

22 October 2015

Case note on C-347/14 *New Media Online GmbH v Bundeskommunikationssenat*

Case facts

Publishers of **online newspapers and magazines** increasingly offer **clips** on their websites as an add-on to written articles. Frequently, these clips are compiled in separate spaces of the websites with particular navigation tools for users (such as most recent videos, most watched videos), and they may cover the entire range of subjects reported on. The **distinction between press products and audiovisual media services** is crucial as different legal requirements and regulatory regimes apply. Publishers of newspapers, in printed form or online, are subject to a much lighter set of rules than audiovisual media services which are regulated by the EU Audiovisual Media Services Directive (AVMSD). Due to the **convergence of media**, the formerly distinct boundary between the two genres has become blurred. The Court of Justice of the European Union (CJEU) has shed some light into how the exercise of classification of services may be carried out.

The case at issue concerned the Austrian publisher New Media Online which makes available an online version of the *Tiroler Tageszeitung*. This website encompasses a sub-domain under the heading "Video" which **compiles more than 300 videos** of varying lengths (between 30 seconds and several minutes). The videos cover a **diversity of topics** and are editorially prepared. The overwhelming majority of audiovisual content was provided as stand-alone videos and had **no relation to the text-based material** offered on the website. Given these characteristics, the Austrian regulatory authority, *KommAustria*, classified the video section of the digital version of the newspaper as an on-demand audiovisual media service. The publisher challenged this assessment before the Austrian courts which led the *Bundeskommunikationssenat* to refer two questions for preliminary ruling to the CJEU.

Ruling

"We all know what a horse is". These were Advocate General Szpunar's introductory words for his opinion delivered on 1 July 2015. He rejected application of the AVMSD to every kind of multimedia portal, arguing that the scope of the Directive should be restricted to the core matter it regulates, namely television broadcasting and its "derivative", on-demand audiovisual media services (para. 21).

In its judgment of 21 October 2015, the CJEU, however, does not follow the analysis of the Advocate General. Two aspects of its decision are particularly worth mentioning.

- Short clips may be classified as programmes

The CJEU was asked to interpret the meaning of the notion "**programme**" as defined by the AVMSD with respect to short form audiovisual content included in a subdomain of an online newspaper. The Court acknowledges that such an aggregation of short clips is commonly not presented on television. Yet, it underlines that the definition of "programme" contained in the AVMSD does not include a requirement of **duration**. The CJEU makes clear that the videos offered by the Austrian publisher are **aimed at a mass audience** and are likely to have a **clear impact** on the general public. Hence, such clips **compete for the same audience** as television broadcasts. Videos of short duration featuring news bulletins, sports and entertainment may therefore be considered as "programmes" within the meaning of the AVMSD.

- Independent function of audiovisual material

The application of the rules of the AVMSD requires, among other things, an assessment of the principal purpose of the service. If the main objective pursued by the provider is the provision of programmes, the **principal purpose** test is met.

The Austrian court had asked about the assessment of the principal purpose for an online newspaper. The CJEU points out that the Directive requires a **case-by-case analysis** of the principal purpose of each service. A systematic exclusion of websites on the sole ground that they are offered by a publishing company would fall short of the requirements of the AVMS Directive and could give operators an excuse to hide behind the multimedia nature of the service in order to evade stricter regulation. Similarly, the Court makes clear that the principal purpose does not relate to the activities carried out by the service provider and the importance of a particular service for its business. Instead, the principal purpose implies that the form and content of the audiovisual material is of self-standing character, **independent** of written articles. If, on the contrary, videos are intrinsically **linked to the texts** and merely of **complementary** nature, the AVMSD will not apply. According to the CJEU, it is down to the national courts to make an individual assessment of each concrete case.

Implications

- Fair share of regulatory burden

With its decision in *New Media Online*, the CJEU has provided some clarity with regards to the scope of application of the AVMSD, which has become increasingly fluid in recent years. Regulatory authorities in EU Member States have struggled with the interpretation of key concepts of the Directive. The Court, in contrast to the Advocate General, offers a more nuanced approach, interpreting the wording of the Directive in the light of market realities and new phenomena. The regulation of short clips under the umbrella of the Directive ensures a **level-playing field**. It thus prevents providers of video catalogues included in online newspapers from engaging in unfair competition.

- No blanket exclusion of online newspapers

In addition, the Court underlines that online newspapers are not *per se* excluded from the scope of the AVMSD. If publishers offer audiovisual material they may be covered by the Directive, provided that the principal purpose test is met. Thereby, the Court ensured that operators may not **circumvent** sector-specific legislation such as national media laws that implement the AVMSD. With regards to the notion of principal purpose, the CJEU outlines some criteria such as the **independence of the audiovisual material** and the **absence of links between the videos and written press articles**.

Moreover, the **design of the website**, and the compilation of videos under a specific subdomain in particular, is irrelevant for the classification of the service. Although it refers the decision back to the Austrian court for final assessment, the CJEU nevertheless indicates that the video section of the *Tiroler Tageszeitung* could be considered as a distinct service under the AVMSD. While the Court offers some guidance with respect to the principal purpose criterion, the latter remains subject to interpretation by national authorities (e.g. regulators or courts).
