



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 June 2012¹

Case C-283/11

Sky Österreich GmbH
v
Österreichischer Rundfunk

(Reference for a preliminary ruling from the Bundeskommunikationssenat (Austria))

(Directive 2010/13/EU — Right of television broadcasting organisations to access, for short news reports, to events of high interest to the public that are subject to exclusive transmission rights — Limitation of compensation to additional costs occasioned by the provision of such access — Compatibility with Articles 16 and 17 of the Charter of Fundamental Rights of the European Union — Proportionality)

1. This reference for a preliminary ruling requests the Court to evaluate the conformity with fundamental rights, in this case, the freedom to conduct a business and the right to property, of Article 15(6) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).²
2. Article 15 of the Directive confers on broadcasters the right to make short news reports on events of high interest to the public which are transmitted on an exclusive basis by a television broadcasting organisation. To this end, broadcasters are allowed access to the signal emitted by the body that holds the exclusive transmission rights in order to enable them to choose the short extracts that will make up their news reports.
3. Article 15(6) of the Directive lays down the rule that where, in the implementation of the right thus granted to broadcasters, compensation is provided for, it may not exceed the additional costs directly incurred in providing access to short extracts.
4. In connection with the last mentioned provision, this reference for a preliminary ruling raises the question of reconciling requirements relating to the protection of various fundamental rights, namely the freedom to conduct a business and the right to property on the one hand, and the freedom to receive information and media pluralism on the other.

1 — Original language: French.

2 — OJ 2010 L 95, p. 1, 'the Directive'.

I – Legal background

A – *Union Law*

5. Recital 48 in the preamble to the Directive states:

‘Television broadcasting rights for events of high interest to the public may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming across the European Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.’ [3]

6. Recital 55 states as follows:

‘In order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the Union are fully and properly protected, those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking due account of exclusive rights. Such terms should be communicated in a timely manner before the event of high interest to the public takes place to give others sufficient time to exercise such a right. Such short extracts may be used for EU-wide broadcasts by any channel including dedicated sports channels and should not exceed 90 seconds. ...

The concept of general news programmes should not cover the compilation of short extracts into programmes serving entertainment purposes. ...’

7. Recital 56 states that:

‘... Member States should facilitate access to events of high interest to the public by granting access to the broadcaster’s signal within the meaning of this Directive. However, they may choose other equivalent means within the meaning of this Directive. Such means include, inter alia, granting access to the venue of these events prior to granting access to the signal. Broadcasters should not be prevented from concluding more detailed contracts’.

8. Article 14(1) of the Directive provides as follows:

‘Each Member State may take measures in accordance with Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due time. In so doing the Member State concerned shall also determine whether these events should be available by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage’.

9. Article 15 of the Directive provides as follows:

‘1. Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction. ...

3 — ‘The Charter’.

3. Member States shall ensure that such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal with, unless impossible for reasons of practicality, at least the identification of their source.
4. As an alternative to paragraph 3, Member States may establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means.
5. Short extracts shall be used solely for general news programmes and may be used in on-demand audiovisual media services only if the same programme is offered on a deferred basis by the same media service provider.
6. Without prejudice to paragraphs 1 to 5, Member States shall ensure, in accordance with their legal systems and practices, that the modalities and conditions regarding the provision of such short extracts are defined, in particular, with respect to any compensation arrangements, the maximum length of short extracts and time limits regarding their transmission. Where compensation is provided for, it shall not exceed the additional costs directly incurred in providing access.'

B – National law

10. For the purposes of the transposition of the Directive, the Federal Law on the exercise of exclusive television broadcasting rights (Bundesgesetz über die Ausübung exklusiver Fernsehübertragungsrechte (Fernseh-Exklusivrechtgesetz))⁴ was amended in 2010.⁵ Article 5 of the FERG provides:

'(1) A broadcaster which has acquired exclusive broadcasting rights to an event of general interest from the point of view of information shall, on request, grant to any broadcaster established in a Contracting Party to the Agreement on the European Economic Area or in a Contracting Party to the European Convention on Transfrontier Television of 5 May 1989, on fair, reasonable and non-discriminatory terms, the right to produce short news reports for the latter's own broadcasting purposes. A general interest from the point of view of information shall exist where, owing to its significance, the event may be expected to enjoy extensive coverage in media reporting in Austria or in another Contracting Party referred to in this provision.

(2) The right to produce short news reports shall include the right to record the signal of the broadcaster who is subject to the obligation under subparagraph 1, and to produce and broadcast or provide a short news report under the conditions laid down in subparagraphs 3 to 5.

(3) Exercise of the right to produce short news reports shall be subject to the following conditions:

1. Reporting shall be restricted to the production of short news reports appropriate to the event;
2. The short news report may be used only in general news programmes;
3. The broadcaster benefiting from the right may freely select the content of the short news report from the signal of the broadcaster subject to the obligation;
4. The permissible duration of the short news report shall be determined by reference to the time needed to convey the news content of the event and, unless otherwise agreed, shall not be more than 90 seconds;

4 — BGBl. I, 85/2001.

5 — BGBl. I, 50/2010, 'The FERG'.

5. If the event extends over more than one day, the right to produce short news reports shall include the daily distribution of a short news report;
6. In any event, the short news report may not be broadcast or provided before the start of the broadcast by the broadcaster subject to the obligation under subparagraph 1;
7. The broadcaster benefiting from the right shall clearly designate the short news report as such and identify the source.

(4) Unless otherwise provided for, the television broadcasting organization which bears the obligation laid down in paragraph 1 can only claim a refund for the additional costs incurred directly by the provision of access.

...

(6) When a television broadcasting organization so requests, the television broadcasting organization on which the duty laid down in paragraph 1 is imposed, must state, in sufficient time before the beginning of the event, the conditions under which it is willing to grant, by contract, the right to produce short news reports.

(7) A television broadcasting organization which calls for the granting of the right provided for in paragraph 1 can apply to the regulatory authority in order to assert this right. ...

(8) Where a procedure under subparagraph 6 cannot be concluded in a timely manner on account of the particular topicality of the event, the regulatory authority may, at the request of one of the broadcasters concerned, give a ruling *ex post facto* on whether and under what conditions a right to produce short news reports should have been granted. In the event that a right to produce short news reports should have been granted, damages may be sought from the broadcaster subject to the obligation, in accordance *mutatis mutandis* with paragraph 3(7) to 9 of this law.

...'

II – Main proceedings and questions referred for a preliminary ruling

11. This reference for a preliminary ruling stems from a dispute between Sky Österreich GmbH ('Sky') and the Österreichischer Rundfunk ('ORF').

12. ORF is a public body whose object is to carry out the public-law tasks entrusted to it by the federal law on Austrian broadcasting (Bundesgesetz über den Österreichischen Rundfunk).⁶ ORF's tasks are to provide not only sound and television broadcasting programmes, but also online contributions related to those programmes.

13. Sky has been authorised by the Kommunikationsbehörde Austria (Austrian regulatory authority in the field of communication, 'KommAustria'), to broadcast via satellite the coded digital television programme 'Sky Sport Austria'. By a contract of 21 August 2009, the latter acquired exclusive rights to broadcast from time to time UEFA Europa League matches in the 2009/2010 to 2011/2012 seasons within the licence territory of Austria. Sky has stated that it had to spend a sum of several million euros each year on the licence and production costs.

14. On 11 September 2009, Sky and ORF entered into an agreement granting the ORF the right to produce short news reports and providing for the payment of EUR 700 per minute for such reports.

⁶ — BGBl. I, 83/2001.

15. By letter dated 4 November 2010, ORF asked KommAustria to declare that Sky was required to grant it the right to produce short news reports on Europa League games involving Austrian teams as from 1 October 2010, without ORF having to pay it remuneration greater than the additional costs incurred directly by the provision of access to the signal.

16. By decision of 22 December 2010, KommAustria held that, as the exclusive right holder, Sky is under an obligation to grant ORF the right to produce short news reports and is not entitled to the reimbursement of any costs beyond the additional costs directly incurred in providing access to the signal. It also laid down the conditions under which this right could be exercised by ORF. Among those, it was stated that the additional costs incurred directly by the provision of access to the satellite signal were zero in this case.

17. Both parties appealed this decision to the Bundeskommunikationssenat (Federal Superior Council for Communication) (Austria).

18. In its appeal, Sky argued, inter alia, that the obligation under Article 15(6) of the Directive and Article 5(4) of the FERG to grant the right to make short news reports for no consideration contravenes the Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁷ and Austrian constitutional law. Sky emphasised, in particular, that Article 15(6) of the Directive systematically – i.e. without establishing differences between the exclusive rights in question – precludes any compensation for the limitation to which the exclusive rights are subject. This would, most of the time, produce results that are seriously unfair. When the right of ownership is restricted, Article 17(1) of the Charter and the principle of proportionality require verification on a case-by-case basis as to whether compensation should be paid. Sky argues that, in the present case, the grant of the right to make short news reports considerably restricts its right to property.

19. With regard to the jurisdiction of the Court to answer the question referred for a preliminary ruling, the Bundeskommunikationssenat refers, in its order for reference, to the judgment in *Österreichischer Rundfunk*⁸ and observes that the same rules apply in this case. In these circumstances, it should be classified as a ‘court or tribunal’ for the purposes of Article 267 TFEU.

20. On the substance, the Bundeskommunikationssenat considers that it is essentially a case of determining whether it is permissible under primary Union law for Sky to be required to grant ORF the right to produce short news reports without being entitled to charge a fee in excess of the reimbursement of the additional costs directly incurred in providing access. According to the Bundeskommunikationssenat, the question arises as to whether the infringement of the fundamental right protected by Article 17 of the Charter entailed by such obligation is consistent with the principle of proportionality.

21. In this context, it cites decisions of the Verfassungsgerichtshof (Constitutional Court) (Austria)⁹ and of the Bundesverfassungsgericht (Federal Constitutional Court) (Germany)¹⁰ which reviewed national rules comparable to the Union rules at issue in the present case and considered that the granting without consideration of the right to make short news reports was disproportionate and therefore in breach, respectively, of the right to property under Article 5 of the Basic Law on the general rights of citizens (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger) and Article 1 of Protocol No 1 to the ECHR, and professional freedom, under Article 12 of the Basic Law (Grundgesetz).

7 — Signed at Rome on 4 November 1950 (the ‘ECHR’).

8 — Case C-195/06 [2007] ECR I-8817.

9 — Judgment of 1 December 2006.

10 — Judgment of 17 February 1998.

22. The Bundeskommunikationssenat questions whether it is not necessary, taking into account, in particular, the principle of proportionality and those decided cases, to adopt a rule allowing account to be taken of the circumstances of the case and, in particular, the subject-matter of the exclusive right in question and the amount paid by the holder for the acquisition of that right in order to calculate compensation. According to the Bundeskommunikationssenat, Article 15(6) of the Directive proves to be particularly problematic where the exclusive right was acquired before the entry into force of this provision, whereas the application for the grant of the right to make short news reports was made after the entry into force of the national provision transposing Article 15 of the Directive.

23. For those reasons, the Bundeskommunikationssenat decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Article 15(6) of [the Directive] compatible with Articles 16 and 17 of the Charter ... and with Article 1 of Protocol No 1 to the [ECHR]?’

24. Written observations were lodged by Sky, ORF, the German and Polish governments, the European Parliament, the Council of the European Union and the European Commission. A hearing was held on 24 April 2012.

III – My analysis

25. This reference for a preliminary ruling asks the Court to assess the compliance of Article 15(6) of the Directive with the fundamental rights protected by Articles 16 and 17 of the Charter, that is to say, freedom to conduct a business, on the one hand, and the right to property, on the other.

26. More specifically, it is a question of determining whether the fact that Article 15(6) of the Directive limits compensation for the provision of short extracts relating to events of great interest to the public to the additional costs incurred directly in providing access to those short extracts constitutes a justified interference with freedom to conduct a business and the right to property of television broadcasters who hold the exclusive rights to the transmission of such events.

27. Article 16 of the Charter provides that ‘[t]he freedom to conduct a business in accordance with Community law and national laws and practices is recognised’. The explanations relating to this Article specify that the latter ‘is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity ^[11] and freedom of contract ^[12], and on Article 119(1) and (3) [TFEU], which recognises free competition.’¹³

28. Article 17 of the Charter provides, in paragraph 1, that ‘Everyone has the right to own, use and dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.’ The explanations related to this article indicate that it corresponds to Article 1 of Additional Protocol No 1 to the ECHR. Thus, under Article 52(3) of the Charter, the right of property protected by Article 17 of the Charter has the same meaning and scope as under the ECHR.¹⁴

11 — See Case 4/73 *Nold v Commission* [1974] ECR 491, paragraph 14, and Case 230/78 *Eridania* [1979] ECR 2749, paragraphs 20 and 31.

12 — See, inter alia, Cases 151/78 *Sukkerfabriken Nykøbing* [1979] ECR 1, paragraph 19 and C-240/97 *Spain v Commission* [1999] ECR I-6571, paragraph 99.

13 — See explanatory remarks on Article 50 of the Charter of Fundamental Rights (OJ 2007 C 303, p. 17 [31]).

14 — *Ibid.*

29. It is clear from the case-law of the Court that the right to property, like the right freely to exercise an economic activity, is one of the general principles of law of the Union. However, those principles are not absolute but must be viewed in relation to their social function. Consequently, restrictions may be imposed on use of the right to property, and the right to freely pursue an economic activity, provided that those restrictions correspond to objectives of general interest pursued by the Union and do not constitute, with regard to the objective pursued, a disproportionate and intolerable interference affecting the very substance of the rights thus guaranteed.¹⁵

30. In line with this case-law, Article 52(1) of the Charter lays down the rules relating to the limitations that can be made to the rights and freedoms recognized by the Charter. Article 52(1) thus accepts that limitations may be imposed on the exercise of rights such as the right to property and the freedom to conduct a business set out in Articles 17 and 16 of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

31. I will examine, first, whether the provisions contained in Article 15(6) of the Directive infringe the rights recognised by Articles 16 and 17 of the Charter. If so, it will then be necessary to verify whether such an infringement is justified.

A – Infringement of the rights recognised by Articles 16 and 17 of the Charter

32. The object of Article 15 of the Directive is to provide, in favour of any television broadcasting organisation established in the Union, for the right to short extracts in order to be able to produce short news reports on events of high interest to the public.

33. Pursuant to this Article, and according to the detailed rules adopted by the Member States for its transposition, the television broadcasting organisations which hold the exclusive rights to transmission on such events are required to allow the other television broadcasting organisations freely to choose the short extracts that will make up their short news reports. Specifically, it may be either access to the signal sent by the primary broadcaster, or access to the place where the event concerned takes place.¹⁶

34. It is clear that such a constraint on television broadcasters who hold exclusive rights of transmission has the effect of limiting the manner in which they might wish to exploit such rights.

35. From the perspective of freedom to conduct a business, of which freedom of contract forms part, the immediate consequence of Article 15 is that television broadcasters who hold exclusive transmission rights can no longer decide freely with which bodies they may wish to enter into an agreement for access to short extracts. In other words, they may no longer grant licences to operators of their choice with a view to turning rights to extracts to account.

36. From the perspective of the right to property, this article has the effect of limiting the use that broadcasters who hold exclusive transmission rights may wish to make of their property. If we refer to the case-law of the European Court of Human Rights, that article can be assimilated to a control of the use of the property within the meaning of Article 1(2) of Additional Protocol No 1 to the ECHR. It is clear from the case-law of that court that the concept of control of the use of property is understood as meaning a measure which, whilst not entailing transfer of ownership, seeks to 'limit or control' the use

15 — See Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 126 and the case-law cited. See also Case T-68/08 *FIFA v Commission* [2011] ECR II-349, paragraph 143.

16 — See recital 56 of the Directive.

of property.¹⁷ By requiring broadcasters who hold exclusive transmission rights to allow certain uses of the subject-matter of those rights, in this case, access to short extracts with a view to the production of brief news reports, Article 15 of the Directive is in my view controlling the use of property in such a way as to interfere with their right of ownership.

37. More specifically as to Article 15(6) of the Directive, there is an infringement of the freedom to conduct a business and the right to property inasmuch as, the compensation of the right to short extracts being limited to the additional costs incurred directly by the provision of access, broadcasters who hold exclusive rights to the transmission of an event of high interest to the public can no longer freely decide on the price they charge for access to short extracts. The arrangements for compensation in this provision prevent, in particular, those bodies from having other television broadcasting organisations which wish to use short extracts contribute to the acquisition costs of those exclusive rights. The way those arrangements are structured may also have a negative impact on the commercial value of exclusive rights.

38. Having established infringement of freedom to conduct a business and the right of property, we must now consider whether it is justified under Article 52(1) of the Charter.

B – Justification of the infringement of the rights recognised by Articles 16 and 17 of the Charter

39. I would observe, first, that the infringement of the rights recognized by Articles 16 and 17 of the Charter must be regarded as ‘provided for by law’ within the meaning of Article 52(1) of the Charter. In fact, under the terms of Article 15(6) of the Directive, when compensation is provided for, it is not to exceed the additional costs incurred directly by the provision of access to short extracts.

40. Next, as to whether the infringement of the rights protected is in order to safeguard an objective of general interest recognized by the Union or the need to protect the rights and freedoms of others, I would observe that the right to short extracts provided for in Article 15(6) of the Directive meets the concern, stated by the EU legislature in recital 48 of the Directive, ‘to promote pluralism through the diversity of news production and programming across the Union and to respect the principles recognised by Article 11 of the [Charter]’.

41. In addition, in recital 55 of the Directive, the right of television broadcasting organisations to use short extracts in news programmes is linked to the goal of ‘safeguard[ing] the fundamental freedom to receive information and [ensuring] that the interests of viewers in the Union are fully and properly protected.’¹⁸

42. By framing one of the ways in which the right to short extracts may be exercised, namely the compensation payable to the primary broadcaster, Article 15(6) of the Directive pursues the objectives set out in recitals 48 and 55, that is to say, in particular, the freedom to receive information and media pluralism. These objectives are themselves closely related to one of the more general objectives of the Directive, which, as specified in recital 11, is to facilitate the emergence of a single European information space.

17 — See ECHR judgment in *Sporrong and Lönnroth v Sweden* of 23 September 1982, Series A No 52, paragraph 65. See also ECHR, judgment of 19 December 1989, *Mellacher and Others v Austria* of 19 December 1989, Series A No 169, paragraph 44. The Court has also referred to the concept of control of use of property [see, inter alia, judgment of 12 May 2005 in Case C-347/03 *Regione Autonoma Friuli-Venezia Giulia and ERSA* [2005] ECR I-3785, paragraphs 124 and 125.

18 — As stated in the summary document drafted by the Commission in July 2005 for the Liverpool audiovisual conference entitled ‘Right to information and right to short extracts’, the issues in relation to the introduction of a right to extracts were as follows. First of all, ‘the lack of coordination of legislative, regulatory or agreements for the provision ... of extracts ... puts at risk the cross-border movement of news programmes and the exercise of the fundamental right to information’. secondly, ‘the absence of any right [to] extracts ... may constitute a threat to pluralism, many of the broadcasters in the Union ... having neither the technical means ... nor sufficient financial means to bear the cost of the systematic commercialisation of exclusive distribution rights in certain major media events’.

43. The freedom to receive information and media pluralism are components of freedom of expression.¹⁹ The latter is one of the general principles of EU law²⁰ and is among the fundamental rights guaranteed by the legal order of the Union.²¹

44. Freedom of expression and information are enshrined in Article 11 of the Charter. Article 11(1) provides that '[e]veryone 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'. Besides, Article 11(2) of the Charter provides that '[t]he freedom and pluralism of the media shall be respected'. The explanations relating to Article 11 of the Charter specify that it corresponds to Article 10 of the ECHR.

45. The reason for the infringement of the rights recognised by Articles 16 and 17 of the Charter having thus been identified, it is now necessary to verify whether the limitation on the rights enshrined by these two articles is proportionate to the legitimate aim pursued. As this aim is primarily the need to protect another fundamental right, namely the freedom to receive information and media pluralism, the review of proportionality which I shall now conduct calls for the weighing of several fundamental rights. The issue is therefore whether, in adopting Article 15(6) of the Directive, the EU legislature achieved a fair balance between the right to property and the freedom to conduct a business, on the one hand, and the freedom to receive information and media pluralism, on the other.

46. With this in mind, my analysis will be guided by several considerations.

47. According to settled case-law, the principle of proportionality, which is one of the general principles of Union law, requires the means employed by a Union provision to be appropriate for attaining the objective pursued and not to go beyond what is necessary to achieve it.²²

48. In regard to justification of restrictions on the use of the right to property, the Court has indicated, referring to the jurisprudence of the European Court of Human Rights, that the means employed must be reasonably proportionate to the aim pursued. According to the Court of Justice, it must therefore be determined whether the balance has been maintained between the requirements of the general interest and the interest of persons invoking the protection of their right to property. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard to both choosing the means of implementation and ascertaining whether their consequences are justified in the public interest for the purpose of achieving the objective of the legislation in question.²³

49. Furthermore, by analogy with what the Court's held in *Germany v Parliament and Council*,²⁴ the Community legislature must be allowed a broad discretion in an area such as that involved in this case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.²⁵

19 — I note that Article 10 of the ECHR includes not only the right to communicate but also to receive information, See *Observer and Guardian v United Kingdom*, judgment of 26 November 1991, Series A No 216, paragraph 59, and *Guerra and Others v Italy*, judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, paragraph 53 .

20 — Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 45.

21 — Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 41.

22 — See, inter alia, Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063 paragraph 74.

23 — Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, paragraph 360 and case-law cited.

24 — Case C-380/03 [2006] ECR I-11573.

25 — Paragraph 145 and the case-law cited.

50. The proportionality of the restriction on the right to property and the freedom to conduct a business contained in Article 15(6) of the Directive must be verified in the light of the wide margin of discretion conferred on the Union legislature.

51. In addition, this review should be conducted taking into account the nature of the Directive, which does not seek complete harmonisation of the rules relating to the areas it covers, but enacts only minimum requirements.²⁶ I note, in this regard, that the EU legislature lays down in Article 15 of the Directive a number of general rules governing the right to short extracts while leaving it to the Member States to define the terms and detailed conditions on the provision of these short extracts.²⁷

52. Finally, according to the case-law of the Court, fundamental rights within the Union must be safeguarded in the context of its structure and objectives.²⁸ In this connection, several recitals in the preamble to the Directive stress that it contributes, in its field, to the completion of the internal market. Thus, recital 2 of the Directive refers to the need to ‘ensure the transition from national markets to a common programme production and distribution market’ and recital 11 states that the application of at least a basic tier of coordinated rules to all audiovisual media services helps ‘to ... complete the internal market and facilitate the emergence of a single information area.’²⁹ It is important that this dimension be taken into account when balancing the various fundamental rights at issue, because the limiting of compensation for providing a right to short extracts in the context of protecting fundamental rights does not arise in the same terms, nor does it necessarily call for the same response, depending on whether it is considered solely in the context of a Member State or by taking account of the requirements for completion of the internal market.

53. The application of that analytical approach to this case leads me to conclude not only that Article 15(6) of the Directive is able to achieve the aim sought, namely to ensure the freedom to receive information and media pluralism, but also that it does not go beyond what is necessary to achieve this aim.

54. In regard to the capacity of the last sentence of Article 15(6) of the Directive to guarantee the freedom to receive information and media pluralism, I believe that this provision, by limiting the amount of compensation which may be claimed by primary broadcasters from secondary broadcasters, is such as to develop the dissemination of information relating to events that are of great interest to the public, in particular by broadcasters who do not have considerable financial resources available to them. Such a provision favours, by the same token, the emergence of a European opinion and information area within which the freedom to receive information and media pluralism are guaranteed.

55. Concerning the need to limit compensation, I see this as the cornerstone of the mechanism put in place by the EU legislature in Article 15 of the Directive; its absence would be detrimental to the effectiveness of the right to short news reports.

56. Limiting compensation to the additional costs directly incurred in providing access has the advantage of putting all television broadcasters on an equal footing. By not allowing holders of exclusive transmission rights to pass on to bodies requesting extracts the costs of acquisition of such rights, Article 15(6) of the Directive precludes a prohibitive price from being charged for short

26 — Case C-227/07 *UTECA* [2009] ECR I-1407, paragraph 19. See also in that connection recital 11 and Article 4(1) of the Directive.

27 — See, in this sense, the statement of the Council’s reasons, at II B vi of Common Position (EC) No 18/2007 of 15 October 2007 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to the adoption of a directive of the European Parliament and of the Council amending Directive 89/552/EEC of the Council aimed at the coordination of certain laws, regulations and administrative provisions of the Member States relating to the exercise of television broadcasting activities (OJ C 307E, p. 1).

28 — Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 4.

29 — See also, along the same lines, recital 10 of the Directive that stressed the importance of a ‘true European market for audiovisual media services’.

extracts, in particular in relation to events likely to attract the attention of a large part of the population and in respect of which the exclusive rights holders will have had to spend large sums of money to acquire transmission rights. It follows that all television broadcasters, whether private or public, whether endowed with major financial resources or not, enjoy the right, under the same conditions, to produce short news reports on events of high public interest.

57. To leave determination of the amount of compensation to free negotiation between the primary and secondary broadcasters would have the disadvantage of putting the holders of exclusive rights in a position of strength, especially when the event in question is of particular importance. In addition, in the light of the increased prices they have to pay to acquire exclusive transmission rights, there is a risk that the price charged to secondary broadcasters who wish to produce short news reports may reach such proportions as to deter them from exercising that right. This could be detrimental to the objective of informing as many persons as possible about events of high public interest. In addition, the exclusion of television broadcasters from coverage of such events would have a negative effect on the pluralism of information, because it would limit the collection and dissemination of information to the largest organisations, to the detriment of their smaller competitors and viewers.

58. That is why I believe that the alternative solution, namely for the EU legislature to provide only for the granting of appropriate compensation without the limit provided for in Article 15(6) of the Directive, would not have been as effective in achieving the objectives sought by establishing a right to short news reports.

59. Merely stipulating appropriate compensation, without fixing a harmonised limit, would lead to costs being determined on a case-by-case basis, following differing procedures in each Member State, which could potentially be an obstacle to the free flow of information and therefore to the emergence of the single information area sought by the Union legislature in recital 11 to the Directive. Limiting compensation to expenses directly incurred in the provision of access allows the problems of determination of costs and any ensuing litigation to be avoided to a great extent. This is the most effective way of avoiding the dissemination of information being partitioned between the Member States and according to the economic importance of television broadcasters.

60. By opting for a solution in keeping with its desire to contribute to the completion of the internal market and bring about the emergence of a single information area, the EU legislature has thus succeeded in reconciling the different regulatory approaches of the Member States, while safeguarding the useful effect of the new harmonised right.

61. In this context, the EU legislature was in my view right to choose not to introduce into the last sentence of Article 15(6) of the Directive distinctions according to whether the compensation is paid by a public or private broadcasting agency, or whether such a body exercises, under the law of the Member State in which it is established, a public-service mission. Such distinctions would have, in fact, been in contradiction with the commitment expressed by the EU legislature to put all of the operators of television broadcasting on an equal footing in the exercise of their right to obtain short news reports.³⁰ In addition, restricting the field of application of the last sentence of Article 15(6) of the Directive only to broadcasters which, by virtue of the law of the Member State in which they are established, exercise a public-service mission would not have enabled the objectives of establishing a

30 — See recital 55 and Article 15(1) of the Directive according to which access to short extracts must be afforded under non-discriminatory conditions.

right to short news reports to be attained so effectively, since it would leave aside those who primarily benefit from the capping of the compensation, namely secondary broadcasters with limited financial means who none the less, whatever their nature or the legal missions entrusted to them, participate in a significant way in a wide dissemination of information within the Member States.³¹

62. The solution adopted by the Union legislature to my mind achieves a fair balance between protecting the freedom to conduct a business and the right to property of organisations holding exclusive transmission rights on the one hand, and the freedom to receive information and media pluralism on the other. Indeed, I do not consider that, in the light of the benefits of the system established by the Union legislature with a view to protecting these last two fundamental rights, the interference with the freedom to conduct a business and of the right to property of organizations holding exclusive transmission rights is excessive.

63. In this respect, it is important to note that the Union legislature has attached to the right to short news reports a number of conditions and limits which help to mitigate the infringement of the freedom to conduct a business and of the right to property of television broadcasters who hold exclusive transmission rights.

64. Among those conditions and limits, I note that the right to short news reports does not apply to all events without distinction for which exclusive transmission rights have been granted; Article 15(1) of the Directive states that they must be ‘events of high interest to the public’.

65. In addition, the extracts provided may be used solely for ‘general news programmes’ under the terms of Article 15(5) of the Directive, and only for the purpose of ‘short news reports’, as provided for in Article 15(1) of the Directive. According to the fifty-fifth recital of the latter, ‘[t]he concept of general news programmes should not cover the compilation of short extracts into programmes serving entertainment purposes’. It is clear from these provisions that there is a crucial difference between the televised broadcast of an event for entertainment purposes and the broadcasting of the key moments of the event for the purposes of information.³² The television broadcasting organisation retains full control of the commercial exploitation of its exclusive rights for the purpose of entertainment. The diminution in the commercial value of these rights must therefore, to this extent, be viewed in context.

66. In addition, Article 15(3) of the Directive specifies that secondary broadcasters must indicate the source of the extracts that they use in their news reports. As the Commission rightly observes in its written observations, the publicity received by the organisation which holds the exclusive rights contributes to the proportionality of the compensation scheme established under Article 15(6) of the Directive, because that publicity has an economic value which benefits that organisation whenever a short news report is broadcast.³³

31 — In this connection, I note that, according to figures published recently by the European Audiovisual Observatory, local and regional channels account for approximately 40 per cent of the total available channels in Europe (see press release of 29 March 2012 available at <http://www.obs.coe.int/about/oea/pr/mavise-miptv2012.html>).

32 — See, in this regard, Schoenthal M., ‘The right of retransmission of major events’, IRIS plus, legal observations of the European Audiovisual Observatory, 2006-04. The author notes that ‘short and informative reports [are] limited to key moments of an event’ and that ‘a gradual mounting of suspense, which provides the distinctive charm of a sporting event, is solely reserved to the actual broadcast transmission’ (p. 3).

33 — Paragraph 43, particularly note 19.

67. Article 15(6) of the Directive also attests to the fact that the Union legislature weighed the various fundamental rights in a balanced way. In order to limit the interference with the freedom to conduct a business and the right to property of the television broadcasting organisation which holds the exclusive rights to transmission, this provision requires the Member States to ensure that rules on the maximum length of short extracts and the periods during which they are to be broadcast are defined. Recital 55 of the Directive provides guidance for the Member States in this regard in stating that short extracts should not exceed 90 seconds.

68. The fact that under Article 15(6) of the Directive it is for the Member States to determine the detailed terms and conditions for the provision of short extracts leads me to the view that the weighing of the different fundamental rights present is a matter not only for the EU legislature, but also for the Member States. In other words, the mechanisms to find the right balance between the different fundamental rights at stake are not only in the Directive itself – mainly through the use of conditions and of the abovementioned limits that govern the right to short news reports – but also result from the adoption by the Member States of national provisions transposing the Directive and its application by the national authorities. In this respect, according to the case-law of the Court, it is for the Member States, in the transposition of the Directive, to ensure that they adopt an interpretation of the Directive which allows a fair balance to be struck between the different fundamental rights protected by the legal order of the Union. Further, when implementing the measures transposing that directive, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that directive but also make sure that they do not interpret it in such a way as to conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.³⁴

69. In my view, on the adoption of measures transposing the Directive, the Member States must strive to take into account fundamental rights, by putting in place the instruments necessary so that the additional costs incurred directly by the provision of access can be the subject of a compensation and the detailed terms and conditions on the provision of short extracts, in particular with regard to maximum duration and transmission periods, are defined so as to minimise the interference with the freedom to conduct a business and the right of property of the television broadcasting organisation which holds the exclusive rights to transmission. I note, in this regard, that the Austrian law transposing Article 15 of the Directive is testimony to the search by the national legislature for a fair balance between the different fundamental rights at issue.

70. Having regard to all those elements which contribute to providing a framework for the right to short news reports and the detailed arrangements for implementation, I believe that the limitation of the compensation due to the television broadcasting organisation which holds the exclusive rights to transmission affects its freedom to conduct a business and right to property in a proportionate manner. In other words, in view of the way Article 15 of the Directive is framed, the taking into account of just the additional costs incurred directly by the provision of the access³⁵ is, in my view, sufficient to prevent the right to short news reports being an excessive burden on the primary broadcasters.

34 — See Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 68, and C-461/10 *Bonnier Audio and Others* [2012] ECR, paragraph 56.

35 — As to the costs incurred by the television broadcasting organization which holds the exclusive broadcasting rights, ORF said that, even when the body which enjoys the right to make short news reports has access to the satellite signal (for example, through direct satellite interception), the granting of this right gives rise to appreciable work for the organisation whose duty it is to grant the said right (verification of the right, establishment, where appropriate, of an agreement on conditions, supervision of compliance with legal and contractual arrangements, etc.).

71. If, conversely, that article had been so structured as not to subject the right to short news reports to any limitation, the infringement could be regarded as disproportionate. The wording chosen by the EU legislature in the last sentence of Article 15(6) of the Directive cannot therefore be correctly construed if it is not viewed in close correlation with the provisions that govern the right to short news reports.³⁶

72. All of these elements lead me to consider that, when adopting Article 15(6) of the Directive, the Union legislature weighed the different fundamental rights at stake in a balanced manner.

73. I note that a similar analysis has been adopted within the Council of Europe. Thus, the European Convention on Transfrontier Television, signed in Strasbourg on 5 May 1989, provides, in Article 9, for the possibility for the Contracting Parties to introduce a right to extracts in the case of events of high interest to the public.³⁷ Recommendation No R (91) 5 of the Committee of Ministers to Member States of 11 April 1991³⁸ provides, in paragraph 4.1 of its section on the financial terms, that, ‘unless otherwise agreed between them, the primary broadcaster should not be able to charge the secondary broadcaster for the short report. In any case, no financial charge should be required of the secondary broadcaster towards the cost of television rights’. Paragraph 4.2 of this recommendation states that, ‘if the secondary broadcaster is granted access to the site, the event organiser or site owner should be able to charge for any necessary additional expenses incurred’. The explanatory report on the recommendation mentioned in particular, in explaining paragraph 4.1 of the recommendation, that ‘secondary broadcasters, notably those with limited resources, should be guaranteed the possibility of having access to a short report on an equal footing.’³⁹

74. The approach chosen by the EU legislature also seems to accord with the case law developed by the European Court of Human Rights with regard to Article 1(2) of Additional Protocol No 1 to the ECHR. That court subjects the use of the property to a review of proportionality in the course of which it verifies, as with expropriation, that the assessment by the national legislature is not manifestly devoid of any reasonable basis.⁴⁰ Thus an interference must strike a fair balance between the imperatives of the general interest and those of safeguarding the fundamental rights of the individual. The European Court of Human Rights requires a reasonable relationship of proportionality between the means employed and the aim pursued. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest by the concern to achieve the aim of the law in question. That balance is lost if the person concerned has been required to bear an individual and excessive burden.⁴¹ That court also ruled that, when a measure controlling the use of property is in issue, the lack of compensation is one of the factors to be taken into account in establishing whether a fair balance has been achieved, but is not in itself sufficient to constitute a violation of Article 1 of Additional Protocol No 1 to the ECHR.⁴²

36 — See, in this regard, communication from the Commission to the European Parliament in accordance with Article 251(2), second paragraph, of the EC Treaty concerning the Council’s common position on the adoption of a proposal for a directive of the European Parliament and of the Council amending directive 89/552/EEC of the Council for the coordination of certain laws, regulations and administrative provisions of the Member States relating to the exercise of television broadcasting activities (‘Audiovisual Media Services directive’) [COM(2007) 639 final]:

‘This wording was chosen to ensure that the right to short reporting cannot be construed as a mandatory licence which would have given the receiving broadcasters wider rights. This solution is largely supported by all stakeholders, broadcasters as well as rights owners’.

37 — According to the explanatory report on this convention, this article is founded in the public’s right to receive information and is intended to ensure that the exercise of this right is not called into question in a transfrontier context. Another objective is to ensure the pluralism of information sources in the framework of transfrontier television.

38 — Recommendation on the right to extracts on major events that are the subject of exclusive rights for TV broadcasting in a transfrontier context.

39 — Paragraph 47.

40 — See on this point *Sudre, F., Droit européen et international des droits de l’homme*, PUF, Paris, 10th edition, 2011, p. 655 et seq.

41 — See ECHR judgment in *Brosset-Triboulet and Others v France* of 29 March 2010, paragraph 86.

42 — *Ibid.* (paragraph 94).

75. I note, moreover, that, in EU law, there are provisions reflecting the idea that a minimal impairment of the right of property does not systematically call for compensation. Thus, the thirty-fifth recital of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁴³ states with regard to the possible exceptions or limitations to those rights, that '[i]n certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.'⁴⁴ In addition, the Court was able to consider, in the case of agricultural policy and about alleged violations of the right to property, that there is no general principle in EU law that requires the granting of compensation in all circumstances.⁴⁵

76. In adopting Article 15(6) of the Directive, the Union legislature in my view struck an acceptable compromise between the granting free of charge of a right to short extracts and the financial participation of secondary broadcasters in the costs of acquisition of the exclusive rights of transmission. In providing that the additional costs incurred in the provision of access must not be charged to the broadcasters holding the exclusive rights to transmission, this provision ensures that the right to short extracts does not constitute a financial burden on them. The fact that they cannot earn a profit from the provision of short extracts is to my mind justified by the need to protect the freedom to receive information and the pluralism of the media, by thereby promoting the emergence of a single information area.

77. The decisions of the Bundesverfassungsgericht and the Verfassungsgerichtshof which are mentioned by the referring court⁴⁶ cannot alter my assessment.

78. While the reasoning advanced by these two courts differs slightly, what principally emerges is that the right to short news reports should not be granted free of charge and that it should therefore give rise to the payment of reasonable remuneration or appropriate consideration. In this perspective, it is envisaged that the cost of acquisition of the exclusive rights should be taken into account. These two courts also indicate that such consideration should not be fixed at a level such as to deter the right to produce short news reports.

79. The approaches adopted by the Bundesverfassungsgericht and by the Verfassungsgerichtshof do not seem to me automatically transferable to the review of the validity of Article 15(6) of the Directive in the light of Articles 16 and 17 of the Charter. First, I have already explained the reasons why my assessment follows closely the way Article 15 of the Directive is structured and with particular reference to the conditions and limits determining the right to short news reports and delimiting its scope.

80. Secondly, I would recall that fundamental rights within the Union must be protected within the framework of its structure and objectives. It follows that the weighing of the different fundamental rights at stake does not necessarily call for the same response at national or EU level. In the present case, I consider, for the reasons set out above, that the requirements relating to the completion of the

43 — OJ 1992 L 167, p. 10.

44 — It is interesting, in this respect, to compare Article 15 of the Directive with Article 5(3)(c) of Directive 2001/29, which allows the Member States to provide for exceptions or limitations to the rights provided for in Articles 2 and 3 of this directive (respectively, right of reproduction, and right of communication to the public of works and the right to make available to the public other protected items) 'use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informative purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible'. See also in the same vein, Article 10(1)(b) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

45 — Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] I-7411, paragraph 85.

46 — See point 21 of this Opinion.

internal market and to the emergence of a single information area militated in favour of the adoption by the EU legislature of a compromise between the granting of a free right to short extracts and the financial participation by secondary broadcasters to the costs of acquisition of exclusive transmission rights.

81. With regard, finally, to the concern expressed by the referring court with respect to the temporal aspect of the application of the limitation of the compensation in a situation such as that at issue in the main proceedings, it should be recalled that Sky acquired, by contract of 21 August 2009, the exclusive right to retransmit on Austrian territory some matches of the Europa League for the seasons 2009/2010 to 2011/2012. On 11 September 2009, Sky and the ORF concluded an agreement granting to the ORF the right to make short news reports on this event. I note that these two dates are after the date of entry into force of the Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007,⁴⁷ which introduced into Directive 89/552/CEE,⁴⁸ the provisions relating to the right to short news reports; according to the first recital, the Directive's purpose was merely to codify the rules contained in Directive 89/552. As Directive 2007/65 entered into force, under Article 4, on 19 December 2007, Sky and the ORF were aware, in 2009, of the establishment at Union level of a harmonised right to short news reports and were in a position to anticipate forthcoming regulatory changes at national level.

IV – Conclusion

82. In the light of the foregoing considerations, I propose that the Court should reply as follows to the question referred to it by the Bundeskommunikationssenat:

Examination of the question referred has not disclosed any factor such as to affect the validity of Article 15(6) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

47 — 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 (OJ 2007 L 332, p. 27).

48 — Council 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 (OJ 1989 L 298, p. 23).