in which the nurse beat the man, and made inhumane comments about him. The Court alleged that the human dignity of the helpless man had been breached.

D. Slovak Media Regulation—Protecting the Human Dignity as a Concept or the Human Dignity of Individuals?

It might be quite interesting to observe, which level(s) of human dignity are protected by Slovak media regulation. The Council for Broadcasting and Retransmission had decided on 23 September 2008 (RP 29/2008) that a television broadcaster breached statutory duty concerning the protection of human dignity imposed by Paragraph 19 of the BA. The Council justified that the programme at issue (*Nevera po slovensky*) might have depicted persons exposed to psychological suffering in a way that is considered an unjustified infringement on human dignity. *Nevera po slovensky* was a Slovak reality show following format of the American hidden camera reality television series about people suspected of committing adultery or cheating on their partners (*Cheaters*). The Slovak programme contained a number of scandalous confrontational scenes that were based on the discovery of infidelity in front of

television cameras, with both spouses present, as well as the interested extramarital partners. These people were presented in tense situations and in critical emotional states. The individual stories did not significantly differ. The story always began with suspicion of one of the partners of the other's infidelity. The suspected partner is observed and investigated by a detective, showing surveillance footage with the commentary of a male voice to the suspecting partner, who is consequently asked to give consent to publish the rest of the reportage, in which they learns whether their partner is really unfaithful. The consent was a prerequisite to show another part of the story, which often contains dramatic confrontational scenes.

The broadcaster appealed to the SC and argued that the whole programme represented people who voluntarily participated in the production under a contractual relationship with the producer. Moreover, these people had been paid actors who had only followed the scenario. Therefore the infringement of human rights could not occur in the way presented by the RVR. The Council stated that the programme had shown people in humiliating and undignified situations, and an average viewer had not been able to recognize that the programme was mere staged drama with a certain scenario. To sum up both parties' position in the proceeding before the SC, the applicant (broadcaster) stressed the (lack of) impact on human dignity of the actors, while the respondent (the RVR) emphasized the impact on human dignity of an audience.

According to the SC (3 Sž 82/2008, 15 January 2009) the position of the respondent was based on the text of Explanatory Report to the ECTT where to infringe upon human dignity it is sufficient to broadcast such content which could objectively be capable to infringe upon human dignity. Contrary to that, the formulation of the BA requires the individualization of the violation of human dignity and the freedoms of others. This means that there must be a particular person whose human dignity was infringed upon. The Supreme Court therefore remanded the decision of the RVR. With regard to this case, the administrative protection of human dignity provided by the RVR should be focused on human dignity of individuals, not human dignity as a concept.

A different approach can be observed under the conditions of Hungarian law, where the occurrence of the violation of individual (personal) rights is not necessary for the establishment of the violation of dignity under the media regulations. This opinion is also shared by the Hungarian Supreme Court.[100]

E. Protection of the Human Dignity of Groups

It should be noted that the protection of personality rights (including human dignity) of groups by the means of Slovak civil law is generally not possible, because only an individual, natural person is considered to be a right-holder. There must always be one or more individuals (plaintiffs) claiming (and consequently proving) that their rights have been breached. Personality rights always belong to a specific individual.[101] Of course, it might theoretically happen that the behaviour of a natural person or legal entity affects the human dignity of a whole group of individuals (eg, a social or ethnic group), and one or more members of such group might bring an action claiming that such behaviour infringed upon their (individual) human dignity. But there has been no court ruling upholding such an action.

100 Koltay, 'The Protection of Human Dignity' (n 90).

101 I Fekete, Commentary on Civic Law. Epi.sk.

It seems that the human dignity of a group of individuals is protected by the administrative media regulation. At least that is what the construction of the RVR and the SC suggests. Council for Broadcasting and Retransmission fined a broadcaster for infringing upon the human dignity of the social group of pensioners (RP 34/2011, 21 June 2011). The programme contained information that the negative demographic development of the population in Slovakia, as well as in other countries, is significantly affected by progress in medical science, which is able to prolong the lives of people, and as a consequence, citizens of retirement age will receive pensions for a longer period than before. The Council expressed the view in its decision that the statement of the editor contravened not only the respect for elder people but the respect for all human life.

In the proceedings before the SC, the broadcaster argued that the group of pensioners is not a sufficiently individualised subject, and consequently, the administrative offence set forth in Article 19(1)a could not have been committed. The Supreme Court agreed that subject to interference must consist of specific rights of persons who can be identified. This does not mean that such persons must be specifically named, or identified by certain personal data; interference with the right to human dignity can be directed also against a whole group of people, and such a group must be objectively identified and identifiable. The group of pensioners is specifically and unmistakably identified even if individual members of the group are not named. Accordingly, the SC did not accept the objection raised by the broadcaster, and affirmed the decision of the RVR (6 Sž 17/2011, 14 December 2011).

It should be mentioned here that similar complaints regarding human dignity of pensioners was actually raised by viewers in 2005/06. The complaint touched advertisements by the insurance company AEGON, broadcast by TV Markíza, TV JOJ, TA3, and STV. The headline the commercial used was 'You are not supposed to remain a burden' ('Nemusíte zostať na krku'). The image was an old man sitting on shoulders of a young man. Both the RVR and the Advertising Council rejected this complaint as not substantiated.

F. Protection of Human Dignity Public Regulation vs Civil Law Disputes

The protection of human dignity is covered by various branches of law. While the Slovak criminal law is predominately used in cases related to the protection of sexual dignity, the Slovak civil law is more often used in libel and defamation cases.[102] When it comes to employment law, the ban on mobbing and bossing is a good example of the protection of human dignity. Of course, the protection of human dignity is also provided in the constitutional law branch. The Constitutional Court decides on complaints by natural persons or legal persons on violations of their fundamental rights or freedoms, including the (fundamental) right to the protection of human dignity. Administrative law also provides protection of human dignity and media regulation outcomes (decisions of the RVR) are part of it. Sometimes it is not easy to determine the boundary between the civil and administration protection of human dignity.

Human dignity is *inter alia* protected by the Civil Code. According to Section 11 (older Code, replaced by a new one in 2014/2015), human dignity is recognized as part of the personality of a

102 J Drgonec, Ústava Slovenskej republiky, komentár (2nd edn, Šamorín Heuréka, 2007) 216–17.

natural person. The Civil Code guarantees legal entities the protection of their name and good reputation, but these subjects do not have (human) dignity. Civil defamation disputes (aimed to protect personality of natural person, including human dignity) are decided by courts, while administrative protection of human dignity in broadcasting is provided by the RVR.

The very competency of the RVR to decide whether a broadcaster infringed on human dignity has been recently questioned by a private television broadcaster in the proceedings before the CC. The broadcaster argued that the pursuant to the Code of Civil Procedure (Law No 99/1963 Coll, no longer valid) the jurisdiction to hear and decide disputes arising from civil relationships (including defamation disputes) is exclusively vested with general courts. However, the CC (III. ÚS 88/2014, 4 February 2014) dismissed broadcaster's complaint claiming that the competence of the RVR is laid down by law. The role of the RVR is to protect the public interest; in this case, the public interest is the protection of human dignity. These conclusions are acceptable, but the line between civil and administrative protection of human dignity remains quite thin and unclear.

It remains questionable whether the public interest is preferred when it comes to protection of human dignity. In the case described above (3 Sž 82/2008, 15 January 2009), the SC required the individualization of the violation of the human dignity and freedoms of others, and the existence of a particular person whose human dignity had been infringed. Such approach is much more reminiscent of the protection of individual rights (protection of someone's human dignity) rather than the protection of public interest.

Anyway, there are still some important differences between the civil and the administrative protection of human dignity we can recognize, eg, the action launched by the RVR does not require the consent of the person whose human dignity had been infringed upon (the RVR should act (*viesť konanie/konať*) irrespective of consent/disagreement of an aggrieved person, and anybody can file a complaint about a breach of the BA), and this person to be a participant in the procedure. The aggrieved person can seek a financial compensation only in civil proceedings (revenues from fines imposed by the RVR belong to the income of the state budget). The nature of a procedure launched by the RVR is quite repressive while the goal of civil proceedings is to provide remedy for the aggrieved person.

Another question is the discrepancy between administrative sanctions and the financial compensation of non-pecuniary damage. It may happen that the person whose human dignity was violated by the broadcaster in television or radio programme will seek compensation for non-pecuniary damage, while the broadcaster will be fined by the RVR for broadcasting the programme. Should the civil court take the fine imposed by the RVR into account while determining the amount of compensation for non-pecuniary damage (and *vice versa*)? Yes, it should, at least in the light of the case law of the ECtHR, which often emphasizes the impact of compensation / sanction on applicant (moreover, the ECtHR has taken the applicant's income or personal financial circumstances into account several times while assessing proportionality of the compensation / fine awarded for the moral injury suffered, eg, *Steel and Morris v the United Kingdom*, *Lepojić v Serbia*, or *Koprivica v Montenegro*). If we assume that the impact of a sanction on a broadcaster is an important fact that is relevant to determining its amount, the impact of a sanction / compensation imposed / awarded by another public authority for—basically—the same conduct should also be relevant.

But is there any legal background for such consideration? Under the current legal framework, the RVR shall determine the (amount of) fine depending on the gravity of

the matter, the method, the duration, and the consequences of the breach of obligation, the degree of blame, the extent and range of the broadcasting and the retransmission. This gained an unjustifiable enrichment and, with regard to the sanction eventually imposed by the self-regulatory body for the area covered by the Act, is handled within its own self-regulatory system. Comparatively, the court determining the amount of compensation in civil proceedings shall take into account the seriousness of the injury and the circumstances under which the infringement occurred.

The BA expressively allows the RVR to only take the sanction imposed by a self-regulatory body into account, but not the compensation already awarded by a civil court. In essence, this statutory term expresses some kind of *quasi ne bis in idem* principle (ie, no legal action can be instituted twice for the same cause of action), which is exclusively related to the sanctions of (non-state) self-regulatory bodies. However, compensation awarded by a civil court could theoretically be taken into account while assessing the consequences of the breach of obligation, as the financial compensation rewarded by a civil court should mitigate the effects of the consequences of defamatory conduct. Accordingly, the RVR could theoretically use this approach within the extensive legal construction regarding the case law of the ECtHR.

On the one hand, a fine imposed by the RVR cannot be conceived as a part of the terms 'seriousness of the injury' or 'circumstances under which the infringement occurred'. On the other hand, a remedy provided for the aggrieved person (plaintiff) should not be affected by the fine imposed on broadcaster (since revenues from the imposed fines are part of the income of the state budget).

G. Consent of the Aggrieved Person

After starting an administrative procedure related to the protection of human dignity, broadcasters often argue that the aggrieved person agreed with the broadcasting of the programme and therefore the human dignity of the person was not infringed upon. Does such consent justify broadcasting otherwise defamatory programme? As it was mentioned before, human dignity belongs to the fundamental rights and freedoms guaranteed by the Constitution. This is a very important aspect as Article 12 of the Constitution stipulates that all human beings are free and equal in dignity and in rights, and fundamental rights and freedoms are sanctioned, inalienable, imprescriptible, and irreversible. This also means that nobody can waive fundamental rights and freedoms. Accordingly, a contract provision stipulating that the contracted party agrees with the broadcast provided by the other contractual party (the broadcaster), which would interfere with his/her human dignity, should be null and void (ie, invalid from the very beginning). This legal opinion has already been confirmed several times by the SC.

On 25 November 2005 the RVR imposed a fine of 50,000 koruna—some 1,300 euro (RP 270/2005)—on the broadcaster for a breach of obligation set forth in Article 19(1) of the BA by broadcasting a part of the reality show *Big Brother Late Night*. The programme contained comments on the images of the exposed male genitalia of one of the contestants. The broadcaster claimed that violations of the human dignity and the rights and freedoms of others had not occurred, because the contestants had entered the reality show voluntarily, knowing that they would be exposed to cameras twenty-four hours a day. Furthermore, the contestant

whose human dignity should have been affected had decided himself to shower nude, and the accompanying comments for the entire event had been appropriate to the nature of the broadcasted programme. The broadcaster has also claimed that human dignity is infringed upon when a person is forced to do something which deprives them of the autonomous control of their own behaviour, thus the person becomes a mere object of a process. Consequently, in accordance with Paragraph 19(1) of the BA, there must be an unauthorized interference, eg, without the person's consent. In this case, the contestant agreed in advance with the interference with his personal rights, by this he consented and pledged himself to endure them, which can be determined from the contract for the participation in the programme. Therefore, there was no unauthorized interference with the right to human dignity.

The respondent (the RVR) claimed in its written statement that although reality show actors had to take account of the twenty-four-hour camera surveillance, this does not mean that they should become a target, for which they cannot be blamed. Concerning the very shot, it was interesting that a few seconds of view, repeated several times, of the intimate part of the participant's body was accompanied by such comments by the moderators that had interfered with human dignity. The Council for Broadcasting and Retransmission also stated that according to the Article 19 of Constitution (right to the protection of human dignity), it is not relevant whether the reality show participant acted voluntarily or not, because no interference with human dignity can be regarded as legitimate, unless this right is restricted by law. The Supreme Court (4 sž 9/2006, 22 March 2007) confirmed the RVR's opinion claiming that Article 19(1) of the BA clearly bans an interference with human dignity, and therefore to assess the breach of the statutory provision, it is not relevant whether the participants act voluntarily or not.

In December 2010, a private broadcaster aired programme Noviny Plus, labelled as *Martinka – Kleopatra z Turca*. This episode should have introduced Martinka, the former contestant of the reality show *Farmár hľadá ženu* (following the format of the American reality television series *Farmer Wants a Wife*), her family, and relatives. The administrative procedure was commenced by the RVR because scenes and dialogues in the programme allegedly contained obscene expressions, which are evaluated under the terms of JSO as inappropriate and inaccessible content to minors under 18 years of age. The broadcaster had ranked it as a programme inappropriate and inaccessible content to minors under 15 years, and due to the ranking, the programme trailer's icon signalled that it was inappropriate for minors under 15 years, and its broadcasting time was between 6 am and 10 pm. Moreover, the RVR had decided (RP 27/2011, 7 June 2011) that the broadcaster breached the provision of Article 19(1) of the BA and human dignity of Marián, the participant of the *Farmár hľadá ženu* show.

The broadcaster had appealed to the SC, arguing that human dignity of Marián could not been affected since he was one of the contractual protagonists of the reality show and accompanying activities, so it should be taken into account that he had been paid for his participation in the programme, and was aware of his role in the show, and therefore cannot seek the same protection as a person not participating in the programme. The Supreme Court (in 5 Sž 18/2011, 29 March 2012), referring to its previous decision (case 4 Sž 9/2006), stated that the BA imposes an obligation not to interfere with human dignity and fundamental rights and freedoms of others, and it remains irrelevant whether the performance was free or not. Public derision and public statements against the person of Marián on the screen therefore interfere with human dignity. The Supreme Court added that it is wrong to expect

that by closing any contract, a person can waive its fundamental rights and freedoms, which are, according to Article 12(1) of the Constitution sanctioned, inalienable, imprescriptible, and irreversible.

In 2012, the Slovak television channel TV JOJ aired a series called *Extrémne rodiny*, a reality-show format in which real families were shown performing their real life activities or coping with situations pre-arranged by the TV crew. One storyline of the series focused on a family of three, mother, father, and a son. The family was of a rather low social status, living under sub-standard living conditions. The son (Tonko—diminutive of Anton) was arguably mentally impaired to some extent. The programme consisted mainly of scenes showing the family in various situations that were intertwined with interviews with the family members in which they were expressing their views on various aspects of their lives, or presumably just answering the questions of the crew. The actions of the family members or their comments were in turn commented on in a voiceover by a presenter who was not present on the scene, and whose comments were editorially composed after the filming took place. These comments were meant to explain various elements of the programme to the viewer, or just move the story on. They were also the main source of entertainment in the program, being often humorously patronizing about the actions, behaviour, and the opinions of the participants.

The Council for Broadcasting and Retransmission received numerous complaints on various parts of the series. One program, initially aired during the night (approx. at 8:20 pm) on 2 March 2012 and rebroadcasted on 5 March 2012 (approx at 3 pm), sparked particularly agitated responses from the viewers. The programme showed, among other things, Tonko's efforts to prepare for a date buying clothes, visiting a hair salon, and contacting the girl who was supposed to go on a date with him, and who eventually declined his proposal. The voiceover commentaries were mocking his actions and views, and were making fun of his mispronunciations of words. The views and the attitude of his mother were commented on in a similar manner.After receiving complaints about the programme and its preliminary examination, the RVR started an administrative procedure against the broadcaster (TV JOJ). The subject of the procedure was a potential breach of the rules safeguarding human dignity (Article 19(1)a) in the program, in relation to the participants.

The broadcaster was asked by the RVR for its reaction to the initiation of the procedure and to the allegations stated in an official letter sent by the RVR. In its reply, the broadcaster stated that the programme had to be examined in its entire context. In its view, the programme in question focused on showing 'various relations existing in familial environments which are not typical or utterly usual in the predominant part of Slovak society.' The broadcaster further claimed that despite the fact that at first sight it might have looked provoking, shocking, or intended merely to sensationalize, 'the attentive and normal viewer will perceive the programme as an account and communication of a daily regime, relations, problems, and various situations that the participants found themselves in, supplemented by the commentary of the presenter.' The broadcaster, according to its reply, was absolutely aware of the aspect of the handicapped person being present in the programme or the non-standard living conditions of the participants, but these were not 'the main motive or the pretext for their ridicule'.

On 10 July 2012 the RVR thus decided (RP 040/2012) that the broadcaster violated the human dignity of two participants,—Tonko and his mother—and fined the broadcaster 25,000 euro. In its decision, the RVR did not agree with the defence of the broadcaster,

stating that, on the contrary, during the programme, the living conditions of the participants and their behaviour, on the part of Tonko strongly influenced by his handicap, were a constant subject of ridicule produced by the voiceover or by other editorial means (such as music, editing of the scenes, etc.). While participants' living conditions and their medical ailment were objective facts that they could do very little about, the editorial treatment of the programme was in control of the producers, and the ridiculing of the participants was induced predominantly by their editorial involvement.

The broadcaster also stated that protection of human dignity of the participants cannot be called into question in this particular case, because they were actors working under short-term artist contracts. The broadcaster referred to the ruling of the SC, in which the SC stated that the provision of the BA on the protection of human dignity can be applied only in cases where a real person is involved. The dramatic programs are therefore completely excluded from its application. The broadcaster presented the contracts of the participants to the RVR, and asked the RVR to call in the participants as witnesses to prove the fact that they willingly committed themselves to produce art performance for the programme.

The Council for Broadcasting and Retransmission refused to hear the participants as witnesses, because it did not hold the fact that the participants were working under contracts as disputed. Their testimony could not therefore contribute to the findings of facts, in addition to those already ascertained during the procedure. The fact that the participants were under contracts, according to the RVR, was not of any relevance to the subject of the case. The participants were real individuals; they were using their real civic names, and were depicted in their real environment. The above-mentioned ruling of the SC was therefore not applicable in this case. The fact that the participants were taking part in the production willingly did not have any relevance either, because the RVR is obliged to act in all cases of violation of human dignity, irrespective of the personal stance of the victim.

The broadcaster appealed to the SC. Nevertheless, on 19 February 2013 the SC (4 Sž 20/2012) upheld the decision of the RVR, stating that indeed the programme was depicting participants in an undignified manner to produce an entertainment programme, and that the main ridicule was caused mainly by broadcaster's editorial voiceover comments. According to this view, the right to human dignity is one of the main characteristics of the modern state, and the level of its protection is the indicator of the advancement of the democracy in the state, and in this particular case, the breach of human dignity was exceedingly serious. Neither signing of a contract nor willing participation can, according to the SC, deprive an individual of the right to human dignity. The Council for Broadcasting and Retransmission is endowed by law to control the respect of the human dignity in broadcasting, and was therefore competent to pass decision in this case. The decision of the RVR entered into force on 18 April 2013, ie, the day it was delivered to the participants. The broadcaster then filed a constitutional complaint with the CC. On 4 February 2014, the CC dismissed the complaint of the broadcaster (III. ÚS 88/2014). The CC held that the competence of the RVR to decide the cases concerning human dignity violations in the broadcasting is indisputably grounded in the BA, and found nothing unconstitutional in the decision of the SC, which the CC was primarily examining.

In all these cases, the body of judicial power (the SC) presented the constitutional limits of contractual freedom by confirming that it is not possible to waive human dignity by entering into contract. Similar question is whether a broadcaster can bypass the responsibility

for infringing upon human dignity by making a contract which stipulates that programme participant agrees with broadcasting the content which would interfere with their human dignity, and will not seek any remedy for it. If it comes to administrative sanctions, it seems to be quite clear that such a provision does not exclude the liability of the broadcaster. The same principle is accepted in civil law. Moreover, according to Paragraph 574 of the (old) Civil Code, the agreement which waives some rights that can only arise in the future, is null and void. This means that such provision has no legal effect from the very beginning.

H. Identification of the Aggrieved Person

As we mentioned before, the SC requires individualization of violation of human dignity and freedoms of others, so there must be a particular person (or group of persons) whose human dignity was infringed upon. Consequently, it is often a crucial question to assess how far the aggrieved person is identified in the programme in issue.

On 25 May 2010, the RVR had decided (RP 22/2010) that a broadcaster breached the provision stipulated in Article 19(1) of the BA by broadcasting a news report about rape and physical assault. The report had included images of the woman—who has been raped—in the hospital. She had been clearly identifiable, even with visible injuries on her face. She had been recorded (and broadcasted) saying that she had not wanted to talk about the matter. There was a title at the bottom of the screen with the text—raped 'X'. The brother of the victim also had been identified. The report included a portrait of the woman and her brother, her first name, age, municipality of origin, the profession of her parents, and details concerning her working activities. The victim had been presented as the daughter of two high-profile people from K. The fined broadcaster had filed an appeal claiming that the reporter had tried to keep the maximum level of anonymity of the victim, who was referred as '24 years old J from K, the daughter of two public figures'. During the preparation of the report, the reporter had personally visited the woman, had been talking to her, and the woman had agreed to provide the information, and had not expressed that she did not want to inform the public about all the facts. Moreover, she had the opportunity to sue the broadcaster in case she felt her personality rights have been aggrieved, but she did not.

The Supreme Court (4 Sž 2/2010, 24 August 2010) upheld the decision of the RVR, and stated that the report had been likely, through its processing and content, to interfere with the woman's human dignity and right to privacy. The content of the report had exceeded what had been necessary to inform the public about the offense, presented as a physical violence and rape. It had been focused mainly on the aggrieved person, despite her disagreement to comment.

Another case was also linked with violence. In March 2009, a television broadcaster had aired the report 'Dobodaná žena v nemocnici' in the programme *Dnes* in which it had informed about an injured woman—a victim of domestic violence. The report included information about her age, the municipality where the accident happened, the information that the woman had two sons, and images of her house and of a car parking in front of it. Consequently, the RVR rendered a decision (RP 38/2009, 8 September 2009), and fined the broadcaster for the infringement of the woman's human dignity. The broadcaster had appealed to the SC claiming that the report had been conducted in the public interest (also state authorities are concerned about the topic of domestic violence), and with regard to

journalistic ethics and the protection of the injured person, the report had not alleged the name of the attacked woman, and had not enabled her identification for the general public.

The Supreme Court (3 Sž 66/2009, 11 March 2010) stated that the visual part of the report included a total of ten shots of different lengths and different angles of the house of the abused women, while the content of those images enabled the house number and vehicle number plate to be identified. On the basis of data and facts contained in the report, which were presented in verbal and visual form, the victim was clearly identifiable for her wider community / environment *(širšie okolie*). The Supreme Court also added that the report should be regarded as dishonouring, abusive, and derogating the right to privacy. The court admitted that it is in the public interest to point to domestic violence against women, but added that the public should be informed mainly about perpetrators of domestic violence, and its victims should be given protection, however, the report had not respected that.

A similar case occurred after broadcasting a report in a television news programme about a Catholic priest who had allegedly sexually molested a minor ministrant. After being fined for infringement of priest's human dignity, the broadcaster filed an appeal claiming that the priest could not have been identified on the basis of the report. The Supreme Court (8 Sž 4/2010, 30 September 2010) did not share that view, seeing that the report made the information about the priest's age, his former and his current station public. Such characteristics were considered satisfactory to identify him for a narrow public *(užšiu verejnosť*).

On 8 December 2009, the RVR had decided (RP 42/2009) that a broadcaster had breached the provisions stipulated in Paragraph 16b (obligation to ensure objectivity) and in Article 19(1) of the BA. The contentious programme had informed about the tragic death of a fifteen-month old child who had fallen down from a balcony on the fifth floor, and presented one-sided (subjective) information accusing the parents of irresponsibility for letting the child alone. The broadcaster had appealed and argued that the parents had not been shown in the report, and their names had not been disclosed, so they could not been identified. The Supreme Court affirmed the decision of the RVR (2 Sž 5/2010, 15 December 2010). Although the report had not disclosed the names and faces of the parents, it was easy to identify them for their community (*okolie*) from the other information provided. The report had informed about the place of tragedy, had shown the house of the parents, and a photograph of the child. According to these data, it had been possible to identify the persons concerned, and in view of the negative information listed on their address, to interfere with their reputation.

I. Analysis of References in Case Law of the Supreme Court

The proper reasoning of the court decision is an integral part of judicial outcomes, and represents the quality of the work of judges. Sufficient and persuasive reasoning is a basic condition for the legitimacy of any court decision in a democratic state under the rule of law.[103] Unfortunately, this aspect of the Slovak case law recognized as the reasoning of the court decisions are often considered unsatisfactory.[104] As the relevant case law should be

103 P Wilfling, 'Kvalitatívne požiadavky na odôvodnenie súdneho rozhodnutia' 71, http://www.viaiuris.sk/stranka_data/subory/publikacie/kvalitativne-poziadavky-na-odovodnenie-sudneho-rozhodnutia-2-vydanie.pdf.
104 See, eg, http://www.sme.sk/c/4120148/michalkova-polovica-rozsudkov-nema-dostatocne-vypracovane-odovodnenie.html.

taken into account while making a new court decision, proper references to it should be a part of the reasoning. Therefore, we have created Table 3 showing how often the SC refers to a case law in its judgements concerning the administrative protection of human dignity in the field of media regulation.

Table 3

Judgment of SC	References to own rulings (SC)	References to Other domestic courts (eg, CC)	References to international or foreign courts (ECtHR and others)	Decision of the RVR
2 Sž 9/2010				RP 12/2010, SC cancels and returns back, RVR sanctions again, RP 21/2011, SC confirms
3 Sž 66/2009				RP 38/2009 SC confirms
5 Sž 5/2013	5 Sž 22/2012, 29 April 2013—criteria for perpetual administrative offence; 5 Sž 18/2011, 29 March 2012—entitlement to request broadcast records from broadcasters; 5 Sž 22/2010, 10 March 2011—identification of wrongdoing; 2 Sž 17/2011, 4 July 2012—consent with infringetment of human dignity; 3 Sž 82/2008, 15 January 2009 (not applied)—identification of aggrieved person	III. ÚS 564/2012, 13 November 2012; IV. ÚS 620/2012, 14 December 2012—entitlement to request broadcast records from broadcasters; PL. ÚS 7/96, 27 February 1997; IV. ÚS 362/09, 15 October 2009—to which extent should fundamental rights and freedoms be protected, balance between fundamental rights and freedoms	*Lingens v Austria*; *Oberschlick v Austria*; *Pedersen and Baadsgaard v Denmark*—necessity to distinguish value judgements and normative statements	RP 004/2013 SC confirms
5 Sž 18/2011	4 Sž 9/2006, 22 March 2007—specification of obligation stipulated in Paragraph 19(1) of the Act, free conduct of actors	IV. ÚS 115/03, 3 July 2003; III. ÚS 209/04, 23 June 2004; III. ÚS 322/2011, 27 July 2011—proper reasoning of decision		RP 27/2011 SC confirms
5 Sž 13/2011	8 Sž 19//2010, 3 February 2011— related decision			RP 14/2011 SC confirms
8 Sž 4/2009				RP 37/2009 SC confirms
8 Sž 4/2010				RP 01/2010SC confirms
5 Sž 22/2010				RP 45/2010 SC confirms
2 Sž 4/2009				RP 32/2009 SC confirms
3 Sž 82/2008				RP 29/2008 SC confirms

8 Sž 19/2010		III. ÚS 231/2010, 25 August 2010—oral hearing and right to fair trial		RP 36/2010 SC cancel and returns, RVR stops
6 Sž 17/2011	2 Sž 21/2010, 18 May 2011—related decision			RP 34/2011 SC cancels and returns back, RVR sanctions again, RP 014/2011—SC confirms
2 Sž 21/2010				RP 42/2010 SC confirms
5 Sž 6/2013	5 Sž 22/2012, 29 April 2013—criteria for perpetual administrative offence; 5 Sž 18/2011, 29 March 2012—entitlement to request broadcast records from broadcasters; 5 Sž 22/2010, 10 March 2011—identification of wrongdoing; 2 Sž 17/2011, 4 July 2012—consent with infringement of human dignity; 3 Sž 82/2008, 15 January 2009 (not applied)—identification of aggrieved person	III. ÚS 564/2012, 13 November 2012; IV. ÚS 620/2012, 1. December 2012—entitlement to request broadcast records from broadcasters; PL. ÚS 7/96, 27 February 1997; IV. ÚS 362/09, 15 October 2009—to which extent should fundamental rights and freedoms be protected, balance between fundamental rights and freedoms	*Lingens v Austria*; *Oberschlick v Austria*; *Pedersen and Baadsgaard v Denmark*— necessity to distinguish value judgements and normative statements	RP 003/2013 SC cancels and returns back, RVR again sanctions, RP 34/2011 which is above
5 Sž 29/2011	5 Sž 17/2010, 10 March 2011; 5 Sž 8/2010,28 September 2010; 4 Sž 2/2010, 24 August 2010; 8 Sž 8/2010, 20 October 2010— precise description of the wrong	PL. ÚS 22/06, 1 October 2008; PL. ÚS 6/04, 19 October 2005; III. ÚS 34/07, 26 June 2007; PL. ÚS 7/96, 27 February 1997—to which extent should fundamental rights and freedoms be protected, balance between fundamental rights and freedoms		RP 83/2011 SC cancels and returns, RVR stops
4 Sž 2/2010				RP 22/2010 SC confirms
2 Sž 5/2010				RP 42/2009 SC confirms
3 Sž 33/2009				RP 10/2009 SC confirms
4 Sž 9/2006				RP 270/2005 SC confirms

4 Sž 20/2012	2 Sž 17/2011, 4 July 2012—consent with infringement of human dignity; 5 Sž 18/2011, 29 March 2012; 5 Sž 37/2011, 28 June 2012; 3 Sž 23/2012, 29 January 2013—entitlement to request broadcast records from broadcasters, character of such evidence			RP 40/2012 SC confirms
2 Sž 3/2012	2 Sžo 73/2010, 4 Sž 10/2012 a sp. zn. 4 Sžo 13/2012—analysed in order to ascertain the moment when all essential parts of decision should be included in it	IV. ÚS 362/09, PL; ÚS 7/96—to which extent are fundamental rights and freedoms protected; conflict between individual fundamental rights and freedoms	*Pedersen and Baadsgaard v Denmark*—nature of the questions asked by moderator; *Prager and Oberschlick v Austria*—necessity to protect confidence in judiciary against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been recognized are subject to a duty of discretion that precludes them from replying; *Pedersen and Baadsgaard v Denmark*; *Oberschlick v Austria*—protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism; *Jersild v Denmark*; *Janowski v Poland*—freedom of expression is subject to exeptions; *Lingens v Austria*; *Pedersen and Baadsgaard v Denmark*; *Oberschlick v Austria*—necessity to distinguish value judgments and normative statements.	RP 112/2011 SC confirms

Before assessing the date shown in the table above, it should be mentioned that there is actually no international case law (ECtHR, CJEU) dealing with such administrative regulation of broadcasting in the context of the protection of human dignity we have been focusing on. Nevertheless, a number of ECtHR judgments are more or less related to the media regulation issues, civil and criminal means of protection of personal reputation / human dignity, or limitations of freedom of speech.

To name a few, in the case of *Radio Twist v Slovakia*, the ECtHR considered the sanctioning of a radio station for the violation of freedom of expression as guaranteed by Article 10 of the Convention. Radio Twist had been convicted for broadcasting in a news programme an illegally tapped telephone conversation between the State Secretary at the Ministry of Justice and the Deputy Prime Minister. As a result of civil proceedings, the Slovak courts considered that the dignity and reputation of the Secretary at the Ministry of Justice had been tarnished, and the radio broadcaster was ordered by the Slovak courts to offer him a written apology, and to broadcast that apology within fifteen days. It was also ordered to pay compensation for damage of a non-pecuniary nature. The ECtHR concluded that such measures were not 'necessary in a democratic society', because the contest of the conversation represented a matter of general interest, and the broadcaster was not responsible for the illegal nature of the recording.

In the case of *Jersild v Denmark*, the ECtHR faced the question how far free expression should be limited when the content of the political expression is of a racist nature. Jens Jersild, a journalist, had conducted and edited a television interview with members of a group called 'the Greenjackets' who made several abusive and derogatory remarks about immigrants and ethnic groups in Denmark during the programme. Later, Jersild was convicted of aiding and abetting 'the Greenjackets'. The ECtHR held that Denmark violated Article 10 of the ECHR (freedom of expression). However, Judges Ryssdal, Bernhardt, Spielmann, and Loizou disagreed with the conclusion of the judgment, and stated in their dissenting opinion:

> And what must be the feelings of those whose human dignity has been attacked, or even denied, by the Greenjackets? Can they get the impression that seen in context, the television broadcast contributes to their protection? A journalist's good intentions are not enough in such a situation, especially in a case in which he himself has provoked the racist statements. . . . The Danish courts fully recognized that the protection of persons whose human dignity is attacked has to be balanced against the right to freedom of expression. They carefully considered the responsibility of the applicant, and the reasons for their conclusions were relevant. The protection of racial minorities cannot have less weight than the right to impart information, and in the concrete circumstances of the present case, it is in our opinion not for this Court to substitute its own balancing of the conflicting interests but that of the Danish Supreme Court. We are convinced that the Danish courts acted inside the margin of appreciation which must be left to the Contracting States in this sensitive area. Accordingly, the findings of the Danish courts cannot be considered as giving rise to a violation of Article 10 of the Convention.

In the light of these words, the protection of human dignity was also involved in the issue. In the case of *Lindon, Otchakovsky-Laurens and July v France*, the ECtHR was also dealing with a conflict between one's reputation and freedom of speech. The judgement is often described as controversial (one of the decisions displaying 'a disproportionate weight being given to reputational rights.' Judge Lucaides in his concurring opinion alleged:

> or many years the jurisprudence of the Court has developed on the premise that, while freedom of speech is a right expressly guaranteed by the Convention, the protection of reputation is simply a ground of permissible restriction on the right in question which may be regarded as justified interference with expression only if it is 'necessary in a democratic society', in other words if it corresponds to 'a pressing social need' and is 'proportionate to the aim pursued' and if 'the reasons given were relevant and sufficient'. Moreover, as a restriction on a right under the Convention it has to be (like any other restriction on such rights) strictly and narrowly interpreted. The State bears the burden of adducing reasons for interfering with expression and has to demonstrate the existence of 'relevant and sufficient' grounds for doing so. As a consequence of this approach, the case-law on the subject of freedom of speech has on occasion shown excessive sensitivity and granted over-protection in respect of interference with freedom of expression, as compared with interference with the right to reputation. Freedom of speech has been upheld as a value of primary importance which in many cases could deprive deserving plaintiffs of an appropriate remedy for the protection of their dignity. This approach cannot be in line with the correct interpretation of the Convention. The right to reputation should always have been considered as safeguarded by Article 8 of the Convention, as part and parcel of the right to respect for one's private life. It would have been inexplicable not to provide for direct protection of the reputation and dignity of the individual in a human rights convention drafted in the aftermath of the Second World War and intended to enhance the protection of the individual as a person after the abhorrent experiences of Nazism. The Convention expressly protects rights of lesser importance, such as the right to respect for one's correspondence. It is therefore difficult to accept that the basic human value of a person's dignity was deprived of direct protection by the Convention and instead simply recognized, under certain conditions, as a possible restriction on freedom of expression.

As we can see in the table, the SC has not referred to the domestic rulings of regional courts. Understandably, regional courts do not deal with administrative protection of human dignity in broadcasting. Furthermore, the SC usually does not rely on conclusions of the lower (regional) courts.

The Supreme Court has made several references to its own decisions, which are usually linked with the regulation of broadcasting, sometimes with the same case. There have also been also some references to the judgements the ECtHR made in three cases (always the same three examples). As it was already mentioned, there is no suitable international case law dealing with such administrative regulation of broadcasting in the context of protection of human dignity. So the SC has referred to ECtHR judgments related to libel / defamation cases. It is also notable that the essential part of these references has been made by the panel, headed by Jana Baricová (currently Judge of the CC). The rest of references are related to the decisions of the CC.

J. Conclusion

There are no doubts about the importance and value of human dignity in a democratic society. But when it comes to safeguarding its protection, law is often not able to answer all the occurring questions. This chapter was dedicated to the protection of human dignity with

regard to broadcasting regulation, namely to the analysis of the Slovak SC case law. We believe that these issues still deserve our attention. The purpose of our research was not to cover all issues related to our topic, but rather to point at the most problematic ones. Although 'human dignity' is frequently used as a legal term, its meaning remains vague. The absence of its definition enables different interpretations, and open discussion about the ways of unifying current approaches and improving the common standards of human dignity protection.

The judgements of the SC we have analysed do not present a persuasive border between the administrative and the civil protection of human dignity. The Supreme Court does not accept the abstract protection of human dignity without the violation of someone's personal rights, although the CC concluded that media regulations should protect the public interest. Therefore, the relationship between administrative sanctions and financial compensation of non-pecuniary damage remains unclear as well. On the other hand, the SC managed to tackle other challenging issues, such as the relevance of identification and the consent of the aggrieved person for the administrative responsibility of broadcaster.

The rulings of Slovak courts often lack the proper reasoning. Clear references to case law used in the decision-making process should help to deal with this gap. Although there are no relevant judgments for every situation, our analysis has shown that the judges of the SC are relatively reluctant to refer to the relevant case law in order to improve their outcomes.

VII. Balanced Coverage

Interestingly, issue of balanced coverage is the second (after commercial communications) most frequent subject of complaints by regular viewers to the RVR.[105] The issue of balanced coverage is a highly controversial one. For example, a public debate began in Slovakia in January 2015. The issue was whether it was legitimate or not to provide space for paid political commercials on controversial issues to be broadcast in private and PSM televisions only by one of the parties of the debate. Both major television stations, TV Markíza and PSM RTVS, rejected the request to broadcast paid statements by a Christian Conservative alliance promoting its point of view on the upcoming referendum in early February 2015. The private broadcaster argued that it would create an imbalanced public debate, considering that opponents of the referendum were not interested in promoting their views. The public broadcaster argued that it will cover the topic and will prepare a special debates on the issue. Strategically, this decision of opponents (mostly LGBT organisations and individuals) made sense—any heated public discussion could increase turnout in referendum which was an implicit pre-condition for its success (there is a 50 per cent minimum threshold for accepting referendum results as valid and legally binding). There is no legal regulation of campaigns in the media before referendums (only general broadcasting regulation rules apply). The referendum topics, approved (save for one exception) as constitutional by the CC, were related to children's education at school without prior approval by their parents on issues like sexuality, euthanasia, the adoption of children by same-sex couples, and that no other union could be called marriage except that among a man and a woman.

After the referendum, when indeed the unexpectedly low turnout invalidated the mostly highly 'yes' votes, the representative of the Catholic Church officially blamed the major

105 Jelčová (n 52).

televisions for their approach to the campaign. Anton Ziolkovský, the Executive Chair of the Conference of Bishops of Slovakia (highest body of Christian Churches' representatives), claimed that 'televisions manipulated with the public opinion.'[106] With regard to an issue of decision of PSM not to broadcast in its regular radio programme the sermon by a Greek-Catholic priest, Ziolkovský, who accepted that perhaps not quite proper language was used (the priest urged believers—referring indirectly to LGBT community—to 'push this dirtiness outside the borders of the State'), but still considered decision of the PSM as 'a clear attempt at censorship'.[107]

Indeed, the concept of plurality and balance of coverage brings both theoretical and practical challenges. For example, when PSM television broadcasted a documentary movie about interwar para-military militia Hlinkova Garda, some historians[108] as well as documentary movie director Maroš Berák published a public protest in which they criticised the glorification of the tool of totalitarian oppression.[109] The historians Slavomír Michálek, Miloslav Čaplovič, Stanislav Mičev, and Eduard Nižňaský criticised it 'for the purpose, sometimes even primitive manipulation with the facts, even many times automatic acceptance of propaganda of that time'.[110] The documentary movie director Ivan Ostrochovský argued that there was no balance or plurality of opinions offered in the documentary movies broadcasted in the past, and no one ever actually asked former members of these para-military militia on their perspective on the issue.[111]

History seems to be controversial in Slovakia. Independent historian Viliam Jablonický discussed a case that was initiated before the RVR and the PSM RTVS by him.[112] In this case, the issue was about the controversial Slovak-Hungarian interwar and WWII politician János Eszterházy, and the broadcaster was PSM (Hungarian news section in 2011). Jablonický seemed to win some support for his argument that broadcasted item was not sufficiently balanced. As mentioned, the BA (Article 16b) obliges a broadcaster to guarantee objectivity and impartiality of news programmes and current affairs programmes (*politicko—publicistických programov*). In particular, opinions and evaluating commentaries / judgments must be separated from news. There are exact criteria on how political current affairs programmes should look like, but there is no exact definition / criteria of news.

The BA further stipulates (Article 64(1)a) a sanction—warning due to breaking the law (*upozornenie na porušenie zákona*) in such cases. This is actually the mildest sanction among all possible ones in the competence of the RVR. This has actually been a rather often used type of sanction, however, even this modest sanction should be issued only when the breach of law is relatively serious. The justification of legal punishment must be well-described and

106 D Mikušovič, 'Sekretár biskupov: rečiam o odluke nerozumiem' *Denník N,* 6 March 2015, 5.

107 ibid. See, http://www.aktuality.sk/clanok/269392/exkluzivne-prepis-kazne-proti-homosexualom-vytlacte-totu-spinu-za-hranice-statu/.

108 See, Z Beňová, 'Ako nerobiť orálnu históriu pre televíziu' *Pravda*, 9 June 2015, http://spravy.pravda.sk/domace/clanok/357831-ako-nerobit-oralnu-historiu-pre-televiziu/.

109 M Berák, 'O Hlinkovej garde s úctou a láskou' *Denník N*, 5 July 2015, 11.

110 TASR, 'RTVS odvysielala dokument o Hlinkovej garde, historici ho kritizujú' https://dennikn.sk/169341/rtvs-odvysielala-dokument-o-hlinkovej-garde-historici-ho-kritizuju/.

111 I Ostrochovský, 'Dokumentárny film a jeho vyváženosť *Denník N*, 5 July 2015, 10.

112 See, V Jablonický, 'János Eszterházy – symbol revizionistickej politiky v mediálnych a historických manipuláciách a sporoch' E Jaššová and I Sečík (eds), *Masmédiá a politika: Komunikácia či manipulácia?* (Bratislava, UPV SAV, 2014) 202–17.

defended by facts by the RVR. This is important both from a legal point of view (the courts increasingly consider these formal and substantial issues) and from the point of view of its impact on the broadcasters—in particular, the PSM. Even mild sanctions of this type (without financial sanctions) can have serious impact on the PSM broadcaster. This is so because, eg, one of the legal reasons for which the Parliament can dismiss the Director General of the RTVS is when the Council of RTVS, in the period of six consecutive months, repeatedly issues the statement that the RTVS does not fulfil its tasks and duties, as defined by the Act No 532/2010 on Radio and Television of Slovakia, or duties established by separate directives. The Act further specifies that these statements by the Council of the RTVS must be based on warnings received from the RVR that the Director General of the RTVS, in spite of the decision of the Council of the RTVS, did not make any steps towards the improvement of the present situation.

Of course, there are other reasons stated in the law which make the potential dismissal of the Director General possible. For example, the previous Director General was dismissed in 2012 by the Parliament on the grounds that she did not inform the Council of the RTVS in advance about her intention to prepare a contract based on a public tender on the rent of a building for the PSM. It was an absolutely legal reasoning. However, it was rightly seen as an excuse for the dismissal. The Director General was elected under the previous Right-wing coalition, while the new government was a one-party, Left-wing one. The breach of the law was mild, and the Parliament had an option not duty to dismiss the Director General. In order to illustrate this decision, it can be mentioned that the Parliamentary Committee did not bother to invite the then Director General to explain her decision about allegedly illegal thoughts on the tender. There have been many cases in which the Director General was dismissed without making serious professional mistakes in the turbulent 25 years since the fall of Communism—and perhaps in some cases they were dismissed exactly due to this reason (behaving professionally, not politically).

In the current BA, there is another potentially controversial paragraph that can be abused in a similar way. The exact definition of both of these key terms (objectivity and impartiality) are missing from the law, as well as clear rules / criteria for the assessment of particular programmes from the aspects of objectivity and impartiality. As a result, both the RVR and the administrative law courts had to develop their own definition(s) and criteria for assessing the correct application of the meaning of objectivity and impartiality. This has proved problematic in a local context. As it will be discussed further, there are actually conflicting visions of broadcasters or journalists, of the RVR, and contradictory views can also be found on the issue of objectivity and impartiality not only between the lower and higher courts (in this case, RCs, the CC, and the SC) but also between the two administrative law senates of the SC.

We have identified 13 rulings by two administrative senates of the SC of Slovakia in this area in the period of 2010–2014. This period, along with the collected / selected data, are only an approximate indicator of the frequency of this type of legal cases, considering that it takes usually about three years until the final verdict is issued. In addition, sometimes the final verdict just postpones the decision—then it is remitted to the RVR for further administrative-legal action. Be that as it may, the number of cases seems to be sufficient for a valid socio-legal analysis.

A recent, special case (not yet dealt with by the SC) related to Slovak Radio's (RTVS) programme *Radiojournal* and Presidential elections in the Spring of 2014 has been added, too. This case is especially relevant because it questions the very idea of the programme broadcast (whether it is actually a news programme, or a current affairs programme), the concept of (radio) news (whether it should include only facts, or context as well), and the very strict criteria applied to the news programmes by the RVR (the conditions set by the RVR very much limit own initiative to put news into context by the journalists). In addition, we have selected two cases for detailed analysis. The first one is related to international news, the second one is an apolitical case related to a private television channel.

A. The European Court of Human Rights and Balanced Coverage

Prior to our detailed analysis, we have selected similar cases of the ECtHR. As of September 2014, there have been 105 legally valid cases related to 'balanced coverage'. Of this number, 35 cases also contained the term 'broadcast'. However, detailed analysis showed that only about two thirds of 35 cases were relevant to our study—some of them were related to the licencing of television and radio companies or to media coverage of alleged criminals, or coverage of private issues. Nevertheless, we have been able to find many relevant instructions with respect to issues related to media regulatory authorities, courts, and general guidelines for electronic / digital (radio and TV broadcasters) or audiovisual media. For example, in the already cited case *Manole and Others v Moldova*, an Appendix to Recommendation Rec(2000)23 of the CoE was mentioned, specifically the 'Guidelines Concerning the Independence and Functions of Regulatory Authorities for the Broadcasting Sector'. With regard to accountability of regulatory authorities, it is mentioned that

> (25) Regulatory authorities should be accountable to the public for their activities, and should, for example, publish regular or ad hoc reports relevant to their work or the exercise of their missions.
> (26) In order to protect the regulatory authorities' independence, whilst at the same time making them accountable for their activities, it is necessary that they should be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities. This requirement (supervision only in respect of the lawfulness of their activities) gives moral reasoning to our study. Furthermore, and more importantly:
> (27) All decisions taken and regulations adopted by the regulatory authorities should be:
> – duly reasoned, in accordance with national law;
> – open to review by the competent jurisdictions according to national law;
> – made available to the public.

Clearly, the second condition is of utmost importance in our analysis.

In the same ruling, it was mentioned that the Organization for Security and Co-operation in Europe (OSCE) and CoE jointly published the 'Benchmarks for the Operation of Public Broadcasters in the Republic of Moldova'. Clearly, these benchmarks are not related only to Moldova. Therefore, it is useful to mention the key guidelines with respect to mission of PSM. The PSM should (among other issues):

> give a complete, accurate, impartial, balanced and objective overview over political, economic, social and cultural developments, . . . provide a comprehensive picture over the real situation in the country; encourage viewers to form their own individual opinion in a free manner; respect the dignity of the human being and promote the values commonly shared by the CoE and the OSCE, especially with respect to democracy, pluralism, tolerance and respect for human rights and freedoms. Factual programs shall be impartial, this means they shall be fair, accurate and shall maintain a proper respect for truth. A programme may choose to explore any subject at any point on the spectrum of debate, as long as there are good editorial reasons for doing so. It may choose to test or report one side of a particular argument. However, it must do so with fairness and integrity. It should ensure that opposing views are not misrepresented.

The last two sentences in particular seem to be very important for our future analysis. Of course, there are immediate questions of what does it mean to be 'fair' in reporting, and to have 'integrity.' Be that as it may, the recommendation continues: 'News reports have to be rigorously sourced and verified. Information should be broadcast as a fact only if it is verified by two independent sources. Acceptable exceptions to the double-source requirement are facts directly confirmed by a reporter of the public broadcaster, or significant news drawn from official announcements of a nation or an organization. When a secondary source offers exclusive significant news which cannot be verified by using a second source, the information should be attributed to the originating agency by name. News should be presented with due accuracy and impartiality. Reporting should be dispassionate, wide-ranging and well-informed. It should present a comprehensive description of events, reporting an issue in a reliable and unbiased way.

The main differing views should be given due weight in the period of which the controversy is active. In case a number of programs are clearly interlinked and form de facto a series on reports of related issues, impartiality can be achieved over the entire series. Editorial programs, for example, should give over one month approximate equal time to representatives of the government and the parliamentary majority on the one hand and the opposition on the other hand on related issues. In case a number of programs are broadcast under the same title, but deal with separate issues, impartiality has to be reached within every individual program. Due impartiality is of special importance in major matters of controversy. It should be especially insured that a full range of significant views and perspectives are heard during the period in which the controversy is active.

The most similar European cases to our case study are *Sigma Radio Television Ltd v Cyprus* (App Nos 32181/04 and 35122/05). These cases deal with the broadcast of a documentary that was found to be biased. The local regulatory authority CRTA has found (Case No 60/2001) that a 'social documentary' broadcast by Sigma TV had not been characterised by objectivity and pluralism, as opinions and allegations had been voiced against doctors and officials working in an institution that had a bone marrow bank, without a complete picture or opposing views being presented. The CRTA considered that the discussion, the direction it had taken, and the manner in which it had developed indicated that it had been orchestrated to favour the views of the presenter and, more broadly, the station's views on the issues raised, to the disadvantage of participants with opposing views.

Having regard to the broadcasts and their content and/or subject matter, the reasons given by the CRTA in its decisions for the findings of violations against the applicant, the amount

of the fines imposed, and the submissions of the parties before it, the ECtHR considered that the impugned interference was proportionate to the aim pursued, and the reasons given to justify it were relevant and sufficient. The ECtHR found therefore, that the interference with the applicant's exercise of their right to freedom of expression in these cases can reasonably be regarded as having been necessary in a democratic society for the protection of the rights of others.

In the case of *Pedersen and Baadsgaard v Denmark* (judgment of 19 June 2003), the ECtHR argued that Article 10 of the ECHR protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on accurate factual basis, and provide 'reliable and precise' information in accordance with the ethics of journalism (see, eg, the *Fressoz and Roire v France* judgment of 21 January 1999, Paragraph 54; the *Bladet Tromsø and Stensaas v Norway* judgment of 20 May 1999, Paragraph 58, and the *Prager and Oberschlick v Austria* judgment of 26 April 1995, Paragraph 37).

In the case of Österreichischer Rundfunk v Austria (App No 35841/02), the ECtHR exercised caution when the measures taken by the national authorities are such as to dissuade the media from taking part in the discussion of matters of public interest (see, eg, *Thoma v Luxembourg*, App No 38432/97, § 58, ECHR 2001III, and *Jersild v Denmark*, judgment of 23 September 1994, Series A No 298, 25–26, [35]). In the case of *Thoma v Luxembourg* (judgment of 29 June 2001), the ECtHR noted that the topic raised in the programme was being widely debated in the Luxembourg media and concerned a problem of general interest, a sphere in which restrictions on freedom of expression are to be strictly construed. Accordingly, the ECtHR must exercise caution when, as in the instant case, the measures taken or penalties imposed by the national authority are such as to dissuade the press from taking part in the discussion of matters of public interest. The ECtHR reiterated that 'punishment of a journalist for assisting in the dissemination of statements made by another person . . . would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so' (see *Jersild*, 25–26, [35]). A general requirement for journalists to systematically and formally distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions, and ideas, concluded the ECtHR. In summary, there seem to be some established principles by the ECtHR that we can use in the analyses of our cases. However, as it will be shown, these particular cases of the ECtHR have rarely been used either by the RVR, the Slovak administrative judiciary, or, indeed, the CC.

B. Discussion on Objectivity and Impartiality

There is an obvious need to discuss at first objectivity and impartiality in news and current affairs programmes in general. There is no single definition of objectivity across journalism and the social sciences, and the word is used differently in practice, depending on the user and the context. Objective, in the most literal sense of the word, is defined as not being influenced by personal feelings or opinions in considering and representing facts. Brent Cunningham's favourite definition was taken from Michael Bugeja, who teaches journalism at Iowa State

University: 'Objectivity is seeing the world as it is, not how you wish it were.'[113] Yet without some criteria for what makes an event or person important or interesting enough to cover, journalists would have no way of choosing among the countless happenings that occur every day around the world, or the billions of people who might interpret them for us as sources. Then, journalists, or rather editors, must make a series of choices about presenting the news. Among the most important of these choices is how to edit events.[114] Especially the foreign news production and content analysis have proved many times since the pioneering study of Johan Galtung and Mari Ruge, 'The Structure of Foreign News' (1965), that there are some implicit criteria which determine the selection of news topics, their amount of coverage, as well as their framing. These criteria are, by and large, far from objective. Among the criteria which have been repeatedly found as determining foreign news selection belongs the 'big' or elite nations (often the same category) factor, the concentration of people, the ethnocentric and the cultural proximity approach. Approaches such as 'herd instinct' (following other media—especially agenda setting media, and other journalists reports on the place), etc. are also in play.[115]

Michael Kunczik distinguished two main concepts of journalism. One is neutrally-objective journalism, passively distanced from the events addressed. The opposite is actively involved, participatory, socially engaged, cause-promoting journalism. In reality, these two normative perceptions by no means rule each other out, argues Kunczik. A journalist can feel equally committed to objective, neutral reporting and to social engagement.[116] There are many aspects of criticism of objectivity in journalism. First, critics argue that the 'objective' news gathering process favours the viewpoints of institutional sources in fact, especially in government and corporations. These institutional sources are favoured because of their presumed legitimacy, as representatives of the public will in a democracy and their presumed knowledge as gatherers and creators of political and economic information. Second, criticism centers on the form of objective news, which is seen as biased toward covering observable and unambiguous facts over new ideas and distinct events over long-term processes or historical context. Finally, objectivity may simply confuse and paralyze audiences.

For example, Brian McNair believes that journalism 'like any other narrative which is the work of human agency, is essentially *ideological* a communicative vehicle for the transmission to an audience (intentionally or otherwise) not just of facts but of the assumptions, attitudes, beliefs and values of its maker(s), drawn from and expressive of a particular world view.'[117] It is true that most codes of ethics share some common features. There is indeed a broad intercultural consensus that standards of truth, accuracy, and objectivity should be central values of journalism.[118] Yet, interestingly, the most common functions of the European codes are to show accountability to the public and the sources, and to protect the professional integrity of journalists from external interference. The most common principles stress the

113 B Cunningham, 'Re-Thinking Objectivity' *Columbia Journalism Review*, 11 July 2003, http://www.cjr.org/feature/rethinking_objectivity.php?page=all.

114 C Raphael, 'Objectivity' http://www.uiowa.edu/~c036088/raphael.pdf.

115 See, eg, I Volkmer (ed), *The Handbook of Global Media Research* (Chichester, John Wiley & Sons, 2012).

116 M Kunczik, 'Media and Democracy: Are Western Concepts of Press Freedom Applicable in New Democracies?' P Bajomi-Lázár and I Hegedűs (eds), *Media and Politics* (Budapest, Új Mandátum, 2001) 76.

117 B McNair, *The Sociology of Journalism* (London, Arnold, 1998) 6.

118 K Hafez, 'Journalism Ethics Revisited: A Comparison of Ethics Codes in Europe, North Africa, the Middle East, and Muslim Asia' *Political Communication* 19(2) (2002) 225–50.

truthfulness of information, the prohibition of discrimination on the basis of race, sex, etc., using fair means in gathering the information, the integrity of the source and the journalist, and the freedom of expression and comment.[119] Thus, it is not the concept of objectivity that is the most common and the most important in European journalism context. Furthermore, journalists are increasingly in the business of supplying meaning and narrative.

It no longer makes sense to say that the media only publishes facts. Research shows this change very clearly. In 1955, stories about events outnumbered other types of front page stories nearly 9 to 1. Now, about half of all stories in three US newspapers are something else, a report that tries to explain why, not just what.[120] Most importantly, various ethical codes and debates usually do not explain what is meant by the concept objectivity. This is usually left to be decided case-by-case. Yet clearly there is an ongoing and increasingly relevant discussion about journalistic objectivity. For example, Mitchell Stephens argues that objectivity is equally impossible to reach, as it is misleading—when newspapers attempt at objectivity at any price, they open the (public) space that could be used by others. Stephens believes that the core of journalism should be in interpretation. A certain phenomenon can be interpreted only when a commentator has an opinion on it.[121] Sharon Beder claims that journalistic objectivity has two components. The first is 'depersonalization', which means that journalists should not overtly express their own views, evaluations, or beliefs. The second is 'balance', which involves presenting the views of representatives of both sides of a controversy without favouring one side.[122] However, Beder is sceptical with respect to the idea of objectivity in journalism. She argues that 'The rhetoric of journalistic objectivity supplies a mask for the inevitable subjectivity that is involved in news reporting and reassures audiences who might otherwise be wary of the power of the media. It also ensures a certain degree of autonomy to journalists and freedom from regulation to media corporations. However, news reporting involves judgements about what is a good story, who will be interviewed for it, what questions will be asked, which parts of those interviews will be printed or broadcast, what facts are relevant and how the story is written.' Finally, Beder concludes that 'Objectivity in journalism has nothing to do with seeking out the truth, except in so much as truth is a matter of accurately reporting what others have said. This contrasts with the concept of scientific objectivity where views are supposed to be verified with empirical evidence in a search for the truth. Ironically, journalistic objectivity discourages a search for evidence; the balancing of opinions often replaces journalistic investigation altogether.'

On the contrary, Alex Jones believes that in fact, objectivity is necessary precisely because journalists are biased. He argues that objectivity also means not trying to create the illusion of fairness by letting advocates pretend that there is a debate about the facts when the weight of truth is clear. He-said/she-said reporting, which just pits one voice against another, has become the discredited face of objectivity. But that is not authentic objectivity. Authentic or genuine journalistic objectivity is in Jones's view an effort to discern a practical truth, not an abstract, perfect truth. Reporters seeking genuine objectivity search out the best truth

119 T Laitila, 'Journalistic Codes of Ethics in Europe' *European Journal of Communication* 10(4) (1995) 527–44.
120 J Stray, 'Objectivity and the Decades-Long Shift from "Just the Facts" to "What does it Mean?"' http://www.niemanlab.org/2013/05/objectivity-and-the-decades-long-shift-from-just-the-facts-to-what-does-it-mean.
121 In T Matějčková, 'Princip novin je mrtvý' Česká pozice, http://ceskapozice.lidovky.cz/princip-novin-je-mrtvy-07j-/recenze.aspx?c=A140909_121804_pozice-recenze_lube.
122 http://www.uow.edu.au/~sharonb/STS218/media/objectivity.html.

possible from the evidence that the reporter, in good faith, can find. In conclusion, Jones describes objectivity as 'news [should be] rooted in a verifiable reality that can be confirmed and that faithfully represents the ambiguity that reality usually includes.' [123]

Some principles and examples of the ways media use to identify an incorrect report can be found on the website of Honest Reporting.[124] These (negative or biased) principles include misleading definitions and terminology; imbalanced reporting; opinions disguised as news; lack of context; selective omission; using true facts to draw false conclusions; distortion of facts. Cunningham summarised some arguments for and against the concept of objectivity in the media.

Pro arguments include that nothing better has replaced objectivity; plenty of good journalists believe in objectivity, at least as a necessary goal; the pursuit of objectivity separates us from the unbridled partisanship; objectivity helps us make decisions quickly and it protects us from the consequences of what we write; readers need, more than ever, reliable reporting that tells them what is true when that is knowable, and pushes as close to truth as possible when it is not. Con arguments include that objectivity excuses lazy reporting—if you are on deadline and all you have is 'both sides of the story', that is often good enough; it exacerbates our tendency to rely on official sources, which is the easiest, quickest way to get both the 'he said' and the 'she said,' and, thus, 'balance'; objectivity makes reporters hesitant to inject issues into the news that are not already out there.[125]

Richard Sambrook holds that there might be real risks to public understanding from the growth of subjective or advocacy news without an underpinning of more objective information. There are also interesting differences in preference of objective and opinionated news among nations. For example, British or German readers prefer more traditional approaches to news, while Italians or Brazilians may prefer more subjective news. There is a difference in preference based on education. If you have a university degree and a good income, you may prefer to have evidence set out for you to make up your own mind. If you are less well-educated or less well-off, you may prefer a journalist to interpret the news for you. Sambrook concludes that although the news landscape is changing rapidly with exponential growth in the sources, styles, and types of news available, audiences appear more attached to the traditional norms of balanced and impartial news than some might suppose.[126]

Finally, Bill Kovach and Tom Rosenstiel discuss that there is nothing approaching standard rules of evidence, as in the law, or an agreed-upon method of observation, as in the conduct of scientific experiments. Nor have older conventions of verification been expanded to match the new forms of journalism. Although journalism may have developed various techniques and conventions for determining facts, it has done less to develop a system for testing the reliability of journalistic interpretation, Kovach and Rosenstiel conclude.[127]

123 http://niemanreports.org/articles/an-argument-why-journalists-should-not-abandon-objectivity/.
124 http://honestreporting.com/7-principles-of-media-objectivity/.
125 Cunningham, 'Re-Thinking Objectivity' (n 113).
126 R Sambrook, 'Objectivity and Impartiality in Digital News Coverage' *The Guardian*, 12 June 2014, http://www.theguardian.com/media/media-blog/2014/jun/12/objectivity-and-impartiality-in-digital-news-coverage.
127 http://www.americanpressinstitute.org/journalism-essentials/bias-objectivity/lost-meaning-objectivity/.

C. The Case of International News Reporting

Especially experienced international reporters from war-torn zones openly question impartiality in news reporting while reporting on war crimes or about aggression as an absurd concept. For example, the British reporter Ed Vulliamy wrote, based on his experience from war reporting in Bosnia and Herzegovina: 'The majority of us sooner or later had been accused . . . of pro-Muslim attitude. . . . For some reasons this instinctive insistence on basic principles of democratic Europe in Bosnia is seen as "pro-Muslim" . . . and in contrast with the bizarre attitude to remain "objective" vis-à-vis the most horrifying racist violence.'[128] Indeed, Tony Rogers[129] mentions exceptions from the objectivity and fairness rule in news reporting:

> Remember that ultimately, reporters are in search of the truth. And while objectivity and fairness are important, a reporter shouldn't let them get in the way of finding the truth. Here's an extreme example: Let's say you're a reporter covering the final days of World War II, and are following the Allied forces as they liberate the concentration camps. You enter one such camp and witness hundreds of gaunt, emaciated people and piles of dead bodies seemingly everywhere. Do you, in an effort to be objective, interview an American soldier to talk about how horrific this is, then interview a Nazi official to get the other side of the story? Of course not. Clearly, this is a place where evil acts have been committed, and it's your job as a reporter to convey that truth.
> In other words, use objectivity and fairness as tools to find the truth. That's your goal as a reporter.

Indeed, from the societal point of view, lack of information or too 'impassionate' information about acts against humanity or about war crimes, can prevent humanitarian or peace-making intervention either by the UN Security Council, relevant superpowers or humanitarian organizations. However, if the media inform too quickly and incorrectly, it may be happen that this will help one (evil or more evil) side of the conflict. In addition, the media may then lose trust of their audiences. The British war reporter Martin Bell covered 11 wars. Bell openly suggested changing the concept of journalistic objectivity to a *journalism of attachment*.[130] Bell claims that a mirror does not impact what it reflects but television screen does so. For example, during war, conflict journalists often became participants of PoW exchanges. Some claim that these exchanges may not have happened without presence of television cameras. Bell speculates that major war crimes may not have happened if there would have been television cameras. 'Journalism of attachment' rejects objectivity because it is, as a concept, lame and at the same time immoral. The French war photographer Patrick Chauvel described the transformation of his attitudes towards the dilemma of objectivity versus attachment—with a Lebanese example. 'In this real war, my journalistic search for truth moved me towards a diminishing objectivity. From simply stating facts, I came to a more elaborated level of their interpretation. The question why do you fight brings only

128 E Vulliamy and V Marek, 'Údobí pekla' (Prague, Naše vojsko, 2009) 13.
129 T Rogers, 'Here Are the Things You Need to Know about Objectivity and Fairness' http://journalism.about.com/od/ethicsprofessionalism/a/objectivity.htm.
130 M Bell, 'The Death of News' *Media, War & Conflict* 1(2) (2008) 221–31.

shifty answers.'[131] In other words, fuzzy explanations on the motivations leading towards civil war forced the journalist to abandon the concept of objectivity. According to Chauvel, beside the wider societal context, there is also an immediate news reporting pressure leading towards the illusory concept of objectivity. 'When a man goes into a terrain, he wants to get accepted by the fighters. Therefore, he must show them that he stays behind them. That he is not there to reprobate them but to show what happens (unless his behaviour could lead to saving lives of innocent civilians, which rarely happens). There is a very thin line between correct and incorrect.'[132] In contrast, defenders of journalistic objectivity in international reporting claim that their approach guarantees at least a certain level of safety for journalists. Many journalists have been killed in conflicts in former Yugoslavia because the Serbs saw them as biased. Defenders of journalistic objectivity believe that those who would like to influence the events should themselves became politicians. Hugo De Burgh asks: 'If not even journalists would inform objectively, who else would?'[133] The same opinion was held by a Czech war reporter Janek Kroupa.[134]

We should mention here that, in this context, perhaps a legal sanction ('warning') issued by the RVR with regard to a series of news items broadcast on 1 March 2014, was unfair. In this series of news reports,[135] a PSM channel broadcasted about the imminent Russian invasion to the Ukrainian Crimean peninsula.[136] On 1 March 2014, the *de facto* Crimean Prime Minister Sergey Aksyonov appealed directly to Russian President Vladimir Putin in a signed statement, calling for Russia to 'provide assistance in ensuring peace and tranquillity on the territory' of Crimea. The Russian Federation Council voted unanimously the same day to grant permission to President Putin to 'use the armed forces of the Russian Federation on the territory of Ukraine until the normalization of the socio-political situation in that country. Later that day, indeed, Russian troops took over the Crimea.[137] It is doubtful whether there was a place and a need for additional information regarding what the aggressor thinks about this situation, as the RVR insisted. In other words, in some contexts—especially with regards to rapid military invasions and foreign news in general—there is no urgent need or possibility for balanced coverage in the short term.

Something else is a long-term propaganda on television screen. This would explain why the Russian-language First Baltic Channel was fined by Latvian authorities for 'non-objective coverage' of developments in Ukraine in October 2014. The First Baltic Channel broadcasts mostly programmes and films of Russia's Channel One (up to 70 per cent). The Latvian National Council for Electronic Mass Media, which controls television and radio broadcasting companies, argued that a 3,600 euro fine was imposed on the television channel for 'repeated broadcasting of one-sided and non-objective information about developments in Ukraine,' adding that it determined the size of the fine taking into consideration that it was

131 P Chauvel, 'Válečný reporter' (Prague, Garamond, 2009) 141.
132 ibid, 184.
133 See, H de Burgh, 'Some Issues Surrounding Investigative Journalism' H de Burgh (ed), *Investigative Journalism. Context and Practice* (London / New York, Routledge 2000) 75–76.
134 *Sme*, 12 May 2007, 34.
135 http://www.omediach.com/tv/item/5369-rtvs-potrestali-za-to-ze-nebola-dostatocne-proruska.
136 http://en.wikipedia.org/wiki/Timeline_of_the_2014_Crimean_crisis#March_1.
137 http://www.spokesman.com/stories/2014/mar/01/russian-troops-take-over-ukraines-crimea-region/; http://www.infoplease.com/news/2014/russia-annexes-crimea.html.

a transfrontier channel, and was penalized more than once before for such violations. The Council also imposed a 700 euro fine on the Auto Radio in Rezekne on the same accusations, explaining that the fine was lower since the radio station broadcasted for a relatively small region, and was not fined before.

The Latvian National Council for Electronic Mass Media on 7 April 2014 banned broadcasting of Russia RTR television for three months for signs of 'military propaganda' it found in its broadcasts during the period from 2 to 17 March 2014. On the other hand, there also was harsh criticism by the German media advisory board on the one-sided coverage of the Ukraine crisis in the PSM ARD (the first German television channel) in late 2013, early 2014.[138] In particular, the German media advisory board criticized the one-sidedness at Russia's expense, lacking a diverse and complete picture above all. The German media advisory board came to the conclusion that the reporting has made the impression of the prepossession about the crisis in the Ukraine only partially, and it was directed against Russia and the Russian positions. However, the German media advisory board did not criticize a single particular programme. It also accepted the difficulty of the ground reporting in conflict situations. Yet it argued that in such difficult situations diversity must be respected as much as possible, and allow for a well-balanced judgment in the most complete way. If this cannot be performed in the topical reporting immediately, it must be brought up in the formats of the background reporting, in *Tagesthemen*, in magazines and in special features, with suitable guests and experts in the talk show formats, concluded the German media advisory board. Both ARD Editor-in-Chief Thomas Baumann and WDR Intendant Tom Buhrow rejected these requisitions.

D. Slovak Cases

One of the most problematic groups of cases with respect to missing objectivity and impartiality has been formulated, as it turned out, by a PSM's programmes, especially in a current affairs political programme on the public Slovak Radio. We have outlined the details of these cases below for two key reasons. First, these outlines give better insight into the (sometimes contradictory) legal thinking and argumentation used by the RVR, the various administrative law senates of the SC, as well as that of the CC. Second, the courts or legal experts may argue that each case is unique, so even a minor difference can in fact have major regulatory-legal consequences. This may or may not be true, but readers will have to make their own judgements on it after getting acquainted with all key details.

i. Case No 1: 6 Sžo 527/2009 (final verdict 26 October 2010)

Verdict: The Supreme Court confirmed the verdict of the RC (3S/135/08-50, 29 September 2009). The Regional Court cancelled the ruling of the RVR from 1 July 2008 (RL/35/2008), and the case was remitted for further administrative-legal action by the RVR. The verdict of the SC was based on 'unexplorability due to the lack of arguments' (*nepreskúmateľné*

138 B Bidder, 'Streit über Ukraine-Berichte: Programmbeirat wirft ARD "antirussische Tendenzen" vor' *Der Spiegel*, 29 September 2014, http://www.spiegel.de/kultur/tv/ard-streit-um-ukraine-berichterstattung-a-993304.html.

pre nedostatok dôvodov). The original sanction was the weakest possible: 'warning due to breaking the law' (Article 16b of the BA). The administrative-legal action (*správne konanie*) was initiated by the RVR itself on 29 April 2008. Clearly, the RVR does not always play the neutral role of a judge but it also initiates some (controversial) administrative-legal regulatory actions and sanctions. In other words, the RVR functions as a prosecutor and as a judge at the same time. It is questionable whether this is the best approach.

Short description of the case: The PSM Slovak Radio broadcasted its news and current affairs programme *Z prvej ruky* on 15 February 2008 at 12:30 pm. There was a discussion with three guests. The content was related to the current socio-political events in the country, ie, the modification of the law on old-age pensions, leaving some participants from the 'second old-age pension pillar', a press law draft, and the renewal of candidacy of political party Smer-SD in the Party of European Socialists.

The Court: It is always necessary to interpret a particular regulation (*výklad*). It should be clear from the ruling defining the breach of law that the disrespect of objectivity and impartiality of a contribution on the side of a broadcaster was not merely noticed by the regulator, they also provided realistic guidelines for reaching objectivity and impartiality of such programmes. It is important, considering that 'warning' is an exclusively preventive-educative measure. This task can be fulfilled only in cases in which it includes advice and guidelines for further activities. It also must state clear guidelines for further work. This includes stating how to deal with this particular type of programme in a clear way (*jasné pravidlá pre ním riešený typ programu* (see more in Rs 55/2003)). However, the SC as well as the RC did not find requested educational guidelines in the criticised verdict. According to the SC, it is impossible to assess individual expressions of commentators in that type of programme because it is necessary to assess them in the context of the whole programme.

In particular, neither the SC nor the RC understood 'how it would be possible to include in broadcast programmes of this type (*Z prvej ruky*) feedback from all involved parties (*zaradiť reakciu dotknutých predstaviteľov*) (members of governments, political parties, international organisations, associations, MPs, and the PM), and how the presence of these contributions could be guaranteed by the broadcaster.' The Supreme Court also assumed that the programme is designed in a way that can guarantee its purpose.[139]

ii. Case No 2: 2Sžo73/2010 (final verdict of the Constitutional Court I. ÚS 29/2012-40)

Verdict: There were actually two verdicts of the CC in this particular case (in 2010 and in 2012). In the very final 'finding' the CC actually supported position of the RVR (one of the Judges dissented). However, the CC mentioned that the SC in related verdict never questioned the *pro futuro* use of the 'empty chair' concept. Nevertheless, the CC underlined that there must be some measures in order to keep objectivity and impartiality of current

139 Considering that a particular programme broadcast on Friday is prepared in such a way that there is room for discussion for commentators (guests) who comment participating actors of political decisions during the previous week. These commentators, according to their previous attitudes, do provide guarantees that discussion should reflect plurality of opinions, and that invited guests can present their opinions and arguments directly, live, and without taking their expressions out of context, moreover, with possibility to react to questions of listeners.

affairs programmes. This all started as an appeal against decision of the RC, the case of 6 November 2007, ruling RC 1 S 15/2008-54 of 10 July 2008, the original ruling was confirmed. The Constitutional Court asked the SC to re-consider the case. The Supreme Court, legally bound by the rulings of the CC, did so initially only formally. In short, despite the clear and substantial arguments used by the CC and its legal obligations to obey the rulings of the CC, the SC preferred a formal approach to its work.

The broadcaster forwarded the case towards the CC of Slovakia (IV. ÚS 245/09-42 of 21 January 2010), arguing with legal arbitrariness of the ruling of the SC (2Sžo202/2008 of 18 March 2009). The Constitutional Court argued in 2010 that the duty of the general courts was to state the 'sufficient and relevant arguments' on which the rulings were based. These arguments must be related both to material and procedural rulings (*skutkovej, ako i právnej stránky rozhodnutia*). The Constitutional Court criticised 'divergent' ('*rozchádzajúcu' sa rozhodovaciu činnosť*) rulings in similar cases. In particular, the CC questioned the words of the Vice-Chairwoman of the SC that the case law of specialised senates has been unified since 2007. The Constitutional Court mentioned, on the one hand, the contradictory rulings of the SC 5 Sž 50/2007 and 5 Sž 55/2007 of 27 November 2007. These rulings were in line with arguments of the SC 2 Sžo 202/2008 of 18 March 2009. On the other hand, the SC in ruling 3 Sž 5/2009 of 23 April 2009 annulled the decision of the RVR, but used different arguments.

In addition, the CC argued that the SC did not deal sufficiently with arguments stated by the broadcaster. The Constitutional Court argued that the SC confirmed the ruling of the RC which, however, was 'one-sided in arguments, fuzzy, and imperfect' ('*argumentačne jednostranne, nedôsledne a nejasným spôsobom vyrovnal so skutkovým stavom'*). Nevertheless, the SC re-affirmed its previous stance in a new decision of October 2010 on the same case.[140] However, in another verdict delivered the same month by another SC Senate, the SC adopted a different reasoning concerning broadcasters' compliance with objectivity requirements for similar programmes.[141]

Short description: There were two issues, a formal and a substantive one. The substantive issue dealt with appeal against decision of the RVR related to the objectivity and impartiality of the programme *Z prvej ruky* on April 10, 2007. The sanction was a 'warning' (RL/110/2007 of 6 November 2007). The Regional Court supported the position of the RVR, namely that the broadcaster was supposed to give room to present an opinion of a representative of the coalition. This was seen as crucial by the RVR and the RC, as well as the SC.

The formal issue dealt with the date when begins the 'subjective' period when the RVR can issue a verdict. Interestingly, the CC enumerated all previous divergent rules used by courts in this regard. First, there were verdicts that considered as formal date when the RVR became familiar with monitoring or the report on investigation of the complaints (verdicts of the SC 5 Sž 30/2006; 1Sž78/2005; 1 Sž 9/2005; 1Sž21/2006). This was finally seen as legally the best option. Second, there were verdicts that this period starts with date of elaboration of the monitoring reports (verdicts 3 Sž 50/2007; 5 Sž 50/2007; 3 Sž 103/2007; 3 Sž 107/2007; 3 Sž 108/2007). Finally, there were verdicts that this period starts with the day when the RVR received a complaint (verdicts of the SC 5 Sž 87/2007; 3 Sž 96/2008; 3 Sž 5/2009; 5 Sž 80/2008; 5 Sž 26/2009; 3 Sž 35/2009).

140 Judgment of the SC 2 Sžo 73/2010.
141 Judgment of the SC 6 Sžo 527/2009.

The broadcaster: The broadcaster argued that there were invited guests representing the coalition, the opposition, as well as an NGO. Furthermore, the broadcaster argued that the radio host lead the discussion in a balanced way. In particular, it was argued that the radio host as well as NGO representative presented a critical point of view with respect to the lack of transparency of the previous government. The broadcaster underlined that the representative of the coalition knowingly and deliberately refused to take part in the discussion. Both the member of the government and the speaker of the same government party declined invitation to participate in the programme.

The regulator: The regulator argued that it was undoubtedly a current affairs programme. The key topic was a motion by the opposition to recall a member of the Government. In the view of the RVR, the broadcaster was obliged to give room for the representative of the Coalition. The Council for Broadcasting and Retransmission argued that a representative of an NGO was logically not a sufficient and efficient representative of a different opinion, considering that the representative of an NGO herself criticised the member of the Government. The Council held that in a case when there would be no representatives of the coalition present during the broadcast, regardless of all efforts, the broadcaster should broaden the discussed topic, and discuss it without any politicians present (*mali tvorcovia predmetného programu možnosť postaviť tému širšie a diskutovať bez politikov*). The Council also considered that invitation was issued on the very day the programme was broadcast, which was seen as an additional negative factor (*tiež bola významná pri rozhodovaní rady v danej veci*). The Council based its decision about the lack of impartiality and objectivity on identical criteria as in the case of general news programmes.

The Court: The Supreme Court argued that the decision of the RVR was justified and explained in details. However, the SC relied on linguistic definitions not on journalistic definitions. With respect to the 'empty chair' editorial approach, the SC considered it as a 'standard' approach in the case of this type of programme. However, the SC also believed that in this particular case, the opinions and arguments of the missing participant were voiced by a representative of an NGO or the editor. Yet the SC did not provide any detailed explanation on why this should be so in this particular case. In other words, there was no clear argument supporting that the 'empty chair' approach was not sufficient in this case. The arguments that an 'unbiased listener might get the feeling after listening to the programme that it was not objective and impartial' is not a good enough reason. It is obvious that 'empty chair' may bring such results, otherwise it would not make much sense to use it. It rather seems that the SC as well as the RVR prefers balance (impartiality and objectivity) under any conditions. In the case of the SC, this concept was based on legal argument, namely, 'there is an objective responsibility for a broadcaster.' Ironically, the emptiness of arguments in the case of the 'empty chair' was actually criticised the CC, too. The Constitutional Court asked the SC to reconsider its approach based on just accepting conclusions of the RC which were, according to the CC, 'rather unclear and vague'.

The Constitutional Court criticised that both the RC and the SC had 'a priory identified a lack of presence of one party in the programme . . . with sufficient reason to claim a lack of objectivity of that particular programme and the breaching the duties of a broadcaster.' The criticism of the CC was that '[t]he specific current affairs programme, ie, which opinions, commentaries, and information on news were voiced by participants in that particular discussion, their relationship (in order to assess them from the point of impartiality and

balance) is not quite clear from any previous rulings in this matter (nor for example the 'empty chair' approach, which is rather typical in European charts of news reporting and current affairs programmes, neither the claim by the broadcaster that the editor—host—and the politically neutral guest rather critically assessed the activities of the political party, the representative of which was present).' Yet the courts failed to consider these facts, the CC concluded. In 2012, the CC argued that the verdict of the SC related to breaking impartiality in that particular programme was 'constitutionally acceptable and correctly (*riadne*) justified.'

iii. Case No 3: 3 Sž 200/2010 (final verdict of 8 October 2010)

Verdict: The Supreme Court *de facto* annulled the ruling RC 1S/126/2009-52 in the sense that a decision of the RVR RL/18/2009 of 19 May 2009 was cancelled. The reasons were 'incorrect legal judgment of an issue as well as non-reviewability'. The Council for Broadcasting and Retransmission was supposed to deal with this issue again. The original sanction was a 'warning' based on the lack of objectivity and impartiality in the current affairs programme *Z prvej ruky*, broadcasted on 10 October 2008 in the Slovak Radio.

Short description: The programme ran on weekdays. During the first four days, politicians were present, but on Fridays, independent publicists were the guests. This particular programme was broadcasted on Friday.

The Court: The Supreme Court studied documents and transcripts, and listened to the original radio broadcast. The Supreme Court argued that it was not sufficiently described why there was a supposed breach of law. It was mentioned there that the broadcaster did not guarantee objectivity and impartiality. This description was seen as not sufficient by the SC. In particular, the SC held that the breach of the law happened only in the first third of the programme. The Supreme Court concluded that the decision of the RVR was non-reviewability due to incomprehensibility (*nepreskúmateľnosť rozhodnutia žalovaného pre nezrozumiteľnosť)*. Nevertheless, the SC came to conclusion that the radio host followed the expectations raised by the RVR, and the programme itself was fairly critical as well. The Supreme Court seemed to differentiate between objectivity and impartiality. More specifically, the SC demanded the RVR to explicitly mention if the programme did not keep the objectivity or impartiality of the current affairs programme, or possibly any of them.

The Regional Court checked the transcript of the programme. The Court accepted the argumentation of the broadcaster that the content was important, not the overall or usual style and content of other identical programmes *Z prvej ruky*. The programme was clearly a current affairs programme. This is an important finding because the criteria of current affairs programmes are clearly defined by the law (in Article 16 b of the BA). The Court identified critical remarks towards the Government and its members in the programme. In many issues there was a consensus. These findings so far do not provide good enough reasons for the claim of lack of objectivity or impartiality of that particular programme, the RC concluded. Yet the Court also explicitly stated that in case no member of the Government was present, there was a duty for host of the programme to moderate discussion in a way to substitute for the missing opponent. The Court concluded that the sanction was issued mainly because of the first part of the programme, dealing with Slovak-Hungarian relations. This seemed to be the most part highly critical towards the Government and the ruling coalition.

The broadcaster: The broadcaster underlined the fact that the Friday's programme is of different type, more analytical than opinionated (*ponúkajú reflexiu, idúcu nad rámec bežných názorových vrstvení*). Therefore, the broadcaster argued, this very specific type of discussion enables the deliberate opinion-based differences among the invited commentators. In addition, the RC argued, sometimes it is impossible to offer a qualified contradictory opinion. The broadcaster argued that it is obliged to guarantee objectivity and impartiality of programmes as a whole, but not of individual expressions / opinions. In other words, the broadcaster argued that the goal is to reach the overall impartiality and objectivity of the programme, but not that of all individual claims. The broadcaster insisted that 'absolute objectivity in a particular part of a broadcast is practically impossible to achieve.' In addition, this goal is very much determined by the education and experience of the radio host (journalist). The broadcaster considered 'balanced' information to be the key term. This should be interpreted, the broadcaster argued, as more views / opinions on the same issue and in adequate ratio. The broadcaster mentioned that it could not predict the way in which two commentators would comment on rather diverse specialised topics with marginal political background. Finally, the broadcaster argued that absolute or case-by-case (point-by-point) balance of opinions is in contradiction with the mission of the media. The broadcaster argued that the RC did not deal with these objections.

The regulator: The Council for Broadcasting and Retransmission did not demand the participation or involvement of all the individual politicians in that programme. However, the regulator underlined that the programme was supposed to offer unbiased discussion on politically and societally important topics. The Council argued that moderating the discussion with the aim to achieve balance and impartiality of the programme was the duty of the radio host. This should include presenting the opinion of a missing participant. The role of the radio host is also important due to the unpredictability of how discussion will evolve, the RVR argued. The radio host should 'neutralise' what was said, or limit the 'inadequate criticism' of subjects who were not present at the discussion.

iv. 2 in 1: Plurality of Opinions and Human Dignity: Case Cervanová

A regular current affairs programme *Večer pod lampou* is a special 'dual-issue' case that should be mentioned in detail here. This case deals with a special case of balanced coverage (understood as plurality of opinions, Article 16(3)a of the BA), as well as human dignity (Article 19(1)a of the BA). An additional, interesting aspect of this case is that PSM television was sanctioned directly by the RVR in administrative proceedings (RP 112/2011 of 20 December 2011). A higher (financial) sanction of 50,000 euro was issued due to the breach of human dignity rather than balanced coverage (there was a duty to broadcast an announcement three times before the programme about 'not guaranteeing universality of information and plurality of opinions' ('*nezabezpečenie všestrannosti informácií a názorovej plurality*'). Regarding the breach of human dignity, the RVR argued that: 'the programme, in the way it was produced and due to its content, interfered with the human dignity of prosecutor Milan Valašík, Ľudmila Cervanová, and forensic psychologist Gejza Dobrotka.'

The irony was that this very programme received a prize for the best interview in electronic media in the same year when it was broadcast, awarded by the Open Society Foundation.[142]

142 http://medialne.etrend.sk/televizia/novinarska-cena-2011-vitazi-su-znami.html; http://www.memo98.sk/index.php?base=data/other/1334403261.txt.

The jury that awarded this prize consisted of many journalists. In other words, while the official media regulator, courts, and some state institutions like the Office of the Prosecutor General saw this programme as a grave breach of law or ethics, the civic sector representatives assessed this programme rather positively. It should be clear that the issue at stake was not so much the professional performance in a narrow sense, but rather its content, on both sides. The Supreme Court in its verdict 2 Sž 3/2012 issued on 27 February 2013 approved the financial sanction of the RVR (dealing with human dignity) while the issue of the breach of balanced coverage was re-directed for further legal action to a lower RC (due to its competency in this matter). Regarding human dignity, the SC argued that this type of programme required 'maximum neutrality from the TV host leading the discussion'. This, however, was not the case here. The Supreme Court based its negative assessment on a) the composition of the guests (invited and not invited, present and not present); b) how a television host lead discussion; c) interference with the human dignity of specific people. The discussion programme was broadcast on 23 June 2011 on second channel of the PSM Television. The discussion programme was about a criminal case that took more than a generation to reach a final verdict. The case, named after the victim, a medicine student called Cervanová, started in 1976. The murderers were sentenced for the first time under communism, in 1982, and for the last time, after the political change—following a new process, in 2006.[143] What was so controversial about this programme? The television host, Štefan Hríb, who was in charge of the external company producing a series of current affairs discussions for PSM, invited four men into the programme who had participated in the brutal murder of a university student. On the one hand, Hríb never doubted that these men were actually innocent. Indeed, all sentenced murderers present claimed to be innocent, and the victims of the failure of justice. On the other hand, Hríb also invited prosecutors, police investigators, and judges. Unsurprisingly, none of them were interested to participate in a discussion with murderers. Furthermore, most of them claimed that they were sworn to secrecy regarding the case. However, Hríb argued that he was doing his job professionally. In his opinion: 'If we, journalists, would step back and not produce a programme in case one side of an issue could not be represented, we would not be able to inform about the issue. The one-sided situation was created not by us, but by the other side.'[144] Yet in the programme, Hríb—as is typical for his style of conducting public debates—did not comment on any claims raised by sentenced murderers. He also openly questioned the ability of Slovak courts (and some other state authorities) to pursue justice and search for the truth. It is true that the Slovak judiciary has long had a very low reputation among the majority of population.

The Council for Broadcasting and Retransmission argued that the 'empty chair' concept was absurd in this context. The Council demanded that in order to maintain the plurality of information (not the more narrow concept of balanced coverage), there was a need to present (broadcast)—in adequate time and with the same scope as the problematic programme—an official follow-up (*v primeranej časovej nadväznosti*) version of the *Cervanová* case to the viewers. This would enable the viewer to become familiar with the argumentation and conclusions of the court in the verdict. The Council based its arguments on the ruling of the CC PL. ÚS 7/96 (published under 77/1997 Z.z.).

143 http://sk.wikipedia.org/wiki/Vra%C5%BEda_%C4%BDudmily_Cervanovej.

144 K Sudor, 'Š Hríb: Nepovažujem sa za veľmi rozumného ani dobrého človeka' https://projektn.sk/8412/stefan-hrib-nepovazujem-sa-za-velmi-rozumneho-ani-dobreho-cloveka/.

The Constitutional Court dealt with the balance of public and private interest there: 'the equilibrium of public and private interest is an important criterion when assessing the adequacy of the limitation of any fundamental right and freedom.' In the present case, the SC summarised its conclusion in a single sentence: 'The aim of this programme was neither a search for the truth, nor a confrontation of different opinions on the *Cervanová* case, but the presentation of facts in favour of the sentenced.' In conclusion, both the RVR and the SC used extended versions of the concept of 'universality of information and plurality of opinions' for the assessment of a particular programme. Previously, it seems that the law and similar regulations understood these concepts as related to efforts to keep particular series of programmes 'plural' and providing 'universal information' (related to that particular series of programmes). In this case, the RVR and the SC made an effort to expand this notion, covering and monitoring various types of news and current affairs programmes. Interestingly, the RVR did monitor the broadcast of PSM in the period of 1 January 2011 to 5 September 2011 (while the discussion programme itself was broadcast on 23 June 2011). Thus, the RVR focused not only at news programmes, but also at current affairs programmes (such as *O 5 minút 12, Reportéri, Komentáre, Správy STV*). The Council for Broadcasting and Retransmission concluded that there was some information on the case, but not enough to fulfil the above-mentioned expectation of guaranteeing the plurality of information. This legal discussion also helped to clarify further what is meant by 'empty chair'.The empty chair concept is not a way of protecting a journalist who issues a formal invitation to people who are not likely to come, due to their professional obligations (eg, professional secrecy) or the possibility of further personal or psychological harm (eg, relatives of the victim). The Supreme Court paid attention to the issue of who was invited and who was not, who was present and who was not. Overall, however, the empty chair was not the crucial problem in this context. As it was mentioned by the SC, the aim of this programme was not the search for the truth. We can conclude that this particular case suggests that the courts and the RVR can be correct in their professional-legal and ethical assessment of a case, as opposed to the civic sector.

Here we are going to discuss the first two non-political cases. In the first case, A Long Way of a Post, the RVR decided correctly, although rather strictly with respect to impartiality and balance reporting in commercial television. In the second example, Symphony Orchestra of the Slovak Radio, both the RVR and the RC took the demand for impartiality and balanced reporting too far. Only the SC issued a clear verdict, with which it stopped the too demanding request for impartiality and balanced reporting.

First, we are going to discuss a relatively recent case, not yet (at the time of writing) submitted before the court: A Long Way of a Post. This case is typical of the way the RVR argues about impartiality and balance in news reporting and current affairs programmes. It is not about a politically contested news item, which made it important to include in our analysis. The case concerns the commercial TV JOJ, which broadcasted the news item 'Dlhá cesta pošty' (A Long Way of a Post) in its main evening news *Veľké Noviny* on 8 October 2013. According to the RVR ruling, no relevant information was in any way provided on how court rulings and verdicts are produced and delivered. Furthermore, the RVR argued that the opinion of concerned courts was not provided in any relevant way. Therefore, the RVR concluded, the objectivity and impartiality of this particular programme has not been guaranteed. The sanction issued was a duty to broadcast an announcement about breaking the law on broadcasting. The broadcaster did not submit any explanation on the case.

The News Story: A Long Way of a Post

Ľuboš Sarnovský, journalist: 'And here it is. Slovaks are complaining once again. This time about our courts.'

Adriana Kmotríková, journalist: 'The judicial proceedings take too much time, and waiting for the court's verdict takes too much time (býva často v nedohľadne).'

ĽS: 'Our reporter Dodo Kačmáry has come up with the theory that actually there are lazy people, and stamps are behind everything.'

Adriana Kmecová, lawyer: 'Unfortunately, in many cases when a common person complains at a court about delays in proceedings, he/she is often right.'

Jozef Kačmáry, journalist: 'The work of the courts is not popular neither among law offices, nor among common folks. Especially the elderly often say that they do not expect them to reach a verdict during their lifetime. We have discovered what a problem that can be. The postal delivery of the consignments of the courts is banal. In some cases, their delivery takes as long as if it were between two planets (*akoby ich posielali medziplanetárnym letom*).'

AK: 'In a specific case concerning the delivery of a verdict from the regional court to a local court, which is located in the same building, it took more than five weeks.'

JK: 'And here it is, black on white. A verdict issued on the first floor on 30 April was delivered onto the second floor by 6 June.'

Tomáš Borec, Minister of Justice: 'If this is indeed the case, and somebody does not move one document or file from one floor to another floor, this, of course, should not be like that, and cannot be like that.'

JK: 'Imagine that this is the court's verdict. We are going to show you how long a delivery from a local court to a regional court can take, which are both located in the same building. And we have come in front of the Court's Registry. It took us a minute from the local court to get here, and one could expect the same with regard to the speed of delivery of postal parcels. And this is another example. From a local [court], it took us a less than a minute [to get here], and this should be like the speed delivery of parcels. And another example. Giving a son back into the care of his mother. The court issued the verdict in August, but she was only able to see him again in September.'

Erika Vasiľová, participant at court's proceedings: 'I could have seen my son twenty two days earlier.'

Marek Gabonay, journalist: 'We shall make a little experiment. We are going to send a postcard directly to New York City, and shall wait to see how long it takes for it to be returned to Slovakia. We have posted it on September 26 at noon. We have not asked for first class service, but for second class. It cost us therefore a dollar. There is no problem with speed of delivery in the USA.'

A US Postal Services Representative: 'Took two days.'

JK: 'Well, and a parcel from New York City to Košice, we have received in five days.'

Postwomen: 'Good morning, there is a letter for you.'

JK: 'Thank you very much. The Spokesperson of the Court does not want to see this as a problem, and talk about it. She has just sent us an extensive statement on how it should work.' (For about five seconds a PC screen was visible with an e-mail on it. It was not possible to comprehend the content of the communication due to the shortage of time.)

Marcela Galová, Spokesperson of Košice Courts: 'Do not invent such things as you have sent to me.'

JK: 'Such as?'

Marcela Gálová: 'If you were to ask me whether it was issued as a decision with regard to putting somebody in jail, I would have told you if it was or not.'

TB: 'I think it is a sign of poor management if it is as you say it is.'

Marek Gabonay: 'Even in the USA, it sometimes takes more than 22 days to deliver a parcel. This often concerns messages that fathers are sending their sons in a bottle. For TV JOJ from Košice, Jozef Kačmáry and from New York, Marek Gabonay.'

The Council for Broadcasting and Retransmission provided a very detailed criticism of this news item in a scope of around 4,500 words (Ruling of the RVR RO/001/2014). The Council based its assessment on premise that 'the acceptable scope of the tolerance of the impreciseness of broadcasted information (*prípustnej miery tolerancie nepresností odvysielaných informácií*) depends on the importance of published information, on the existence of public interest, on making it public as soon as possible, and on the real availability of the published information and the possibility to verify its truthfulness at the time of its broadcast.' In particular, the RVR criticised that the concerned courts did not get the opportunity to express their opinions either directly or indirectly, and that the news item did not clearly differentiate the various administrative steps related to issuing and delivering courts' verdicts. Therefore, the RVR argued, a news item informed in an 'extremely simplified way, schematically, and most of all imprecisely' (Ruling of the RVR RO/001/2014). The Office of the RVR also supported this decision (Administrative Act 31/SKO/2014). Interestingly, our independent professional assessor (a journalist) did not find any problems in this particular news item. 'This particular news item is OK under the condition that there has been no fundamental manipulation of the presented statements and opinions by the editors. This is impossible to verify from the transcript, but could be detected by the eventual complaints by those offended, supported by strong evidence.'[145] In short, for people not familiar how the courts and judicial administration works, this case could be seen as not problematic. However, for law professionals, this was an unprofessional news item.

We can also take an example of the RVR and the lower RC taking their expectations with regard to journalistic professionalism (related to balanced coverage and impartiality) perhaps too far. This can be seen by another example, 6 Sžo 390/20009. This case concerned a news item broadcast in PSM Slovak Radio on 6 February 2007. This news item informed about the expected changes in the Symphony Orchestra of the Slovak Radio. This news item was allegedly not impartial and objective. However, the SC accepted defence of the PSM. The opinions of the general director of the Slovak Radio and of the conductor were presented. Therefore, giving voice to members of the Orchestra was perhaps not necessary. The most important aspect of the case was that the news item was broadcast on 6 February 2007. However, a preliminary list of members of the Orchestra to be fired was put together on 16 February 2007. Thus it could perhaps be seen as more internal affair till then. Finally, the trade union received this list only on 13 March 2007. Clearly, it did not make much professional sense to ask for the opinions of members of the Orchestra at this stage.

145 E-mails from Juraj Filin, Editor of the *Goodwill*, on 1 and 17 December 2014.

E. The Case Study: Commentaries v Information in News Reporting—Where does the Border Lie?

An especially controversial case, which deserves detailed analytical attention, was a ruling issued by the regulator. The Council for Broadcasting and Retransmission issued a verdict in late August 2014, claiming that when the PSM Slovak Radio (part of Radio and Television of Slovakia, RTVS) broadcast the news that the President presented the state awards (*Prezident Gašparovič udeľoval vyznamenania*) on its public radio channel Rádio Slovensko in its regular news programme *Rádiožurnál* on 10 February 2014, this was a breach of the law according to Article 16(3)b of the BA. This particular Paragraph deals with the objectivity and impartiality of news, and a duty to separate news from commentaries, and opinions from news-type information. This case will probably end before the Administrative Law Senate of the SC. Therefore, its analysis is relevant. Regardless of this fact, and although the original legal punishment was relatively mild (although as assessed by the RVR itself it was a serious breach of the law, otherwise there could be no sanction issued), and although this case falls outside of our original research period, it is a most significant, highly normatively value-based case study, directly related to the perception of the mission of journalism in general, and to concept of news (especially their objectivity and impartiality) in particular. This case also reflects the thinking of the majority of the RVR members, with respect to their notion of news objectivity and the mission of journalism (only one member of the RVR abstained from voting among those present, all others voted in favour of the breach of law by the RTVS).We have thought it useful to present here the full, English language transcript of the contested news report.

The anchor*:* 'Twenty-eight orders, one hundred and twelve crosses, and forty-two badges—this is the number of medals issued by President Ivan Gašparovič in ten years. The President gave these awards to various personalities. Although the Head of State awarded them mainly for exceptional contributions in arts, sports, or the dissemination of a positive image of Slovakia abroad, one can also find people with questionable pasts among the appreciated personalities.'

The journalist: 'The President presents the state awards on the occasion of the anniversary of the founding of the Republic, at the beginning of a new year. He did so last time a month ago when he gave state awards to sixteen personalities. The suggestions of whom to appreciate are given by the Cabinet or Parliament. These suggestions are then assessed by a six-member committee. The President can give state awards independently, on his own initiative as well. What matters in such a case is explained by the Spokesperson of the Head of the State, Marek Trubač.'

Trubač, Spokesperson of the President of Slovakia: 'Extraordinary contribution to development in the field of arts, sports, culture, the representation of Slovakia abroad, and the dissemination of good image, as well as the contribution during the fight for freedom in the WWII period, the fight against fascism, etc.'

The journalist*:* 'In spite of the efforts to assess positive contributions, there are still many controversial people among the recognised ones. An example can be Ondrej Šedivý, a former colonel of the Border Guard, which is known from the times of totalitarianism for its many deadly incidents. Nevertheless, the President awarded him the Milan Rastislav Štefánik Cross III. Class, ironically, for protection of human lives in 2006. Šedivý is also mentioned

in a notice for crimes committed at the borders, submitted to the Office of the Prosecutor General by the National Memory Institute by its Chair, Ondrej Krajňák.'

Krajňák, Chairman of the Board of Trustees of the National Memory Institute: 'About 42 people have been killed at the Slovak-Austrian border, guarded by the 11th brigade of the Border Guard. These deeds, already committed, are barred; therefore the Office of the Prosecutor General does not deal with them anymore.'

The Journalists*:* 'Among the controversially reputable, there is also the President of the Kazakhstan Republic, Nursultan Nazarbayev, seen as dictator; Professor Jaroslav Chovanec, suspected of sexually harassing female students; the creator of the sculpture of Klement Gottwald, Tibor Bártfay; but also the actress Eva Kristínová, who has been regularly present at extremist events, or the novelist Jozef Bob, who is the author of works questioned by historians. The Spokesperson of the Head of State claims that not one of the awarded has been sentenced. In addition, the law which came into force in 2008 brought stricter criteria for awarding state awards.'

Trubač: 'The new law on state awards has defined stricter criteria for the selection of persons to be awarded, in order to select only those who will be a positive example.'

The Journalist*:* 'Controversy was caused also by Gašparovič's predecessor, Rudolf Schuster, who gave an award to the then Mayor of Žilina, Ján Slota, in 2004. Filip Domovec, RTVS.'

The news story itself was part of a series of contributions before the Presidential elections, and at the same time, these news and current affairs items assessed the role of the President whose term was coming to the end. The PSM also assessed in its previous reports other aspects of the retiring President, including, eg, his Reports on the State of the Republic, or the scope of the President's rights.

i. Argumentation by the Media Regulator

The Council for Broadcasting and Retransmission argued in its verdict that the 'one-sided information about personalities that received awards did not include another point of view (*neboli objektivizované*) through giving air-time to their opinion or by some other way. In addition, there were value-based commentaries broadcasted, dealing with the aforementioned subjects. These commentaries, however, were not separated from news-type information. Therefore, the objectivity and impartiality of that particular programme was not guaranteed.'[146] As a result, the public broadcaster was obliged to repeatedly broadcast an announcement that included the following sentence (providing an additional explanation on what was perceived as the moral problem by the RVR): 'The editor [journalist] has expressed himself critically about some of the awarded personalities of Slovak cultural and social life, without any effort to make the contributions [of these awarded persons] known in at least a minimal scope, for which the President gave them awards.'[147] In summary, there were three problems with this news story, according to the RVR.

First, the journalist was supposed to give air-time to all, or perhaps even more persons than were mentioned, or guarantee the allegedly missing objectivity in another way. This would

146 Minutes from the Meeting of the RVR (26 August 2014), http://www.rvr.sk/sk/spravy/index.php?aktualitaId=2603.
147 ibid.

mean making phone calls (in addition to contacting the original two people) to seven or eight people, including a foreign President and, possibly, to a former Slovak President. This at first sight seems to be an absurdly demanding concept of objectivity. It seems that the RVR itself felt this would be a too demanding concept of objectivity, so it also gave the option of 'in another way'. However, it is not clear what this would actually entail, practically speaking. It would most likely mean to leave more time to present the news than they originally had. This is problematic in itself, considering that each news item has a more or less limited time-scope, adapted to a radio news broadcast. We will discuss this issue later, under the heading of objectivity.

Second, the RVR argued that there were broadcasted 'value-based commentaries . . . not separated from news-type information.' However, one can also find a sentence in the reasoning of the RVR that contradicts the previous one. The Council argues that the journalist broadcasted 'generally known, objective facts connected without any relevant precision (*spresnenie*) with the awarded personalities.'[148] This is a very important statement by the RVR itself. If there were broadcast 'generally known objective facts', regardless of the second part of the sentence, what was the problem actually? It seems that the issue here is whether news programmes should broadcast only facts, or broadcasters should also include the context of these facts. Perhaps more precisely the issue is whether this was actually a news item, or should it rather be a part of a (different) current affairs programme. Still, it could be seen as an acceptable news item if it was a standard or typical news item for that particular programme (regardless of its name or formal categorisation). We will examine this issue later in detail.

Third, the RVR argued that the editor / journalist did not show any effort to show positive side of the story, ie, there was no mention of the positive achievements of the awarded people. It seems that the issue here is whether balance and objectivity in news (and perhaps not only in news programmes) also means balancing the positive and negative aspects of events and people (here it should be again mentioned ECtHR verdict in *Manole*, cited earlier). We can say that, in general, news or journalism is by definition based on negativity ('good news is usually no news'). Indeed, there seems to be a consensus that a consistent pattern of negative news erodes the specific support for particular leaders, governments, or policies.[149] However. there are occasional inconsistencies or differences regarding the impact of different media[150] or the varied media impact in the case of the perceived political versus economy performance,[151] or findings related to particular sectors and media are in indirect cooperation with particular institutions of horizontal accountability.[152] Sometimes, there is disagreement with respect to the impact of negative media reporting on the legitimacy of political systems.[153] Some researchers have pointed out the complexity of the interactions of various types of

148 Ruling of the RVR, Rozhodnutie č. RO/001/2014, Bratislava, 8 April 2014, 5.

149 See, J Pietsch and A Martin, 'Media Use and its Effect on Trust in Politicians, Parties, and Democracy' *Australasian Parliamentary Review* 26(1) (2011) 131–41; P Norris, *A Virtuous Circle: Political Communications in Post-Industrial Societies* (New York, Cambridge University Press, 2000).

150 K Gross, Sean Aday, Paul R Brewer, 'A Panel Study of Media Effects on Political and Social Trust after September 11, 2001' *The International Journal of Press/Politics* 9(4) (2004) 49–73.

151 L Camaj, 'Media Use and Political Trust in an Emerging Democracy: Setting the Institutional Trust Agenda in Kosovo' *International Journal of Communication* 8 (2014) 187–209.

152 L Camaj, 'The Media's Role in Fighting Corruption: Media Effects on Governmental Accountability' *The International Journal of Press/Politics* 18(1) (2013) 21–42.

153 J Wolling, 'Skandalbericherstattung in den Medien und die Folgen fur die Demokratie' *Publizistik* 1 (2000) 20–36 vs Norris, *Virtuous Circle* (n 149).

media, types of programmes watched, different levels of education and ideologies, social versus political trust, among other factors.

ii. Public / Experts' Reactions to this Case

This case caused reactions both from a media portal[154] and public intellectuals in Slovakia. For example, Peter Zajac called it an 'entirely absurd ruling'.[155] Zajac argued that the RVR preferred 'a principle of omitting unpleasant facts from the public memory'. In contrast, Pavol Dinka, a Member of the RVR, has also acknowledged that one of the criticised artists produced artwork which 'reflected the ideology of its time' ('*poplatné dielo*').[156] This, however, Dinka justified on the grounds that 'he [the artist] lived in such an era; the artist wanted to live and express himself creatively [even under such conditions].' To summarise it in Dinka's words: 'The story included commentative parts [this has to do with a key criterion—to exclusively respect facts], missing especially precision, balance and topicality [the story was broadcast after a month the award ceremony had taken place].' The arguments defending the RTVS (justifying its decision to broadcast contested news item) and the journalist included statements both by the Office of the RVR and the RTVS. These reasons were mixed also in the documents by the Office of the RVR.

It was pointed out that air-time was given to the Spokesperson of the President as well as to the Representative of the National Memory Institute in the news story. In fact, the Spokesperson of the President acknowledged that there were problems with some of these awards in the past. In his words: 'A new act on state awards defined stricter criteria for the selection of these important personalities in order to guarantee that these will be really positive examples [worthy to follow].' Indeed, there had been problem with selection of candidates for state awards. The President himself initiated a change of the Act on state awards in 2008. The President justified these changes with the aim to reach a 'more narrow and responsible selection'. In addition, a special Presidential Committee would assess nominees.[157] There was indeed some past criticism of the selection of the President or the Government for state awards, related to foreign dignitaries[158] and domestic personalities.[159] The Presidential Office (in an e-mail from Peter Rusiňák)[160] has confirmed that the former President Gašparovič initiated the drafting a new law on state awards. In addition, the Presidential Office confirmed that there were some 20 suggestions or questions with respect to state awards, mostly related to the criticism they received in the last ten years.

154 M Kernová, 'Rozhlas si dovolil kritizovať Gašparoviča, dostal trest' http://www.omediach.com/radio/item/4932-rozhlas-si-dovolil-kritizovat-gasparovica-dostal-trest.

155 P Zajac, 'O pamäti a nepamäti' .*týždeň*, 8 September 2014, 50.

156 P Dinka, 'Mentálne mediálne zbojstvo' http://www.noveslovo.sk/c/Mentalne_medialne_zbojstvo.

157 SITA, 'Prezident chce, aby štátne vyznamenania mali väčšiu vážnosť' http://www.kysuce.sk/cl/4018/prezident-chce-aby-statne-vyznamenania-mali-vacsiu-vaznost.html.

158 See, I Kuhn, *Hodnotová orientácia slovenskej zahraničnej politiky* (Braitslava, MR Štefánik Conservative Institute, 2008) 6–7.

159 M Vagovič, 'Obťažoval študentky, dostal štátne vyznamenanie' http://www.sme.sk/c/4079232/obtazoval-studentkydostal-statne-vyznamenanie.html; O Bardiovský, 'Ako súvisia morálka a kvalita? Príklad J. Chovanec, prof. JUDr. CSc' http://bardiovsky.blog.sme.sk/c/196705/Ako-suvisia-moralka-a-kvalita-Priklad-J-Chovanec-prof-JUDr-CSc.html.

160 Head of the Personnel Office of the President, 14 October 2014.

iii. Argumentation by the Office of the Rada pre vysielanie a retransmisiu

The Office of the RVR recommended stopping further administrative-legal steps based on additional arguments. The Office argued that '[t]he statement on the "controversial aspects" (*kontroverznosti*) of some of the awarded personalities had its origin in widely known and verified facts (*skutočností*). These facts were commented upon by the Spokesperson of the President. Considering the aim and scope of the story, we assume that to give space to individual "controversial" nominees was neither efficient (*účelné*), nor necessary in this particular matter in order to guarantee the objectivity and impartiality of the programme.'[161] Thus it seems that the Office of the RVR based its argumentation on two issues; first, it was the correct content of the news story, and second, the journalist's output was in line with the necessarily imperfect (or perhaps by definition rather incomplete) journalistic news work (as it is often said, journalism is seen as the first draft of history). The Office of the RVR based its advice on usual approach. This included a brief summary of the legislation, a quotation of the key paragraph, the full transcript of the controversial item, the opinion of the broadcaster, and some thoughts by the staff.

The most relevant and usually used ones were thus the quotations from the BA (Article 16(3)b) and the statement that none of the two key terms have an explicit definition in the Act. Then the usually accepted key criteria of objectivity followed, ie, relevance, transparency, precision, completeness, factuality, balance, plurality, actuality / topicality, clarity, distance and neutrality, and, in the case of news reporting, lack of partiality.[162] It seems that the key assumption of the staff (the Office) was that the item broadcast was not actually problematic. This would explain—together with many other cases the Office has to deal with—the relatively little attention paid to the justification of the legal-factual position on this case. In any case, it seems that a more advanced methodology for the evaluation / assessment of controversial broadcast items might be considered useful. An attempt to outline such a methodology is made in this paper. It is perhaps enough to mention here that some research could have been done by the Office of the RVR on why the spokesperson tacitly or indirectly accepted that there had been some problems with moral or professional qualities of awarded personalities, what exactly has been said or written about these controversial personalities, and whether the criticised personalities or any other person quoted or mentioned in the broadcasted item actually reacted to the broadcasted item (or what has been written or broadcast about them in the past). Perhaps all this would be vanity, carefully considering the argumentation used by the RVR for the justification of its ruling.

161 Kernová, 'Rozhlas si dovolil kritizovať Gašparoviča' (n 154).

162 Kancelária, Pracovný materiál Kancelárie Rady na rokovanie Rady pre vysielanie a retransmisiu, 26 August 2014.

iv. Argumentation by the RTVS

As one could expect, the RTVS argued with public interest and public service mission:

> The goal of the report was not to analyse the pasts of the awarded persons but to assess the process of giving awards by the President of the Slovak Republic. The Slovak Republic appreciates the extraordinary achievements for the Slovak Republic in this way, its founding, establishment, and nourishing of democratic society, the extraordinary achievements or important contributions to the defence and security of the Slovak Republic, the extraordinary or significant results of work, heroic acts, and other extraordinary acts. A public discussion about giving state awards, part of which was also this report, undoubtedly fulfils the key parameters of public interest and public supervision, according to the broadcaster.[163]

It should be noted that the journalist himself was not asked for his opinion by anybody.[164]

v. Method of Analysis

The general and most important issue is, based on the already presented discussion, firstly, how to decide whether a news item was balanced or impartial? Secondly, was this a relevant issue at all? There are a number of possible methodological approaches for answering these questions. Obviously, we have to look into the text of the law. As it was mentioned, the legal sanction was based on Paragraph 16(3)b of the BA. This particular Paragraph deals with the objectivity and impartiality of news and a duty to separate news from commentaries, and opinions from news-type information. The translation of the original legal text is as follows: 'the broadcaster must (*je povinný*) . . . guarantee the objectivity and impartiality of news programmes and current affairs programmes (*politickopublicistických programov*); opinions and value-based commentaries (*hodnotiace komentáre*) must be separated from news-type information.' However, there is also another relevant law, Act No 532/2010 Z.z. on the Radio and Television of Slovakia, which further specifies the role of PSM in Paragraph 3: 'Public service in the area of broadcasting is . . . prepared . . . with the notion (*s pocitom*) of societal responsibility . . . [which] contribute to . . . the ethical understanding (*vedomie*) . . . offering . . . overall balanced and plural information.'

Although internal Programme Status of the RTVS also specifies in more details the correct approaches, with the aim to achieve objectivity (as discussed below), there is also a fundamental value-based conflict about the mission of journalism here (and, in fact, about journalism in general). On the one hand, there is a demand for objectivity and impartiality, on the other hand, there is a request for societal responsibility and overall (thus not necessarily related to partial news items) balance and plural information. These two inevitably conflicting legal requests come into conflict. Be that as it may, clearly, if there is missing (perhaps by necessity) the definition of what objectivity and impartiality

163 Kernová, 'Rozhlas si dovolil kritizovať Gašparoviča' (n 154).
164 E-mail from Filip Domovec, Editor-in-Chief of the Radio Slovakia, on 18 September 2014.

of news reporting is meant to be, a very precise analysis of this news item and the notion of impartiality and objectivity should be available. Were these actually available? We have seen quite a few rather demanding but also rather general expectations above, with respect to objectivity (relevance, transparency, precision, completeness, factuality, balance, plurality, actuality / topicality, clarity, distance, and neutrality in the case of news reporting, lack of partiality—or perhaps rather absence of impartiality). Again, the RVR criticised, based on the discussion outlined above, the following issues as problematic: a) the absence of completeness; b) the presence of partiality, and missing distance and neutrality; c) the missing balance.

The question is how to define objectivity and impartiality in more details, and how to analyse them more carefully. We know there have been many attempts to define these issues in journalism. We also know that there is a group of scientists and practitioners (journalists) who argue that there is no such thing as objectivity and impartiality in social interaction in general, and in journalism in particular. Most of these scientists and many journalists (especially foreign correspondents) actually add that this worldview also makes (more) sense and contributes (more) to social good from a practical point of view. However, we cannot ignore the currently valid legal and ethical requirements. First, the most common approach would be to ask for the opinion of fellow senior journalists and/or media experts. We could call this approach 'fellows' judgment' and/or 'experts' judgment'. It is the most common sense approach, similar to the intellectual process used by the members of the RVR (who, however, mostly are not media experts or former journalists). Yet some of them—three members—actually were former radio journalists, or had some experience with working for the radio. We should note again that the members of the RVR ignored the more professional advice prepared by their Office.

The advantage of this methodological approach is that it considers local conditions and context and local standards / expectations. Therefore, we used this methodological approach (in addition to additional analysis). The disadvantage of this approach is that it usually offers common sense answers, without a deeper knowledge of other relevant issues such as media law, media ethics, media types, applied media standards, or perhaps most importantly, the context of the story.

The second most reasonable approach would be to check whether a particular news item was significantly different from the typical or standard news reporting of that particular news programme. This approach could be called 'following (local) standards'. Of course, standards can be low or high; they are not necessarily correct or follow an ideal broadcast quality. But if this news story would follow the usual approach used in news reporting, it could be questioned why the RVR has chosen to punish the broadcaster just because of this particular news report. Was it such a socially or politically significant case? Perhaps it was. One can certainly include nation-wide Journalist's Code of Ethics among the local standards. According to this Code, 'the key principles that a journalist follows in his/her work are impartiality, balance, objectivity, integrity, virtue, honesty, responsibility, and thorough verification of the facts.' Furthermore, 'Comments and opinions must be clearly indicated and differentiated from the information and facts.' However, the same Code underlines that: 'the primary values in journalistic work are the values of personal freedom, fairness, and decency. Journalists shall endeavour to enforce these values in society through their work.' In addition, considering that the RVR criticised the fact of not giving air-time to everyone

who had been mentioned in the news report, there is another relevant clause in the Code: 'Journalists must not write, speak, or view the facts about an individual in a way that would infringe upon the private life of the person concerned, without their consent; he/she may only do that when the public interest requires knowledge of the person's private life; journalists must not tarnish the good name, honour, and dignity of the person concerned, provided they themselves have not invoked suspicion of illegal conduct or of causing offence.'

There is also a regulation between law and ethics—an internal code of conduct. The RTVS, according to its internal document 'strictly differentiates between information of news-type (news report) and value based judgment (commentary). It is unacceptable to merge or to confuse the two programme types in broadcasting. A listener, viewer, or a user of communication technologies has the right to be informed in advance on whether the following programme or contribution offers news, or commentaries.'[165]

We must take it into account that the RVR assumed that the broadcast in question was not actually a news item. Therefore, we have to examine details of both aspects—the expectations related to news programmes and to current affairs programmes in the Programme Status of the RTVS. Thus, the first question in this part is—was the programme actually a news item according to the above stated definitions or expectations? Strictly speaking, news is usually, by definition, something new (or older news seen in a new context, or gaining a new relevance). However, there was little new in this particular news item except, and this is important, the summaries of the role of the President, who was coming to the end of his term, and that a campaign started (actually, it was unofficially in full speed already) before the Presidential elections. Indeed, newsworthiness is usually defined as a subject having sufficient relevance to the public or a special audience to warrant press attention or media coverage.

The answer to this question thus very much depends on the context and on what an observer sees as more important—the strictly defined impartiality of a particular news item or a broader public mission of journalism. Both goals have a strong legal and ethical basis, but the ethical dimension of journalism in Slovakia (and in Europe in general) seem to focus (explicitly or implicitly) on the social mission of journalism. This item was broadcast just a few days before the official election campaign began (28 February 2014) before Presidential elections (which had two rounds, the first one held on 15 March 2014, the second on 29 March 2014) as part of a series on the rights and responsibilities of the President. Presidential elections in Slovakia are direct—based on a nation-wide popular vote. The President has significant constitutional rights; it is therefore important to select the proper candidate for this job. From this point of view, broader context of the report was both useful and necessary.

The second, follow-up question would be whether it was a common type of news items, or items presented as news, in this type of programme? We can answer this with more certainty—indeed, this is what a listener could expect to find in the main news programme of the Slovak Radio. It is also a requirement that '[n]ews reports must be verified at least from two trustworthy and mutually independent sources, with the exception of information provided by official state and public authorities.' This is easy to answer—the news report did use two trustworthy and mutually independent sources. 'The RTVS is obliged to offer

165 Programme Status. Štatút programových pracovníkov a spolupracovníkov Rozhlasu a televízie Slovenska (2011), 8–9, http://cdn.srv.rtvs.sk/a542/file/item/sk/0000/statut-programovych-pracovnikov-a-spolupracovnikov-rtvs.52.pdf.

a factually precise and not misleading picture of reality. In the case, it is impossible to get information from all interested parties, the RTVS must follow an approach that will allow coming as close as possible to the reality.' Was this information as close as possible to the reality? It seems so, based on the additional evidence presented thus far in this article.

It is, of course, questionable whether we should stay with the criteria used for current affairs programmes in this analysis, considering that the news item was broadcast in a news programme. Current affairs programmes are understood in Slovakia as usually longer programmes which include discussion mostly about political and social issues. Thus, if this news item did not fit into a news programme, would it fit into current affairs programme? The Programme Status has the following expectations in this regard: 'The current affairs programmes (*publicistické programy*) of RTVS offer a critical reflection on reality. These programmes must at the same time consider (*zohľadniť*) the real pre-conditions (*reálne predpoklady*), the causes, the development of events as well as their results, and the importance and impact of the consequences for the public.' It seems unambiguous that the controversial news item fulfils the above mentioned expectations. In addition, the Programme Status expects that '[i]n the current affairs programmes all known and accessible interested parties (*zainteresované strany*) get space for argumentation and the justification (*zdôvodnenie*) of their positions (*postojov*). The parties that are not accessible (*nedostupné zainteresované*) must be mentioned in the programme, and the reasons for their involvement as well as their known attitudes (postoje) must be made public.' These expectations were only partly met. Yet, as mentioned, these expectations are related to longer discussion programmes.

Indeed, the CC argued in a similar case (Case No 1: 6 Sžo 527/2009) that: 'it is impossible to assess the individual expressions of the commentators in that type of programme because it is necessary to assess them in the context of the whole programme.' Furthermore, the CC stated that the RVR 'must also create clear guidelines for further work. This includes stating clearly how to deal with this particular type of programme also (*jasné pravidlá pre ním riešený typ programu*, see more in Rs 55/2003). Finally, the CC did not understand 'how it would be possible to include feedback from all involved parties (*zaradiť reakciu dotknutých predstaviteľov*) (members of governments, political parties, international organisations, associations, MPs, and the PM) in a broadcast programme of this type (*Z prvej ruky*), and how the presence of these contributions could be guaranteed by the broadcaster.' Yet we do have the court's case 2 Sžo 73/2010 (final verdict of 20 October 2010) which presents the opposite view. The broadcaster was supposed to give room to present an opinion of a representative of the coalition. This was seen as crucial by the RVR and the RC, as well as the SC. Clearly, as mentioned, there was disagreement on this important conceptual normative-legal issue among the judiciary too.

The third approach would be to look at news standards abroad. This could be called 'international comparison'. This approach could guarantee some international comparison, thus providing international standards. Obviously, it is enough if a single person presents the relevant arguments questioning the professional-ethical aspect of this news story. In other words, we can rely on falsifiability or refutability as a method.

vi. Fellows' Judgment and/or Experts' Judgment

Therefore, we have contacted a number of journalists, media experts, and media institutions (journalism schools and organisations of journalists) in order to get their opinion on this case.

We have shown them only the transcript of the news story. We have categorised their answers into three groups: a) grave problem; b) some doubts; d) no problem; d) no answer or no opinion.

a. Grave Problems

There were two opinions of this type. Filin expressed his criticism of the news item in the following way:

> In my view, this item is too biased and sensationalized (partially also of a virtual type), from the view of the mission of the PSM. This type of news item should not be included into programme. I can imagine such item in a private radio or private, politically engaged medium, such as the case of Radio Twist. However, this type of news item does not belong to PSM which has its mission defined by a relatively broad social consensus (it should have objective news reporting and quality current affairs programmes). Therefore, the objection that the separation of opinion and news items is missing is correct, and this really reflects the key problem of the issue. This was probably the only information of this type in that particular news and current affairs programme. If this was the case, then this news item did not fulfil its purpose. There was no substantial description of an event about which this news was supposed to inform listeners. The journalist selected, based on its political preference, a certain negative aspect, which was elaborated further, amplified and put into frontal position. This approach could be seen as OK, in a different context, perhaps in other medium (eg, at opinionated webpage) or in a current affairs programme with the motto 'Our comments'. The fact that the news item was also broadcast is not the responsibility of the journalist, but that of the editor. In other words, it is institutional failure. The listener might be more interested which known 'non-controversial' personalities did get awards. The factor of controversy would justifiably be the key issue of an article in the case of this item, eg, if the President would have awarded a person the type of Marian Kotleba. In the case of Šedivý, this is not about a generally, morally disqualified person (if it were so, why would he not be more publicly known?).
>
> Speculations that Eva Kristínová provides entertainment at 'extremist meetings' or that the author Bob is criticised by fellow historians do not belong to the main news programme of Slovak Radio. When the President decides to give a state award to Erich von Däniken, the same arguments could be used, but would it have any normative value?
>
> The fact that the Office of the President was given space to comment does not solve two problems. First, it does not influence the biased and selective approach towards the presented facts. Second, we do not actually know what the Spokesperson commented upon. The Spokesperson has not distanced himself from claims about so called 'names with questionable past' anywhere. The broadcast words could be received as an answer to a simple question—what are criteria for getting state awards? (Personally, I suspect that the journalist did not tell the Spokesperson that he intends to present the specific names of the 'controversial personalities'—this could be seen partially from unabridged recordings). My opinion is thus rather unambiguous. The question remains what could a proper corrective measure be to prevent similar excesses in the PSM. I think that first of all, the editors should know the criteria and the limits affiliated with the public service.

Jari Väliverronen, from the University of Tampere, Finland, wrote that

> The RTVS report on the honours awarded by President Ivan Gašparovič shows a couple of practices that appear at least questionable, maybe even unethical to a Finnish reader. It strikes me first that the list of the award-winning people considered to have a questionable past is very unclear. The grounds given in the story for including people on the list are quite varying in quality, to put it mildly. To a foreign reader, it seems odd to include in the list an author (Jozef Bob) on the grounds that he has written works that are 'questioned by historians', or a sculptor (Tibor Bártfay) who has created the statue of a former Communist president.
> The fuzziness in the story increases as I notice in the story that the law on conferring state awards was changed in 2008 and made stricter with regard to the awarding criteria. However, the pre-2008 rules for awards are not mentioned, and with the exception of Ondrej Šedivý and Ján Slota (who both received their awards before the law was amended), we do not know when the people mentioned in the story were given their medals. Thus, on the basis of the story it is impossible to make any solid judgment about the main question presented in the story: have the people responsible done the right thing in awarding these people the medals?
> The implication in the story is that some (at least moral) transgressions have been made by those in authority—mostly by President Gašparovič, who is presented as the biggest culprit. Interestingly enough, he does not appear in the story to defend himself. As audiences, we do not know if he was contacted at all, if he was unavailable, or declined to comment. In Finland, it would be standard journalistic practice to mention in the story that the person criticized has been at least contacted to give him a chance to present his views. If there was no contact, the story could be published, but the President would still have a right of reply. Such a policy would seem appropriate here too - whether it has actually been followed I do not know.
> As such, the story is vague and inaccurate and fails to generate a sense of impartiality, which is especially interesting in the case of a public service media, where impartiality in political reporting is usually placed high on the agenda.

b. Some Doubts

Beata Klimkiewicz from the Institute of Journalism and Social Communication of the Jagiellonian University in Kraków (a Slovak native speaker) wrote:

> The news item selected from the news programme *Radiožurnál* focuses on the highest awards and honours given by the former Slovak President Gašparovič. The message of the whole item presents a critical stance summarizing that among many (altogether 362) honours and awards those that were assigned by the President to controversial figures. It seems just a right journalistic strategy to quote the President's Spokesperson to explain rationales and reasons that may justify the President's choices. The reporter then mentions one of the awarded persons—Ondrej Šedivý, a former colonel of the border control unit that was known for a number of death incidents during the communism. These data are then supported by a short record of the Chair of the Institute for National Memory. He asserted that 42 persons were killed on the territory controlled by the unit, however, none of the cases was brought to the court, thus the crime, even if documented by the Institute, was not judicially proved. Nevertheless, the investigative journalistic strategy seems

right in this case—the reporter was able to find an evidence of killings, and support a critical comment with the concrete data. In the case of some other 'controversial figures' honoured by the President's awards, this background seems missing. Although the case of Nursultan Nazarbajev is largely known, it would help ordinary listeners to get some short opinion from international organizations such as CoE, on eliminating the political opposition by the Kazakh leader. Likewise, the case of Eva Kristínova seems to need some further explanation—what extremist movements did the reporter mean? Are they legal in Slovakia? Also, the accusations of Jaroslav Chovanec should be explained in more detail—how serious are they? How many female students brought the case? Finally, the case of Jozef Bob, the author of books questioned by historians could be reported with one or two sentences devoted to controversies. Who is criticizing the author? What are the competencies of the person making the criticisms?
In sum: The news item certainly focuses on one of the crucial issues for the public opinion. The public should know who the President is awarding. The journalists are right to analyse controversies and ask questions, as it is the watchdog and investigative function of news reporters. In the case of the selected item, they carried out their mission in accordance with the standards of impartiality in some ways, however, some other ways (as mentioned above) they lacked the data and information to justify the critical stance. This might have stemmed from time pressure, but a slightly deeper background to the mentioned cases would certainly improve the quality of journalism and reporting.[166]

Cunningham, Reporter for *The Economist*:

I don't see the report as particularly ethically flawed, but I do see it as rather poor journalism. The journalist quotes the President's Spokesman, but not in a way that appears to be commenting on the actual content of the report. In other words, the tone of the report is that Gašparovič is awarding state honours to people he perhaps should not. However, the Spokesman never really responds to this allegation. Instead, the quotes are just bureaucratic language about the purpose of the awards, etc. Perhaps the president's office declined to respond to accusations that the recipients were controversial or not deserving, but then the report should have said this more clearly... 'We asked the president's office to explain why they awarded the president of Kazahkstan, and they declined to comment.' As it stands now, the report basically accuses the president of awarding unfit people, quotes an outside opinion supporting this view, but never actually confronts the president's office about whether these were valid choices—which seems the entire point of doing a report like this.[167]

Martin Gonda media analyst perceived a term 'controversial personalities' in the expression of the Editor of RTVS as commentative feature in the news reporting. According to him, a better and equally illustrating term would be to use 'disputable personalities' (*'sporných osobností'*) about 'whom it is being said that they are controversial personalities'.[168]

166 E-mail from Beata Klimkiewicz on 20 September 2014.
167 E-mails from Ben Cunningham on 9 December 2014.
168 E-mail from Martin Gonda on 18 September 2014.

c. No Problem

Pavol Múdry, Chair of the International Press Institute Slovensko and former Director of private wire agency SITA argued: 'This news report is absolutely OK. The Council for Broadcasting and Retransmission is not competent to assess the content of news reports and their quality. Furthermore, it is a political body, considering that its members are elected by a political institution, the Parliament.'[169]

d. No Answer / No Opinion

No opinion: Zuzana Šangalová, Secretary of Association of Independent Radio and Television Stations.[170]

No answer: As expected, the majority of institutions and individuals we approached did not answer our call. This was the case of all three journalistic organisations in Slovakia (Slovak Syndicate of Journalists, Slovak Section of Association of European Journalists (AEJ), and Slovak Association of Journalists). In the case of the Slovak Section of AEJ, this is perhaps understandable considering that their leaders actually work for the PSM. However, one would perhaps expect that at least academic institutions such as the Department of Journalism at Comenius University or the Catholic University respectively, or both Faculties of media / mass media communication at the Paneuropean University in Bratislava or UCM in Trnava would be interested in this issue. Unfortunately, this was not the case either.

F. Conclusion

There is a significant ongoing discussion among media professionals regarding the meaning of balanced reporting, impartiality, and similar concepts. Yet there still is a place for impartial and balanced reporting in the PSM under normal circumstances, and especially in domestic news.

We should differentiate between news on the one hand, and current affairs programmes on the other. Furthermore, we should also differentiate between domestic news and international news. While domestic news should be, especially in PSM programmes, very impartial and balanced, not that different from wire agency reports, current affairs programmes can be less balanced (it is sufficient if they are balanced in general in a series broadcasts), but at the same time 'due impartiality is of special importance in major matters of controversy' (see, *Benchmarks for the Operation of Public Broadcasters in the Republic of Moldova*). Of course, clear bias should not be present in various forms (*Sigma Radio Television Ltd. v Cyprus*). However, demanding absolute balance in a sense, ignoring 'empty chair' rule, would be in contradiction to established principles. Here again, the ECtHR clearly noted: 'A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions

169 E-mail from Pavol Múdry on 18 September 2014.
170 E-mail from Zuzana Šangalová on 18 September 2014.

and ideas' (*Thoma v Luxembourg*, App No 38432/97). However, we can also appreciate that measures taken by the RVR (in most cases 'warnings') probably did not 'dissuade the media from taking part in the discussion of matters of public interest' (Österreichischer Rundfunk v Austria). Still, foreign or international reporting seems to be a special case, where principles of balance and impartiality are practically impossible to follow. Here it can be argued that the RVR was clearly wrong in its standard-setting function. The above findings also suggest some general conclusions. First, there seems to be relatively low use of foreign examples—verdicts of foreign and international courts in the decision of Slovak administrative law senates in media regulatory issues (with some exceptions, eg, 2 Sž 3/2012—*Cervanová* case). This fact may not in itself suggest low quality of verdicts, but still, it is indicative of missing wider international context. As one could expect, these used examples are mostly coming from CoE, especially ECtHR, and sometimes from the Czech Republic.

Second, we have noticed many contradictory verdicts even among the various senates of the SC in the period of 2007–2012. Obviously, this was especially confusing for the RVR and broadcasters.

Third, the legal argumentation used by the courts sometimes seems to be low quality (again, with some exceptions, eg, 2 Sž/3/2012—*Cervanová* case). This is probably related to the quality of education of some judges (and lawyers in general). These problems can be seen as a broader or a narrower issue. The relatively minor problem is that judges do not have sufficient level of understanding of how media operate. This is understandable, considering that judges must deal with different regulatory issues related to administrative law. This could perhaps be fixed with some short-term education in media matters. The broader problem is that judges often apply the law very narrowly. They are often missing the 'deeper' meaning of the law. As it is known, the basis for Roman laws was the idea that the exact form—not the intention—of words or of actions produced legal consequences. This still seems to be the case for many Slovak judges. This issue has also been recognised by some judges. For example, Judge Dušan Čimo, Member of the Judicial Council (self-governing body of judges) explicitly criticised 'marginalisation of value-based criteria' and 'decision-making based just on argument in line with valid law'.[171] Similarly, Judges Ivan Rumana and Alena Pauličková argue that the problem with formal legislation is that it often does not fit reality and is abstract. This issue has deeper causes and wider consequences.[172]

171 See, Z Petková, 'Krajina sa prebúdza. Aj súdy' *Trend*, 4 December 2014, 30–33.

172 I Rumana and A Pauličková 'Súdny precedens ako systémový prvok vo vymožiteľnosti správneho práva' S Ficová (ed), *Vymožiteľnosť práva v Slovenskej republike*, 45–46, http://www.ja-sr.sk/files/Zbornik%20Vymozitelnost%20prava%20v%20SR_oktober%202009.pdf.

Table 4

Judgment of the CC of Slovakia	References to domestic rulings of RCs	References to own rulings (CC)	References to other domestic courts (eg, CC)	References to international or foreign courts (ECtHR and others)	Decision of the RVR
6 Sžo 527/2009	3S/135/08-50—related to appeal to this case	4 Sž 27/02, 25 June 2002—definition of meaning of 'warning'			RL/35/2008 SC confirmed ruling of RC which cancelled ruling of RVR
5 Sžo 164/2010	3S/160/09-45—related to appeal to this case	4 Sž 27/02, 25 June 2002; 6 Sžo 390/2009, 18 August 2010; 6 Sžo 527/2009, 26 October 2010—definition meaning of 'warning'	IV. US 245/09—definition of meaning of 'warning'; conlusion of RVR are too vague and fuzzy (four times); list of Fundamental Rights and Freedoms and Article 26 of the Constitution	*Handyside v the UK* (App No 5493/72); *Sunday Times v UK* (App No 6538/74); *Lingens v Austria* (App No 9815/82); *Oberschlick v Austria No 1.*	RO/02/2009 RC rejects case, SC cancels ruling of RVR, RVR stopped further legal actioin
2 Sžo 73/2010	1S/15/2008-54—related to appeal to this case	3 Sž 11/2007, 31 May 2007—internal organisation of administrative affairs has no impact on deadlines; 2 Sžo 202/2008, 18 March 2009—confirms 1S/15/2008-54, 27 November 2007; 5 Sž 50/2007 and 5 Sž 55/2007—legal deadlines; 5 Sž 87/2007, 1 July 2008; 3 Sž 96/2008, 9 April 2009; 3 Sž 5/2009, 23 April 2009; 5 Sž 80/2008, 2 June 2009; 5 Sž 26/2009, 21 July 2009; 3 Sž 35/2009, 5 November 2009—first learnt about breaking the law when a complaint was delivered; 3 Sž 50/2007, 18 October 2007; 5 Sž 50/2007, 27 November 2007; 3 Sž 103/2007, 17 January 2008; 3 Sž 107/2007, 17 January 2008, and 3 Sž 108/2007, 17 January 2008—administrative deadline starts when the monitoring is submitted 5 Sž 30/2006, 28 September 2006; 1Sž/78/2005, 16 May 2007; 1Sž/79/2005, 19 December 2007, and 1Sž/21/2006, 19 December 2007—day when RVR discussed the report	IV. ÚS 245/09-42, 21 January 2010—abolishing NS 2 Sžo 202/2008—Fundamental right to judicial protection Article 46(1) of the Constitution; right to fair trial, Article 6(1) of ECHR, and right to disseminate information Article 26(2) of the Constitution, and right to freedom of expression Article 10(1) of the Covenant broken by NS 2 Sžo 202/2008 3 Sž 5/2009, 23 April 2009—different argumentation used in 5 Sž 50/2007 and 5 Sž 55/2007		RL/110/2007 RC dismissed case, SC confirms verdict of RC

8 Sžo 112/2010	4S/78/2008-43—related to appeal to this case			Municipal Court in Prague, 7Ca 315/07—missing identification of an issue	RL/128/2007 RC rejects the case, SC confirms verdict of the RC
3 Sžo /200/2010	1S/126/2009-52—related to appeal to this case				RL/18/2009 RC dismissed case, SC cancelled ruling of RVR and returns to RVR, RVR stops the case
6 Sžo112/2010	4S/49/2008-32 - related to appeal to this case			Municipal Court in Prague, 7Ca 315/07—missing identification of an issue	RL/132/2007 RC dismissed the case, SC confirms verdict of the RC
6 Sžo 390/2009	3S/16/2008-35—related to appeal to this case	Twice mentioned in 4 Sž 27/02, 25 June 2002—defining meaning of warning			RL/72/2007 RC rejects the case, SC cancels ruling of RVR and returns back, RVR stops further legal action
6 Sžo 55/2010 **(sponsored current affairs programme)**	1S/145/2008-39—related to appeal to this case	5 Sž 24/2008-45 17 March 2009, and 5 Sž 11/2008-37, 17 March 2009—not submitting materials for decision		Article 6(l) of the Covenant	RL/117/2007 RC dismissed the case, SC rejects ruling of RVR, and returns to RVR, RVR issued a new sanction; RL/49/2010—RC rejects the case and returns to RVR, RVR filed an appeal, SC has not decided yet
2 Sžo 202/2008	1S/15/2008-54—related to appeal to this case	5 Sž 50/2007 and 5 Sž 55/2007—legal deadlines			RL/110/2007 RC rejects the case, SC confirms the verdict of RC
(does not quite belong here) **8 Sž 7/2011-21**	2S/284/2010—repeated breaking the law but it has not been decided yet	2 Sž 8/2010; 5 Sž 94/2008; 3 Sž 33/2009; 8 Sž 4/2009; 3 Sž 63/2008; 5 Sž 7/2009—multiregional broadcast; 3 Sž 67/2008; 5 Sž 94/2008; 3 Sž 33/2009-25; 8 Sž 4/2009-21; 3 Sž 63/2008; 5 Sž 7/2009 and 3 Sž 67/2008—incomplete justification of decision; 3 Sž 4/2011, 10 March 2011—sanction for breaking the identical text of law			8 Sž 7/2011-21 Sponsorship of this type of programmes

3 Sžo 38/2011	1S/164/2010-51—related to appeal to this case	8 Sžo 112/2010, 20 October 2010—sufficient identification of breach; 6Sžf/20/2010, 6 Sžo 152/2010—rulings cancelled due to incorrect interpretation of law but without reasoning; 3 Sžo 200/2010, 8 October 2010, and 2 Sž 7/2010-21, 18 May 2011—insufficient identification of breach; 3 Sž p/5/2008, 23 July 2009; 2 Sžo 106/2007, 13 March 2008; 8 Sžo 28/2007, 6 March 2008—need to define a breach		Recommendation of the Council of Minister of CoE (91) 1, 13 February 1991, no double punishment	RL/26/2010 RC cancelled the ruling of RVR, SC confirmed the verdict of RC, RVR again issued sanction RL/15/2012—RC dismissed the case, verdict is valid
6 Sžo 31/2011	3S/141/2009-48—related to appeal to this case	3 Sžo 200/2010, 2 Sž 7/2010—insufficient identification of breach; 2 Sž 9/2010, 8 Sžo 112/2010, 6 Sžo 112/2010, 2 Sž 4/2009, 8 Sž 4/2010, 4 Sž 2/2010, 5 Sž 8/2010, 8 Sž 8/2010, 5 Sž 17/2010—insufficient identification of breach; 3 Sž n/68/2004, 3 Sž 85/2007, 8 Sžo 28/2007, 8 Sžo 147/2008—administrative law principles			RL/17/2009 RC dismissed the case, SC confirms the verdict of RC, RVR stops the case

4 Sžo 13/2012	3S/292/2010-55—related to appeal to this case	3 Sžo 200/2010, 8 October 2010; 2 Sž 7/2010, 18 May 2011; 5Cdo/126/2007, 30 August 2008—insufficient identification of breach, confusing; 2 Sžo 73/2010, 20 October 2010; 5 Sžo 28/2011, 29 September 2011—who is a legal body inside RVR; 3 Sžo 200/2010—impossibility to guarantee always raising voice of contradictory opinions; 8 Sžo 112/2010, 20 October 2010—sufficient identification of breach; 2 Sžo 73/2010, 20 October 2010—if a member of the Cabinet is nor present, a radio host should provide reaction; 3 Sž p/5/2008, 23 July 2009; 2 Sžo 106/2007, 13 March 2008; 8 Sžo 28/2007, 6 March 2008—a need to identify exactly the breach	IV. ÚS 197/2010—insufficient identification of breach	judgment of the Municipal Court in Prague, Czech Republic, 7Ca/315/07—sufficient identification of breach; Çetin and Others v Turkey, App Nos 40153/98 and 40160/98, Point 64	RL/33/2010 RC dismissed the case, SC confirms the verdict of RC, RVR stops the case

The data in the table suggest that there is only limited use of ECtHR judgments. The examples used are rather well-known. However, there are not cited ECtHR judgments which would tackle electronic / digital media directly, especially television or radio broadcast. For example, in many cases related to the balanced coverage, the relevant case of *Jersild v Denmark* would be cited, which deals with Denmark's Radio (the Danish Broadcasting Corporation broadcasts not only radio but also television programmes). The latter is known as a serious television programme intended for a well-informed audience, dealing with a wide range of social and political issues, including xenophobia, immigration, and refugees. This case goes back as far as the year 1985. Probably the most important legal sentence still relevant today is the following one:

> 35. News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of a 'public watchdog' . . . The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to the discussion of matters of public interest, and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.

In the Slovak case, about half of the controversies were related to the balanced coverage of similar current affairs programmes of the Slovak Radio. However, not only was the case of *Jersild v Denmark* not used, none of the cases we have identified (about two thirds of 35 cases of the ECtHR that contained words 'broadcast media' and 'balanced coverage' were relevant to our study) have been used in judgments by either the RC or the SC in regulatory cases. There is an opinion that *Jersild* was a unique case, still a controversial one, and related to criminal proceedings of a Danish journalist. In Slovak cases, there are administrative procedures and sanctions used with relatively mild consequences ('warning').

The Council for Broadcasting and Retransmission, and especially the SC, settled various details related to the formal-administrative (see, eg, SC 4 Sžo 13/2012) and the substantial-content related parts of sanctions approximately in the period of 2007–2012. In other words, the relevant case law in issues related to balanced coverage was far from fixed, and especially the formal legal-administrative rules, related to formal features of sanctions, seemed to be imperfect by the SC and especially by the CC. This lack of precision in the argumentation used by the RVR was often a ground for the formal reason of the SC to dismiss and return the case to further administrative-legal action to the RVR or a lower (regional) court. Another issue was the content of rulings issued either by the RC or by the SC. Here too, contradiction rather than consistency in verdicts issued by the SC senates was the norm. Only the RVR seemed to be consistent in its reasons for giving sanctions, constantly demanding to give voice to all sides of the debate.

Sometimes, however, this was perhaps too perfectionist an aim. For example, the RVR stated that the public radio was supposed to give voice to members of the Orchestra (in addition to the conductor), as the other part of a story, when news appeared—as of yet unconfirmed—about firing some 25 members of the public radio ensemble. Some issues clearly deserved more public discussion and criticism, as it was in the case of the controversial awards issued by the President Gašparovič, but it should be done in a current affairs programme, and not in news programmes.

Furthermore, foreign news reporting cannot be put on equal level with domestic news with regards to the objectivity / impartiality of a particular news item. This is related to the controversial one day reporting on Russian invasion to Crimea. Most often, in the focus of balanced coverage and missing impartiality issues was the public service radio, Slovak Radio, especially its current affairs programme *Z prvej ruky*. The occasional problem with impartiality and objectivity in television news and current affairs programmes (especially of commercial televisions) was only secondary.

Rather important is the ruling of the SC 2 Sžo 73/2010. This ruling has three significant points. First, the SC *de facto* ignored the legally binding opinion of the CC. The Supreme Court issued a new verdict, in which it dealt with the ruling of the CC. However, actually, the SC *de facto* ignored the core of the ruling of the CC (2 Sžo 73/2010, 7–8) and issued in a verdict identical in its core, against the wishes and arguments of the CC. This was actually not the first time. It seems that the SC *de facto* pays lip service to the law as far as the position of the CC is concerned. It is also true that the CC criticised (IV. ÚS 245/09-42, 21 January 2010) the more formal, legal aspects of the problematic ruling of the SC (2 Sžo 202/2008, 18 March 2009). However, the CC had suggested a more liberal approach to that particular case. Yet it should be noted here that the CC (IV. ÚS 245/09-42, 21 January 2010) had, at first, also dealt with an institution of 'empty chair' in a more serious way. Clearly, this was the key issue in current affairs programmes.

The Constitutional Court also dealt with inconsistencies in its previous rulings related to the administrative issue. The issue arose when legal deadlines were set up for issuing a verdict by the RVR. This is an administrative but legally important issue. The plaintiff can argue that the RVR missed the deadline. Until this ruling, there were three different opinions of the various senates of the SC on this issue. In the first group of rulings by the SC (5 Sž 87/2007, 1 July 2008; 3 Sž 96/2008, 9 April 2009; 3 Sž 5/2009, 23 April 2009; 5 Sž 80/2008, 2 June 2009; 5 Sž 26/2009, 21 July 2009, and 3 Sž 35/2009, 5 November 2009), the SC argued that the first objective possibility when the RVR could learn about a breach of law was at the day when it received a complaint. These rulings also claimed that it is only an internal administrative issue of the Office and the RVR when they deal with validity of a complaint and when a complaint is elaborated and submitted to the RVR to make a decision (*kedy je dôvodnosť sťažnosti preverená a spracované zistenia predložené rade na prerokovanie*).

In the second group of legal opinions, the SC ruled that administrative deadlines for the RVR's decision-making is the day when the monitoring report is finished, or when the assessment report of a complaint is ready (3 Sž 50/2007, 18 October 2007; 5 Sž 50/2007, 27 November 2007; 3 Sž 103/2007, 17 January 2008; 3 Sž 107/2007, 17 January 2008, and 3 Sž 108/2007, 17 January 2008).

In the third group of legal opinions, the SC argued that the deadlines are related to the time when the RVR approved a report on a complaint or the monitoring of a complaint. In other words, these would be the days when the RVR learnt about the possible breach of law (5 Sž 30/2006, 28 September 2006; 1 Sž 78/2005, 16 May 2007; 1 Sž 79/2005, 19 December 2007, and 1 Sž 21/2006, 19 December 2007). This third legal opinion accepted the SC as its unified legal opinion. The Supreme Court argued (2 Sžo 73/2010) that the RVR is not a body of state administration in traditional sense but a state organ *sui generis*. The legally valid decision of the RVR is created by the nine-member collective body (*prejavom vôle)*. Furthermore, argued the RVR, considering that being a member of the RVR is a public position (*verejnou funkciou*),

and the members, with the exception of the Chairperson) can perform their tasks in addition to their regular jobs, it comes as natural that members of the RVR cannot be continuously present in the seat of the RVR (similarly to other state organs). The Council for Broadcasting and Retransmission held its meetings twice a month. Therefore, the RVR (the Board) can learn about certain issues (including possible breach of the law) at these meetings. One could argue that this is a somewhat outdated approach when everybody uses and checks its e-mail every day. Be that as it may, the SC furthermore argued that the will of the board of the RVR can be formed only at the meeting. This seems to be a more reasonable and persuasive argument.

Third, the SC was criticised by the CC (cited in the ruling SC 2 Sžo 73/2010) that its case law is inconsistent in a substantial (not administrative) matter. The Supreme Court had to accept criticism in that particular case related to the objectivity and impartiality of a broadcast. In particular, the CC argued that, despite arguing otherwise, the SC did not in fact unify its contradictory case law as far as the concept of impartiality and objectivity is concerned in similar cases (5 Sž 50/2007 and 5 Sž 55/2007, 27 November 2007; 2 Sžo 202/2008, 18 March 2009; VS 3 Sž 5/2009, 23 April 2009). In this ruling (2 Sžo 73/2010), the SC actually adopted a more restrictive approach to impartiality and balance in current affairs programmes. This could be seen in the ruling of the CC 2 Sžo 73/2010, 7. Perhaps ironically, the SC again issued a more liberal verdict in another ruling in the same year (3 Sžo 200/2010), related to the same programme. This can be seen in ruling 3 Sžo 200/2010, 7. Yet it is true that the major part of argumentation used by the SC against the decision of the RC was more of formal type. In particular, the SC argued that the exact description of 'the way' the law had been broken was missing, as well as an exact 'part of the programme' which was seen as problematic either by the RVR or the RC.

VIII. Commercial Communications

Advertising is naturally the main source of income for the commercial television and radio stations in Slovakia. It is also not negligible, albeit neither considerable, source of income for the PSM which is mainly financed from the general broadcasting fee. This part of the study will deal with individual types of commercial communication recognized by the Slovak electronic media legislation and its regulation. It is important topic considering that commercial communications is the most frequent subject of complaints by regular viewers to the RVR.[173] It should be mentioned here that the ECtHR holds that States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising (see *Markt Intern Verlag GmbH and Klaus Beermann v Germany*, 20 November 1989, § 33, Series A No 165, and *Casado Coca v Spain*, 24 February 1994, § 50, Series A No 285A).

A. Media Commercial Communication

The concept of media commercial communication was introduced into the Slovak legal system during the implementation of AVMSD. It is the equivalent of AVMSD's audiovisual commercial communication, with the word 'audiovisual' replaced by 'media' due to the

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fact that in BA this concept incorporates also various types of commercial communication in radio broadcasting, and word 'audiovisual' was not deemed suitable. This also means that media commercial communication is in this sense wider in scope then its AVMSD counterpart. Apart from this, the concept closely follows AVMSD in its design.

Paragraph 31a(1) of the BA defines Media commercial communication as follows:

> For the purposes of this act, media commercial communication shall mean information in sound, pictures or audiovisual presentation designed to promote, directly or indirectly, the goods, services or reputation of a natural person or legal entity pursuing an economic activity and which
> a) is provided as a part of a programme or accompanies a programme in return for payment or for similar consideration or for self-promotional purposes or
> b) is a programme service intended exclusively for advertising and teleshopping or a programme service intended exclusively for self-promotion.

The explicit mentioning of programme service as a whole is the consequence of not incorporating the concept of audiovisual media service into Slovak media law. The definition of audiovisual media service in AVMSD has a well-known intrinsic problem in relation to the audiovisual commercial communication in its core, where the latter is defined as a part of the former, but can be also the former itself. To avoid this logical problem (part of the set cannot also be the set itself) the definition of audiovisual media service was not transposed into Slovak legal system; therefore, there are only separate definitions of broadcasting (ie, linear audiovisual media service) and audiovisual media service on demand (ie, non-linear audiovisual media service) without the higher umbrella term encompassing them.

Paragraph 31a(2) of the BA adds to the definition demonstrative enumeration of the commercial communications that are enclosed by the above-mentioned definition: 'Media commercial communication includes particularly advertising, teleshopping, sponsorship, product placement, programme service intended exclusively for advertising and teleshopping, programme service intended exclusively for self-promotion and longer advertising messages under Section 35(8).' These are the same as commercial communications mentioned in AVMSD definition of audiovisual commercial communication, apart from the last one—the longer advertising messages—which is Slovak distinctive commercial communication type usable only in radio broadcasts (see below). The demonstrative character of the enumeration means of course that the scope of the definition of the commercial communication is not limited to the types mentioned in the quoted paragraph. The rationale of this open approach is the same as in AVMSD—to provide for the new types of commercial communication being regulated in the same or similar way the existing ones already are. There is, however, no commercial communication currently being used in Slovak electronic media that is not enumerated in the above mentioned provision.

All commercial communication must be clearly distinguishable from other parts of media services. This basic requirement for transparency in use of commercial elements in electronic media, as will be seen below, is further elaborated in the BA provisions laying down specific rules for different types of media commercial communication. It is worth mentioning that the principle of separation of commercial content from editorial programming generally was always deemed supreme in Slovak media law, and the rules dealing with it were quite strict both in wording and their application by the regulator. The application of the principle, however,

was eased during the implementation of the AVMSD not only by introduction of the product placement, where the strict adherence to the principle of separation is impossible, but also by reducing the strictness of other requirements aimed at recognisability of commercial content.

Other requirements for commercial communication (Paragraphs 31a(7)–(11) of the BA) are in line with those in AVMSD. Those applicable for all commercial communication (Paragraph 31a(7) of the BA) prohibit to

- prejudice freedom and equality in dignity and human rights;
- contain or support discrimination based on sex, race, skin colour, age, language, sexual orientation, disability, religion or belief, national or social origin or membership of a nationality or ethnic group;
- encourage behaviour that is harmful to or endangers health or safety;
- encourage behaviour that is grossly prejudicial to the environment.

Media commercial communication promoting cigarettes and other tobacco products is prohibited altogether. The explicit prohibition of evasion of this rule through the use of brand names, trademarks, emblems or other recognizable marks of these products (Paragraph 31a(8) of the BA) goes beyond AVMSD requirement. The same goes for media commercial communication promoting medicine products available only on prescription and medical treatments paid from public health insurance (Paragraph 31a(10) of the BA). For media commercial communications promoting alcoholic beverages the BA rules (Paragraph 31a(9) of the BA) that it a) must not be aimed at minors; b) must not encourage immoderate consumption of alcoholic beverages.

In relation to minors (Paragraph 31a(11) of the BA), the broadcaster and the provider of an on-demand audiovisual media service is obliged to ensure that media commercial communication does not cause physical or moral detriment to minors and therefore media commercial communication must not

- directly encourage minors to purchase or hire a product or service by exploiting their inexperience or credulity;
- directly encourage minors to persuade their parents or other persons to purchase the goods or services being advertised;
- exploit the special trust that minors place in parents, teachers, or other persons, or
- unreasonably show minors in dangerous situations.

B. Subliminal Commercial Communication

Subliminal advertising has been banned in Slovak media law from the outset of its post-communist era. In the recent legislation it is banned from use in broadcasting or audiovisual services on-demand, in line with AVMSD, by Paragraph 31a(6) of the BA, however without further elaboration on what constitutes subliminal commercial communication. Indirect definition can be found in the Advertising Act, which in the Paragraph 3(1)g stipulates that advertising cannot exploit sensory perception in a way that influences memory of an individual without his realization. This is in line with the general understanding of how subliminal advertising techniques work, and why it is important to protect consumers from their influence. This perception of subliminal advertising is nevertheless merely putative, as there is no known research that would prove this assumption. Even the presupposed impact of subliminal

techniques is, however, considered dangerous enough to justify absolute ban of this technique in the media. Unsurprisingly, under the circumstances, there are indeed no cases involving subliminal commercial communication use in Slovak media environment on record.

C. Surreptitious Commercial Communication

Surreptitious advertising is another advertising technique that is entirely banned in AVMSD and the BA, albeit the track record of the legal cases involving its use is much richer then the previous one. Its definition in BA (Paragraph 31a(3)) is very similar to the one in AVMSD (Article 1(1)j): 'Surreptitious media commercial communication is information in sound, pictures, or audiovisual presentation promoting, directly or indirectly, the goods, services, a trade mark, business name, or activities of a natural person or legal entity pursuing an economic activity that a broadcaster or a provider of on-demand audiovisual media services intentionally includes in a programme for a promotional purposes in a way that might mislead the public about the nature of the information. Such information shall, in particular, be considered as intentional if it is broadcasted or provided in return for payment or for similar consideration.'

Surreptitious commercial communication is a new term for what has been previously, ie, before the AVMSD implementation, known as surreptitious advertising. Although only rather cosmetic changes were made to the actual wording of the definition of this technique, the question arose before the regulator and the courts in various times, whether the new definition constitutes the same legal instrument as the old one. As was stated previously in this study, the older sanctions imposed on the broadcasters or other subjects of the regulation may influence the later cases and the form and severity of the punishment for the subsequent breaches of the law. The problem of the sameness of the surreptitious commercial communication with its previous wording under the term surreptitious advertising was therefore not negligible. The Supreme Court eventually resolved the dispute by decreeing that indeed for all legal purposes the surreptitious commercial communication is still the same legal instrument as surreptitious advertising (3 Sž 18/2010-31).

When examining a programme for surreptitious commercial elements, the RVR is looking for five criteria that constitute its definition and that have to be cumulatively fulfilled in order to establish the case of surreptitious commercial communication:

(1) information in sound, pictures, or audiovisual presentation;
(2) directly or indirectly promoting the goods, services, a trade mark, business name, or activities of a natural person or legal entity pursuing an economic activity;
(3) in a programme;
(4) intentionally used for promotional purposes;
(5) in a way that might mislead the public about the nature of the information.

Surreptitious commercial communication has to include information that marks a product of a subject pursuing an economic activity. Denoting of the product or activity may be direct (name or logo) or indirect (various visual components or use of the slogan). The information has to simultaneously fulfil the promotional function. Before the implementation of AVMSD, the old definition of surreptitious advertising, replaced by surreptitious commercial communication by the implementation, did not contain the element of direct/indirect promotion. The same function was fulfilled by wording 'advertising purpose' which

remained in the definition as '*promotional purposes*' in the fourth criterion mentioned above. The promotional function of the information as elements of surreptitious commercial communication in its second and fourth criterions aims at the same point, and thus is generally treated as one. In its past decisions the RVR, eg, considered the advertising purpose to be fulfilled when there was positive qualitative assessment of the product involved. This approach of the RVR was approved by the courts on various occasions and there does not seem to be any indication of change in this practice for future even when the term 'advertising purpose' was changed to 'promotional'.

According to the third criterion, the promotional information has to be incorporated in a programme. It means that it has to be an integral part of it, and it is therefore not sufficient that such information intercepts the programme or runs parallel to it (eg, in split-screen). This element sets apart surreptitious commercial communication from wrongly labelled or undistinguishable vertising (see below).

The criterion of intentionality is a bit more problematic as it refers to subjective motivations of the provider of the audiovisual media service, which always puts the regulator in a difficult situation in the process of collecting the evidence. It has been long established in the judicial practice, however, that if the programme is editorially prepared in advance, and its content is promotional in nature, the intention of the broadcaster to include the promotional information into the programme is presumed. Although this practice was developed in the context of surreptitious advertising, it was accepted by the SC also for the application of surreptitious media commercial communication (6 Sž 19/2010). Simultaneously, this approach is in compliance with the view of EC on the question of intentionality of surreptitious advertising presented in its Interpretative Communication on Certain Aspects of the Provisions on Televised Advertising in the TWFD, according to which for distinguishing of surreptitious advertising from lawful inclusion of information about products, etc. EC considers appropriate to apply criterion of 'undue prominence'. 'The undue nature may result from the recurring presence of the brand, good or service in question or from the manner in which it is presented and appear.'

The essence of the criterion of misleading the public about the nature of the information lies in its inclusion into the programme in a way that viewer cannot anticipate. It generally means that the commercial information is inserted in the programme, character of which is presented as other then promotional and the viewer is not informed about the advertising nature of its content.

There is also an additional element in the definition of surreptitious commercial communication inscribed in its last sentence, which stipulates that the information is to be considered intentional, in particular, if there is some kind of payment or similar consideration involved. Nevertheless, this criterion is not essential for the case of surreptitious commercial communication to be established and indeed the RVR has little competence to prove the realization of such a payment in majority of cases. In the case of surreptitious commercial communication in the form of self-promotion of another programme, however, the RVR usually recognizes the reward for the broadcaster stemming out of the use of this advertising technique for potential increase in the audience share.

i. Surreptitious Advertising in the News Program—Case Study

The above-mentioned approach of the RVR and the SC in regard to examining the criteria for surreptitious advertising can be illustrated by one of the most recent cases that, rather interestingly, goes back to 2012. On 15 July 2012, the major Slovak broadcaster TV Markíza aired within its main evening news program an item under the heading 'They relax and make money' (*Oddychujú a zarábajú*). Among other things, the item mentioned a website / agency through which young girls can find work as strip dancers in various exotic destinations. The reporter introduced the person running the agency: 'This is Andy. Every year, he sends tens of Slovak women abroad, and says that in the Summer, the interest in them is at its highest.' Then the reporter went on characterizing their motivations: 'To Cyprus, Mexico, or Caribbean, they rush to bring home decent amount of money and have a good relax along that.' The man called Andy said: 'The girls are free all day. They can spend the day like ordinary tourists, relaxing on the beach, sleeping their fill after the night shift, because, of course, the work in dancing clubs is a night-time job.' While Andy was speaking, he was identified on the screen in writing: 'Andy, owner of the tancovanie.eu' ('tancovanie' means dancing in Slovak). Then the reporter said that the girls can earn 'very decent money' while Andy concluded: 'Girls who do not get along with the dancing that much . . . let us say, 2000 or 2,500 euro, and girls, who really feel good about the work, they bring back 5-6-7 thousand euro a month.'

On 29 September, the RVR initiated the administrative procedure on potential surreptitious advertising concerning the alleged promotion of the abovementioned website tancovanie.eu in the news program. In its reaction during the procedure, the broadcaster stated that the item was purely informative in its nature. Its purpose, according to the broadcaster, was to inform about the fact that many young girls leave Slovakia seeking a job abroad, and that the job in this case is not of ordinary nature—the job of a stripper. The name of the agency, it further added, was mentioned only marginally, only once, and only for the purpose of denoting the respondent.

On 18 December 2012, the RVR issued its decision in the case (RP 087/2012), in which it fined the broadcaster with 10,000 euro for breaching the Paragraph 31a(4) of the BA that prohibits the use of surreptitious advertising. In the reasoning of the decision, the RVR analysed five criteria that comprise the definition of surreptitious advertising (see above) with following results. First (information) and third (in a program) criteria were undisputedly there. The item clearly denoted the agency, and the information was part of the program. As to the second criterion (promotion of goods, services, etc.), the RVR, referring to its case law and the case law of the Slovak SC, stated that the information is to be deemed promotional when (*inter alia*) it positively assesses the product or service under discussion. In this case, the RVR identified several positive assessments of various aspects of the jobs provided by the agency, eg, the girls can relax, they can earn substantial amount of money, they have free days, etc. The Council for Broadcasting and Retransmission concluded that this information was indeed promotional in character. For the fourth criterion (intentionality), the RVR again referred to established case-law of the SC, according to which the information is deemed to be intentionally used for promotional purposes if the program is prepared in advance, and the broadcaster thus cannot claim that inclusion of these information into the broadcast was inadvertent. Although the news program was aired live, the individual news-items were

pre-recorded, including one under scrutiny, and thus fourth criterion was, according to the RVR, fulfilled. The fifth criterion (misleading nature) was also considered fulfilled by the RVR, because the promotional information was included in the news-program where such information cannot be expected by the viewers.

The broadcaster appealed against the RVR's decision to the SC. The broadcaster mainly claimed that the information was not promotional as there was no payment by the agency involved and allegedly promoted in the news-item, and thus the intentionality of the inclusion of supposedly promotional information into the program cannot be established. The Supreme Court upheld the decision of the RVR. It stated that the intention is not connected to the remuneration, but rather, to the final effect achieved. Thus, if the execution of the program is promotional in its effect, the broadcaster cannot claim that it could not know or did not know about its content. An eventual remuneration may be an additional proof of the promotional intent of the broadcaster, the absence of the payment, however, does not serve as a proof to the contrary.

This is the last case of surreptitious advertising the RVR, and subsequently the SC was dealing with to date. While it proved the willingness of both institutions to cling to the well-established case law to a tee, the sheer fact that there were no further cases of surreptitious advertising is intriguing. It may, of course, indicate that the regulation of surreptitious advertising in Slovak broadcasting works almost perfectly. However, the more plausible explanation would probably be that the emphasis in commercial exploiting of the broadcasts, outside the regular advertising spots, has finally moved toward the use of product placement.

D. Definitions of Advertising and Teleshopping

Advertising in the form of a short spot is still by far the main type of commercial communication. Its definition (Paragraph 32(1) of the BA) remained intact after the implementation of the AVMSD, as the definition of the television advertising in the Directive has not changed either: 'Advertising, for the purpose of this act, means any public announcement broadcast in return for payment or any similar consideration, including self-promotion, intended to promote the sale, purchase or lease of goods, services, including real estates, rights and obligations, or to achieve another effect pursued by the ordering party of the advertisement or by the broadcaster.'

The wording of the definition in the BA was based on the ECTT definition rather then the one in the former TWFD. Although both are very similar, there is one important difference. While the AVMSD recognizes as advertising only the spots with commercial content, the definition in the ECTT, and consequently the one in the BA, accept also other purposes that might be followed by the advertiser or the broadcaster. The definition of the advertising in the BA furthermore deviates from both the ECTT and the AVMSD in that it encompasses advertising also in the radio broadcasting.

The self-promotion is part of the scope of definition of advertising in the BA and in the AVMSD. While the AVMSD does not elaborate more its meaning, the BA has a special definition for it in Paragraph 37a(2): 'Self-promotion, for the purposes of this act, shall mean a broadcaster's activity for building and retaining public attention for the broadcaster's own broadcasting, programmes, goods, or services directly connected with broadcasting and

programmes; announcements in which the broadcaster provides information about the broadcaster's own programmes shall not be deemed self-promotion.'

As self-promotion is advertising, the rules for advertising apply to it in full scale except for one important aspect—self-promotional spots are not counted into the time dedicated to advertising. The crucial moment of the definition is the direct connection of the content of the promotional item to the broadcast or broadcasters' activities. As the SC stipulated, it is, eg, not sufficient for the advertising to be treated as self-promotion if the broadcaster promotes the movie going currently to the theatres with the claim that it plans to air it in unspecified future (3 Sž 10/2012).

The announcement of the broadcaster about its own programmes (the last part of the definition after the semi-colon) was rather a tricky element in the definition of self-promotion from the beginning. It was not clear what kind of information and in what form is admissible for the programming item to contain for being considered as a broadcaster's announcement but not self-promotion—and, therefore, advertising. It was eventually established through decisions of the RVR that the broadcaster's announcement may contain just basic information about the programme, mainly its name and time of airing, without additional promotional elements.

The definition of teleshopping is contained in the Paragraph 32(2) of the BA: 'Teleshopping, for the purpose of this act, means a direct offer broadcast to the public with the aim of supplying goods or services, including real estates, rights, and obligations in return for payment. Teleshopping can be in the form of a) a teleshopping spot; b) a series of teleshopping spots with a duration of at least 15 minutes.' The definition is essentially the same as in the AVMSD. The only difference is that it explicitly distinguishes between teleshopping spots, which are counted into the advertising time, and series of teleshopping spots as equivalent of teleshopping windows mentioned in the Article 24 of the AVMSD, which are not counted into the advertising time.[174]

i. Prize Games as Teleshopping—Case Study

Provisions on regulation of teleshopping have taken new prominence nowadays as these are being used by the RVR to tackle cases of prize games that recently sprung up on many television channels in Slovakia. Many of these use rather dubious game rules or tactics provoking discontent of the players / viewers that often takes the form of complaints addressed to the RVR.

This type of program does not have a special regulation (either in the BA or elsewhere in the Slovak legislation), and in fact, until recently, was generally seen as unregulated. There were debates among various state authorities in Slovakia as who, if anyone at all, should overseeing these programmes, without any tangible result. Indeed, there are several problematic aspects regarding prize games that fall under different areas of regulation, so under present circumstances it is not possible for a single authority to regulate all of them.

174 It should be mentioned that Kristofčáková and Polakevičová argue that there is fragmented legislation regarding the term 'advertising', and suggest some possible legal solutions. L Kristofčáková and I Polakevičová, 'Variability of the (Non-)Definition of the Term "Advertising" in Slovak Legislation' 4(2) *Political Science Forum* (2015) 28–42.

Nevertheless, eventually the RVR demonstrated some regulatory imagination, and started to deal with content aspects of the prize games through the regulation of teleshopping.

To determine whether in a particular case the program shall be recognized as teleshopping, the RVR uses a test based on the ECJ's decision C-195/06 in *Komm Austria v ORF*. In this decision, the ECJ was dealing with the question whether the broadcast or its part, in which broadcaster offers viewers an opportunity to take part in the game for a prize through the call on premium rate phone number, ie, for payment, can be considered teleshopping. In this test, the RVR considers three main aspects of the program: 1) whether there is a real offer of service having regard to the purpose of the broadcast of which the game forms part; 2) significance of the game within the broadcast in terms of time and anticipated economic benefit; 3) types of questions the participant is asked.

The first case in which this test was used by the RVR for the first time was a joint decision in three administrative procedures against the broadcaster of TV Markíza channel issued in September 2013 (RP 073/2013). The broadcasts in question were several instalments of prize games called *Sexy výhra* and *Akčná výhra* aired from January to May 2013. In assessment of the three aspects mentioned above in order to determine whether the broadcasts fall within the definition of teleshopping, the RVR noted the following.

Ad 1) In the broadcasts in question, the recipients were repeatedly invited to participate in the game for prize by calling the premium rate phone number. There was, therefore, a direct offer to use the service that consisted of the opportunity to win the prize for solving a task. The primary purpose of the broadcasts was the promotion of the service and its subsequent provision. According to the rules of both games that the RVR examined during the administrative procedures, the service was provided by a third party company (it was not produced by the broadcaster itself or on its request), and its purpose, as defined in the rules, was to promote the activities and the brand of the producing company. From this information the RVR concluded that the game constituted a genuine economic activity consisting of provision of services by the producing company.

Ad 2) The broadcasts were aired daily. The programme called *Sexy výhra* was aired during the night or early in the morning (00:30–02:00 am), and *Akčná výhra* was aired daily in the morning (07:00–08:30 am), which means that both programmes together were aired for 10,5 hours weekly, ie, 6–7 per cent of the daily time of the television channel. The broadcasting time of the games, according to the RVR, therefore, cannot be considered negligible. As a prize game was the only content of the broadcasts, the RVR concluded again that the only purpose of the broadcast was promotion and provision of service.

From the economic point of view, the RVR pointed out that viewers were making calls on premium-rate numbers. Every call, including those that were not connected to the studio, was charged 2 euro. In connection with the time allocated to these broadcasts, the RVR concluded that this activity cannot be considered economically negligible. The Council for Broadcasting and Retransmission further stated that it is not in its competence to ascertain the actual sum that the broadcaster or the producing company gains from the broadcast, but it is not necessary either. The information gathered during the administrative procedure is sufficient for the RVR to conclude that the economic gain from the broadcasts is not marginal or accidental but it is its very purpose. As it was ascertained that the broadcaster either rents out the broadcasting time to the producing company to air the prize games or is awarded a share of the profits from the broadcast, the nature of the activity is similar

to advertising or teleshopping. This is after all, according to the RVR, in line with how the producing company is promoting its activities in its promotional materials, where it characterizes its prize games as an alternative to advertising for broadcasters as a mean to monetize their broadcasts.

Ad 3) The aspect of the nature of the questions being asked in the programmes is there to further ascertain the nature of the programme itself. The purpose of the programme may be, eg, to promote other programmes of the broadcaster. As the ECJ stated in its decision C-195/06 in *Komm Austria v ORF*:

> the game may consist in indirectly promoting the merits of the broadcaster's programmes, in particular if the questions given to the candidate relate to his knowledge of other broadcasts by that body and are thus capable of encouraging potential candidates to watch them. The same would be true if the prizes to be won consisted of derivative goods serving to promote those programmes, such as video recordings. In such circumstances, the announcement made by that broadcast or part of a broadcast could be regarded as television advertising in the form of self-promotion. The announcement could also be regarded as television advertising if the goods and services offered as prizes to be won were the subject of representations or promotions intended to encourage viewers to buy those goods and services.

In the cases in question the game consisted of mathematical tasks that the viewers had to solve in order to win the prize. However, considering the outcomes of the examination of previous two aspects, the RVR concluded that the aspect of the type of questions asked during the programmes is not relevant for the cases in question, as the games themselves are directly offered and provided as a service.

According to the RVR, the examination of the programmes through the test described above revealed that the broadcasts contained a direct offer (by means of making public the premium rate phone number, and inviting the viewers to call) broadcast to the public with the aim of supplying a service (the prize game), and therefore, fulfilled the definition of teleshopping. After deciding that the prize games in question constitute teleshopping, the RVR was examining whether the broadcasts are in line with the content requirements for the advertising and teleshopping enshrined in the BA. These requirements will be described further below. At this point, we are interested merely in the obligation of the broadcaster to ensure that the advertising and teleshopping is honest and fair, on possible breach of which the RVR has started the administrative procedures.

Monitoring of the programmes revealed that the mathematical tasks in the games were not following proper mathematical rules. Furthermore, the rules were not the same at various times, and even within the different instalments of the prize games, the rules, as announced by the presenter, kept changing. The prize games thus, according to the RVR, were broadcasted in a way, which by providing the incorrect, ambiguous, or inaccurate information, induced in the recipient the false notion of the difficulty of the task or the method with which to solve it, in order to persuade him to participate in the game, and therefore, breached the obligation of honest and fair teleshopping.

This decision laid down the template for all subsequent cases of prize game broadcasts, which are quite numerous. For example, in 2014 the RVR, according to its annual report, dealt with 25 cases. All of them were initially examined through the test described above to

decide whether or not they constitute teleshopping as defined in the BA and, subsequently, their content was evaluated as to its fairness. In the twenty-five cases mentioned above, all of the broadcasts in question were found to be teleshopping, and in twenty of them, the broadcasts were also found to be unfair. In remaining five cases the broadcasts were found to be in compliance with the obligation on honest and fair teleshopping, thus the administrative procedures ended without sanctioning the broadcaster.[175]

E. Content Requirements for the Advertising and Teleshopping

In addition to requirements for all media commercial communication, the BA contains special rules for advertising. These do not follow strictly the requirements of the AVMSD, although all of the directive's requirements are part of the BA, and in some aspects go considerably beyond its scope. The broadcaster has to ensure that all advertising and teleshopping in his broadcasting

- is honest and fair;
- does not harm the interests of consumers and does not exploit the confidence of consumers;
- if aimed at children or with the participation of children, does not contain anything prejudicial to their interests, and includes nothing that does not take into account their specific susceptibility;
- does not encourage minors to buy products that are prohibited from sale to these persons under other specific legislation;
- erotic services, products and audiotext services are not broadcast between 6 am and 10 pm;
- does not encourage minors to order, sell, or lease goods or services.

In relation to editorial independence, the BA stipulates in Article 32(8) that a party ordering advertising and teleshopping cannot exercise any influence on the programme content or programme selection. The practical use of this provision is, however, minimal. Either will this influence be visible, and therefore, punishable as surreptitious advertising, etc., or it will be indiscernible, and therefore, virtually impossible to prove.

There are also specific rules on advertising for specific products. In relation to alcoholic beverages, excluding beer and wine, the BA stipulates that advertising promoting them may not be aired from 6 am to 10 pm. For wine, the restriction is eased to 6 am to 8 pm. Beer is excluded from this kind of restriction altogether. The airing time restrictions do not cover Internet broadcasting. There are also some restrictions for advertising of medicinal products and an absolute ban on advertising on arms and ammunition.

Into the content requirements we may also count the ban for presenters and hosts of news and political affairs programmes to appear in advertising or teleshopping, neither in picture nor in sound (Article 34(4)). The obligation to observe this ban aims at the broadcaster, and the responsibility for an eventual breach is on its part.

175 See also D Mikušovič, 'Ako telefonické hry klamú televíznych divákov' *Denník N*, 31 May 2016, 3.

F. Formal Requirements for the Advertising and Teleshopping

Until the AVMSD, the main principle for insertion of commercial information into the broadcasting was its strict division from editorial content. With the implementation of the AVMSD, this principle loses its rigidness, mainly because of the introduction of product placement. In the case of traditional advertising spots, with one minor change, this principle remains valid.

Yet Viliam Janáč argues that there is a very thin red line between legal and illegal product placement. Janáč also criticised dual options offered by the EP and the Council Directive 2010/13/EU.[176] The current wording means that some media service can either ban use of product placement or allow its use. Slovak legislation is stricter with respect to product placement—it considers any product placement as product placement, regardless of its real value (ie, it does not consider a mininal threshold).

According to Article 34(1) of the BA, the broadcasting of advertising and teleshopping has to be recognisable and clearly separated from other parts of the broadcasting to ensure that they are not interchangeable with other parts of the programme service. In radio broadcasting this, is to be achieved by acoustic means, in the television broadcasting, by audiovisual or spatial means. The spatial means are new element in Slovak broadcasting law introduced by the AVMSD (this is the minor change mentioned above) that explicitly recognizes legality of split-screen advertising. The split-screen advertising was, however, accepted by the RVR even before this change. The acoustic means in the radio broadcasting, according to the RVR, do not have to explicitly say that advertising is to follow, but they have to be associable with the advertising for the listener, which means they cannot be used for other purposes (RP 083/2012). In the television broadcasting, the audiovisual means similarly do not have to be explicit but have to be distinct enough to not to be confused with other broadcasting elements (judgement of the SC 4 Sž 19/2012).

According to Article 34(2) of the BA, advertising and teleshopping have to be broadcast in blocks and separated from other parts of the broadcasting. There is a possibility of broadcasting-isolated advertising and teleshopping spot, but only as an exception.

G. Insertion of Advertising and Teleshopping into the Television Broadcasting

The rules for insertion of advertising into the television broadcasting of commercial broadcaster (ie, not PSM) closely follow those in the AVMSD. Advertising and teleshopping is to be inserted into broadcasting between individual programmes. In programmes consisting of individual parts, during live coverage of sport events, or in similarly structured events, the spots have to be inserted only between individual parts or during breaks.

When broadcasting a news programme or an audiovisual work other than a serial, series, documentary film, a programme for minors, or a religious ceremony, the broadcaster may interrupt the programme by insertion of advertising or teleshopping once in every 30 minutes even if the scheduled duration of the news programme or audiovisual work is less than 30 minutes. Broadcasting of serials, series and documentary films can be interrupted by the

176 V Janáč, 'Umiestňovanie produktov' *Právny obzor* 95(5) (2012) 473–74.

insertion of advertising or teleshopping regardless of their duration. In children programmes, insertion of advertising is permitted if the programme lasts longer then 30 minutes. One advertising break is then permitted for every 30 minutes.

For the calculation of the 30 minutes sections, following the ruling of the ECJ, the RVR uses the so called gross principle, which means that the advertising itself is also counted into the 30 minutes time. This system is more favourable to broadcaster than the so called net principle, where advertising is omitted from the 30 minutes period, and is also easier to calculate.

For non-PSM broadcaster the only programme that cannot be interrupted by insertion of advertising or teleshopping is religious ceremony. In other cases, subject to rules stated above, it may interrupt any programme provided that the integrity, value, and character of the programme, including its natural internal breaks, are not impaired, and the rights of owners of rights are respected.

PSM cannot use advertising breaks during the programmes, and therefore, can only insert advertising between them. The only exception, which is not explicit in the law but was recognized by the CBR and the SC in their practice, is insertion of advertising during the natural breaks in sports or similar events (eg, judgment of SC No 4 Sž 32/2005).

H. Insertion of Advertising into the Radio Broadcasting

Radio broadcaster is not subject to the above-mentioned rules for insertion of advertising. The non-PSM broadcaster may interrupt any program freely, except for the news, religious programme, programmes for minors, and religious ceremonies that cannot be interrupted at all. The non-PSM broadcaster may also broadcast the so called longer advertising messages 'in the form of a programme presenting information that supports the sale, purchase, or leasing of goods or services'. This type of commercial communication has to be separated from other broadcasts with explicit announcement as to its advertising character.

PSM radio cannot insert advertising during the news programmes, political affairs, and religious programmes, artistic programmes, and programmes for minors, literary-dramatic programmes, and religious ceremonies.

I. Advertising Time

According to the BA, advertising broadcast in the television programme service of a PSM may not exceed a 0.5 per cent share of the daily broadcasting time. This share of broadcasting time shall be allowed to rise up to 2.5 per cent of daily broadcasting time through the time reserved for teleshopping spots. This does not apply if the advertising is in direct connection with the broadcast of a sports or a cultural event for which the broadcasting of advertising is a condition for obtaining the license. Even then the advertising time cannot exceed 15 per cent of daily broadcasting of the entire television channel of the PSM.

In line with the AVMSD, the time reserved for advertising may not exceed 20 per cent within given clock hour (ie, twelve minutes). This rule applies to all broadcasters, however, PSM is further restricted in prime-time (7–10 pm), during which the advertising cannot exceed eight minutes per given clock hour.

In radio broadcasting the advertising time on non-PSM channel cannot exceed 20 per cent of total daily broadcasting time. For PSM the advertising time is restricted to 3 per cent of the broadcasting time for all its radio channels.

J. Sponsoring

Sponsorship, as another legitimate means of financing broadcasts, has spread in the European broadcasting, and with a certain delay in Slovakia, only after passing of the ECTT. In Europe, unlike in the USA, where sponsoring of television programs has been used since the 1950s, it is therefore a much younger type of commercial communication than advertising. Implementation of the TWFD, the forerunner of the AVMSD, has established sponsorship as a significant element in the commercial broadcasting that enabled broadcasters to increase their income from commercial activities without substantially intensifying advertising pressure on recipients. Adoption of the AVMSD has not changed the regulation of the sponsorship in broadcasting, but extended its reach also on the on-demand audiovisual services.

Sponsorship has two basic characteristics, ie, direct or indirect financing of the programmes of the broadcaster or other audiovisual media service provider by the sponsor and, at the same time, the promotion of the sponsor. The original purpose of the sponsorship was to enable direct or indirect (eg, through provision of the goods or services) financing of the actual program. Today in Slovak broadcasting market, as arguably also in other European countries, the actual practice is very similar to advertising, and the sponsor pays for the broadcast of its sponsoring announcements in a certain amount and time. The sponsoring announcement does not have a definition in the BA, and not long ago, there has been a debate about what kind of information could be included into this type of commercial communication (see case-study below).

i. Sponsoring Announcements v Advertising—Case Study

In July 2009, the RVR was asked to comment on a survey documenting supposed breaches of Articles 18(1) and 18(2) of the TWFD by various broadcasters under Slovak jurisdiction during a two-month period from 1 November 2007 to 31 December 2007. The objective of the survey was to examine the level of compliance of the Slovak broadcasting market with the above-mentioned provisions of the TWFD, and was taken by an independent company, which was for that purpose hired by the EC. The survey identified 22 violations of Article 18(1) and 314 violations of Article 18(2) of the TWFD. Provisions of the TWFD, the observance of which was targeted by the survey, were concerned with the limits of the broadcasting time dedicated to advertising. Article 18(1) stipulated that the proportion of transmission time devoted to advertising shall not exceed 20 per cent of the daily transmission time. Article 18(2) put a 20 per cent limit on advertising within any given hour.

The main problem found was not that Slovak broadcasters intentionally or negligently transmitted advertising spots in an amount that exceeded the said restrictions. In fact, these types of violations were marginal. The issue was that service providers broadcast sponsoring announcements, the content of which fulfils the definition of advertising. Hence, these sponsoring announcements were in fact advertising spots, and therefore, had to be counted in

the transmission time dedicated to advertising. It was in this manner that the vast majority of violations documented in the survey were committed; therefore, Slovakia was called upon by the EC to remedy this situation, otherwise the infringement procedure by the EC could follow.

Until the survey was sent to the RVR for comments, neither the RVR nor Slovak broadcasters seemed to be aware of any non-compliance with the TWFD of the above-mentioned kind. The definitions of advertising and sponsoring were essentially the same in the BA as in the TWFD. In fact, there was one documented case in which a sponsoring announcement was found to have advertising qualities and thus in violation with the concerned provisions of the BA. It was therefore not a case of inadequate implementation of the TWFD; the wording of the BA allowed for the action to be asked by the EC. It was a problem of interpretation. The distinction between advertising and sponsoring announcement was assessed differently in Slovakia then in the survey. There is no definition of sponsor's announcement in the TWFD, nor is there such a definition in the BA, and there are no special rules as to the limits of what information could be contained within it. The distinction between advertising content and legitimate content of sponsor's announcement therefore may not be readily recognizable. What the EC was essentially asking for was to change the regulatory approach by altering the interpretation of the provisions concerned. This case study follows the rulings of the RVR, through which this change was brought about and the rulings of the courts that were reviewing the regulator's approach. The course of the change was not straightforward and there were some contradictions between the courts' decisions along the way. But eventually, as it seems now, the new regulatory practice was recognized by the courts as fully legitimate. The course of establishing this new regulatory practice shows in a very condensed and clear form how regulatory practices in broadcasting are forged through the interplay between the RVR and the courts reviewing its decisions, and therefore it is an ideal example through which their mutual relations and inter-communication can be explained.

Since 2007, when Slovakia was notified about the potential violations of the TWFD, the legislation has changed. The Television without Frontiers Directive was amended and renamed as AVMSD. The change also abolished one of the provisions—18(1) stipulating the daily limit of the amount of advertisement, which was supposed to be violated by Slovak broadcasters in 2007. The provision of Article 18(2) changed its position within the text of the Directive to 23(1), but otherwise remained intact. The definitions of television advertising and sponsoring also stayed unaffected, and therefore the essential moment of the whole issue remained that where to put limits to the contents of the sponsoring announcements if they are not to be deemed as advertising. The subject of the case study is therefore still relevant today as, indeed, there are still cases concerned with the issue tried by the RVR and subsequently by Slovak courts.

K. Legal Basis

For the comprehensive overview of the subject of this case study, it is useful to understand the legal definitions and the obligations involved. This part therefore presents the definitions of advertising, sponsorship, and connected obligations both from the AVMSD and the BA, accompanied by short comparison.

Television advertising: Article 1(1)a of the AVMSD reads: 'television advertising' means any form of announcement broadcast whether in return for payment or for

similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft, or profession in order to promote the supply of goods or services, including immovable property, rights, and obligations, in return for payment. Article 32(1) of the BA reads: 'Advertising, for the purpose of this act, means any public announcement broadcast in return for payment or any similar consideration, including self-promotion, intended to promote the sale, purchase, or lease of goods, services, including real estates, rights and obligations, or to achieve another effect pursued by the ordering party of the advertisement or by the broadcaster.' Clearly, the definition of television advertising in the BA is very similar to that of the AVMSD. There are only two substantial differences. The first is that the definition in the BA also covers advertising in radio broadcasting, and therefore it is not called television advertising as it is the case in the AVMSD. The second difference is that while the AVMSD covers only commercial broadcasting, the definition in the BA, by admitting other intentions of the advertiser or broadcaster in its last part, is broader. This part of the definition is the result of the implementation of the ECTT definition of advertising which was always broader than the one in the TWFD, and subsequently in the AVMSD. Neither of the differences however has any bearing on the subject matter of this case study and if not stated otherwise, both definitions will be considered equal.

Article 19(1) of the AVMSD reads: 'Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.' Paragraph 34 (1) of the BA: 'Broadcast advertising and teleshopping shall be recognisable and clearly separated from other parts of the programme service to ensure that they are not interchangeable with other parts of the programme service; in the broadcasts of a radio programme service acoustic means shall be used for separation, and in the broadcasts of a television programme service audiovisual or spatial means.' There are minor differences in the obligations of separation of advertising from editorial content in broadcasting according to the AVMSD and the BA. In this case it is however readily understandable, as national legislation is often more elaborate for the sake of clarity and legal certainty. While the AVMSD allows for just acoustic means to be employed for the advertising spot to be deemed separate, in the BA these have to be audiovisual or spatial. Acoustic means only would not be sufficient. The mention of new advertising techniques is also omitted in the BA as superfluous under the circumstances.

Article 23(1) of the AVMSD reads: 'The proportion of television advertising spots and teleshopping spots within a given clock hour shall not exceed 20 per cent.' Paragraph 36(2) (first sentence) of the BA reads: 'Broadcasting time reserved for advertising spots and teleshopping spots must not exceed 20 per cent of broadcasting within one hour (12 min).'

Sponsoring: Article 1(1)k of the AVMSD reads: '"Sponsorship" means any contribution made by public or private undertakings or natural persons not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting their name, trade mark, image, activities, or products.' Paragraph 38(1) of the BA reads: 'Sponsorship, for the purposes of this act, shall mean any contribution to the direct or indirect financing of programmes, programme service or an on-demand audiovisual media service intended

to promote the business name, trade mark, reputation, or activities of this legal entity or natural person who provided the financing. Contributions under the first sentence provided by a legal entity or natural person that is a broadcaster or a provider of an on-demand audiovisual media service, or that produced the programme shall not be deemed to be sponsorship.' Despite the different wording, the meaning of the definitions of sponsorship in the AVMSD and the BA is almost identical. The only difference is in the promoting of the products of the sponsor (as one of the sponsor's intentions that are alternatively enumerated as the criteria for sponsorship), which is part of the AVMSD but is not explicitly stipulated in the BA definition. As the promotional intention of a sponsor is perhaps always more holistic then just to promote one of the enumerated elements, no practical problems have ever arisen with the application of this definition in Slovakia.

Article 10(1) of the AVMSD: 'Audiovisual media services or programmes that are sponsored shall meet the following requirements: their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider; they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services; viewers shall be clearly informed of the existence of a sponsorship agreement. Sponsored programmes shall be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and/or at the end of the programmes.'

Paragraph 38(2) of the BA: 'If the whole or a part of a programme or series of programmes is sponsored, the broadcaster or the provider of the on-demand audiovisual media service must clearly display the business name of the legal entity or the business name or name and surname of the natural person that provided the sponsorship at the start and the end of the programme. The broadcaster and the provider of an on-demand audiovisual media service can replace the identification of the sponsored programme or series of programmes at the start and the end of the programme specified in the first sentence with the sponsor's logo or a reference to the sponsor's product or service.' Paragraph 38(3) of the BA reads: 'A sponsor must not influence the content or scheduling of a sponsored programme, programme service, and on-demand audiovisual media service in a way that would affect the editorial responsibility or editorial independence of the broadcaster or provider of on-demand audiovisual media services.'

Paragraph 38(4) of the BA: 'A broadcaster or provider of an on-demand audiovisual media service shall ensure that a sponsored programme, sponsored programme service or sponsored on-demand audiovisual media service does not directly promote the sale, purchase, or lease of the goods or services of the sponsor or a third party, in particular by making special promotional references to such products or services in the sponsored programmes, programme service, or on-demand audiovisual media services.' Responsibilities of the broadcaster with regard to the sponsored programs in the BA are fully compatible with those in the AVMSD. The wording and the composition is indeed different, and there are few elaborations made in some obligations, such as in the obligation to identify sponsored program, but there are no substantial deviations that may be important in the course of this case study.

L. The Interpretation

Upon receiving the notification about the Survey, and following subsequent communication with the EC, the RVR invited broadcasters that might have been aggrieved by the change of the regulatory practice to the assessment of the sponsor's announcements. A position paper clarifying the position of the EC was prepared for this occasion (the Survey itself was labelled as confidential, and the RVR was not allowed to reveal its content to third party) in which the arguments for the limits of content of the sponsor's announcements were stated along with some examples of their practical application. The arguments for the limits of the content of sponsoring announcement as stated below are based on the arguments used by the RVR in its decisions. Sponsoring announcement, in contrast to advertising, does not have legal definition either in the BA or the AVMSD. Indeed, sponsoring is defined in both legal documents, but it is defined as a complex activity that goes beyond the content of broadcasting itself, not as a programming element as in the case of advertising. Sponsoring announcement and sponsoring are thus two separate things. The definition of sponsoring hints toward the elements that may be contained within the sponsoring announcement, considering that the intention of the sponsor is stated as being alternatively the promotion of his name, trade mark, image, activities, or products, but there is no reference to the intensity of the promotional or advertising effect. It has to be stressed though that function of sponsoring is not purely promotional. Its inclusion in media legislation is supposed to relieve the viewers from commercial pressure, whilst giving broadcasters another way to finance their broadcast, alongside advertising. If the promotional elements in sponsoring are the same as in advertising, the original function of sponsoring is no longer fulfilled, as the commercial pressure on viewers is the same as in advertising. In order to avoid this, the promotional elements in sponsoring announcements have to have limits.

This is the point where the definition of advertising steps in. As advertising is defined as a programming element, it is relatively easy to identify an advertising spot. In contrast to the sponsoring, the function of advertising is purely promotional. In order to achieve its promotional effect, it may contain special promotional elements, such as superlatives, subjective assessments of the product, or stressing of the positive elements. This, at the same time, is the limit for the content of the sponsoring announcements. If the sponsoring announcement is not to be considered an advertising spot, it must not communicate special promotional elements. It can communicate, eg, labels, logos, or pictures of the products of the sponsor, stating its characteristics, but without a qualitative assessment or the stressing of their positive qualities.

M. The Initial Case

The Council for Broadcasting and Retransmission started to apply this interpretation in administrative procedures that were launched at the end of 2010 and at the beginning of 2011, and were concerned with programmes broadcasted in September 2010 and later. The first decision, issued on 12 April 2011, dealt with the violations of Paragraph 36(2) of the BA, ie, exceeding 12 minutes of advertising time within a given hour, and Paragraph 34(1), ie, the separation of advertising from editorial content. Both violations were committed by the

insertion of sponsoring announcements in the broadcast that were considered to be advertising spots by the RVR. In its defence, the broadcaster claimed that the RVR was changing its regulatory approach, and was not informed about it in advance. The broadcaster claimed furthermore that sponsoring is one of the advertising techniques, and that the promotional effect is its inherent part. The promotional elements found in the sponsoring announcements by the RVR are thus fully legitimate. In response to the first claim, the RVR stated that it was not a change of the regulatory approach *per se*, as there was very little done in the past in the area of sponsoring announcements that might have been considered as a regulatory approach. It indeed provided an interpretation of the relevant provisions of the BA that was new in a certain sense, as there had been only one decision with this interpretation employed in the past, but there were no decisions of the RVR that would use other interpretations or adjudicate contrary to this decision. The Council furthermore stated that it did not have any competence on issuing any kind of regulatory statements in advance, and there was no other way of introducing a particular interpretation of a law than through the adjudication in concrete cases. To the second claim, the RVR responded by arguments already mentioned in the section above.

Regarding the sanction, in the majority of potential violations of its provisions, the BA stipulates that when these violations are committed for the first time, the so called notification on a breach of law is issued to the broadcaster, and no other punishment is employed. In the case of repeated violation of the same provision (but not the commitment of the identical violation, ie, by the same action in the same way), the RVR is obliged to impose a fine. In the case of the violations in question, these were indeed the types that fall under the rule mentioned, and the concerned broadcaster was indeed already notified in the past about the violation of both the relevant provisions. Given the special circumstances, however, the RVR decided not to impose a fine that would normally be due by law, but referring to the constitutional principle of legal certainty and the exceptional factors that had to be taken into account (mainly the introduction of the new interpretation of the law), they only issued the above-mentioned notification to the broadcaster. There were 15 such decisions issued by the RVR in 2011. All were concerned with the violation of either Paragraph 36(2) or Paragraph 34(1) of the BA, or both, and the arguments employed by broadcasters and the regulator were very similar too. In all cases, the RVR issued only a notification on a breach of law under the same rationale mentioned above. In all cases, the broadcaster sought an annulment of the RVR's decisions through actions filed with the RC. Majority of the RVR's decisions were upheld both by the relevant RC and subsequently, after the broadcasters' appeal, by the SC. In a few cases, the SC found certain procedural errors on the part of the RVR or the RC. Four cases, however, were substantially different—the next part of this case study will review them.

Since the decisions of imposing a notification on a breach of law on the broadcaster are fully valid once they are delivered to the recipient, there is no possibility of appeal against them, and their legality can be challenged only by action against them, filed with the RC. The action, however, in contrast to the appeal, does not negate the validity of the decision, the legality of which it challenges. In consequence, not only do these cases take quite a long time to get resolved, but there may meanwhile be cases where the same broadcaster was fined for the same kind of violation of law, because it was already (in a legally valid way) notified about the same type of violation prior to this one, which is now eligible to be punished by

fine. The decision of imposing a fine can nonetheless be challenged by a regular appeal which goes directly to the SC. This subsequent case of violation may therefore take considerably less time to review then the first case, where the broadcaster was sanctioned only by issuing the notification.

These situations were indeed happening throughout the reviewing process of the 15 decisions that this study is concerned with. There were no judgments of the SC that would influence the reviewing process in a way worth mentioning in this case study. However, this peculiarity of the system of reviewing the administrative decisions explains why the last of the cases that will be described it this case study ended by the judgment of the SC, issued only in 22 May 2014. The first case that deviated from the previous ones, where the decisions of the RVR were confirmed by the courts, was the case with the RVR's decision issued on 26 April 2011. At first, upon receiving the action by the broadcaster, the RC upheld the RVR's decision stating that it had not found any violation of procedural legal requirements, and agreed with the RVR as to the substance of the case, ie, that sponsoring announcements in question fulfilled the definition of advertising, and were thus rightly considered to be advertising spots. In consequence, the broadcaster violated provisions 34(1) and 36(2) of the BA. In its judgment the RC furthermore stated that the only way the RVR could introduce certain interpretation of law was through its decisions in concrete cases, and it could not notify the broadcaster about such an issue in any other legally valid manner.

The broadcaster then appealed to the SC. The Supreme Court, however, took a different position in the matter. In its judgment of 13 November 2012, it stated that the procedural aspects of the case were in order. It also admitted that the content of the sponsoring announcements was exceedingly promotional. What was not in compliance with the valid law was the legal assessment of the situation. According to the SC, the case should have not been treated as a violation of the Paragraphs 34(1) and 36(2) of BA, but Paragraph 38(4), according to which the sponsored programme cannot directly promote the sale, purchase, or lease of the goods or services of the sponsor. Once the programme is sponsored, all its parts have to be in compliance with the rules for sponsored programmes, sponsoring announcement included. When the sponsoring announcement contains special promotional elements fit for advertising, it does not mean that it is advertising as such. It may, however, violate rules for sponsored programmes embedded in Paragraph 38(4) of the BA. The Council for Broadcasting and Retransmission and the RC were thus wrong when they assessed the case as one of violation of Paragraphs 34(1) and 36(2) of the BA. This interpretation of the problem is different from the one presented by the EC or the RVR, which was confirmed by other Senates of the SC in other cases.

One has to admit though that it is not grammatically or semantically impossible. If one deems sponsoring announcements to be a part of the sponsored programme, which is possible considering the absence of a definition or any rule that would say otherwise, it is imaginable to apply rules for sponsored programmes even on them. This interpretation, however, does not directly address the crucial problem that overly promotional sponsoring announcements cause the system of advertising in electronic media regulation—the circumvention of the rules for the separation of advertising from editorial content, but more importantly, of the limit for the amount of advertising allowed. While it does so indirectly, since the broadcaster is still punished for the violation of the law, it does not deem this problem to be a part of the advertising regulation *stricto sensu*, which rather misses the mark. Shortly after the RC

adopted this view in its judgment of 12 February 2013, in a similar case it dismissed the decision of the RVR. The Council then appealed to the SC, where the focus of the parties in dispute shifted to stressing or rebuking this new approach before the courts. Broadcasters claimed that indeed this was the right legal assessment of the problem, while the RVR claimed its unreasonableness, stressing the importance of an euro-conforming interpretation in cases that have a bearing on EU law.

Meanwhile, in another case, the SC adopted the same approach, and in its judgment of 26 February 2014, it dismissed the judgment of the RC which upheld the decision of the RVR, under the same arguments. The same Senate however, in a different but similar case, upheld the RC with the same factual basis (30 April 2014). The Supreme Court acknowledged the fact that the different courts and even different Senates of the SC ruled differently in the similar circumstances. In this case, however, the SC adopted the original interpretation of the problem of overly promotional sponsoring announcements, and explicitly said that it did not agree with the interpretation that the SC had presented in its ruling of 13 November 2012. The peculiar thing is that while this particular Senate only two months earlier subscribed to the interpretation that it now resolutely dismissed, it did not elaborate much on this change of opinion. The senate restrained itself only to acknowledge the administrative discretion of the RVR in the matters at hand, upon which it did not want to infringe. Why this was not the case two months earlier, the SC did not explain.

Finally, we are coming back to the RVR's appeal against the judgment of the RC of 12 February 2013 that dismissed the RVR's decision using the argument that sponsoring an announcement cannot be considered advertising, but must be treated as part of the sponsored programme. In this ruling, which is the last one that deals with the original 15 decisions of the RVR that started the change of approach to sponsoring announcements, the SC decreed that the sponsoring announcements in question fulfilled the definition of advertising, and therefore they have to be considered advertising spots. Under these arguments the SC changed the judgment of the Regional court and confirmed the decision of the RVR.

It seems that the problem of how to treat the overly promotional sponsoring announcements in the Slovak legal system is now settled. There were no other judgments deviating from the interpretation of the majority until now. Of course, it does not mean that there cannot be such decisions in the future, nonetheless, considering the number of decisions agreeing with the original position of the RVR, this seems unlikely. What this case study tried to illustrate was how the interpretation of the law is created through the workings of the Slovak system of administrative judiciary, which includes the review of the electronic media regulation. As it can be seen, it is not a straightforward process. Especially in the field of media regulation, where the rules are often based on notions that may be hard to grasp from a legal point of view (objectivity, human dignity, etc.) or, as was the case in this section, may be ambiguously formulated, and thus can offer more than one possible interpretation, it is quite common that the different courts or their senates will have different opinions on the same matter. While this sheer fact is understandable to some extent, a court should not merely ignore another court's judgments and not address it in its ruling with proper arguments. Even more so if the judgment was brought to the court's attention by disputing parties, and thus it is an important part of their argumentation. Such a situation is especially alarming in the case of the SC, as the unification of judicature is one of its primary duties.

N. Product Placement

Perhaps the most significant, and surely the most discussed change brought about by the AVMSD in the sphere of commercial content was the introduction of product placement. This type of commercial communication has been long used in the broadcasting in the USA, and in cinematographic works, also in Europe. In European broadcasting, however, the product placement was either explicitly prohibited or was at least considered as practice balancing on the verge of surreptitious advertising. The latter approach was typical for the Slovak media regulation before the AVMSD implementation.

Long and intense debate preceded the actual incorporation of product placement into the AVMSD. The main concern of the critic of the legalization of product placement was impossibility of safeguarding the clear division of commercial content from the editorial one. Eventually, the product placement was legalised, but as a compromise, the actual rules are introduced as an exception to the declaratory prohibition of its use (Article 3g of the AVMSD). Slovak rules for product placement are similarly designed but the general prohibition was replaced by words 'product placement shall be permitted only under the conditions laid down by this act' (Paragraph 39a(2) of the BA). According to its definition in the Paragraph 39a(1) of the BA, the product placement means a representation by sound, image or audiovisual presentation of goods, services or a trademark that is included in a programme in return for payment or for other similar consideration.

As in the advertising, the remuneration is an essential point of the definition, but in the case of product placement, assessment of this criterion is much more problematic. It is very hard to distinguish, and even harder to prove, whether some product used in the dramatic scene is a genuine part of the script or is on display as a consequence of a commercial deal with its producer, unless this information is made public by the broadcaster himself, eg, by labelling the program with product placement sign. In broadcasting regulation, it is always easier to examine the content of what has been clearly displayed in the program than to research the circumstances of its production. While the surreptitious advertising, examination of which can be based solely on the content of the program, is quite effectively regulated by the RVR, the control of the observance of the rules on product placement may be quite difficult. This was clearly revealed during one of the first cases concerning product placement in 2011. In the broadcast of the Slovak news channel TA 3, laptops with Sony Vaio label were quite prominently shown next to the presenters. The administrative procedure that had been started by the RVR was terminated, because it was not proved that the laptops were shown in order to promote them, let alone that they were included in the broadcast for remuneration (RVR Annual Report 2011).

It is clear that too restrictive interpretation of remuneration criterion may hinder the effective or, considering the competencies of the RVR, any regulation of product placement if broadcasters would be unwilling to cooperate. It was clearly with this in mind that the RVR in one of the more recent cases has adopted a rather pragmatic approach under which the criterion of remuneration has to be interpreted in such manner that 'concrete motivation of the broadcaster is irrelevant in the cases, where from the manner of inclusion of the information it is apparent that it was intentional, and its purpose was the promotion of a certain product' (Decision of the RVR RL/12/2012).

The BA recognizes also the category of unpaid product placement (Paragraph 39a(3) of the BA), which may seem a bit unsystematic if viewed through the prism of 'payment or for other similar consideration' criterion as an essential part of the product placement's definition. Its inclusion into the BA, and to the AVMSD for that matter, can be, however, explained trough the term 'similar consideration'. The purpose of the unpaid product placement is in the providing of the products to the producers of the programme for free. The similar consideration lies therefore in saving of the financial means that would have to be otherwise employed to get the needed product. The unpaid product placement may be realized in all types of programs. The paid product placement on the other hand may be used only in cinematographic works, films, series, sports programmes, and entertainment programmes (Paragraph 39a(4) of the BA).

The programs in which the product placement, both paid and unpaid, is used, have to fulfil the following requirements:

- their content and scheduling in the programme service must not be influenced in a way that would affect the editorial responsibility or editorial independence of the broadcaster or the provider of on-demand audiovisual media service;
- do not directly promote the purchase, sale, or lease of goods or services, in particular by making specific references to those goods or services;
- undue prominence is not given to the goods or services in question;
- viewers are clearly informed of the existence of product placement by means of identification at the start and the end of the programme, and when a programme resumes after a media commercial communication break. This does not apply to a programme, production of which has not been commissioned or that has not been produced by the broadcaster or by the provider of the on-demand audiovisual media service that broadcasts or provides the programme in question.

In Table 5 below, we have summarised where administrative senates actually found inspiration, if any. In addition, there is information about the final decision of the RVR. First, references to domestic rulings of regional courts (*de facto* fellow administrative Senates) are rather rare. Second, references to own rulings are more frequent. Third, frequency of references to other domestic courts fits between references to domestic rulings of regional courts and references to own rulings. However, the SC finds here (binding) inspiration mostly in verdicts of the CC. Similarly, references to international or foreign courts is at about the same frequency as references to other domestic courts. Interestingly, though, in addition to the ECtHR, two Czech courts are mentioned, the Municipal Court in Prague and the Supreme Administrative Court in Brno.

Table 5

Judgment of the SC of Slovakia	References to domestic rulings of RCs	References to own rulings (SC)	References to other domestic courts (eg, CC)	References to international or foreign courts (ECtHR and others)	Decision of RVR
5 Sž 18/2010		8 Sž 6/2009-30, 20 May 2010—previous to this case	I. ÚS 17/1999—following the conception of material, not formal-legal state	verdict of Municipal Court in Prague, 8 Ca 297/2007-43—issue of definition of hidden advertising	RP 37/2010 SC cancels, RVR stops
4 Sž/4/2010-29					RP 35/2010 SC confirms
6 Sž 19/2010					RP 27/2010 SC confirms
3 Sž 11/2010					RP 17/2010 SC cancels, RVR stops
3 Sž 17/2010					RP 28/2010 SC cancels, RVR stops
8 Sž 7/2010-22					RP 08/2010 SC cancels, RVR again sanctions RP 020/2011 SC confirms
8 Sž 18/2010-31		6 Sž 9/2009—if later passed law did not adopt original delict, its criminal character vanished			RP 34/2010 SC cancels, RVR again sanctions RP 67/2011 SC cancels, RVR stops
3 Sž 4/2011	2S/284/2010—repeatedly broken duty (the court has not decided yet)	5 Sž 94/2008; 3 Sž 33/2009-25; 8 Sž 4/2009-21; 3 Sž 63/2008; 5 Sž 7/2009; 3 Sž 67/2008—additionally justification of verdict			RP /52/2010 SC cancels, RVR again sanctions RP 67/2011 SC cancels, RVR stops
3 Sž 18/2010-31		6 Sž 4/2009—previous to this judgment			RP 33/2010 SC cancels RVR again sanctions RP 003/2011 SC confirms
8 Sž 13/2010-24		3 Sž 6/2010-27—wrongly used legal norm and incompleteness of previous ruling			RP 20/2010 SC confirms
2 Sž 10/2010-34		3 Sž 39/2009-33—previous to this case			RP 13/2010 SC cancels, RVR again sanctions RP 58/2010—SC cancels, RVR stops
2 Sž 3/2009					RP 30/2009 SC confirms

8 Sž 6/2009-30		3 Sž 112/2007, 17 January 2008; 5 Sž 13/2009—information deliberately used for commercial purposes; 3 Sž 49/2007, 18 October 2007 or 3 Sž 112/2007, 17 January 2008—increase in viewership			RP 39/2009 SC cancels, RVR again sanctions RP 37/2010 which is above
3 Sž 5/2009-41					RP 35/2008 SC cancels, RVR stops
3 Sž 59/2009-19		3 Sž 112/2007, 17 January 2008—information in programme exclusively positive			RP 28/2009 SC confirms
3 Sž 58/2009-27		5 Sž 69/2005—issue whether two communications form a single programme			RP 27/2009 SC confirms
3 Sž 52/2009-25					RP 21/2009 SC confirms
3 Sž 39/2009-33					RP 14/2009 SC cancels. RVR again sanctions RP 13/2010, which is above
8 Sž 4/2011-24		3 Sž 39/2009; 3 Sžo 200/2010; 2 Sžo 106/2007; 7 Sžso 7/2007—definition of legal delict; 4 Sž 24/96—RVR did not consider the way the delict was executed, its duration and consequences; 6 Sž 5/2009; 6 Sžo 390/2009—plaintiff could not influence expressions of participants and awarded personalities; 2 Sž 9/2006—it was impossible to agree with a claim that the broadcaster could not influence what a person would say in live transmission; 2 Sž 9/2009—vague and imprecise sentence of a ruling			RP 02/2011 SC cancels, RVR again sanctions RP113/2011 SC confirms

8 Sž 19/2011-29		3 Sž 58/2009-27—sanction for breaking the programme with ad; 1 Sžn 50/2004—intertwining of particular parts of information may mislead the recipient; 5 Sž 18/2010—this was not about hidden advertisement but about info of general interest; 6 Sž 9/2009—previous to this case, this was not about hidden advertisement but about info of general interest; 6 Sž 7/2010; 8 Sž 8/2010; 3 Sž 14/2008—justification of the level of financial sanction; 8 Sžo 28/2007; 3 Sžo 79/2010, 8 Sžo 147/2008—criminal charges according to Covenant; 8 Sž 18/2010—second previous to this case	I. ÚS 17/1999, 22 September 1999; I. ÚS 44/1999, 13 October 1999—guarantee of material and not formal law state	ECtHR, Garyfallou AEBE v Greece, 24 September 1997, [32]; Kadubec v Slovakia, 2 September 1998, [50]; Lauko v Slovakia, 2 September 1998—meaning of 'criminal accusation' according to Article 6(1) of the Covenant; Öztürk v Germany, 21 February 1984, Serie A-73, 19, [52]—the importance of approach to a delict taken by intrastate law is only relative, more important factors are nature of delicts, nature, and level of strictness of sanction; inter alia verdict of Lutz v Germany, 25 August 1987, Serie A-123, 23, [55], cit Kadubec v Slovakia, [51]—for application of Article [6] of the Covenant, arguing that in matter of 'criminal accusation' it is sufficient to fulfil at least one of the mentioned criteria. In other words, it is enough that delicts is in its nature (nature of the offence) criminal from the point of Covenant, or that this delict makes a person vulnerable to threat of sanctions which belong to criminal sphere	RP 67/2011 SC cancels, RVR stops, see above
8 Sž 18/2011 8 Sž 22/2011 8 Sž 23/2011 8 Sž 24/2011			ÚS 17/1999, Finding 22 September 1999; I. ÚS 44/1999, Finding 13 October 1999; I. ÚS 10/98; I. ÚS 54/02, 13 November 2002—guarantee of material and not formal law state; III. ÚS 2310/2010-38, 25 August 2010—when Covenant in Article 6(1) mentions 'any criminal charges', it is necessary to provide guarantee to accused in criminal as well as in administrative proceedings for suspicion of committing administrative delict	judgment Neumeister v Austria, July 1976—to interpret 'criminal charges' and 'rights and obligations of civic nature' as far as scope of applicability is concerned Article 6(1) of the Covenant autonomously from their definition in intrastate legal system	RP 36/2011; RP 31/2011; RP 49/2011; RP 29/2011 SC cancels, RVR again sanctions RP 010/2012—SC cancels, RVR Again sanctions RP 017/2013—SC confirms

6 Sž 11/2013	2S/114/11—protest related to explanation of Paragraph 35(2) of the BA (in every 30 minutes slot only 1 commercial break)	2 Sž 3/2009; 3 Sž 66/2009; 5 Sž 8/2010; 3 Sž 22/2012—no concrete objections of a plaintiff in written statement to the subject of proceedings against materials for decision; 8 Sž 7/2012—objections against explanation Paragraph 35(2) of the BA; 6 Sž 28/2011—sanction without warning on repeated breaking the law, other decision are legally valid till RC or SC nullify them; 2 Sž 27/2012—objection on ambiguity	2 June 2009, sp. zn. III. ÚS 42/09-77—Article 10(1) of the ECtHR guarantees protection against intervention of public authorities into execution to right to free expression	ruling of the Supreme Administrative Court of Czech Republic 7As/57/2010—82, 3 April 2012—RVR while collecting evidence breached the Administrative Law Order; ruling of the ECtHR in Amann v Switzerland, App No 27798/95—certain legal norm is 'predictable' when it is being formulated sufficiently precisely to allow every person in the case of need to ask for the help of professional advisors. Request to limit insertions of commercial breaks follows the need to protect viewers from too much add pressure and also to keep integrity of audiovisual works; ruling of the Supreme Administrative Court ČR, 3 April 2012, 6 As/26/2010—sanction without previous warning on breaking a duty; ruling of the CoJ EU, ARD v PRO Sieben Media AG, C-6/98—Article 20(2) of the AVMSD is ambiguous only in that respect that it is not clear whether by duration of audiovisual work means net time or time including ads, ECtHR, Amann v Switzerland and finding of CC, 2 June 2009 III. ÚS 42/09-77—insufficiency of legal norm is not possible to correct either via application or via interpretation practice of the RVR; ruling of the Supreme Administrative Court ČR, 7As/57/2010-82, 3 April 2012—insufficiently checked factual situation	RP 024/2013 SC confirms

6 Sžo 38/2013	1S 216/2011-91, 16 May 2013—previous to this case; 3S 190/2011 – 83, 12 February 2013—action of the RVR seen as breaking constitutional rights, legal certainty and law predictability	3 Sžo 40/2012, 13 November 2012—action of RVR seen as breaking constitutional rights, legal certainty and law predictability; 8 Sž 11/2012, 29 November 2012—definition of advertising in Article 32(1) of the Act does not include any exception for public announcements		ruling of the Supreme Administrative Court 7As 80/2009 and Municipal Court in Prague 8Ca 345/2009—difference between sponsoring message and advertising; ruling of Municipal Court in Prague 8A 144/2010, 8 February 2011—also part related to unchangeability of ad and other forms as insufficient and not suitable for checking; CZ 7As 81/2005; 6As 44/2006; 6As 13/2009; 6As 5/2010; 7As 3/2009; 7As 53/2009; 7As 16/201—definition of ads in Paragraph 32(1) does not contains any exemption for public announcements	RL/82/2011 RC case dismissed, SC confirms verdict of RC
3 Sž 22/2013		8 Sžo 28/2007—comparison of amount of fine; 6 Sž 7/2012—amount of fine (for each partial attach); 4 Sž 101/01, 26 February 2002—stricter sanction for repeated breach	ÚS 17/1999, Finding 22 September 1999; I. ÚS 44/1999, Finding 13 October 1999, I. ÚS 10/98; I. ÚS 54/02. Finding 13 November 2002—guaranteeing material and not formal legal state	ruling of the CJEU in Kommunikations-behörde Austria v Österreichischer Rundfunk, C-195/06—definition of teleshopping	RP 073/2013 SC confirms
2 Sž 15/2013	2S/114/2011—case related to repeated breach of law		III. ÚS 42/09, 2 June 2009—intervention into the right to freedom of speech; if the public authority intervenes into this right, it is up to it to prove that this intervention corresponds with criteria of legality, legitimacy, and proportionality	verdict of CJEU in ARD v PRO Sieben Media AG, C-6/98—existence of work is seen as brutto time (Council)	RP 036/2013 SC confirms
2 Sžo 16/2013	1S/186/2011-33—previous appeal	8 Sž 11/2012—legal opinion on sponsored messages		ruling of the Supreme Administrative Court in CZ 7 As 88/2010—an effort to approach new customers is legitimate aims of sponsoring; verdict SC CZ 7 As 81/2005—legal assessment of difference between advertising and sponsored messages	RL/65/2011 RC dismissed the case, SC confirms the verdict

8 Sž 10/2013-41		2 Sž 7/2012—arguments about volume of sound in advertising; 3 Sž 19/2012, 29 January 2013—it is not clear whether the court considered teleological approach (de ratione legis) with respect to Article 34(3) of the Act 308/2000 Z. z., as it was in the previous case; 5 Sžo 195/2010—mutually contradictory case law intrastate supreme court represents breach of ECtHR	III. ÚS 341/2007; III. ÚS 274/2007—importance of original wording, however, the court is not bound by word by word text absolutely; IV. ÚS 14/07—similar cases must be judged in similar legal way; I. ÚS 199/07; I. ÚS 18/08—the role of SC to unify case law	ECtHR, Beian v Romania, 1 6 December 2007—mutually contradicting case law intra state supreme court is in breach of the Covenants	RP 038/2013 SC confirms
7 Sžo 4/2013	2S/126/2011-46—previous appeal				RL/55/2011 RC dismissed the case, SC confirms the verdict
5 Sž 22/2013		3 Sž 19/2012, 29 January 2013—it is unclear whether the court dealt with teleological explanation (de ratione legis) Article 34(3) of the Act 308/2000 Z. z.	III. ÚS 341/2007 and III. ÚS 274/2007—initial and explicit wording but not bound by this absolutely; I. ÚS 351/2010, 5 October 2011—interpretation of legal documents cannot be done only by looking at the text but first of all their meaning and purpose		RP 066/2013 SC confirms

IX. Hate Speech

Although we did not find any case that would be tackled by the Administrative Senates of the SC, the topic is important for Slovakia. There is a relatively low level of tolerance of different and foreign people, and racism is still present in Slovakia to some extent. For example, the UN Committee on the Elimination of Racial Discrimination criticised some Slovak politicians and journalists for their racist comments in its 2013 report.[177] Nevertheless, the European Commission Against Racism and Intolerance 2014 Report CRI(2014)37 mentions that there has been a detectable progress in combating racism and intolerance in Slovakia since 2008.[178] However, during refugee crisis in the Summer of 2015, the majority of Slovak politicians were strongly against accepting quota on refugees, and even the majority of population—70 per cent—was clearly against accepting migrants on quota system.[179] Even earlier, in November 2014, a local radio SiTy broadcast a foreign expert's opinion. The Council for Broadcasting and Retransmission decided this was in breach of the law. The broadcast included—in the expert's words—calls for killing loosely defined 'radical Muslims'.[180]

We have been able to document some interesting cases of hate speech or cases similar to that (seen by some as hate speech or, at least, held problematic by many) related particularly to online media and television broadcasts. The only other case the RVR dealt with, and which is the most similar to hate speech, was related to a news item broadcast in television. In it (discussed in section on human dignity, 6 Sž 17/2011), the RVR saw a sentence which pointed at the longer life expectancy of pensioners and its impact on wellbeing of employed people.

There are some studies that document websites with hate speech in Slovakia or in Slovak language.[181] Hate speech is also a usual part of vulgarity, which is actually a great problem for online comment sections. For this reason, some Slovak online media started changing their editorial policies. In addition to ongoing monitoring and 'deleting' some offensive or libellous comments, in 2014, some of the print media publishing online as well, and online news media allow writing comments only to registered users.[182]

Most recently, the two public discussions in January 2015 actually raised the issue of hate speech into prominence. First, there was a public discussion in January 2015 about cartoons of the Prophet Muhammad published by the *Charlie Hebdo*. It dealt with the limits of humour and caricature, when it is actually hate speech (at least, perceived as such by some). Interestingly, Slovak broadcasters by and large did not broadcast the controversial cartoons in their news and current affairs programmes. The news television TA3 broadcast two discussions in which the freedom of speech and hate speech were debated. Let us discuss the first issue from a broader perspective. Caricatures arouse fatal passions. Predominant or, at least, the most visible public debate in Europe, including Slovakia, seems to favor the

177 'OSN obviňuje slovenských politikov z rasizmum' *Aktuality*, http://www.aktuality.sk/clanok/234217/osn-obvinuje-slovenskych-politikov-z-rasizmu/m.

178 http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Slovakia/SVK-CbC-V-2014-037-SVK.pdf.

179 https://dennikn.sk/162251/prieskum-utecencov-nechceme-a-bojime-sa-ich/.

180 http://medialne.etrend.sk/radia/radio-sity-v-eteri-vyzyvalo-k-fyzickej-likvidacii-moslimov.html.

181 I Bihariová, 'Cyberhate – Nenávisť ma Internete' http://www.minv.sk/?kampan-bez-nenavisti.

182 See 'Některá slovenská média ruší diskusi pod články, vadí jim nenávist a rasismus' *Romea*, 12 August 2014, http://www.romea.cz/cz/zpravodajstvi/zahranicni/nektera-slovenska-media-meni-pravidla-diskusi-vadi-jim-nenavist-a-rasismus.

idea that the freedom of expression is a decisive factor for a free society, regardless of the consequences. Several arguments were sounded, eg, the freedom of speech is absolute, either it exists or it does not; our laws and customs apply here (in Europe, in France, and Slovakia); terrorists would attack anyway, and cartoons were just a pretext for this attack.

Of course, that is a natural position for journalists. It is a pragmatic basis for tackling several potential ethical dilemmas. In other words, the journalist may stick to their belief, and not to differentiate much nuances of each case. Some leftist and right-wing intellectuals with clearly defined views hold the same stance. For them, this position is also natural, since clear-cut opinions inherently inevitably lead to radical ideas and attitudes in virtually all areas. A type of a (radical) integrity and consistency of thought is also necessary for prestigious and psychological reasons. But neither journalists nor intellectuals are infallible in their beliefs and attitudes. And it is not the only possible attitude, nor necessarily the only correct attitude. This was also the case of the reaction of several media and intellectuals to the recent tragic events in France. It is necessary to remind ourselves that a number of fundamental human rights and freedoms co-exist.

If we return to the first argument—freedom of speech either exists or not—it is clearly an absurd argument. Stanley Fish offers the best answer in his book *There's No Such Thing as Free Speech. And it's a Good Thing, too*. Briefly, the boundaries of the freedom of speech constantly change in time, but the absolute freedom of speech in practice does not exist anywhere. Because the absolute freedom is the idealized version of anarchy (society without a government), classless society, or paradise. In all of these versions of society we find, theoretically speaking, an unlimited freedom of speech. It was most poignantly expressed by the Frenchmen (not by accident)—Albert Camus. 'The only way to deal with an unfree world is to become so absolutely free that your very existence is an act of rebellion.'

The second group of thinkers claims that our laws and customs apply here (in Europe, France, or in Slovakia). Their argumentation is most frequently used implicitly, though at times also explicitly: 'this is our home' (to put it simply) will not do. Besides the fact that Muslims are also at home here (especially in France), denigration of religion operates across borders. Additionally, it is only an excuse for the fanatics for killing. It is possible that they will find another argument, but likely one even less persuasive. And the modern world is about the battle of arguments, even in a battle with the fanatics inspired by religion in the first place. In other words, it is possible that we will allow to be defeated by our own arrogance first.

The third discussion group claims that terrorists would attack either way, and that the cartoons were just a pretex for the attack. More so, the local Muslim groups were painted with a broad brush, it was assumed that there is some longterm hatred toward the country where they live and where many of them were born. Well, in both cases (the Danish cartoons in December 2005 and the French cartoons in January 2015), the attacks were preceded by peaceful protests and judicial requests from the side of the Muslim communities. Those remained unheard. In the first case, they were ignored by the local politicians, and in the second case, they were dismissed by the court.

The French were publishing the cartoons for a long time, therefore it was not a one-time aberration of the attackers' mind. It is obvious that the attackers have chosen a concrete target with a concrete goal—and did not act irrationally in this case. According to the published information, they were in the Middle East, where they most likely acquired training and

perhaps inspiration. In other words, the selection was not arbitrary, it was vengeance targeted at certain people. In the end, the fact that the killers had a list of names confirms this assumption. This clarifies their motivation, but of course, it does not pardon their act. Yet we can assume with a high degree of probability, bordering on certainty, that if the magazine would not have published controversial cartoons over a long period of time, there would have been no attack against its editorial board. It is quite possible that the murderers would have joined the fights in Syria or Iraq. It is also possible that they would have taken part in another terrorist attack in Europe, but their target would have been different. But it is important that the current target of the attack, the magazine and its editors, had greater legitimacy in the eyes of many Muslims than an attack against random civilians. Several demonstrations in multiple Muslim countries support that thesis. We do not recall such demonstrations taking place after the terrorist attacks against the subway and a bus in London or a train in Madrid.

Neither of the outraged discussion groups bears the consequences for their radical views. The case of the murder of a part of the editorial board of the magazine *Charlie Hebdo* and the worldwide reactions to it prove that it is the exception confirming the rule. Fortunately. It is, however, crucial to realize that absolutisation of the freedom of speech, including in the form of cartoons insulting the dark foundations of human culture, can, from time to time, lead to extreme reactions. Sadly, history is full of religion-inspired violence. There are only a few monotheistic religions that do not include detailed violent scenes within their 'sacred' books. As the *New York Times* has stated: while the Bible is descriptive, the Qur'an is prescriptive when it comes to this. That means that the Bible describes acts of violence, but does not require anyone to act on them. The Qur'an certainly contains more explicit instructions when it comes to violence, but again, the result is closely dependent on its literal (dis)interpretation. Christian believers did not have a problem to use violence in the past either, when the representative of God on Earth called, despite the peaceloving nature of the Bible. Majority of monotheistic religions requires a blind obedience to God or to his current representative on earth, or to 'divine' inspiration, which again allows for various interpretations and acts of the abiding subjects in practice. Religions and some ideologies do not operate on the basis of rational discussion but on faith. We cannot rationally discuss faith, and it is not possible to expect rational action always and everywhere. So much, briefly, on religion, freedom of speech and criticism of religion through cartoons.

How to deal with this problem with majority of religions and some ideologies? Modern states and societies found the answer in separation of the religious from the earthly, and in tolerance of otherwise ideologically intolerable to the degree that it does not threaten the very foundation of tolerance. This also goes for communication that is too expressive. We can take Slovak legislation as an example. Perhaps this will come as a surprise to some, but our legislation contains a number of limitations of the freedom of speech in various forms. Suffice it to mention the question of the Holocaust or Nazi symbols. Slovak Penal Code, eg, forbids public denial, doubt or support of the Holocaust or of the crimes based on fascist ideology. Why is that so if freedom of speech is above all? It is forbidden to promote a group of people or a movement, which violates basic human rights through committing or threatening violence or another severe deprivation. There are many such restrictions, not only within the Penal Code. Some prohibitions could really be questioned. How is it related to the cartoons? Not everything can be tolerated, not everything can be forbidden by law. Irony and humor are always on the edge of what is acceptable as humor and what offends a part of the

population. It is an issue that can be concretely localized. Even the ECtHR does not wish to decide in very local (national) cases, which are bound to local culture, but follows opinions, eg, takes into consideration the views of the local courts.

If we know that we live in a country where jokes about some regional, ethnic or, religious group are considered to be dehonesting by (several) members of these groups, it would be appropriate to consider their publication or refine their content. Out of politeness and respect, not out of fear. Several media took this route before, especially in the USA or in the UK, when they decided not to publish some cartoons ridiculing the prophet Muhammad. Today, some media do so out of fear. We got into a situation in which the freedom of speech is limited not by internal ethical limits but by fear of external (fatal) threat. It is hard to say to what extent we would be in this situation without the ethical self-limitation, but it is certain that the fanatics were not motivated only by the last few published cartoons. In other words, the power and self-esteem does not mean doing everything despite the wishes of the weaker or less numerable (or more aggressive or more sensitive). Internal power manifests itself the most in self-restrain and self-control. This is not a defence of the murderers of the French cartoonists. The point is that the reactions of our media and intellectuals indicate that they still view tolerance as our radical vision of freedom, which is not far removed from anarchy or a particular majority opinion or totality.

In yet other words, if we are not publishing the really insulting jokes about the Jews, Scots, Czechs, or Hungarians (and there used to be a multitude of these jokes) in Slovakia anymore, or if we cannot publicly deny the Holocaust or the crimes of fascism or communism, why should it be OK to rudely insult the supporters of one of the most widespread faiths on the planet, even if in a form of cartoons? If anyone believes that this is a radically wrong opinion, why then several British and US media did not publish the controversial cartoons to this day but limited themselves to their description? Is it possible that in the cradle of JS Mill, J Milton, or G Washington, T Jefferson, and A Lincoln, they do not understand the meaning of the freedom of the press?

It will be decisive whether we will assume the position of liberal fundamentalism, where truth and freedom are above all regardless circumstances and links, or if we will assume the value position of liberal pragmatism, where truth and freedom are—theoretically—still above all, but do take the relevant circumstances and connections into regard, including the possible consequences.

In the case of liberal fundamentalism, one of the more or less admitted goals (as was also the case with the Danish daily *Jyllands Posten* publishing the cartoons of Muhammad) is allegedly cultivating tolerance by exposing the readers or viewers to extreme diversity. We know how it ended then. Several people died in multiple countries (most frequently Muslims), and several buildings burnt down (mostly Danish or belonging to the EU). Today, we know that outside of France, there were victims elsewhere, after the attacks, while protesting the cartoons. Today, the *Jyllands Posten* does not want to publish any religious cartoons. What will it be like in a few years here? Will we hand the excuses for killing to the religious fanatics, or will we deprive them of one such opportunity? Which is a better solution?

Second, during almost the same period, there was a public discussion on issues raised in a referendum held on 7 February 2015, which was initiated by Christian activists in 2014. This discussion brought accusations of hate speech as well as regulatory challenges related to paid and unpaid campaign announcements and speeches for broadcasters as well as for

online media. In particular, the new law on elections does not cover referenda. Therefore, the RVR issued its official opinion on the legal situation, with regard to the campaign before the referendum. This opinion stated that a broadcaster is not obliged to broadcast TV or radio ads. However, if the broadcaster decides to do so, it must respect the rules regarding the universality of information and plurality of opinion (*zabezpečiť všestrannosť informácií a názorovú pluralitu*), as well as the protection of human dignity and humanity, the ban on political and religious advertising (political advertising is allowed only before elections), and broadcaster cannot break the rules regarding freedom and equality in dignity, and the rights of people. Finally, the broadcaster was not allowed to include or support discrimination based on—among others—sexual orientation, religion, or faith in its programmes.

The above rules, combined, prove that hate speech can actually relate to other regulatory aspects of broadcasting. It was clear that the legal uncertainty still remained significant. The first rule, keeping universality of information and plurality of opinion, meant that the broadcaster would have to give equal space in advertising to both sides. However, opponents of the referendum—various LGBT organisations—decided, on the advice of a PR agency, not to run any ads or participate in public discussion in television or radio. Under media pressure, the opponents established a special website with their opinions (nejdeme.sk). The decision of the opponents not to participate in public discussions was a logical result of referendum rules. There is a minimum of 50 per cent threshold to have a valid referendum. However, so far only one referendum crossed this threshold (on the EU membership in 2004). Therefore, emotionally charged public discussions might encourage citizens to participate, thus increasing chances that the referendum would be successful even with a minority of all citizens—eligible voters—actually voting. All other regulations or limitation on free speech mentioned above meant that broadcasters had to carefully watch who said what even in regular religious programmes. This brought—even before this statement by the RVR was issued—many complications for broadcasters.

For example, the RTVS regularly broadcasts religious mass. The public radio (a part of the RTVS) refused to broadcast a Greco-Catholic Mass in its regional radio programme as it was 'bordering on hate speech and in opposition with internal, national, and international legislation' in January 2015. The RTVS suggested first to cut out problematic parts, but the priest did not agree with this pragmatic solution. There was no available official transcript and translation for this mass, but it seems that it was similar to words used by Catholic Bishops in similar cases.[183] There was a long-time plan to broadcast a radioed Catholic mass before referendum on 2 February 2015 (a week before the referendum) on two channels of public service radio. The Conference of Bishops of Slovakia announced that it would broadcast a special message in which it would urge followers to participate at the referendum as well as to vote yes to all questions asked in referendum.[184] However, the internal guidelines of the RTVS on referendum coverage, issued exclusively in January 2015 (ie, before the controversial referendum) stated that there can be no promotion of any opinion before referendum in its broadcast. The RTVS solved this dilemma by follow-up broadcast which included opinions from the other side of the ideological spectrum. Of course, this discussion moves us away

183 http://spravy.pravda.sk/domace/clanok/343978-preklad-neodvysielanej-kazne-bol-nepresny-tvrdi-cirkev/.
184 http://kbs.sk/obsah/sekcia/h/dokumenty-a-vyhlasenia/p/pastierske-listy-konferencie-biskupov-slovenska/c/pastiersky-list-k-referendu-o-ochrane-rodiny.

from the issue of hate speech, but it is significant from a perspective of real and sometimes rather complex regulatory challenges.

A. Local Cultural Context

Katarína Ondrejková argued that national and patriotic feelings often turn into synonym of nationalism, chauvinism, and racism.[185] This is still sometimes the case in Slovakia. The major targets of hate speech in Slovakia seem to be the Roma in general (especially around the year 2000), the ethnic Hungarians (especially in the 1990s) by a few radical media outlets and by some nationalist politicians, and surprisingly, the Jews among underground (or rather Internet) extremists (in early 1990s to some degree in *Zmena* and *Hlas Slovenska* weeklies, later also occasionally in *Literárny týždenník* and daily *Slovenská republika*, renamed as *Republika*). According to Daniel Milo, representative of the NGO People Against Racism, about half of all cases of monitored racially motivated hate speech cases targeted Roma; the other half targeted Jews (in Internet chat discussions) in the late 1990s. Milo defined hate speech as any words or graphic expression of ideas spreading hatred. Out of 18 cases of racism submitted to the police for investigation in 1999 by this NGO, 15 were related to hate speech. In 2001, out of 60 monitored cases of racism by this NGO, up to 20 were classified as hate speech.[186]

However, more recent analysis has shown that although journalists still often use stereotypes, only 4 per cent of analysed news items in major news outlets ignited hated speech due to ethnicity in 2014.[187] In addition, homosexuals, feminists, Vietnamese and Chinese migrants, including their children born in Slovakia, and some other groups like Africans, are still from time to time targets of disregard in form of specific jokes (at least). New information and communication technologies make situation sometimes worse in this regard. For example, at the turn of the century, there was one case when mobile phones of one provider were flooded with racist messages, offering 50 free minutes of using the network for each killed Roma.[188] There were too many frequent racist and xenophobic attitudes and remarks towards Roma and ethnic Hungarians and also to Jews in online comment sections. As a result, many editorial offices have adopted stricter policies with respect to online comments. As mentioned, in this context it is puzzling that there are just a few RVR rulings with respect to broadcasted hate speech. We can identify cases that seem to be similar to hate speech dealt with from the aspects of human dignity, protection of minors, and balanced coverage. This may be correct; eg, John Rex has suggested that multicultural policies—which may include ban on hate speech—might marginalize minority groups and marks them for inferior treatment in special forms of manipulation and control.[189]

185 K Ondrejková, 'Hrdosť príde sama…' *Domino fórum* 10 (2002) 9.

186 A Školkay, 'Xenophobia: A Catalyst of Hate and Defamation Speech in Slovakia and Slovenia. Comparative study' www2.mirovni-institut.si/eng_html/articles/skolkay.doc.

187 'RÓMOVIA, V médiách ich zobrazujú stereotypne a často anonymne' http://www.gipsytv.eu/gipsy-television/spravy/slovensko/romovia-v-mediach-ich-zobrazuju-stereotypne-a-casto-anonymne.html?page_id=3414.

188 *Ochrana menšín na Slovensku. Program monitorovania vstupu do EÚ* (Bratislava, Open Society Institute, 2001) 3.

189 J Rex, 'Multiculturalism and Political Integration in Europe' R Koopmans and P Statham (eds), *Challenging Immigration and Ethnic relations Politics. Comparative European Perspective* (Oxford, Oxford University Press, 2000) 69.

He suggests that minorities should not be marked for inferior treatment and special control. In contrast, Richard Delgado and Jean Stefanic believe that the establishment of a legal norm creates a public conscience and a standard for expected behaviour that keeps overt signs of prejudice in check. They believe that creating institutional arrangements in which exploitive behaviours are no longer reinforced will result in changing attitudes. The question of whether the defendant's conduct counts as 'extreme and outrageous' must be answered on a case-by-case basis. Social scientists who have studied the effects of racism have found that speech that communicates low regard for an individual because of race tends to create those very traits of inferiority in the victim that it ascribes to him. This is in addition to the more general harms associated with racism and racist treatment, and the specific mental or emotional distress.[190]

There was an interesting public controversy about limits of anti-Jewish remarks and the function/mission of documentary programmes in the year 2004. In a documentary programme broadcast by a public TV about an anti-Jewish pogrom in a little West Slovakian city after the Second World War, a local citizen openly made racist (both anti-Semitic and anti-Roma) remarks. On the one hand, this was supposed to be the official reason why the director of public STV at that time hesitated to broadcast this programme. On the other hand, the director of the documentary claimed that this was not the main reason, but that the film raised critical questions about the problematic role of the Catholic Church in Slovakia during and after the Second World War. Be that as it may, the documentary film was finally broadcast late in the evening with follow-up live discussions which were supposed to explain the context of the story. It seems that society has changed and moved from discussing strictly political issues towards various cultural and ethical issues in the last years.

This shift in public discussions and values can be seen at following examples. The Conference of Bishops of Slovakia issued a traditional Christmas letter before Christmas in 2013. The following was written in this open letter: 'Supporters of the culture of death come with new "gender ideology". They want to pursue the so called "gender equality" in its name . . . thus they want to take a man's right to identity as a man, and a woman's right to identity as a woman, and family's right to the identity of family. The aim is that a man should no longer feel like a man, and a woman as a woman. They want to put the coexistence of two men or two women at the level of marriage. In this way a sort of Sodoma quitch is created (*paškvil)* which is against the God's will and will result in God's punishment.' As result, this quote won in second year competition on hate speech, organised by two LGBT groups.[191] Interestingly, no one seriously questioned why this was allowed to be broadcasted in public television this time (as is tradition in Slovakia with this type of communication during Christmas). However, an almost identical letter by a Greco-Catholic Bishop broadcast by a public television during Christmas of 2014 was questioned exactly from this point of view by a gay university journalism teacher.[192]

Another controversy was related to a video in which Catholic priest Marián Kuffa spoked offensively about homosexuals in the summer of 2014. The .*týždeň* conservative weekly

190 R Delgado and J Stefanic, *Must we Defend Nazis? Hate Speech, Pornography, and the New First Amendment* (New York / London, New York University Press, 1997) 11, 8.

191 http://www.tvnoviny.sk/domace/1766738_negativnu-cenu-za-nenavist-ziskali-ludia-ktori-maju-sirit-lasku.

192 B Ondrášik, 'Kňaz gayom: Vytlačte totu špinu za hranice štátu…k AZR sa prihlásili aj kotlebovci' http://ondrasik.blog.sme.sk/c/373639/knaz-gayom-vytlacte-totu-spinu-za-hranice-statuk-azr-sa-prihlasili-aj-kotlebovci.html.

magazine, on which website this was posted, has withdrawn the video from its website, just one day after publishing it. The video has been criticised by several non-governmental organisations and activists who even sent an open letter to Hríb, the Editor-in-Chief of .*týždeň*. The controversial statement was: 'Homosexuals are sometimes worse than murderers.' Kuffa called them 'mass murderers' and talked about 'the genocide of the nation'.[193]

Kristína Kormúthová, a sport TV presenter at the PSM, was fired after she posted a controversial comment on her Facebook profile on 16 May 2014. Kormúthová wrote on Facebook that a man who, according to her, tried to steal the rain gutter from her house at night was 'a prematurely born, stinky gypsy' and asked why 'us hunters' cannot shoot such people like animals. She concluded, 'And let anyone dare to call me a racist!' Kormúthová later deleted the text, but not before a screen capture of it began circulating around on the Internet. She publicly apologised for her words, and explained in an official written statement that she wrote it 'in a flurry after my family and I became victims of a crime.' Kormúthová said she did not intend to generally disparage any nation, race, or ethnicity but rather condemn a specific deed of a thief. Culture Minister Marek Maďarič said he would have chosen a less severe punishment in the case of Kormúthová, though he perceived her racism-tinged Facebook post that ultimately cost her job as unacceptable.

Monika Flašíková Beňová, an MEP for Slovakia, published the following statement on the social network on 19 October 2014, calling a Catholic synod a 'sophisticated marketing tool serving to declare conservatism and the power of those who cover paedophilia, cocaine, and the Vatican Bank. Well, God sees them, old bastards.' She was initially investigated on the suspicion of a crime of the defamation of nation, race, and belief. However, the accusations were later withdrawn.

Finally, when Romana Schlesinger, informal representative of the LGBTI and member of SAS political party, expressed her harsh comments about a ban in Austria on shopping on Sundays in relation to Christian values, this was very much criticised even by Richard Sulík, the Head of her Liberal Party SAS (Freedom and Solidarity).[194]

B. International and European Legislation and Norms

An issue of hate speech is rather controversial and sometimes confusing. For example, Helen Darbishire (1999) argues that '[i]t must be recognized that some speech which is undoubtedly offensive does not constitute hate speech, even though it may contribute to a climate of prejudice and discrimination against minorities. Such speech would include the tendency by media to report the bad news about minorities when it affects the majority population, for example noting when the perpetrator of a crime is the member of a minority.'[195] Also Susan Benesch argues that most of the existing hate speech laws—including international, regional, and national ones—are dangerously vague in ways that are often used to restrict

193 See more on this in J Vittek, 'Kuffovo video a názory katolíkov – nedorozumenie či skutočná nenávisť?' http://www.vkontexte.sk/2014/08/kuffove-video-nazory-katolikov.html.

194 http://www.teraz.sk/slovensko/politicka-sas-oznacila-jezisa-krista/129083-clanok.html.

195 H Darbishire, 'Hate Speech: New European Perspective' http://www.errc.org/article/hate-speech-new-european-perspective/1129.

the freedom of speech of minorities, including preventing them from expressing legitimate grievances.[196] Benesch quotes Bhikhu Parekh, who wrote that 'Britain bans abusive, insulting, and threatening speech. Denmark prohibits speech that is insulting and degrading; and India and Israel ban speech that incites racial and religious hatred and is likely to stir up hostility between groups. In the Netherlands, it is a criminal offence to publicly express views insulting to groups of persons . . . Germany ban[s] hate speech that violates the dignity of an individual, implies that he or she is an inferior being, or maliciously degrades or defames a group.'[197]

Provisions relating to the prohibition of hate speech and all forms of intolerance and discrimination on grounds such as race, religion, and belief are to be found in a number of international instruments, eg, in the 1945 United Nations Charter (Paragraph 2 of the Preamble, Articles 1(3), 13(1)b, 55(c), and 76(c)), the 1948 Universal Declaration of Human Rights (Articles 1, 2, and 7), the 1966 International Covenant on Civil and Political Rights (Articles 2(1), 20(2), and 26), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (Articles 4 and 5), and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Furthermore, the Vienna Declaration, adopted on 9 October 1993, expressed alarm at the present resurgence of racism, xenophobia, and anti-Semitism, and the development of a climate of intolerance. Among such instruments, Resolution No 52/122 on the elimination of all forms of religious intolerance, adopted by the United Nations General Assembly on 12 December 1997, deals more specifically with the issue of religious intolerance. Among the European instruments dealing more directly with the issue of 'hate speech' are the Recommendation No R (97) 20 on 'hate speech', adopted on 30 October 1997 by the Committee of Ministers of the Council of Europe,[198] and the General Policy Recommendation No 7 of the European Commission against Racism and Intolerance on national legislation to combat racism and racial discrimination. The appendix to the recommendation states that the term 'hate speech' is to be 'understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance.' In 2002, the Council of Europe's European Commission against Racism and Intolerance adopted a recommendation on the key components which should feature in the national legislation of the member States of the Council of Europe in order to combat effectively against racism and racial discrimination. The AVMSD in its Article 6 requests the Member States to ensure by appropriate means that audiovisual media services of media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion, or nationality.

In theory as well as in practice, there are significant differences among political and legal cultures. For example, the Supreme Court of the United States ruled in the early 1990s that it was legal when a man burned a cross in front of a house where an Afro-American family lived (a Ku Klux Klan activity). The Supreme Court preferred freedom to expression before the right to protection against possible hate speech. The explanation was that it was racist

196 S Benesch, 'Defining and diminishing hate speech' *State of the World's Minorities and Indigenous Peoples 2014*, 5, http://www.minorityrights.org/12473/state-of-the-worlds-minorities/mrg-state-of-the-worlds-minorities-2014-chapter02.pdf.

197 ibid, 21–22.

198 See the local translation available at the RVR website, http://www.rvr.sk/sk/spravy/index.php?aktualitaId=45.

but not illegal. However, if this act would cause violence, it would be illegal, the SC argued. Similarly, an earlier decision by the SC freed a man, a Ku Klux Klan member who said in a television broadcast that 'Negroes should go back to Africa and Jews back to Israel.'

In contrast, the ECtHR ruled that Germany has a right to ban exhibiting Nazi posters on the streets.[199] The Supreme Court of the USA considered the problem of intimidation in the *Virginia v Black*, 538 US 343 (2003) case. The Supreme Court struck down Virginia statute in this case, to the extent that it considered cross burning as *prima facie* evidence of intent to intimidate. Such a provision, the SC argued, blurs the distinction between proscribable 'threats of intimidation' and the Ku Klux Klan's protected 'messages of shared ideology.' However, cross-burning can be a criminal offense if the intent to intimidate is proven. Thus, argued the SC, 'just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *RAV* and is proscribable under the First Amendment. . . . "True 'threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'

In contrast, the ECtHR following ideas expressed in the ECHR argues that the very essence of hate-speech is in opposition to the principles of a democratic society. The ECtHR turned down all rare demands for the protection of hate speech under Article 10 of the ECHR. European standards protect only opinions that represent a creative contribution to the public debate, and enhance understanding and tolerance among people by presenting various points of views on specific issues.[200] The ECtHR argued that although sentencing is in principle a matter for the national courts, the ECtHR considered that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the ECHR only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as is, eg, the case of hate speech or incitement to violence (see, *mutatis mutandis*, *Feridun Yazar v Turkey,* App No 42713/98, judgment of 23 September 2004, [27], and *Sürek and Özdemir v Turkey* [GC], App Nos 23927/94 and 24277/94, judgment of 8 July 1999, [63]. The ECtHR's line of argumentation can be summarised in Jansen's words: Tolerance is achieved through intolerance of the intolerant.[201] Indeed, Delgado and Stefanic suggest that the main inhibitor of prejudice is the certainty that it will be noticed and punished.[202] The ECtHR also acknowledges (*Erdoğdu v Turkey*, App No 25723/94, [62]) that in situations of conflict and tension, particular caution is called for on the part of the national authorities when consideration is being given to the publication of opinions which advocate recourse to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence (see, *mutatis mutandis, Sürek and Özdemir v Turkey*).

199 TS Orlin, 'Sloboda prejavu ako základný prvok prechodného obdobia' M Horský (ed), *Novinár a zákony* (Sielnica, Nadácia Milana Šimečku, 1994) 12–15.

200 B Kovačič, 'The Legal Aspect of Hate-Speech' B Petkovič (ed), *Intolerance Monitoring Group Report 01* (Ljubljana, Mirovni Inštitut, 2001) 177–98.

201 SC Jansen, *Censorship: The Knot That Binds Power and Knowledge* (New York / Oxford, Oxford University Press, 1991) 44.

202 Delgado and Stefanic, *Must we Defend Nazis?* (n 190) 60.

C. The Media and Hate Speech

The Ethical Journalism Network claims: 'It's a tricky task to judge exactly what constitutes hate-speech. There is no accepted international definition and the tolerance levels of speech vary dramatically from country to country.'[203] Perhaps this is the reason why there were only a few cases before the ECtHR that dealt with the media and hate speech. The most well-know is the *Jersild v Denmark* case that we have already discussed. The ECtHR stated there that specific expressions that doubtlessly constitute hate speech and which may be insulting to particular individuals or groups are not protected by Article 10 of the ECHR. Another particularly relevant case is the *Gündüz v Turkey* (App No 35071/97). On 12 June 1995, the applicant took part in the capacity of the leader of Tarikat Aczmendi (a community describing themselves as an Islamic sect) in the television programme *Ceviz Kabuğu*, broadcast live on HBB, an independent channel. In this case, the ECtHR noted that as a matter of principle, it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote, or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued (with regard to hate speech and the glorification of violence, see, *mutatis mutandis*, *Sürek v Turkey (No 1)* [GC], App No 26682/95, ECHR 1999IV, 40, [62]). Furthermore, the ECtHR stated that it must consider the impugned 'interference' in the light of the case as a whole, including the content of the comments in issue and the context in which they were broadcast, in order to determine whether it was 'proportionate to the legitimate aims pursued', and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' (see, among other authorities, *Fressoz and Roire v France* [GC], App No 29183/95, ECHR 1999-I). Furthermore, the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see *Skałka v Poland*, App No 43425/98, judgment of 27 May 2003, [42]).

In the case *Gündüz v Turkey* therefore the ECtHR noted that comments demonstrated an intransigent attitude towards and profound dissatisfaction with contemporary institutions in Turkey, such as the principle of secularism and democracy. However, seen in their context, they cannot be construed as a call to violence or as a hate speech based on religious intolerance. Furthermore, the ECtHR accepted that the Turkish people may have been attacked in an unwarranted and offensive manner. It pointed out, however, that the applicant's statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining, or retracting them before they were made public (see *Fuentes Bobo v Spain*, App No 39293/98, judgment of 29 February 2000, [46]). Interestingly, the ECtHR observed that the Turkish courts, which are in a better position than an international court to assess the impact of such comments, did not attach a particular importance to that factor. Finally, the ECtHR considered that the mere fact of defending *sharia*, without calling for violence to establish it, cannot be regarded as 'hate speech'. Moreover, the applicant's case should be seen in a very particular context. The aim of the programme in question was to

203 'Hate-Speech: A Five-Point Test for Journalists. Turning the Page of Hate in Media Campaign for Tolerance in African Journalism' http://ethicaljournalismnetwork.org/en/contents/hate-speech-a-five-point-test-for-journalists.

present the sect which the applicant was the leader of; and the applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the ECtHR considered that in the instant case, the need for the restriction has not been established convincingly.

X. Right of Reply

During the passing of the new Press Law in 2008, there was a public and parliamentary discussion whether the right to reply should be a part of the regulation of electronic media or not.[204] However, the BA mentions in Paragraph 21 only the right to correction. This is actually by and large identical for the case of the right to reply concerning the original Directive (AVMSD). The right of reply is also regulated in a different way (in addition to the separate right to correction) in the Press Law (not applicable to the broadcast media).

Acts 346/1990 on elections to local municipalities and 46/1999 on elections of the President used to guarantee the right to reply (not the right to correction) to political parties and independent candidates in political broadcast (naturally, only during the election campaign). Until 2015, the legislation dealing with various elections was not unified. For instance, this right was not to be found in the Act 80/1990 on elections to the Parliament, Act 564/1991 on referenda, or in the Act 303/2001 on elections to self-governing regions.[205] The new complex Act (180/2014) on conditions of exercising the right to vote has abolished all partial regulations related to various elections. However, in effect, it also abolished the right to reply, as it was used during some election campaigns. The new complex 'sister' Act 181/2014 on election campaign does not deal with this right either. Yet, although we do not find critical comments about this particular issue (perhaps because, in effect, general legislation applies in this case), some legal experts harshly criticized the Act on election campaign for strictly limiting critical voices, while at the same time arguing with the need to create equal conditions during election campaigns for all candidates.[206]

It seems that the current Act on election campaign may bring serious legal challenges in this respect in the future. The Constitutional Court refers to its established case law, in which it says that only really serious or repository breach of law dealing with elections can be turned to the CC (as a result of the breach of constitutional rights). In addition, this really serious or repository breach of the constitution must have direct consequence on the results of the elections. Moreover, this claim must be supported by facts (PL ÚS 17/94, PL ÚS 5/03, PL ÚS 35/03, PL ÚS 3/2010). These are clearly challenging legal or evidence-based

204 M Kernová and M Kern, 'Právo na odpoveď má byť aj v televízii' http://www.sme.sk/c/3726405/pravo-na-odpoved-ma-byt-aj-v-televizii.html#ixzz3fx4EbQ8i; E Chmelár, 'Falošní bojovníci za slobodu prejavu' http://blisty.cz/art/40084.html.

205 See, Election / referendum campaigns and electronic media, http://www.rvr.sk//_cms/data/modules/download/1167759843_Volebna%20a%20referendova%20kampan%20a%20elektronicke%20media%20v%20zakonoch%20SR.pdf.

206 See, T Martaus, 'Stanovisko PP k návrhu zákona o volebnej kampani' http://parlamentpravnikov.sk/?p=589.

conditions. Moreover, the CC also claims that the breach of election blackout happens only when the public has the access to new information about a candidate or a political party during the election blackout (ruling of the CC PL ÚS 15/2013, 11 December 2013).[207] Can the apparently untrue and misleading information broadcast about a candidate or a political party, who, by the way, has no specifically regulated right to reply (in addition to the legal election black-out) influence the election results? This question may be difficult to answer, but in case the results are tie, there may be a legal constitutional basis for filing a suit, following the CC argumentation. Moreover, the legislation does not seem to consider the role of blogs and online social networks.

The right of reply has specific position in our study since it has not been dealt with via administrative court but via civil courts. In other words, no single case was noted when the RVR had to intervene, leaving the broadcaster lodging an appeal to the administrative court. This is so because the BA clearly states that if a broadcaster will not broadcast correction or will not meet conditions stated by the BA (Sections 21(5)–21(8) of BA), this will be decided by a court on proposal of a person who had originally requested a correction. There is strict condition that this case must be submitted to the court within 15 days after 8 days have passed when the broadcaster received this request for reply. In other words, the broadcaster is obliged to broadcast reply within 8 days when it receives such request. If it does not do so, the complainer has another 15 days to file a civil suit. Thus, the complaining-requesting person must check broadcast, and if there is no reply broadcast within 8 days, she/he can turn to the court.

The proper application of the right to publish correction presupposes submission of a written request for broadcasting a correction, which must clearly state what constitutes untrueness of the facts or distortion of the truth. The request must also contain the proposal of the correction. Only a complete request constitutes an obligation for the broadcaster to broadcast the proposed correction. The proposal of the corrections must be included in the request, because the broadcaster is bound by the proposed wording of the correction in terms of its scope and content. The broadcaster cannot make essential changes in the request complying with law. The law obliges the broadcaster to broadcast the correction in the same programme in which the contested facts were published or in the same time, in such a form and content which is appropriate to the contested facts. It must also indicate that it is a correction and a designation of the person who requested the broadcasting of the correction (Section 21). On the other hand, the plaintiff is entitled to the broadcasting of the correction formulated by him/her. The proposed wording of the correction is relevant also from the point of view that the proposed text must be examined by the broadcaster to ensure that broadcasting will not result in committing a crime or being contrary to good morals (Sections 21(9)a–21(9)b). Based on this, it can be presumed that in terms of the provisions of Section 21(9) of the cited law governing the case, the broadcaster is not obliged to broadcast a correction, when the wording of the correction or an application is containing false data or distortion of truth, relevant in relation to the obligation of the broadcaster to broadcast a correction in the proposed wording.

As the particulars of a request for broadcasting a correction are justified by the fact that the broadcaster has to assess whether the person concerned had a right to ask for the correction,

207 http://portal.concourt.sk/Zbierka/2013/54_13s.pdf.

and considered its broadcasting in the required wording, it is not sufficient that the proposer stated the concrete data objected and for what reasons he/she demanded only subsequently during the court proceedings. These facts should have been already contained in the request for broadcasting a correction. The correction cannot include satisfaction (apology), and any other subjective statements excessing statutory (factual) framework of the correction (it cannot include subjective opinions, attitudes, assumptions, and own feelings of the person concerned, unless they are the description of the factual allegations, its denial, explaining, specifying, or supplementing it).

The subsection of the BA further specifies that this right is related to both untrue and misleading (so called truth-deforming) information. This right belongs to both legal and natural persons, and even after the death of the natural person, this right remains applicable for his/her relatives (or, more precisely, the law mentions 'close' persons). When it comes to a legal person (a company or a natural person who owns a license to broadcast) that in the meantime has lost the license to broadcast, there is still an obligation to guarantee the broadcasting of a correction on its own territory or via a similar broadcaster (from the point of view of the territory covered). However, any such complaining or requesting (correction) subject must be clearly identifiable (based on untrue or misleading, truth-deforming information). The conditions do not include national citizenship, address/headquarters location, or long-term permit. The correction must be broadcast free of charge.

The request must be submitted in written form and delivered within 30 days following the controversial broadcast. The request for correction must clearly state what was untrue or misleading regarding the broadcaster information. The BA demands a suggested text of correction in the attachment. Finally, as was mentioned, correction must be broadcasted within eight days from the day of receiving such a request.

There are four general statutory exceptions from obligation to broadcast a correction. These are a) if it would be followed by a crime or delict (four categories), or if the message would be in contradiction with general ethics; b) if the broadcast of the suggested text would intervene into the rights of another person; c) if the broadcaster has already broadcast correction in accordance with this law (before receiving such a request); d) if it can prove the truthfulness of information of which correction is requested. Obviously, the court can intervene in the case of disagreement or not abiding by the law.

We do have original research data on use and possible abuse of this legal instrument in Slovakia. However, these are rather limited. The official case law online database shows only eight such cases since 2007, two of which came from regional courts. When leaving out the two appeals, we get six such cases. In 2011, the Local Court of Bratislava dealt with the first and the oldest case (18C/321/2007). The case concerned national news television TA3, and a business company located in East Slovakia. The story was broadcasted on 24 October 2007, causing the plaintiff to submit a file on 7 December 2007. The story was about alleged violation of human and labour rights. It was about an employee who was allegedly fired after asking for a lunch voucher. The court dismissed the case due to lack of the original evidence. The plaintiff failed to deliver the video-recording of that particular program upon the request. Even though the broadcaster is not obliged to archive programs for more than 30 days, transcript of the program was not a valid material.

Both the court and the plaintiff confirmed that the document was a part of an online archive. However, since the plaintiff did not download the file, it was deleted later on. It was

not disputed whether the story was broadcasted or not, the court cared about the visual part of the content, or, more precisely, about the original or authentic evidence (not transcript). Considering that the plaintiff failed to bring any witness who could testify in his favour, it was impossible to find out more information. Consequently, the court issued the judgment saying that even the relationship between the transcript and the plaintiff was not established. Company name, along with other data, were not clearly identifiable, which lead to questioning the very legitimacy of the plaintiff's accusation. It should be mentioned here similar and highly relevant verdict of the SC on quality of recordings provided by a broadcaster. In ruling of 3 Sž 16/2014 (24 February 2015), the SC dealt exactly with low quality of supplied recordings. The Supreme Court argued that when the RVR has 'undoubtedly proven' that broadcaster has fulfilled basic duty to send recording in time, and only later it has found out that these recording are of insufficient quality and do not include content of real broadcast, it is impossible to come to conclusion that broadcaster did not fulfil its legal duty.

The second court case was filed back in 2012 (50C/6/2012), and the verdict was issued in 2015 (14Co/415/2013). It referred to the same TV news channel, TA3, and a regional high school in Trenčín. The Regional Court of Bratislava dismissed the case because of the lack of formal legal requirements (outlined by the BA). The plaintiff missed the deadline and failed to lodge the case to the court within fifteen days (he was late for about a week). This case demonstrates both the plaintiff's and his lawyers' professional incompetence. The plaintiff could have used a special pre-paid postal service in order to check whether the document was delivered to the defendant. The defendant would then send a reply to the high school, stating the time and day when the request was received. However, the plaintiff tried to justify himself by arguing that it was not possible to check whether or not did the defendant receive the document.

The third case, which dates back to 2009, was ruled by the Regional (appellate) Court in 2015 (8Co/566/2013). The court case was, again, dismissed due to the lawyer's unprofessionalism. The plaintiff was not clear in specifying the defendant's fault. The court called the proposal fuzzy and not in line with the BA. In particular, the content of plaintiff's request which referred to broadcasting the reply was different from the original proposal submitted to the court. The plaintiff argued, and appellate court agreed in this, that one sentence could not have made a difference. Then, the defendant as well as appellate court blamed the plaintiff for demanding to broadcast content of reply based by and large on the civil law, and not the BA. The verdict reads as follows:

> Information is false if it does not correspond to the objective truth. Although the information distorting the truth is not untrue, it is made in a form and in such contexts which can lead to distortion of the information to be given to the public. In fact, the law thus can not be required to correct untrue critical statements in the form of value judgments, the veracity of which (like subjective opinion) is the subject of inquiry; in the context of protection against unjustified criticism, only untrueness or misrepresentation can be assessed, which were the basis for critical opinions.
> The institute of correction does not serve either for presentation of ideas based on a subjective assessment of the person concerned, comments, and assessment of the situation from the perspective of the person concerned or for providing moral satisfaction, eg, an excuse; the text of the correction must be objective, based on verifiable facts and not on the subjective view of the person concerned arising from its personal bias. At the same time, it must be impartial, not affecting the rights and

> legitimate interests of other persons concerned by the matter. The purpose of the correction is to replace false information by the correct facts, or misleading data by complete information, which correspond to the truth, and thus to ensure quick and effective protection in relation to the person concerned and in relation to the public (viewing or listening) for the right to truthful information.

Moreover,

> the wording of the correction must primarily reflect the literal meaning of the broadcasted text, since it is not possible to request correction of information which was not included in the post, or was included, but with a different wording than in the text of correction.

The text of the correction proposed in the request for broadcasting a correction must correspond to the wording of the correction suggested in the complaint because the plaintiff may claim in the court proceedings only broadcasting of such a correction which was involved in a request for broadcasting a correction, or in the attached text of correction within the statutory limitation period. In the proceedings on imposing an obligation to broadcast free correction, the plaintiff may only review truthfulness and completeness of the information which claimed in the request for broadcasting a correction. Indication of contested data (false or distorting the truth) is therefore important also for the subsequent definition of the subject of court proceedings for broadcasting a correction.

In the context of that, however, the Court of Appeal, unlike the Court of First Instance, hold the opinion that only deletion of apology (in the form of a single sentence) in the plea (compared to the text of the proposal of the correction in the request for broadcasting a correction) does not constitute grounds to justify the rejection of the proposal to publish correction. Apology, as a part of the wording of the correction, was in this case superfluous, and the defendant could broadcast (upon fulfilment of other substantive conditions) the correction without apology for which the plaintiff had no legal claim.

The fourth court case (19C/70/2012) originated in 2012 and finished in 2014. The case was dismissed. The case concerned commercial JOJ TV. The broadcast story was about unfair practices of a bailiff. There were three reasons for dismissal of the case. First, the proposal was not enforceable and it was applied in conflict with Section 21 of the BA, as it took over the wording of the obligation to apologize to the plaintiff, as it represented a moral satisfaction, which is not possible to adjudicate in the correction procedure. Second, the present proposal deemed unenforceable from the reason mentioned above, and also because it took a formulation or corrected information that were not explicitly mentioned in the coverage. Third, whereas it was not clear what execution was in question, ie, the execution was not specified and concretized on the basis of which the television viewer could understand what should be the essence of the correction, or what should be the reason for a correction.

The fifth case concerned again commercial TV JOJ (14C/133/2010). It originated in 2010, finished in 2012. The case was dismissed. The case was about a former MP (sentenced to jail) who was not satisfied how he was portrayed in the programme about criminals. The court argued that the request for broadcasting a correction must contain specific facts, in which lies the untrueness of the facts or distortion of the truth, and it must contain also a proposed text of the corrections. The proposal for an initiation of proceedings contained the text of the correction, from which the specific reason for the correction was not clear. It was the same in

this case, when the defendant was ordered to broadcast a correction only in general, grounded in a finding that the defendant broadcast about him and his wife false information. However, the plaintiff did not present any factual allegations, which he considered true compared to the allegations broadcasted. This fact was finally admitted also by the plaintiff in the proceedings. However, his reasoning that it was not his interest to have published about him any information by TV JOJ (truthful, false, or misleading), and that people will remember the information they hear and think about it, and thus the group of people who are familiar with the given information will extend, legally did not stand according the court.

The sixth case (17C/111/2009) was the only case in which the Court accepted arguments by the plaintiff. This case started in 2009, and finished in 2010. The case referred to the legal dispute between the TV TA3 news channel and a non-profit organization.

In the law case (25C/178/2013), a private company requested that the Court issues a preliminary ban on broadcasting the content of the TV Markíza related to the private company. The proposal was dismissed. The Court was of the opinion that if the request for interim measures is upheld, it would be contrary to the requirement of proportionality of the interference through interim measures in the legal relations between the parties. The proposal would excessively interfere with the defendant's right to freedom of expression which includes the right to freely disseminate information to the public. The fact that the broadcast reports about the plaintiff did not create an entitlement to interim measures that could be imposed on the defendant to refrain from broadcasting further coverages. The plaintiff mentioned that it also lodged request to broadcast a reply, but it was not clear from the document how this case proceeded further.

Very occasionally, we can watch on televisions some 'replies', but more often public apologies. Sometimes these apologies are clearly marked as based on courts' verdicts, sometimes they seem to be voluntary initiative by broadcasters. In any case, in most if not all cases these apologies seem to be cases based on civic law, ie, related to defamation and libel. Our off-the-record sources suggest that major broadcasters try to deal with these cases primarily out of the court, and are willing to pay some non-pecuniary damages rather than to broadcast corrections or apologies. For comparison, there is an early research on the use of the right to reply, noted in three major daily newspapers in Slovakia (based on Press Act).[208] This research suggests that, firstly, the majority of requests to publish replies did not get published due to formal reasons (eg, inadequate forms) and, secondly, all requests came from public authorities or politicians, some law offices and celebrities. The author claims that, since there were no common citizens, the law has failed in its original mission—to protect public at large from the untrue information. Yet, common people usually do not appear in media, and when they do, they often lack knowledge of their rights.

Later on, in 2011, the Press Act was modified. There were some liberal changes, and politicians lost the right to ask for the right to reply. Some more strict formal-bureaucratic changes in the Press Act consisted of the duty to provide evidence that the published information was untrue. However, the right to correction in the BA has remained unchanged. It should be also mentioned that, the Code of Ethics of Journalist speak about the issue of correction. The Code is actually rather demanding in this respect as in Section III, it specifically demands

208 B Ondrášik, 'Právo na opravu a na odpoveď. Ako sa využíva v slovenských denníkoch od prijatia nového tlačového zákona' http://www.hovorca.sk/menu/uvod/news_list/actual/news/pravo-na-opravu-a-na-odpoved/.

that a journalist should correct his or her mistakes, even without any call for such action, whether it comes from a side of any part of the story or of the editorial office.[209]

An interesting case study produced by the Press Council in 2013, should be mentioned. The Press Council discussed an issue of the right to reply related to advertisement. The issue was whether a person has the right to reply when the controversial text is published in a form of a paid advertisement. The Press Council has found that this issue has not been solved either in theory or in practice. The Council argued that legal arguments allowing the publisher to reject the request to publish the correction or the reply are defined in Sections 7 and 8 of the Press Act. This list of choices is fixed, meaning that it is legally impossible to expand this list. On the one hand, this list of choices does not mention data published as a part of advertising. On the other hand, according to the Section 5(3), 'periodical press publisher does not bear any responsibility for truthfulness of information published in the correction, reply, additional announcement, advertisement, as well as in the misleading or comparative adds.' These exemptions do not refer to the published advertisements in which the periodical press promotes their own people, activities, services, or products.

Thus, the Press Council reviewed its own previous similar verdicts (eg, 14/2013), and came to a conclusion that, in the case of advertisements, there is a duty to publish the reply as a correction. The Council defended its position on the grounds that the publisher (that can reject an advertisement) contributes to the breach of the third person rights, when it disseminates the advertisement. Finally, the Press Council argued that, if the lawmaker would prefer to exclude such options from the list, it would have to include that case among exemptions. The right to reply or to correction do not correlate with such activity (refer to Sections 7 and 8). Although the Press Council cannot deal with issues related to electronic / digital media, this verdict is rather interesting because it may have further regulatory consequences, should there be similar (legal-ethical) controversies in electronic / digital media regulations (and especially online media which are by and large in self-regulatory vacuum except ethical aspects of advertisements) in the future.

A. Analytical Summary

As mentioned above, this legal instrument has a very unique position in our study since it has not been dealt via administrative court (Senates) but via civil courts, although still using the BA. In other words, neither the RVR nor the Administrative Law Senates of the SC dealt with this type of cases. Furthermore, relatively low number of court cases allows us to make only tentative conclusions with regard to right to reply.

First, we can see that this right is actually called as right to correction although it has by and large identical meaning as in the AVMSD.

Second, the low number of such court cases indicates a bit odd situation, considering that television and radio broadcasts are rather popular and thus possibly controversial. We have suggested that broadcasters try to deal with these demands out of the court.

Third, the court cases transcripts clearly show that lawyers commonly fail to act in line with the rather strict and precise procedural rules set by the BA, thus bring these cases quite often

209 http://trsr.sk/dokumenty/eticky-kodex-novinara-uinny-od-1-1-2011.

to failure before the court. This is actually similarly dire situation with initial application of right to reply or correction according to the Press Act by (quite many incompetent) lawyers.

Fourth, the case law puts both the RVR and plaintiffs into rather difficult situation with respect to providing evidence. Evidence must include original recording. This means that the RVR has to check all submitted recordings in due time (*de facto* immediately after delivery), otherwise it may end up with evidence which may not be usable before the court. Similarly, natural and legal persons must assure to record contested broadcast on their own.

Fifth, it seems that the current Act on Election Campaign may bring serious legal constitutional challenges with respect to right to reply related to election campaigns. The case law of the CC allows that only really serious or repository breach of law dealing with elections can be turned to the CC. In addition, this really serious or repository breach of the constitution must have direct consequence on the results of the elections, and this claim must be supported by the facts. One can wonder how all these legal conditions can be fulfilled and proven, and how fair election campaign can be guaranteed under these rather strict legal conditions.

Sixth, although the Code of Ethics of Journalist speaks of the issue of correction very clearly, apparently no one referred to this instrument before the court. We do not know whether any television accepted these ethical guidelines in off-court dealing with such request, but this seems to be unlikely.

Seventh, we could see that this issue is really challenging. This could be seen in reversing the Press Council's own previous decisions in the case of advertisements which resulted in morally binding verdict that there is a duty to publish the reply—correction for print media.

XI. Protection of Minors

Protection of minors has become one of the most important regulatory issues in Slovakia. Just during the first half of 2015, the RVR issued in this regard fines in total 67,665 euro. Almost all fines—with a minor fine given to a local broadcaster—were shared by two major television networks (chains) of broadcasters, Markíza-Slovakia, spol. s r.o. (Markíza, Doma, and Dajto) and MAC TV, s.r.o. (JOJ, PLUS, and WAU).[210] This seems to be a general and logical recent trend—almost all fines in this regard were also issued to two major television networks in 2014, too. Similarly, a study of Central European Regulatory Forum (CERF) argues that since the founding of CERF, perhaps the most recurring theme at their annual meetings has been protection of minors from harmful media content.[211]

Protection of minors proved to be more or less regular but challenging business of the media regulator in Slovakia. Initially, in part, this was the result of some vague terms related either to protection of minors, such as obscenity or in general, such as 'display'. In part, this was also the result of lack of experience with new regulation also known as labelling system. This JSO regulation (based on the Decree of the Ministry of Culture 589/2007), as

210 http://www.webnoviny.sk/slovensko/clanok/977352-rada-pokutovala-televizie-maloletych-nechrania-dostatocne/.

211 CERF, 'Comparative Study on the Protection of Minors in Electronic Media in the CERF Countries' Draft, 16 November 2015, 2.

it is mentioned above, specifies age categories which set viewing limitations for broadcasters, multimedia products, audiovisual works on demand and audiovisual works (eg, movies in cinemas) for 7, 12, 15 and 18 years. It also includes listening restrictions for 15 and 18 years, valid for radio broadcasting or recorded programmes. A specific programme can be 'correctly' classified according to JSO and subsequently referred to only under one category of age appropriateness, given the occurrence of the assessment criteria (8 Sž 16/2010). JSO was tested already at the beginning by fifty volunteers.[212] Nevertheless, especially JSO causes a lot of problems which can be seen in its inconsistent assessment by various administrative senates of the SC. Slovak regulatory system applies only two of three possible ways of informing about the unsuitability of programmes, ie, graphic symbol in the case of television programmes, and warning before radio broadcasts. It does not use warning before the programme in the case of television programmes.

This issue is of EU-wide importance too. On 15 December 15 2003, the European Commission adopted a communication on the future of European regulatory audiovisual policy in which it stressed that the regulatory policy in that sector has to safeguard certain public interests, such as cultural diversity, the right to information, media pluralism, consumer protection, and the protection of minors. Enhancing public awareness and media literacy was also included. In general, there are two systems of protection of minors. The first system is focused on users own initiative, the second one is contextually based (content on the screen). There are some systems of protection of minors used for online services—'pull' services of the Internet or telecom providers, and 'push' services for terrestrial / cable / satellite television broadcasts).

The BA defines (Section 20) that a broadcaster is obliged to ensure that programmes or other elements of the programme service which can impair the physical, mental, or moral development of minors, especially such that contain pornography or coarse unjustified violence, are not broadcast. The depiction of unjustified violence for the purposes of this law is the spreading of reports, verbal expressions or images where the violent content is unnecessarily in the foreground. All elements of the programme service which could endanger the physical, mental, or moral development of minors, or impair their mental health or emotional state, must not be broadcast between 6 am and 10 pm. When broadcasting individual programmes, the broadcaster and the television programme distributor are obliged to take into account certain elements, such as their viewers' age.

Interestingly, the on-demand audiovisual services have to ensure that, if the service endangers the physical, psychological, or moral development of minors (especially pornography or brutal, unjustified violence), it should not be accessible to minors under normal circumstances. It is questionable how to fulfil this condition. On-demand audiovisual media service also has some specific and softer regulations. There is no general ban on broadcasting pornography (Section 19(1)g of the BA), just a ban 'to show pornography or pornography which includes pathological sexual practices to a child.' On the basis of the program classification according to age appropriateness, the broadcaster of a television programme service, the IPTV or on-demand audiovisual media service provider is obliged to form and follow a unified system. The system consists of marking programmes addressed to parents and tutors of minors, which informs on the appropriateness of programmes for 7, 12, and 18 year age groups.

212 N Slavíková at Media and Protection of Minors Seminar (n 2).

However, in the case of on-demand audiovisual media service, this obligation is restricted to the classification and marking of programs in the program catalogue only. There were rare cases when this issue became a subject to administrative procedure before the RVR, too. For example, in the case of www.metoo.sk and its programme *Beat It: Michadelik a Polemic* (29 May 2012), there was a complaint that there were vulgarisms broadcast. However, the RVR initiated administrative procedure based on possible breach of Section 20(4) of the BA—ie, the programme was not labelled in catalogue according to the JSO. Similarly, the television archive which did not have labelled videos from reality show on website www.joj.sk, according to JSO, was sanctioned by the RVR in 2012.

Television programme distributor shall also be obliged to enforce the unified system of marking programmes in the programme offer, through its own broadcast. The distributor is also obligated to enforce the unified system in the program summary, published in the periodic press and other media. The previous three provisions do not apply to the local broadcasting of a television programme service, unless it is part of a program network. Programmes are assessed on contextual analysis of an individual assessment criterion. In all of the above mentioned cases, each part of the programme should be assessed separately. However, there are exceptions referring to works produced exclusively for educational purposes.

All programmes which are not suitable for children under the age of 18 must be broadcasted only between 10 pm and 6 am. All programmes which are not suitable for children under the age of 15, must be broadcasted only between 8 pm and 6 am. It is not allowed to broadcast programmes for age categories 15–18 before, during, and after broadcasting for age groups up to 12 years. Based on the CERF Report, we can present a simpler summary of categories used for protection of minors in Slovakia:[213]

- suitable for minors of all age groups;
- unsuitable for minors under the age of 7;
- unsuitable for minors under the age of 12;
- unsuitable for minors under the age of 15;
- unsuitable and restricted for minors under the age of 18

There are also categories of suitability which are used for programmes produced exclusively for upbringing and educational purposes:

- suitable for minors under the age of 7;
- suitable for minors over the age of 7;
- suitable for minors over the age of 12;
- suitable for minors over the age of 15.

There is also a special category of programmes suitable for minors under the age of 12, produced and designed exclusively for the minors under the age of 12.

The Decree of the Ministry of Culture which is used for labelling these categories (JSO) is adequately rather detailed—it has almost 3,000 words. Interestingly, it is not based on the BA but more broadly, on the Act on audiovisual, aural recordings and multimedia works (343/2007 Z. z.). Under Section 1(1) of the JSO, these components of the television programme service are classified as inappropriate and restricted for minors under 18 if they contain verbal aggressiveness, profane language, obscene expressions or gestures.

According to the Article 1(5) of the Decree 589/2007 Coll. of the Ministry of Culture, the

213 CERF, *Comparative Study* (n 211) 8.

RVR is obliged, in addition to observation if the programme does not contain inappropriate content, to consider the content of the work in terms of:

- contextual occurrence of inappropriateness and inadmissibility;
- ways and forms of processing or depicting of the individual evaluation criteria in terms of the nature and type of work and its artistic and moral message;
- intensity and frequency of inappropriate and inadmissible elements in the work.

In determining the amount of the sanction, the RVR takes into account mainly the seriousness of the administrative offense, the scope and impact of broadcasting, the degree of fault, and the consequences of violation. The criteria defining inappropriate contents are drawn quite broadly, while according to other provisions of the Decree 589/2007 Coll. it must also take into account other matters, eg, the manner and form of processing or depicting of inappropriate contents, their intensity, frequency or context occurrence in the work, etc.

In this context, it is useful to compare general criteria for sanctions. According to Section 64(3) of the BA, the RVR will determine the fine according to the seriousness of the matter, the manner, duration and consequences of breach of duty, the degree of culpability with regard to the scope and impact of broadcasts, the provision of on-demand audiovisual media services and retransmission, obtained unjust enrichment, and sanctions that already have been imposed by a self-regulatory body for the matters covered by this law within its own self-regulatory system. According to Section 67(3)c of the BA, the RVR shall impose a fine on the broadcaster of a television programme service, except Internet broadcaster, from 663 to 66,387 euro and the broadcaster of a radio programme service from 99 to 19,916 euro if it fails to classify and label programmes or other components of the programme service (Section 20(4)) or to provide a time inclusion of programmes or other components of programme services in line with the conditions stipulated by special regulations (Section 20(5)).

According to Section 67(5) of the BA, broadcasters of the television programme services are imposed a sanction—a fine ranging from 3,319 to 165,969 euro—for breaching the laws governing substantively different obligations, and, by the BA, protecting a number of diverse interests. There is no doubt that the interests protected by Section 19 of the BA are of great importance for the society. These interests include a provision that mental suffering of minors is not displayed in an improper form.

Although the RVR seems to be rather strict in protection of minors, especially in connection with sexual content (the CERF Study suggests that Slovakia has the most comprehensive rules with respect to classification criteria of sexual content among eight Central and South European countries),[214] it does not mean that it always uses sanctioning powers. For example, on April 2010, the RVR received two complains against the movie *Borat*, broadcasted by TV JOJ. Obscenity and vulgar speech in the film were claimed in these complaints. However, the complaints were dismissed on the grounds that the RVR found that these obscenity and vulgar speeches were clearly marked as not suitable for minors under the age of 15.

Already the first series of reality shows—*VyVolení*, *TV Markíza*, and *Big Brother*, broadcast by TV JOJ became rather strictly fined in 2005. Fines were 10,000 euro (for protection of minors against vulgarism, sexual scenes). Even more interestingly, reporting on the same reality show, *Big Brother* in the evening news was seen as breaking regulation on protection of minors, as well as hidden advertising in a news item called *Prvý vzťah* (First Love Story) broadcasted

214 ibid, 30.

on 8 October 2005. The sanction in this case was initially about 65,000 euro.[215] Indeed, the RVR seem to reflect general uproar with respect to content reflected in reality shows among publics. This can be seen at statistics—number of complaints received by the RVR and related to reality shows. While in 2003 there were 63 complaints, in 2004 there were already 152, while in 2005—when reality show appeared in broadcasting—this number jumped up to 574, and in 2006, the number of complaints was 213.[216] Nevertheless, the popularity of reality shows continued in the next few years. So did the RVR continue to impose sanctions. For example, the reality show *Hotel Paradise* broadcast in 2012 was fined for obscene speech and sexual behaviour as a form of entertainment. The problem was—as in most cases related to protection of minors—the age suitability. Children under the age of 18 were allowed to watch the programs, which was suitable for adults only, according to the RVR.

Although the major issue is obviously related to television broadcasts, there were occasionally cases when radio broadcasts breached obligations related to protection of minors (and there were some additional cases when the publics believed this was the case, but it was not the opinion of the RVR). For example, Radio Expres was under scrutiny of the RVR since it broadcast song *Rosana (*17 July 2013) which was accused of vulgarism in English broadcast before 10 pm. Some other complaints submitted by listeners in 2013, one complaint related to Radio Expres and the song *Another Love,* and another complaint with respect to Fun Radio, were not found problematic in this respect.

The Council for Broadcasting and Retransmission did not accept all complaints as justified, as can be seen from the table below. It should be mentioned here that the RVR does not differentiate in its annual reports between protection of minors and human dignity, these topics are put in the same category. Therefore, we have attempted to detect and differentiate these two different aspects from common category individually. Furthermore, some complaints were categorised separately, under the section of follow-up monitoring of a broadcaster. In other cases, the RVR did not accept the substance of the original complaint, but after checking the programme, it found another breach of law which it sanctioned. Obviously, some cases overlapped two reporting periods. Sometimes it was not clear whether complaint touched upon human dignity and/or protection of minors (eg, suffering of a child). Some complainers mentioned not just one case but more. Alternatively, some complainers mentioned the same programme. The Council included here some cases which were related to alleged libel and defamation cases—clearly not fitting into the protection of human dignity or protection of minors. There also is clear and huge difference between numbers of complaints mentioned above in the conference report by the RVR and in the table below. This difference can also be partially explained by informal and imprecise ways the citizens expressed their dissatisfaction with programmes. Therefore, our table should be seen as providing general picture and trend rather than giving mathematically absolutely correct data.

215 http://realityshow.sme.sk/c/2442137/zalezi-nam-na-ochrane-maloletych-tvrdi-joj-aj-markiza.html.
216 http://apkt.sk/wp-content/uploads/event-camed07-camed_rvr.pdf.

Table 6. Complaints by public on protection of minors based on annual reports v total number of complaints received

	Accepted complaints	Dismissed complaints	Others / comments	Total number of complaints received
2010	5 (out of which 2 based on JSO)	17	1 still under revision	
2011	5 (out of which 3 based on JSO)	25	2 still under revision	899
2012	8 (out of which 3 based on JSO)	52	2 still under revision	557
2013	3 (out of which 1 based on JSO)	13	7 still under revision	110
2014	3 (out of which 3 based on JSO)	17	4 still under revision	95

The data presented above in the table (compiled from the RVR annual reports) suggest that only very limited number of complaints related to protection of minors have been actually accepted by the RVR each year. Both data (mentioned in annual reports as well as those provided by the RVR separately) suggest rapid decline of received total number of complaints. This trend might suggest that the rules of the game are in place.

We have made compilation of sanctions issued by the RVR based on key categories. We have omitted two rarely sanctioned categories; first, it was Section 20(2) which says that provider of the AVMS must guarantee that if this service can potentially disturb physical, psychical, or ethical development of minors, especially programmes that include pornography or brutal, not justified violence, must not be accessible to minors under normal circumstance, and second, it was Section 20(5) which deals with JSO presence in programme offer provided to the media as well as in own broadcast.

Moreover, radio broadcast was also very rarely subject to sanctions under protection of minors regulations. For example, radio Europa 2 was found breaching Section 20(5) in 2011 for broadcasting repeatedly a song. It should be mentioned here that as far as proper categorisation of the age category and time slot for broadcast (Section 20(4)) is concerned, as well as proper labelling system application according to JSO (Section 20(3)), the SC almost in all cases confirmed decisions of the RVR.

Table 7. Sanctions based on protection of minors

	Section 20(1) (not suitable for children)	Section 20(3) (JSO)	Section 20(4) (age + time slot)
2010	0	3	13
2011	0	0	19
2012	0	5	19
2013	0	0	23
2014	1	8	12

The table above suggests (with caveats mentioned above) that the key focus of viewers or rather the RVR (since it sometimes changes subject of its investigation based on impetus from viewers) is (im)proper categorisation of the age category and time slot allocated for broadcast for children and youth, followed by missing labelling of programmes (JSO system). Interestingly, the issue of JSO seem to be appearing every

two years only. Now we turn to cases related to protection of minors that ended before administrative senates of the SC.

A. Case Study

The Supreme Court in its decision 5 Sž 20/2010 repeatedly annulled the decision of the RVR RP 44/2010 (14 September 2010, document RVR 307PLO/0-4353/2009, first decision RP 3/2010, 12 January 2010, SC 3 Sž 6/2010), and referred the matter back to the defender. The decision (Section 250l(2) Civil Procedural Order (OSP) in connection with Section 250j(2)e of the OSP) was established on that the assessment of the administrative offense was based on the fact that the RVR used the BA, which was not effective at the time when the supposed breach of the law happened. In further proceedings it was therefore an incumbent of the respondent to apply the BA, which was in force at the time when the assessed action happened, ie, on 26 September 2009. This case is unique as it brought into decision-making of the RVR two bad solutions, ie, either to keep the ban of retroactivity of law and would use and old (no longer valid) law or would follow general administrative rule and would utilise currently valid BA. In this case, the SC preferred different approach than the RVR.

Nevertheless, beginning with initial legal development of this case (10 March 2010) is interesting to our debate from various aspects. The broadcasted programme in 2009 was seen as potentially threatening the moral development of minors. The sanction was (Section 64(1)d) a (lowest possible) fine of 3,320 euro for breaking Section 20(4) of the BA. In other words, the programme was inappropriately labelled for minors. The amount of the fine was specified both on 'qualitative and quantitative criteria'. More specifically, the RVR argued that although this programme fitted into the category of entertainment, it was wrongly assumed that depiction of sexual behaviour as a form of entertainment is normal and can be broadcast before 10 pm.

Since there was also a breach of Decree by the Ministry of Culture (589/2007 Z. z.), the broadcaster also received additional sanction (Section 64(1)c), a fine (Section 67(3)c of the BA) of 670 euro. In other words, we can see that there were actually issued two different sanctions in a single case. This was recognised as a legal problem, as we shall see. Moreover, this court case documents how much time a single case can take to conclude, as well as it documents procedural mistakes of the RVR. The decision of the RVR was actually cancelled twice—first time by the verdict 3 Sž6/2010-27 of the SC in May 2010 due to procedural reasons (application of law not valid at that time). Second time the decision of the RVR was RP 44/2010, issued in September 2010. This decision of the RVR was legally binding by the previous legal opinion of the SC (Section 250r of the OSP).

The BA was amended by the Act No 498/2009 Coll. with the effect from 15 December 2009, however, the transitional provisions (Section 76) modified certain specific legal institutes, but did not address the application of the BA as a whole. According to the SC, although this general amendment of the method of application of the BA (effective from 15 December 2009) is missing in transitional provisions, in this case, rules of the procedure were clearly given in the legal theory and defined by the valid constitutional principles (see the similar verdict 8 Sž 28/2012 of 11 March 2012). Given the general rule, which

in case of a change or repeal of legislation and its replacement by a new law, determines that the legal relationships which came into being and effectiveness based on the earlier legislation, continue to be governed by the provisions being in force at the time in which they arose, if not otherwise provided by the later law, the defendant, according to the SC, decided correctly to impose a sanction according to the BA valid and effective at the time of transmission of the programme.

In the opinion of the SC, it could not be overlooked that minors are the most susceptible group to the acceptance of external influences and patterns in shaping their own individual scale of values, especially from the media, and therefore it considers the programme and its content not only inappropriate for minor children, but also able at least to disturb and disrupt the emotional state of minors.

Furthermore, despite the fact that the decision of the SC in the case 3 Sž 6/2010 was not in that matter explicit, the SC 'did not remain indifferent' to the serious infringement made by the defendant in the decision, ie, that the imposition of two separate sanctions for one and the same act (deed) for situations when it would breach two or more qualified legal obligations in a single legal provision (single acting concurrence); in this case, Sections 20(3)–20(4) of the BA were contradictory to the principles of administrative punishment stemming from the recommendations of the Committee of Ministers of the Council of Europe 91/1 of February 13, 1991 and constant case-law (see, eg, ZSP 69/2008). The legislator did not established specific rules in the text of BA for punishing an entity that violates several obligations under the BA by one deed (ie, the imposition of sanctions in the event of concurrence of administrative offenses). Thus then, according to the constant case-law, there was no other choice than to use *per analogiam legis*, the rules which address the issue of imposing sanctions for administrative offenses closest. According to the SC, the closest analogical applicable arrangement was the provision in Section 12(2) of the Act No 372/1990 Coll. on administrative offences, under which more offenses of the same offender present in one proceeding will be penalised by a sanction under the provisions applicable to the strictest punishable offense. This meant the application of the principle of absorption rather than the principle of totalisation. It was more convenient for the offender, as the principle of totalisation would impose a penalty for each offense separately.

However, Kukliš argues (in line with discussion in part of the rules of procedures) that this omission in the BA could actually mean that the law-maker really wanted to punish a broadcaster individually for each specified delict (ie, effectively twice for two different breaches).[217] This could be justified by different status of legal subjects (broadcasters or providers of specified online services) which are not so much threatened by higher financial sanctions. Be that as it may, according to the SC (which did not deal sufficiently with these legal aspects in its verdict), the most important substantive legal consequence of concurrence is that more offenses of the same offender are penalised under the provisions applicable to the strictest punishable offense, so the applicable law does not support imposing two or more penalties for one deed.

However, as the complainant in this respect did not raise an objection, the SC dealt with this unlawfulness, which was based on the fact that the administrative authority '*uno actu*'

217 Kukliš, 'Analógia v správnom trestaní' (n 65) 463.

imposed two penalties for two violations of the law to the same subject, although, according to the absorption principle, it should have imposed only one penalty with higher rate with regard to the follow-respondent in this as in other similar cases; with regard to the further respondent's steps in this and other similar cases.

Yet Kukliš argued that the aim of absorption principle is to eliminate excessive punishments.[218] In this particular case, there was no such situation. The final fine (after dealing with appeal and the SC verdict) in this case was exactly the same as it was decided originally by the RVR. Moreover, the SC could make fine lower, and thus there would be no problem with absorption principle.

Although the SC accepted that it was not its task to replace grounds of appeal nor to seek defects in the decision and procedure of the administrative authority, based on the above mentioned facts, however, the SC argued that it could not disregard the lack of justification for the amount of the sanctions imposed, since, as it was clear from the justification of the contested decision, the defendant 'justified' the fine by quoting the relevant statutory provisions of the BA.[219] In the opinion of the SC, such 'justification' had to be regarded as unreviewable, while the SC could not accept the argument of the defendant presented at the hearing that the fine was imposed on the low end, and it was not possible to impose a lower fine, and therefore it did not have to be further substantiated. The Supreme Court did not ignore that pursuant to Section 67(5)c of the BA, the lowest amount of the fine was 663 euro, and according to Section 67(5)d of the Act, 3,319 euro, and the defendant imposed a fine of 670 and 3,320 euro. Therefore, the argument of the defendant on the impossibility of imposing a lower fine had no basis in law, and it was also not possible to disregard insufficient reasoning about the sum of the fine in order to determine whether the plaintiff breached the provisions of Sections 20(3)–20(4) of the BA in repeated sanctions.

Moreover, the decision did not show how the administrative authority coped up with the criteria of imposing a penalty, therefore the SC considered the fine not justified. Thus, the SC, despite inadequate grounds of the appeal provided by the plaintiff, had to repeal the decision of the defender under Section 250q(2) of the OSP, with reference to the Section 250j(3) of the OSP in conjunction with Section 250l(2) of the OSP, since the decision was unreviewable in this section for the lack of reasons and referred the matter back to the defendant for further proceedings. In conclusion, the SC highlighted its finding based on the enclosed record, that the (rock music) video clip which was broadcast in the programme, and considered by the RVR as of promiscuity, did not present such a behaviour.

i. Case Study 1 (3 Sž 6/2011 SC, Decision RP 56/2010, 21 December 2010, fine 7,000 euro, justified)

On 23 July 2010, at about 8:40 am, the service provider broadcasted the programme *Instructions for the murder* that was labelled as inappropriate for minors under the age of 12, whereby the plaintiff failed to apply correctly a uniform labelling system. The law was violated by the mere fact that the programme *Instructions for the murder* was labelled

218 ibid, 464.

219 Sections 64(2) and 64(3), 67(5)c and 67(5)d.

under JSO as inappropriate for minors under 12. The plaintiff was imposed the sanction under Section 64(1)d of the BA—a fine determined in accordance with Section 67(3)c of the BA.

The story was based on reading chapters of the book *The Assassin*. It is a book which describes the instructions on how to successfully proceed with committing a murder. The content of this book will become a subject of dispute, since, based on the steps described in it, actual murders of three people were committed. At the end of the programme, the publisher of the book pays the victims' families substantial financial compensation without any decision of the jury, and, at the same time, withdraws all copies of the book from sale.

The Council for Broadcasting and Retransmission based its decision on the arguments that the content and situations presented in the programme were not common in everyday life. Presenting a detailed guidance on how to proceed in the commission of a murder could not be considered as a standard content presented in the media. In the presented program, indeed, the instructions were read from the book, which became the subject of a dispute concerning the interpretation of the right to freedom of expression. The publisher at the end of the programme admitted their guilt, however, the context in which the scenes with inappropriate content were broadcast was so complicated that a minor spectator (12–15 years old) could not understand the whole context of the programme. The Council came to the conclusion that the programme contained scenes that met the criteria classified under the unified labelling system JSO as inappropriate for the age group up to 15 years (display of physical aggression and related acts of violence ending in death—murder of three persons by an assassin).

There was an interesting legal dispute about what should be understood under term 'to make visible / display' (*zobrazit*). The BA does not define directly what it understands by 'improper display format'. The plaintiff argued that the legislation is aimed at protecting minors from viewing undesirable contents in broadcasting; in view of the fact that there was no undesirable display, the plaintiff considered the disputed decision to be based on incorrect assessment of the matter.

The defendant RVR argued that the content and situations presented in the programme were not common in everyday life. Presenting a detailed guidance on how to proceed in the commission of a murder cannot be considered as a standard content presented in the media. The context in which the scenes with inappropriate content were broadcast was so complicated that a minor spectator (12–15 years) did not have to understand the whole context of the programme. The Council for Broadcasting and Retransmission came to the conclusion that the programme contained scenes that meet the criteria classified under the JSO, as inappropriate for the age group up to 15 years (display of physical aggression and related acts of violence ending in death—murder of three persons by an assassin).

The defendant RVR argued that the above-mentioned specified criterion of JSO is aimed at 'display', and while in the programme the controversial scenes included predominantly a spoken word—reading from the book *The Assassin*, this was accompanied by pictures which represented the read content, in which there were also images of physical aggression and related acts of violence ending in death. So, according to plaintiff, it remained partially unclear whether in television broadcast one can consider only aural aspects of controversial content of this type.

Another interesting aspect of this legal debate concerned the fact, according to the plaintiff, that the primary idea of the broadcast content was the question of the absoluteness of the right to information. The plaintiff argued that it was socially accepted that minors above 12 years are familiarised with this issue, as it happens in teaching in schools.

The Council for Broadcasting and Retransmission argued that, in this case, the frequency of inappropriate content was not so high to justify the labelling of the program as inappropriate and inaccessible to minors under 18. However, the age group of minors of 15 years, in the opinion of the RVR, is capable to perceive the moral message and the essence of the programme, which is the fact that the right to freedom of speech should have its limits, which, in order to protect the right to life should not be exceeded. It was a bit bizarre that defendant argued here with the First Amendment of the US Constitution. If at all, it should perhaps use the case law of the ECtHR. Finally, the SC debated also whether it was necessary and/or useful to consider the programme suitability as a whole or its specific parts.

The defendant argued that it was necessary to assess the program *Instructions for the murder* from the point of view of proper implementation of the JSO as a whole, ie, the single scenes containing unsuitable content in the context of the whole programme, its character and content. The defendant's argument was that determining the specific part of the program, which is contrary to the provisions of the Decree No 589/2007 Coll. directly in the statement of the decision would be incomplete and inaccurate, and such taking out the inappropriate content of the context or fulfilling the criteria for each category of impropriety would be contrary to the purpose of the Decree, and cause incompleteness and inaccuracy of the statement. Moreover, the defendant argued, it was obvious that for the purpose of a reliable assessment of the scenes with the content mentioned above, it was necessary to see these scenes in the context of the whole programme. Furthermore, it was clear that the arguments that the RVR expressed in a contested decision were based on seeing the recorded broadcasts of the programme. In particular, the most fundamental issue that justified labelling of the programme as inappropriate for minors under 15 years in line with JSO was the fact, that the programme contained a scene in which there were three persons murdered by an assassin, one of which was a child lying in the bed, connected to devices that ensured his vital functions and that kept him alive.

Nevertheless, the RVR argued that in the course of the administrative procedure, clarification of the facts was done, which was mentioned in the transcript / description of facts on the ground that the RVR, in a detailed re-examination of the programme found small, insignificant irregularities in terms of possible violation of Section 20(4) of the BA. Justification of the contested decision on the pages 7–12 described in details which specific scenes in the content, manner and form of processing, while taking into account the context in which they were broadcasted, met the criteria to justify the labelling of the program as inappropriate for minors under 15 years. In support of its arguments, the RVR referred to the judgments SC 5 Sž 17/2010 of 10 March 2011, 8 Sž 8/2010 of 20 October 2010, 2 Sž 8/2010, 5 Sž 8/2010, 4 Sž 10/2010, and 5 Sž 17/2010. In the view of the SC, pursuant to Section 1(2)a of the Decree, television programmes that contain images of physical aggression and related acts of violence ending in death or serious consequences, the details of the consequences of violent acts are classified as inappropriate and restricted for minors under the age of 15.

The discussion about the content of the decision of the media regulator was important. Although the cited provision did not state explicitly that the operative part of the decision must contain the objective, time, and place of the act on which the administrative offense is based, there was no question that only the operative part of an administrative decision was able to affect the rights and obligations of the parties, and only it could gain legal force. A correctly worded statement was therefore an irreplaceable part of the decision; only the operative part indicates whether and what obligations are imposed; only by comparing the operative part it is possible to presume the existence of a barrier in the decision; exclusion of barriers *lis pendens,* double punishment for the same act; it is important to determine the extent of substantiation, as well as to ensure the proper rights to defence; only the operative part of the decision and not the justification may be enforceable by an execution, etc. For these reasons, the definition of the subject of the matter is included in the operative part of the decision on an administrative offense, which is based on the specification of an administrative offense in such a way that the sanctioned act cannot be interchangeable with other acts.

ii. Case Study 2 (8 Sž 8/2010, 20 October 2010, RP 07/2010 of 9 February 2010, Changed the Part of the Operative Part, the Plaintiff was Obliged to Pay a Fine 10,000 euro, ie, the Half of the Former Sum)

The issue was again appropriateness of marking of a programme. The Council for Broadcasting and Retransmission concluded that adequate indication of the programme in TV Markíza would be 'inappropriate for minors under the age of 15.' Expressions and statements that the programme of 14 September 2009 CS Superstar contained (eg, 'He has no balls crappy, what's your problem', 'In does not matter, dog shit on it', 'I like that you did not fuck out of it', 'But he is fifteen years old. Maybe once he will fuck'), were, in the view of the RVR, not the standard slang language but vulgarisms. However, the RVR took into account the fact that they were not the harshest vulgarisms; therefore, the RVR considered as adequate indication the pictogram 'not suitable for minors under the age of 15.' The Council shared the arguments of the party that the occurrence of vulgarisms was not dominant. However, it took into account the fact that the jury members of the contest used the expressions also in communication with minors, and that were presented by real persons that were popular and known from the media. In effect, minors often consider them to be their idols, models, or persons whose behaviour they tend to imitate, what constitutes an increased risk for threatening the moral development of minors, concluded the RVR.

Taking into account the fact that the broadcaster infringed the provisions of Section 20(4) of the BA in the past, the RVR imposed the plaintiff a penalty (fine) for this violation of law and in determining its amount it took into account, in particular, the seriousness of the administrative offense (the programme was broadcast in the prime time, and the vulgar language justifies classification of the programme as inappropriate for minors under 15; the vulgar statements were presented by public figures, which—as mentioned—may lead to the acquisition of such a behavior by minors); the scope and impact of broadcasting (the plaintiff was a multiregional broadcaster); the degree of offense (objective liability for an administrative offense, while the participant was already in breach of the provisions of the

law sanctioned, moreover, it was a programme that has been edited in advance, so it was possible to consider the selection of images and information presented).

iii. Case Study 3 (28 September 2010, 5 Sž 8/2010, verdict was confirmed)

The case concerned the broadcasting of the programme *The Long weekend*, and its labelling as a programme suitable for minors under the age of 15, with final fine of 1,500 euro. The programme was broadcast on 13 September 2009 at 9.30 pm. According to both the RVR and the SC, it was indeed inappropriate for minors under the age of 15, showing sexual behaviour in the form of entertainment, vulgar language, obscene gestures or expressions that come to the fore, which were intended exclusively for adults because of the intensity of inappropriate scenes and expressions, as well as the moral message of the programme.

In this regard, the defendant RVR assessed the scenes in question—sexual behaviour, vulgar language, obscene expressions or gestures presented as a form of entertainment only for adults (18+). Additionally, these scenes were occurring in the context where the search of sexual experiences in order to enjoy as much as possible had a dominant role. the RVR pointed out that minors are often unable to understand the contents of some of the scenes, in this case, mainly the presentation of sexual behaviour, vulgar language, obscene scenes and expression, or scenes with copulating animals; and this misunderstanding was likely to cause a danger that minors adopt a model of behaviour without having understood and perceived unsuitability of their subsequent adopted behaviour.

The Supreme Court, after reviewing the case file including the attached recording (Section 250q(1), second sentence of the OSP) concluded that the *Long Weekend* was dedicated exclusively to adults because of the intensity of inappropriate scenes and expressions, as well as the moral message of the programme, ie, it considered it to be absolutely inappropriate for children and teenagers under 18, since—the SC counted—it recorded usage of vulgar words 25 times, while in 10 times the vulgar words were presented in the time before 10 pm.

The Supreme Court joined the choir arguing that minors are the most susceptible group to the acceptance of external influences and patterns in shaping their own individual scale of values, especially from the media. Therefore it considered the programme and its content not only inappropriate for minor children, but also able at least to disturb and disrupt the emotional state of minors.

iv. Case Study 4 (5 Sž 14/2011, RP 21/2011 of 24 May 2011, the Sanction was Confirmed—Fine 20,000 euro)

The case concerned the program *Blue of the Sky* broadcast on 7 October 2009 at 8 pm. This program (which is based on fulfilling secret wishes to selected, usually poor or handicapped people) showed a minor, who was exposed to what was defined as psychological suffering. In one scene of the programme, the moderator of the programme continued in conversation with the minor about his suicide attempts even after it was clear that he was feeling uncomfortable. The conversation ended in the emotional reaction of the minor when he burst into tears and walked out of the room.

The Council for Broadcasting and Retransmission did not accept the argument that all issues had been discussed with the mother of the minor before the programme. The Council stated that the broadcaster is responsible for the content of the programme services and for its compliance with the law, and this responsibility cannot be disposed of with the consent of a legal guardian of the minor. The Council stated that the crucial was not the fact how the minor perceived the programme as a whole, but whether there was a display of a minor who was exposed to psychological suffering. Escalation of the situation by the moderator towards the emotional reactions of the minor and its display in a slow motion supplemented with suggestive music constituted the improper display format. In assessing whether this was a psychological suffering, the defendant relied on the responses of the minor and the processing of the programme.

In determining the penalty and the amount thereof, the RVR in its decision took into account the severity of the administrative offense, as despite the fact that the assessed program was prepared in advance, the defendant broadcast the scene in a form that exposed the minor to psychological distress using suggestive elements that highlighted the displayed mental suffering of the minor while broadcasting the scene in question was in terms of the content and the programme structure purposeless.

Interestingly, the previous decision in this case was annulled by the judgment of the SC of 16 March 2011, 2 Sž 9/2010, and the case was referred back to the RVR for further proceedings, because the RVR in its decision applied the legislation, which was not at the time of the plaintiff's breach of duty in force and effect. It could have used the law only if it was more favourable for the broadcaster. Such a reason for the application of the later legislation, however, did not imply from the contested decision. In line with views expressed in the SC judgment, the RVR in the new decision applied to the assessment of the works of the BA in force at the time when the facts had assessed.

v. Case Study 5 (6 Sž 5/2013, 19 March 2014, RP 009/2013 of 29 January 2013, fine 3,319 euro, confirmed)

On 23 August 2012 at about 9.30 pm, the service provider broadcast the trailer of the reality show *The farmer is looking for a wife*, which included the scenes of violence, for which the RVR imposed a penalty of 3,319 euro. The trailer on the new series (ie, the first part) of the programme was an edition of passages of the advertised programme. It did not include any accompanying comments at the end of the trailer, just a text information on the programme and performers was published. There was a debate about terminology—scenes displaying violence, the scenes that capture aggressive behaviour of acting women to each other, and the RVR assessed these as being contrary to the obligation of the broadcaster.

The Supreme Court argued that the concept of violence or violent scenes is quite broad, and its (precise) legal definition is impossible or undesirable as its perception may change in the course of time, the place of application of legal norms as well as (within) the society. In other words, in the view of the SC, the concept of violence can be categorized as a so-called undefined legal term. Yet among other issues, it can be concluded that term 'violence' has a broad philosophical, sociological, and legal dimension. The role of the administrative authority in this case was thus to specify the general content and meaning of this term,

taking into account the specific circumstances of the case as well as the case merits of the administrative offense.

In the view of the RVR, the scenes depicting aggressive and violent expressions of women to each other met the concept of 'scenes of violence' within the meaning of the provision Section 19(2) of the BA. Consequently, their inclusion in trailers constitutes the breach of that provision. In the context of the administrative discretion, the RVR coped up with the concept of violence, and in its interpretation, it took into account a legally protected interest enshrined in the provision of Section 19(2) of the BA—mainly aim to protect the viewer from an excessive and immediate confrontation with violent and other inappropriate content presented in television broadcasting. The Council for Broadcasting and Retransmission drew attention to the page 7 of its decision 4 6 Sž 5/2013 which shows that the defendant based the definition of violence on professional sources (literature), which was quoted in the justification of its decision. Thus, according to the RVR, the term violence must be, under the provision of Section 19(2) of the BA, understood as any explicit, verbal, or physical attack directed against the physical or moral integrity of another person, or thing that gives rise to damages, or is likely to cause a risk of injury or other harm.

After evaluating the picture and sound elements of the trailers in question, the RVR concluded that the scenes in which the women verbally harassed each other, and these attacks were accompanied by physical attacks of women, were justly regarded as depicting violence. Although these were short scenes, in the RVR's opinion, they were a substantive and not inconsiderable proportion of the trailers. These scenes were not fictional, acted scenes of a dramatic programme, but the violent behaviour of real individuals.

vi. Case Study 6

We put these two cases together because they seem to tackle in essence identical issues (8 Sž 16/2010, RVR RP 26/2010, 22 June 2010, confirmed on 2 June 2011: fine in the amount of 5,000 euro, on 11 January 2010; and 5 Sž 17/2010, 10 March 2010, RP 29/2010, 8 June 2010, confirms verdict. Redress No RP 29/2010 of 8 June 2010, the defendant RVR in administrative procedure, No 120-PLO/0-1809/2010, fine of 5.000 euro).

a. First Case

The programme *N. Z.* was broadcast at about noon. Although it was labelled as unsuitable for minors under 15, in the view of the RVR, it could have included a criterion for classifying and labelling the program as inappropriate and inaccessible to minors under 18—for the obscene expression and obscene gestures, which presented the abuse of inexperience, and naivety of young girls to satisfy their own needs, or to strengthen the 'reputation' of deceivers, or 'monsters' among students, in addition in the context, in which they were broadcast (perverse and immoral practices of the main characters).

Broadcaster argued that the RVR did not define what constitutes obscenity of the broadcast content, and did not define obscenity as such, despite the fact that when taking their decisions to define obscenity it had to proceed within the framework of administrative

discretion. In the view of the RVR, the concept of obscene expression is not a term with legal or another consistent, universally accepted definition, therefore it is a so-called (legally) vague term, and its interpretation is the responsibility of the administrative authority. The Supreme Court argued that the objection of the broadcaster was legally irrelevant. Indeed obscenity in general is typical of something indecent, lewd, offensive stud, immoral, and so on. For this reason, it was not the duty of the defendant to give the definition of obscenity in its decision, argued the SC.

Yet the SC did not react to the argument of the plaintiff about the labelling of the program by a pictogram in other European countries (Sweden 7, Great Britain and Norway 15), although the Slovak televisions broadcast the programme with the pictogram '15'. In the view of the SC, the plaintiff's arguments in which it pointed out the labelling of the programme by a pictogram on the age suitability in other EU countries was irrelevant. However, the SC did not state why it was not relevant. The Council for Broadcasting and Retransmission expressed itself in this respect. In the view of the RVR, the fact that the programme in question was broadcast in the past, and with what label of age appropriateness, is irrelevant in relation to the subject of (local) administrative proceedings. The Council considered as substantial the fact that the defendant did not take into account this aspect of the programme in the prior period within the administrative proceedings or at its meeting on discussing the report on compliance with the obligations under the BA. Due to the limited capacity of the defendant, it was clear that it could not consider all programmes broadcast by the entities under its responsibility.

Determining the amount of the fine, the RVR took into account the fact that the plaintiff had already been legitimately penalized several times in the past for a breach of that obligation, and the amount of imposed sanctions as well. The Council also concluded that the intensity of the evaluation criteria of inappropriateness was high, especially given the context in which the expressions and scenes were broadcasted.

b. Second Case

On 10 January 2010 at noon, the plaintiff broadcast the programme *Panenstvo na obtiaž*, which was labelled as inappropriate for the age group up to 12 years. The programme depicted a situation of the main character who was one of the last virgins in the class. Loss of virginity was the main motive of the programme. This theme was treated from the perspective of the main characters of the programme, ie, adolescents attending the second grade of a secondary school (about 16 years). The overall approach was considerably lightened and simplified, eg, an advice of the main character's female friends that she cannot lose virginity with her boyfriend, because it would be embarrassing. Although the programme had a happy end, it cannot be considered as having a clear positive moral message. The programme did not answer the questions related to sexual activity of minors, especially for minors under the age of 15.

The programme included the scene in which the female character loses her virginity. The scene showed the sexual act between the girl and her partner. The scene did not include any images that would show genitals, rather provided a detailed view of the emotions that both partners experienced before, during, and after the sexual act. Also, rendering the act itself was real and credible, taking into account the age and experience of the actors. The Council

for Broadcasting and Retransmission therefore made a conclusion that the nature of the scene reflect the ambition of filmmakers to capture the particular emotions of both partners, especially apparent nervousness and apprehension and the resulting 'problems' at the first sexual intercourse, embarrassment during the sexual intercourse by the main protagonist in the view of the fact that it was her first sexual experience, 'orgasm' of the partner, a surprise about the 'duration' of the sexual intercourse, as well as the contradictory emotions of the female partner after the act. The Council therefore concluded that the 12, 13, and 14-year minors encounter the topic of sexuality in everyday life, but at this age, they are not able to understand the complexity of this issue yet. The Council concluded that the method of processing the main theme of the program was not suitable for minors under 15 years.

It is obvious that that scene was undoubtedly important for the story line of the programme, its duration and in particular a detailed display of emotions of both partners, especially the main character, answered this aim. The film was a Swedish and Norwegian co-production; in Sweden, it was labelled with a pictogram '11', and in Norway, it was marked as inappropriate for minors under 15. In the view of the SC, the content of the programme was not only improperly labelled for minors under 12 years, but it could send morally misleading the message to minors. In the view of the SC, it cannot be neglected that minors are the most susceptible group to the acceptance of external influences and patterns in shaping their own individual values, especially from media. In effect, the SC argued that it could not accept the argumentation of the applicant that the programme was labelled by a pictogram on the criteria for age suitability in other EU Member States. However, it did not give the reason for this.

vii. Case Study 7 (8 Sž 15/2010, RP 21/2010, 11 May 2010, annuls and returns the matter back for further proceedings)

On 26 December 2009 at about 8 pm and on 27 December 2009 at about 5 pm, TVM broadcast the programme which was labelled as inappropriate for the age group up to 15 years, thereby committing an error of application of a uniform labelling system for which it was fined 3,400 euro. When imposing the sanctions, the RVR took into account the fact that, at the time of broadcasting of the programme, the TVM was sanctioned for breaching the provisions of Section 20(4) of the BA (final decisions Nos RP 51/2007, a fine of 100,000 koruna (approx 3,000 euro); RP 62/2007, 100,000 koruna; RP 14/2008, 50,000 koruna; RP 13/2008, 50,000 koruna). The Council for Broadcasting and Retransmission took into account that the previous penalties have not fulfilled their precautionary and/or educational purpose; therefore it considered the amount of the sanction fully justified.

The programme depicted the assistance of a grandmother during a male masturbation and subsequent orgasm on her face; the hardest penis competition; bouncing of table-tennis balls by a penis; a sexual act with a hint of sadomasochistic practices, etc. These scenes were assessed as rather obscene expressions, which in any case are not part of the standard civilian life of minors under 18. Therefore, the RVR came to the clear conclusion that the context of obscene expressions was inappropriate for minors under 18 years, and the intensity of this obscene expression was high.

An assessment of the legality of the decision which was based on the use of the implemented regulation, the Decree of the Ministry of Culture No 589/2007 Coll. as amended on 1 January

2010, remained controversial. From 1 January 2010 it was amended by the Decree of the Ministry of Culture No 541/2009 Coll., which had no transitional provisions.A comparison of these legal texts confirmed that the revised text did not affect the obligations which this regulation imposes on the applicant. The Supreme Court Senate has already issued a legal opinion in a similar case, saying that application of the legislation in force at the time the decision does not affect its legality. Yet at the hearing on 25 November 2010, the plaintiff, with the reference to the provision of Section 250j(3) of the OSP, added an objection to the plea saying that the operative part of the decision contained a reference to the provision of Section 67(10) of the BA, which, at the time of the decision, was not effective. The fact that it was not a mistake in writing in this case is confirmed by the validity of this provision until 15 December 2009. A decision made on the basis of an ineffective regulation establishes a statutory ground for revocation (Section 250j(3) in conjunction with Section 250l(2) of the OSP). Therefore, the SC annulled the contested decision and returned the case for further proceedings. This case thus again highlights importance attached to the operative part of the decision.

Table 8. Verdicts of the SC related to protection of minors

Judgment of the CC of Slovakia	References to own rulings (CC)	References to other domestic courts (eg, CC)	References to international or foreign courts (ECtHR and others)	Decision of the RVR
5 Sž 20/2010	3 Sž6/2010—used law in force at the time of breach of duty			RP 44/2010 cancels and returns back
8 Sž 16/2010	6 Sžo 55/2010, 1 June 2010—inability to comment on the subject of administrative proceedings			RP 26/2010 confirms
3 Sž 6/2011	5 Sž 17/2010 10 March 2011; 8 Sž 8/2010, 20 October 2010; 2 Sž 8/2010; 5 Sž 8/2010; 4 Sž 10/2010, and 5 Sž 17/2010—assessment of the program as a whole; 2 Sž 8/2010—omission of facts that did not and could not affect the determination of the amount of the fine, and cannot therefore justify the annulment of the decision			RP 56/2010 confirms
8 Sž 15/2010	3 Sž 6/2010-27—misapplication of legislation—retroactivity			RP 21/2010 cancels and returns back
8 Sž 8/2010	5 Sž 9/2009 22 September 2009—lack of definition of the offense; 3 Sž 4/2007—lack of definition of the offense; this is a measure of the ethical evaluation of the facts			RP 07/2010 changed only in part on amount of fine to 10,000 euro
5 Sž 17/2010	6 Sžo 55/2010—the absence of a precise description of the administrative offense; 6 Sžo 55/2010—the opportunity to comment on the basis for the decision; 3 Sž 4/2007—competence of the Council to assess the content of the programme		decision of the Municipal Court in Prague 7Ca/315/07—the absence of a precise description of the administrative offense; the Municipal Court in Prague, 8 Ca/297/2007-4— exact description of the administrative offense	RP 29/2010 confirms
3 Sž 6/2010				RP 3/2010 cancels and returns back
3 Sž 96/2008	5 Sž 89/2007—previous to this case			RP 33/2008 cancels and returns back
5 Sž 8/2010				RP 09/2010 confirms
6 Sž 7/2011				RP 06/2011 confirms

5 Sž 14/2011	2 Sž 9/2010-25, 16 March 2011—previous to this case; 2 Sž 21/2010—the absence of a precise description of the administrative offense; 8 Sž 8/2010; 3 Sž 14/2008, and 6 Sž 7/2010—excessive sanction; 4 Sž 2/2010 of 24 August 2010—a precise description of the administrative offense			RP 21/2011 confirms
5 Sž 27/2011	3 Sž 4/2007—the competence of the Council to assess the content of the programme; 5Sţ/66/98; 6Sţo/156/2007; 3Sţ/60/2009; 4Sţ/2/2010; 5Sţ/8/2010; 8Sţ/8/2010; 8Sţ/16/2010; 3Sţ/6/2011; 6Sţ/5/2011—sufficiently precise formulation of the deed in the decision		decision of the Supreme Administrative Court CR 8As 62/2005—the competence of the Council to assess the content of the programme—assessment of the ethics is subjective	RP 84/2011 confirms
6 Sž 5/2013		IV. ÚS 324/2011-16—any public authority determines the kind of legislation and its interpretation in accordance with the principle of the rule of law		RP 009/2013 confirms
3 Sž 18/2013	4 Sž 101/01; 4 Sž 145/02—application of a more severe sanction is bound to repeated breach of a legal obligation and not the identical act; 3 Sž 2/2013—justification of a more severe sanction		Decision of the Supreme Administrative Court CR No. 7As/57/2010-82—the duty of the RVR is to get acquainted with any evidence which forms the basis for an administrative decision, Decision of the Supreme Administrative Court CR No 6As/26/2010-101 of 3 April 2012 lack of notification of breach of the same duty in the past	RP 053/2013 confirms

B. Analytical Summary

In almost all cases that ended before the SC with respect to protection of minors, the issue at stake was that the programme was inappropriately labelled for a particular category of minors. One can argue that the average amount of fines imposed on broadcasters was initially relatively low— hundreds or thousands euros. Yet it is also true that the RVR applies progressive level of fines, ie, increasingly higher fines for the same broadcaster and in the case of more or less identical breach of the law.

Similarly to other areas, the issue of protection of minors seemed to be novelty to regulatory and judicial bodies. This finding explains some procedural mistakes done by the RVR such as that two different sanctions were in a single case, or that exceptionally the media regulator did

not cope up sufficiently with the criteria of imposing a penalty, or that there were problems with interpretation of missing clause in transitional legal provisions (as it was attempted to use this argument by a barrister of a broadcaster), or that there was omission by lawmaker of specific rules for punishing an entity that violates several obligations under the BA by one deed.

It was an important opinion of the SC in which it supported the RVR that it was necessary to consider the programme suitability as a whole and not only its specific parts. Probably the most arguable verdict for viewer not familiar with this broadcast remains the *Blue of the Sky* decision (5 Sž 14/2011). It is useful to repeat the key issue here: 'Escalation of the situation by the moderator towards the emotional reactions of the minor, and its display in a slow motion supplemented with suggestive music constituted the improper display format.' It is true that this programme was based on escalating emotions. Yet this is nothing in itself unusual. At the same time, this programme brought in many positive aspects to the participants (fulfilling their dreams). Moreover, escalating emotions, if all parties agree, even among minors, may not really be seen as an improper method. Finally, the sanction—20,000 euro—could also be seen as inappropriately high, even considering that the media regulator took into account previous breaches of the law by the broadcaster. In this case, the RVR issued a strong message to all broadcasters about high protection given to minors used in emotionally laden and commercially utilised situations. Moreover, it should be mentioned, the overall consensus was that this was an appropriate sanction.

Finally, perhaps the most controversial issue seems to be not taking into consideration different (usually more liberal) labelling in other countries by the Slovak media regulator as well as by the SC. Two cases can be seen the most problematic in which the SC did not explain why this argument was not relevant. It is true that countries in Europe have different level of tolerance, and see differently various cultural issues, including sexual education or protection of minors. This also was highlighted by the ECtHR. It is also true that, legally speaking, neither Slovak courts nor media regulator can ignore local legislation (in this case, the JSO decree). Be that as it may, an explanation on this issue (which actually came before the SC twice) should be provided by the SC—at least for general public. Moreover, children seem to be children everywhere, and foreign television broadcast is accessible either via satellite or cable or Internet everywhere in the EU. Therefore, as it is put in the CERF Report,[220] different labelling systems may dispatch different and potentially conflicting regulatory signals, which may diminish the effectiveness of each individual labelling system. Therefore, one can find in the CERF Report a reference to the European Regulators Group for Audiovisual Media Services on protection of minors work,[221] ie, the draft Report on the protection of minors in a converged environment. This report conveys a wide consensus among regulators about the need to 'develop a set of universal content categories at European level'. This is actually, also in the interest of the European Commission, which, however, would prefer assessment based on individual countries. Another issue are the changing viewing habits when it seems that minors prefer to watch television and video on the Internet.

220 CERF, *Comparative Study* (n 211) 2.
221 ibid, 3.

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