



## Reports of Cases

### JUDGMENT OF THE COURT (Grand Chamber)

22 January 2013 \*

(Directive 2010/13/EU — Provision of audiovisual media services — Article 15(6) — Validity — Events of high interest to the public that are subject to exclusive broadcasting rights — Right of access of broadcasters to such events for the purpose of making short news reports — Limitation of possible compensation for the holder of the exclusive right to additional costs incurred in providing such access — Charter of Fundamental Rights of the European Union — Articles 16 and 17 — Proportionality)

In Case C-283/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundeskommunikationssenat (Austria), made by decision of 31 May 2011, received at the Court on 8 June 2011, in the proceedings

**Sky Österreich GmbH**

v

**Österreichischer Rundfunk,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič, T. von Danwitz (Rapporteur), J. Malenovský, Presidents of Chambers, A. Borg Barthet, U. Lohmus, J.-C. Bonichot, C. Toader, J.-J. Kasel, M. Safjan and D. Šváby, Judges,

Advocate General: Y. Bot,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 24 April 2012,

after considering the observations submitted on behalf of:

- Sky Österreich GmbH, by G. Engin-Deniz, Rechtsanwalt,
- Österreichischer Rundfunk, by S. Korn, Rechtsanwalt,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- the Polish Government, by M. Szpunar, acting as Agent,
- the European Parliament, by R. Kaškina and U. Rösslein, acting as Agents,

\* Language of the case: German.

— the Council of the European Union, by R. Liudvinaviciute-Cordeiro and J. Herrmann, acting as Agents,

— the European Commission, by G. Braun, S. La Pergola and C. Vrignon, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 June 2012,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns 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) (OJ 2010 L 95, p. 1, and corrigendum OJ 2010 L 263, p. 15).
- 2 The request has been made in proceedings between Sky Österreich GmbH ('SKY') and Österreichischer Rundfunk ('ORF') concerning the financial conditions under which the latter is entitled to gain access to the satellite signal to make short news reports.

### **Legal context**

#### *European Union law*

#### Directive 2007/65/EC

- 3 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) was amended by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 332, p. 27). Article 1(9) of the latter directive introduced Article 3k into Directive 89/552, which provides for the right for broadcasters, for the purpose of short news reports, to use short extracts from the transmitting broadcaster's signal of events of high interest to the public, to which the transmitting broadcaster has acquired broadcasting rights on an exclusive basis.
- 4 As regards possible compensation, Article 3k(6) provided that such compensation could not exceed the additional costs directly incurred in providing access.
- 5 In accordance with the first subparagraph of Article 3(1) of Directive 2007/65, Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 19 December 2009.
- 6 Pursuant to Article 4 of Directive 2007/65, the directive entered into force on the day following its publication in the *Official Journal of the European Union*, that is, on 19 December 2007.

Directive 2010/13

- 7 Directive 89/552, as amended by Directive 2007/65, was repealed by Article 34(1) of Directive 2010/13, recital 48 in the preamble thereto 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 [(“The Charter”)].’

- 8 Recital 55 in the preamble to Directive 2010/13 reads as follows:

‘In order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the [European] 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 right of access to short extracts should apply on a trans-frontier basis only where it is necessary. Therefore a broadcaster should first seek access from a broadcaster established in the same Member State having exclusive rights to the event of high interest to the public.

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

- 9 Article 15 of that directive provides:

‘1. Member States shall ensure that for the purpose of short news reports, any broadcaster established in the [European] 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.

2. If another broadcaster established in the same Member State as the broadcaster seeking access has acquired exclusive rights to the event of high interest to the public, access shall be sought from that broadcaster.

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, 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.'

*National law*

- 10 Paragraph 5(4) of the Federal Law on Exclusive Television Broadcasting Rights (Bundesgesetz über die Ausübung exklusiver Fernsehübertragungsrechte) ('Fernseh-Exklusivrechtsgesetz'), BGBl. I, 85/2001], provided, until 30 September 2010, that in the absence of an amicable agreement between the broadcasters concerned, the Bundeskommunikationssenat was to decide whether the right to make short news reports should be granted to a television broadcasting organisation and, where necessary, under what conditions.
- 11 As of 1 October 2010, Paragraph 5(4), read in conjunction with Paragraph 5(2), provides that the broadcaster which has acquired the exclusive broadcasting rights to an event of general interest from the point of view of information and which is required to grant to any broadcaster which requests the right to make short news reports from its signal for broadcasting purposes is entitled only to the reimbursement of the additional costs directly incurred in providing access to the signal.
- 12 The Bundeskommunikationssenat was created by the Federal Law on the creation of the Kommunikationsbehörde Austria and the Bundeskommunikationssenat (Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria und eines Bundeskommunikationsssenates, BGBl. I, 32/2001 'the KOG'), in order to review the decisions of the Kommunikationsbehörde Austria (the Austrian communications regulator, 'KommAustria') and to exercise judicial review over ORF as a collegiate authority with a judicial component within the meaning of Paragraph 20(2) of the Federal Constitutional Law (Bundes-Verfassungsgesetz).
- 13 Paragraph 36(1) to (3) of the KOG, in the version in force at the time of the facts of the dispute in the main proceedings, provides:

'1. A Bundeskommunikationssenat responsible for monitoring the decisions of KommAustria ... shall be set up at the Federal Chancellery.

2. The Bundeskommunikationssenat shall decide at last instance on appeals against decisions of KommAustria ..., with the exception of appeals concerning administrative penalties.

3. The decisions of the Bundeskommunikationssenat may not be set aside or varied by administrative action. Appeals against its decisions may be brought before the Verwaltungsgerichtshof [Administrative Court].'
- 14 Paragraph 37(1) and (2) of the KOG provides:

'1. The Bundeskommunikationssenat shall consist of five members, of whom three must belong to the judiciary. The members of the Bundeskommunikationssenat shall perform their duties independently and are not bound by any directions or instructions. The Bundeskommunikationssenat shall elect a chairperson and a deputy chairperson from the members who belong to the judiciary.

2. The members of the Bundeskommunikationssenat shall be appointed by the Federal President upon proposal of the Federal Government for a term of six years. For each member a substitute member shall be appointed to take the place of a member prevented from fulfilling his obligations.'

15 According to Paragraph 20(2) of the Federal Constitutional Law:

‘The legislature may free a body

...

3. created as a collegiate authority required to decide at last instance, the decisions of which may not be annulled or varied by administrative procedure, and which comprises at least one judge,

...

of its obligation to comply with instructions issued by a body which is of higher rank. ...’

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

16 Sky has been authorised by KommAustria to broadcast via satellite the coded digital television programme ‘Sky Sport Austria’. By a contract of 21 August 2009, Sky acquired exclusive rights to broadcast Europa League matches in the 2009/2010 to 2011/2012 seasons in Austrian territory. Sky states that it spends several million euros each year on the licence and production costs.

17 On 11 September 2009, Sky and ORF entered into an agreement granting ORF the right to produce short news reports and providing for the payment of EUR 700 per minute for such reports. As regards that remuneration, the parties limited the duration of the validity of the agreement to the entry into force of the amendment to Article 5 of the Federal Law on the Exercise of Exclusive Broadcasting Rights, namely 1 October 2010.

18 At the request of ORF, made in November 2010, KommAustria decided that Sky was required, as the holder of exclusive broadcasting rights, to grant ORF the right to produce short news reports, but was not entitled to demand remuneration greater than the additional costs directly incurred in providing access to the satellite signal, which were non-existent in this case. At the same time, it determined the conditions under which ORF could exercise that right. Both parties appealed against that decision before the Bundeskommunikationssenat.

19 In its order for reference, the Bundeskommunikationssenat refers, in so far as concerns the admissibility of the request for a preliminary ruling, to the judgment in Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, and considers that it should also be regarded, in the present case, as a court or tribunal within the meaning of Article 267 TFEU, given that the same rules of jurisdiction apply in the present case as in the case which gave rise to that judgment.

20 On the substance, the Bundeskommunikationssenat considers that the right to produce short news reports constitutes an interference with the right to property, as laid down in Article 17 of the Charter, of the broadcaster which has acquired, on a contractual basis, broadcasting rights relating to an event of high interest to the public on an exclusive basis (‘the holder of exclusive broadcasting rights’).

21 Referring, in particular, to Article 52(1) of the Charter, the Bundeskommunikationssenat questions whether a provision of a directive which prevents the authorities of a Member State from providing for compensation for such an interference with the right to property is consistent with the principle of proportionality. It considers that the fact that Article 15(6) of Directive 2010/13 provides that the Member States are required to define the modalities and conditions relating to the right to produce short news reports cannot make up for such an inference. The Bundeskommunikationssenat considers that, in the light, in particular, of the principle of proportionality, it is necessary to adopt a rule



allowing account to be taken of the circumstances of the case and, in particular, the subject-matter of the exclusive broadcasting rights and the amount paid by the holder to acquire those rights in order to calculate appropriate compensation.

- 22 According to the Bundeskommunikationssenat, Article 15 of Directive 2010/13 is particularly contestable where exclusive broadcasting rights were acquired prior to the entry into force of that directive, whereas the application for 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 In that context, the Bundeskommunikationssenat refers to decisions of the Bundesverfassungsgericht (German Federal Constitutional Court) and of the Verfassungsgerichtshof (Austrian Constitutional Court) in which it has been considered that the granting of a right to make short news reports free of charge is disproportionate and, as a result, infringes professional freedom, within the meaning of Article 12 of the German Basic Law (Grundgesetz), and the right to property, within the meaning of Article 5 of the Austrian Basic Law on the general rights of citizens (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger) and Article 1 of Additional Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952 ('the Additional Protocol').
- 24 In those circumstances, the Bundeskommunikationssenat decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 15(6) of [Directive 2010/13] compatible with Articles 16 and 17 of the Charter ... and with Article 1 of [the Additional] Protocol ...?'

### **Consideration of the question referred**

#### *Admissibility*

- 25 At the outset, it is necessary to verify the classification, in the context of this case, of the Bundeskommunikationssenat as a court or tribunal for the purposes of Article 267 TFEU and, consequently, whether the request for a preliminary ruling is admissible.
- 26 In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by European Union law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (Case C-196/09 *Miles and Others* [2011] ECR I-5105, paragraph 37 and the case-law cited).
- 27 The Court has already had the opportunity to determine, in the case which gave rise to the judgment in *Österreichischer Rundfunk*, whether the Bundeskommunikationssenat is a court or tribunal for the purposes of Article 234 EC. In that regard, it held, in paragraphs 19 to 21 of its judgment, that, on the basis of the provisions relating to the establishment and functioning of the Bundeskommunikationssenat, applicable in that case, that body had to be considered to be a court or tribunal for the purposes of Article 234 EC.
- 28 In the present case, provisions regarding the establishment and functioning of the Bundeskommunikationssenat are applicable which are identical in content to those which were applicable in the case which gave rise to the judgment in *Österreichischer Rundfunk*. In those circumstances, the Bundeskommunikationssenat must be considered to be a court or tribunal for the purposes of Article 267 TFEU also in the present case.

- 29 It is apparent from the foregoing that the request for a preliminary ruling made by the Bundeskommunikationssenat is admissible.

### *Substance*

- 30 By its question, the Bundeskommunikationssenat requests the Court, in essence, to examine the validity of Article 15(6) of Directive 2010/13 in the light of Articles 16 and 17(1) of the Charter and Article 1 of the Additional Protocol. In particular, it asks whether Article 15(6) amounts to an infringement of the fundamental rights of the holder of exclusive broadcasting rights, since the holder of those rights is required to authorise any other broadcaster, established in the European Union, to make short news reports, without being able to seek compensation exceeding the additional costs directly incurred in providing access to the signal.

### Article 17 of the Charter

- 31 Article 17(1) of the Charter provides that '[e]veryone has the right to own, use, 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 in so far as is necessary for the general interest.'
- 32 Article 15(1) of Directive 2010/13 provides that, for the purpose of short news reports, any broadcaster established in the European Union must have access to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction. Pursuant to Article 15(3) thereof, in principle, such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal. Article 15(6) of the directive states that, where compensation is provided for the holder of the exclusive audiovisual broadcasting rights, it shall not exceed the additional costs directly incurred in providing access to the signal.
- 33 Rules with an identical content to those set out in the preceding paragraph were already contained in Article 3k of Directive 89/552, as amended by Directive 2007/65.
- 34 In those circumstances, the question arises as to whether the guarantees provided in Article 17(1) of the Charter extend to audiovisual broadcasting rights acquired contractually. The protection granted by that article does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity (Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECR I-6513, paragraph 185 and the case-law cited), but applies to rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit.
- 35 It is true that exclusive broadcasting rights are granted, on a contractual basis, to broadcasters for consideration, enabling the latter to broadcast certain events on an exclusive basis, thereby precluding other broadcasters from transmitting those events in any way. Thus, those rights must not be regarded as constituting mere commercial interests or opportunities, but as having asset value.
- 36 However, in the light of the circumstances of the case in the main proceedings, the question arises as to whether the exclusive rights at issue constitute an established legal position within the meaning of paragraph 34 above.

- 37 In that regard, since the entry into force of Directive 2007/65, namely on 19 December 2007, European Union law requires the Member States to guarantee the right of broadcasters to make short news reports on events of high interest to the public which are subject to exclusive broadcasting rights, without the holders of such a right being able to demand compensation exceeding the additional costs directly incurred in providing access to the signal.
- 38 In the light of that European Union legislation, which the Member States are required to transpose into their respective national laws, a contractual clause, such as the one at issue in the main proceedings, cannot confer an established legal position on a broadcaster, protected by Article 17(1) of the Charter, enabling it to exercise its broadcasting right autonomously, as referred to in paragraph 34 above, in the sense that it could demand compensation exceeding the additional costs directly incurred in providing access to the signal, contrary to the mandatory provisions of Directive 2007/65.
- 39 An economic operator, such as Sky, which, after the entry into force of Directive 2007/65 on 19 December 2007, has acquired exclusive broadcasting rights by means of a contract – on 21 August 2009 in this instance – cannot, in the light of European Union law, rely on an acquired legal position, protected by Article 17(1) of the Charter, as the Member States were required to transpose that directive, which they might do at any point and had to do by 19 December 2009 at the latest.
- 40 In those circumstances, a holder of exclusive broadcasting rights relating to events of high interest to the public cannot rely on the protection afforded by Article 17(1) of the Charter.

#### Article 16 of the Charter

- 41 Article 16 of the Charter provides that '[t]he freedom to conduct a business in accordance with European Union law and national laws and practices is recognised'.
- 42 The protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition, as is apparent from the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter (Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 32).
- 43 In addition, the freedom of contract includes, in particular, the freedom to choose with whom to do business (see, to that effect, Joined Cases C-90/90 and C-91/90 *Neu* [1991] ECR I-3617, paragraph 13), and the freedom to determine the price of a service (see, to that effect, Case C-437/04 *Commission v Belgium* [2007] ECR I-2513, paragraph 51, and Case C-213/10 *F-TEX* [2012] ECR, paragraph 45).
- 44 The consequence of Article 15 of Directive 2010/13, as is apparent from points 35 and 37 of the Opinion of the Advocate General, is that the holder of exclusive broadcasting rights cannot decide freely with which broadcasters it may wish to enter into an agreement regarding the granting of the right to make short news reports. Similarly, in the light of Article 15(6) of that directive, in relation to which the referring court has requested a preliminary ruling, the holder of exclusive broadcasting rights cannot decide freely on the price to be charged for access to the signal for the purpose of making short news reports. That provision prevents, in particular, the holder of such a right from making broadcasters which produce short news reports contribute to the costs of acquiring exclusive broadcasting rights. In those circumstances, Article 15(6) amounts to inference with the freedom to conduct a business of holders of exclusive broadcasting rights.



- 45 However, in accordance with the Court's case-law, the freedom to conduct a business is not absolute, but must be viewed in relation to its social function (see, to that effect, Joined Cases C-184/02 and C-223/02 *Spain and Finland v Parliament and Council* [2004] ECR I-7789, paragraphs 51 and 52, and Case C-544/10 *Deutsches Weintor* [2012] ECR, paragraph 54 and the case-law cited).
- 46 On the basis of that case-law and in the light of the wording of Article 16 of the Charter, which differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter, the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.
- 47 That circumstance is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the principle of proportionality to be implemented.
- 48 In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.
- 49 In that regard, the Court notes that Article 15(6) of Directive 2010/13 does not affect the core content of the freedom to conduct a business. That provision does not prevent a business activity from being carried out as such by the holder of exclusive broadcasting rights. In addition, it does not prevent the holder of those rights from making use of them by broadcasting the event in question itself for consideration or by granting that right to another broadcaster on a contractual basis for consideration or to any other economic operator.
- 50 In so far as concerns the proportionality of the interference found to exist, the Court recalls that, according to settled case-law, the principle of proportionality requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 45, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR, paragraph 71 and the case-law cited).
- 51 In that regard, the Court notes, first of all, that the marketing on an exclusive basis of events of high interest to the public is increasing and liable to restrict considerably the access of the general public to information relating to those events. It is in that connection that Article 15 of Directive 2010/13 seeks, as is apparent from recitals 48 and 55 in the preamble thereto, to safeguard the fundamental freedom to receive information, guaranteed under Article 11(1) of the Charter, and to promote pluralism of the media in the production and programming of information in the European Union, protected under Article 11(2) of the Charter.
- 52 The safeguarding of the freedoms protected under Article 11 of the Charter undoubtedly constitutes a legitimate aim in the general interest (see, to that effect, Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 42), the importance of which in a democratic and pluralistic society must be stressed in particular (see, to that effect, Case C-336/07 *Kabel Deutschland Vertrieb und Service* [2008] ECR I-10889, paragraph 33, and Case C-163/10 *Patriciello* [2011] ECR I-7565, paragraph 31). That importance is particularly evident in the case of events of high interest to the public. It must thus be found that Article 15 of Directive 2010/13 does pursue an objective in the general interest.

- 53 Similarly, Article 15(6) of Directive 2010/13 is appropriate for the purpose of ensuring that the objective pursued is achieved. That provision puts any broadcaster in a position to be able to make short news reports and thus to inform the general public of events of high interest to it which are marketed on an exclusive basis, by guaranteeing those broadcasters access to those events. That access is guaranteed to them irrespective of their commercial power and financial capacity, on the one hand, and the price paid to acquire the exclusive broadcasting rights, the contractual negotiations with the holders of such rights and the scale of the events at issue, on the other.
- 54 Next, so far as concerns the necessity of such legislation, the Court notes that a less restrictive measure could have consisted in providing compensation to holders of exclusive broadcasting rights in excess of the costs directly incurred in providing access to the signal, with a view, in particular, to making broadcasters which make short news reports contribute to the cost of acquiring those exclusive rights.
- 55 However, it is apparent that less restrictive legislation would not achieve the objective pursued by Article 15(6) of Directive 2010/13 as effectively as the application of that provision. A regulation providing for compensation to holders of exclusive broadcasting rights exceeding the costs directly incurred in providing access to the signal and calculated on the basis of additional criteria such as, in particular, the price paid to acquire such rights and/or the scale of the event at issue could, *inter alia*, depending on the method used to determine the amount of compensation to be paid and the financial capacities of the broadcasters wishing to gain access to the signal, deter or even prevent certain broadcasters from requesting access for the purpose of making short news reports and thus considerably restrict the access of the general public to the information.
- 56 By contrast, Article 15(6) of Directive 2010/13 guarantees any broadcaster access to the event, which is to be provided, in accordance with Article 15(1), in compliance with the principle of equal treatment and is entirely independent of the circumstances referred to in the preceding paragraph, thereby providing any broadcaster with the opportunity to make short news reports.
- 57 In those circumstances, the European Union legislature could legitimately consider that legislation providing for compensation to holders of exclusive broadcasting rights exceeding the costs directly incurred in providing access to the signal would not have achieved the objective pursued as effectively as legislation such as Article 15(6) of Directive 2010/13, which limits any compensation to the amount of those costs and that, consequently, such legislation was necessary.
- 58 Finally, as regards the possible disproportionate nature of Article 15(6) of Directive 2010/13, the referring court asks, in essence, whether the obligation of the Member States, laid down in that provision, to define the modalities and conditions regarding the right to make short news reports appropriately balances the requirements resulting from the fundamental freedom to receive information and those resulting from the freedom to conduct a business. It considers that only a rule providing for payment of compensation which takes account, in particular, of the subject-matter of the exclusive broadcasting rights at issue and the sum paid by the holder to acquire those rights should be regarded as proportionate.
- 59 In that regard, it should be noted that the European Union legislature was required to strike a balance between the freedom to conduct a business, on the one hand, and the fundamental freedom of citizens of the European Union to receive information and the freedom and pluralism of the media, on the other.
- 60 Where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them (see, to that effect, Case C-275/06 *Promusicae* [2008] ECR I-271, paragraphs 65 and 66, and *Deutsches Weintor*, paragraph 47).

- 61 By establishing requirements relating to the use of extracts from the signal, the European Union legislature has ensured that the extent of the interference with the freedom to conduct a business and the possible economic benefit which broadcasters might draw from making a short news report are confined within precise limits.
- 62 Article 15(5) of Directive 2010/13 provides that short news reports on the event being exclusively retransmitted may not be produced for any kind of television programme, but only for general news programmes. Thus, the use of extracts from the signal in programmes serving entertainment purposes, which have a much greater economic impact than general news programmes, is ruled out, in accordance with recital 55 in the preamble to Directive 2010/13.
- 63 In addition, pursuant to that recital and Article 15(6) of Directive 2010/13, the Member States are required to define the modalities and conditions regarding the provision of extracts from the signal used by taking due account of exclusive broadcasting rights. In that regard, it is apparent from Article 15(3),(5) and (6) and from recital 55 that those extracts must, *inter alia*, be short and that their maximum length should not exceed ninety seconds. Similarly, the Member States are required to define the time limits regarding the transmission of those extracts. Finally, broadcasters producing a brief news report must, in accordance with Article 15(3), identify the source of the short extracts used in their reports, which is likely to have a positive effect in terms of publicity for the holder of the exclusive broadcasting rights at issue.
- 64 Moreover, as noted in paragraph 49 above, Article 15 of Directive 2010/13 does not prevent holders of exclusive broadcasting rights from charging for the use of their rights. Furthermore, the absence of a possibility of refinancing through set-off and any reduction in the commercial value of those exclusive broadcasting rights may, in practice, be taken into account during contractual negotiations relating to the acquisition of the rights at issue and be reflected in the price paid for that acquisition.
- 65 By contrast, in so far as concerns the rights and interests which Article 15 of Directive 2010/13 seeks to protect, it should be noted that the marketing on an exclusive basis of events of high interest to the public is, as noted in paragraph 51 above, increasing and may significantly restrict the access of the general public to information relating to those events.
- 66 In the light, first, of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and, second, of the protection of the freedom to conduct a business as guaranteed by Article 16 of the Charter, the European Union legislature was entitled to adopt rules such as those laid down in Article 15 of Directive 2010/13, which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom.
- 67 In those circumstances, the European Union legislature was lawfully entitled to impose the limitations on the freedom to conduct a business contained in Article 15(6) of Directive 2010/13 in relation to holders of exclusive broadcasting rights and to consider that the disadvantages resulting from that provision are not disproportionate in the light of the aims which it pursues and are such as to ensure a fair balance between the various rights and fundamental freedoms at issue in the case.
- 68 It is apparent from all of the above that consideration of the question raised has not disclosed any factor of such a kind as to affect the validity of Article 15(6) of Directive 2010/13.

## **Costs**

- <sup>69</sup> Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

**Consideration of the question raised has not disclosed any factor of such a kind 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).**

[Signatures]