



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

21 October 2015*

(Reference for a preliminary ruling — Directive 2010/13/EU — Concepts of ‘programme’ and ‘audiovisual media service’ — Determination of the principal purpose of an audiovisual media service — Comparability of the service to television broadcasting — Inclusion of short videos in a section of a newspaper’s website available on the Internet)

In Case C-347/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 26 June 2014, received at the Court on 18 July 2014, in the proceedings

New Media Online GmbH

v

Bundeskommunikationssenat,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, K. Lenaerts (Rapporteur), President of the Court, J.L. da Cruz Vilaça, A. Arabadjiev and J.-C. Bonichot, Judges,

Advocate General: M. Szpunar,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 22 April 2015,

after considering the observations submitted on behalf of:

- New Media Online GmbH, by M. Hetzenauer, Rechtsanwältin,
- the Swedish Government, by A. Falk and N. Otte Widgren, acting as Agents,
- the European Commission, by G. Braun and A. Marcoulli, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 July 2015,

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(1)(a)(i) and (b) 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).
- 2 The request has been made in proceedings between New Media Online GmbH, established in Innsbruck (Austria), and Bundeskommunikationssenat (Federal Communications Board) concerning the decision of the Austrian communications authority (Kommunikationsbehörde Austria) to classify a part of the services proposed by the appellant in the main proceedings as an ‘on-demand audiovisual media service’ which was therefore subject to the reporting obligation laid down by the relevant legislation.

Legal context

EU law

- 3 According to recitals 10, 11, 21, 22, 24 and 28 in the preamble to Directive 2010/13:
 - ‘(10) Traditional audiovisual media services — such as television — and emerging on-demand audiovisual media services offer significant employment opportunities in the Union, particularly in small and medium-sized enterprises, and stimulate economic growth and investment. Bearing in mind the importance of a level playing-field and a true European market for audiovisual media services, the basic principles of the internal market, such as free competition and equal treatment, should be respected in order to ensure transparency and predictability in markets for audiovisual media services and to achieve low barriers to entry.
 - (11) It is necessary, in order to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services).
- ...
- (21) For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.
- (22) For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should

exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.

...

- (24) It is characteristic of on-demand audiovisual media services that they are ‘television-like’, i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of ‘programme’ should be interpreted in a dynamic way taking into account developments in television broadcasting.

...

- (28) The scope of this Directive should not cover electronic versions of newspapers and magazines.’

4 Article 1 of Directive 2010/13, entitled ‘Definitions’, provides in paragraph 1:

‘For the purposes of this Directive, the following definitions shall apply:

- (a) “audiovisual media service” means:

(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication;

- (b) “programme” means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama;

...

- (g) “on-demand audiovisual media service” (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;

...’

Austrian law

- 5 Paragraph 2 of the Law on audiovisual media services (Audiovisuelle Mediendienste-Gesetz, BGBl. I, 84/2001), in the version applicable to the facts in the main proceedings ('the Law on audiovisual media services'), entitled 'Definitions', provides:

'The following definitions shall apply to this Law:

...

3. audiovisual media service: A service as defined by Articles 56 and 57 TFEU which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks (Paragraph 3(11) of the Law on telecommunications (Telekommunikationsgesetz) 2003). Audiovisual media services include television channels and on-demand audiovisual media services;
4. on-demand audiovisual media service: An audiovisual media service provided by a media service provider for the viewing of programs at the moment chosen by the user and at the user's individual request on the basis of a catalog of programs selected by the media service provider (on-demand service);

...'

- 6 Paragraph 9 of the Law on audiovisual media services, entitled 'Services Subject to a Reporting Obligation', provides in point 1 thereof:

'Television operators, unless they are subject to the licensing requirement pursuant to Paragraph 3(1), and providers of on-demand media services shall report to the regulatory authority their activity no later than two weeks before commencement of the activity.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 7 The appellant in the main proceedings runs the online newspaper 'Tiroler Tageszeitung online', whose Internet address is <http://www.tt.com>. The website, which mainly features articles from the written press, included, at the material time, a link to the subdomain, <http://video.tt.com>, entitled 'Video' ('the videos subdomain'), which led to a page on which it was possible, thanks to the search catalogue, to access more than 300 videos.
- 8 The videos accordingly put online provided edited reports of varying lengths, from 30 seconds to several minutes, concerning various subjects such as local news and events, vox-pop interviews on current topics, sports events, film trailers, craft activities for children, or readers' videos selected by the editors. Very few of the videos which appeared in the videos subdomain had a connection to the articles featured on the Tiroler Tageszeitung newspaper website.
- 9 By decision of 9 October 2012, the Austrian communications authority found that, in relation to the videos subdomain, the appellant in the main proceedings was providing an on-demand audiovisual media service within the meaning of Paragraph 2(4) in conjunction with Paragraph 2(3) of the Law on audiovisual media services, which is subject to the reporting obligation pursuant to Paragraph 9(1) of the Law on audiovisual media services. The videos subdomain was televisual in nature and had an independent function with respect to the Tiroler Tageszeitung newspaper website. It met the criterion

according to which the principal purpose was to inform, entertain or educate the general public. Consequently, according to the Austrian communications authority, the videos subdomain falls within the scope of the Law on audiovisual media services and its regulatory requirements.

- 10 The appellant in the main proceedings disputed that assessment and brought an action before the Federal Communications Board. The latter dismissed that action by decision of 13 December 2012 for the reasons put forward by the Austrian communications authority.
- 11 The appellant in the main proceedings brought an appeal before the Verwaltungsgerichtshof (Administrative Court). Before that court, the appellant claims that the audiovisual content accessible in the videos subdomain are only ancillary to its main website and is not an audiovisual media service. Moreover, it claims that the short videos provided in the videos subdomain are not comparable, in their form and content, to the television broadcasting service.
- 12 The referring court asks, first, whether the videos proposed can be classified as a ‘programme’, within the meaning of Article 1(1)(b), of Directive 2010/13 and, more specifically, whether the video collection at issue in the main proceedings complies with the requirement set out in that provision, namely that its form and content must be comparable to those of television broadcasting. It proceeds from the premiss that a comparability of the service examined with television broadcasting service can be assumed where such a service is offered by that television broadcasting service. However, its doubts stem from the fact that the service at issue in the main proceedings consists of offering videos of short duration which correspond to brief news clips and which are not found, in that format, on ‘traditional’ television.
- 13 Second, the referring court asks whether the ‘principal purpose’ of the service at issue in the main proceedings is the provision of programmes to inform, entertain or educate. According to that court, Directive 2010/13 gives no clear indication as to whether the classification of a service as an audiovisual media service in the light of the ‘principal purpose’ depends on the full range of a service provider’s services or whether a separate examination of each service may be envisaged. However, it is of the opinion that the purpose of that directive militates in favour of the second approach, as otherwise, by extending the range of services, a provider could accordingly remove them from that directive’s scope.
- 14 In those circumstances, the Verwaltungsgerichtshof (Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
 - ‘(1) Should Article 1(1)(b) of Directive 2010/13 be interpreted as meaning that the form and content of a service under examination can be considered to be sufficiently comparable to the form and content of television broadcasting if such services are also offered in television broadcasting which can be regarded as mass media and which are intended for reception by, and could have a clear impact on, a significant proportion of the general public?
 - (2) Should Article 1(1)(a)(i) of Directive 2010/13 be interpreted as meaning that an assessment of the principal purpose of a service offered in the electronic version of a newspaper can be based on a subsection mainly providing a collection of short videos, which in other sections of that website are used only to supplement text articles in the online newspaper?’

Consideration of the questions referred

The first question

- 15 By its first question, the referring court wishes to know, in essence, whether the concept of ‘programme’ within the meaning of Article 1(1)(b) of Directive 2010/13 must be interpreted as including, under the subdomain of a website of a newspaper, the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips.
- 16 As a preliminary point it must be noted that, according to the information provided by the referring court, the videos at issue in the main proceedings amount to news bulletins of various lengths and relate to diverse subjects. Those videos concerned reports on local events inter alia in the areas of politics, culture, sport and economics.
- 17 In that context, the referring court entertains doubts as to whether the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips, is comparable to ‘television broadcasting’ within the meaning of Article 1(1)(b) of Directive 2010/13, since such a compilation of short videos has not, until now, been offered as such by traditional television broadcasting.
- 18 In that regard, it must be recalled that, according to the definition contained in Article 1(1)(b) of Directive 2010/13, the concept of ‘programme’ means ‘a set of moving images ... constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting’.
- 19 That provision thus requires that video clips, such as those at issue in the main proceedings, can be compared to the form and content of television broadcasting, and not that a complete compilation of short videos can be compared to a complete schedule or a catalogue established by a television broadcaster.
- 20 Moreover, the fact that the videos at issue in the main proceedings are short does not rule out their classification as a ‘programme’, within the meaning of Article 1(1)(b) of Directive 2010/13. That provision does not contain any requirement relating to the length of the set of images concerned. In addition, as the European Commission stated, television broadcasting offers, alongside programmes of long to medium length, programmes of short length.
- 21 As regards the possibility, for the internet user, of having access to the video which interests him upon individual request when he wants on the basis of a catalogue established by the operator of the online newspaper, which allows both selection by heading and by the most watched or most recent videos, that does not alter the fact that, like a television broadcast programme, the videos at issue in the main proceedings are aimed at a mass audience and are likely to have a clear impact on that audience within the meaning of recital 21 in the preamble to Directive 2010/13. Furthermore, such a possibility corresponds to that explicitly provided for in the definition of an on-demand audiovisual media service, contained in Article 1(1)(g) of Directive 2010/13. Consequently, the manner in which the videos at issue in the main proceedings are selected is no different from that proposed in the context of on-demand audiovisual media services, which fall within the scope of that directive.
- 22 In addition, as is clear from recitals 11, 21 and 24 in the preamble to Directive 2010/13, the purpose of that directive is to apply, in a particularly competitive media landscape, the same rules to actors competing for the same audience and to prevent on-demand audiovisual media services, such as the video collection at issue in the main proceedings, from engaging in unfair competition with traditional television.

- 23 In that regard, it is clear from the information provided by the referring court that a part of the videos available in the videos subdomain is produced by the regional radio broadcaster, Tirol TV, and is also accessible on its website. Those videos accordingly compete with the news services offered by regional radio broadcasters. That is also true for videos of short duration which do not relate to local news, but to cultural or sporting events or recreational reports, and which compete with music channels, sports channels and entertainment programmes.
- 24 In the light of the foregoing considerations, the answer to the first question is that the concept of ‘programme’ within the meaning of Article 1(1)(b) of Directive 2010/13 must be interpreted as including, under the subdomain of a website of a newspaper, the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips.

The second question

- 25 By its second question, the referring court asks, in essence, on the basis of which criteria the principal purpose, within the meaning of Article 1(1)(a)(i) of Directive 2010/13, of a service making videos available in the electronic version of a newspaper is to be assessed.
- 26 In that regard, it is clear from Directive 2010/13 that an electronic version of a newspaper, notwithstanding the audiovisual elements within it, must not be regarded as audiovisual services where those audiovisual elements are incidental and serve only to complement the provision of written press articles.
- 27 Recital 22 in the preamble to Directive 2010/13 thus sets out the principle that services whose audiovisual content is merely incidental and does not constitute its principal purpose do not satisfy the definition of an ‘audiovisual media service’, within the meaning of Article 1(1)(a)(i) of that directive. Recital 28 in the preamble to that directive, for its part, states that ‘electronic versions of newspapers and magazines’ are excluded from that directive’s scope. The Austrian authorities accordingly decided not to classify the website of the appellant in the main proceedings, considered in its entirety, as an audiovisual media service.
- 28 However, recital 28 in the preamble to Directive 2010/13 cannot be understood as meaning that an audiovisual service must systematically be excluded from the scope of that directive solely on the ground that the operator of the website of which that service is part is a publishing company of an online newspaper. A video section which, solely as part of a website, meets the conditions to be classified as an on-demand audiovisual media service, does not lose that classification merely because it is accessible on the website of a newspaper or because it is offered within that site.
- 29 An approach systematically excluding from the scope of the directive services managed by publishers of daily online newspapers due to their multimedia nature, without assessing on a case-by-case basis the ‘principal purpose’ of the service at issue, would not sufficiently take into account the diversity of the situations which could be envisaged and would run the risk that operators effectively providing audiovisual services within the meaning of Article 1(1)(a)(i) of that directive might be able to use a multimedia portal in order to evade the legislation which is applicable to them in that area.
- 30 In addition, an individualised approach, based on the characteristics of the operator, consisting of taking into consideration all the services offered by that operator in order to weigh their respective purpose and leading that operator, in respect of all the services which he offers through his website, either falling or not falling within the scope of Directive 2010/13, would not permit a correct assessment of specific situations such as those in which an undertaking carries out activities in several fields, increases the scope of its activities or merges with another undertaking.

- 31 In that regard, it must be pointed out that one of the main purposes of Directive 2010/13 is, as stated in recital 10 in the preamble thereto, to achieve a level playing-field on the audiovisual media services market. It follows that the classification of the ‘principal purpose’ of a website does not depend on whether the website concerned, considered in its entirety, is related to the principal activity of an undertaking or an activity which, for that undertaking, is ancillary.
- 32 The level of protection granted to consumers could not be dependent on whether the same televisual content is offered by an undertaking for which that content is only of minor importance, or by an undertaking for which that content represents all that it offers.
- 33 In those conditions, preference must be given to a substantive approach which, according to the wording of Article 1(1)(a)(i), consists of examining whether the principal purpose of the service at issue, in itself and regardless of the framework in which it is offered, is the provision of programmes to inform, entertain or educate the general public.
- 34 As regards the case in the main proceedings, it is for the referring court to examine whether the service offered in the videos subdomain has form and content which is independent of that of the written press articles of the publisher of an online newspaper. If so, that service falls within the scope of Directive 2010/13. If, on the other hand, that service appears to be indissociably complementary to the journalistic activity of that publisher, in particular as a result of the links between the audiovisual offer and the offer in text form, it does not fall within the scope of that directive.
- 35 When carrying out the analysis, the fact that the audiovisual offer at issue is presented in the principal domain of the website concerned or in a subdomain of that website cannot be the decisive factor, so as not to open the way for the rules of Directive 2010/13 to be circumvented by designing that website to that end.
- 36 In the case in the main proceedings, it appears from the statements of the referring court and the documents submitted to the Court that very few press articles are linked to the video clips at issue. Moreover, according to the information in the documents before the Court, the majority of those videos can be accessed and watched regardless of whether the articles of the electronic version of a newspaper are consulted. Those factors tend to show that the service at issue in the main proceedings could be regarded as having form and content which is independent of that of the journalistic activity of the appellant in the main proceedings and, therefore, as constituting a distinct service from the other services offered by that appellant. Such an assessment is a matter for the referring court.
- 37 In the light of the foregoing considerations, the answer to the second question must be that, on a proper interpretation of Article 1(1)(a)(i) of Directive 2010/13, assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper must focus on whether that service as such has content and form which is independent of that of the journalistic activity of the operator of the website at issue, and is not merely an indissociable complement to that activity, in particular as a result of the links between the audiovisual offer and the offer in text form. That assessment is a matter for the referring court.

Costs

- 38 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 (Second Chamber) hereby rules:

- 1. The concept of ‘programme’, within the meaning of Article 1(1)(b) 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), must be interpreted as including, under the subdomain of a website of a newspaper, the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips.**
- 2. On a proper interpretation of Article 1(1)(a)(i) of Directive 2010/13, assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper must focus on whether that service as such has content and form which is independent of that of the journalistic activity of the operator of the website at issue, and is not merely an indissociable complement to that activity, in particular as a result of the links between the audiovisual offer and the offer in text form. That assessment is a matter for the referring court.**

[Signatures]