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The Court of Justice of the European Union ('**CJEU**') judgment last month in *New Media Online GmbH v Bundeskommunikationssenat*, Case C-347/14, has potentially significant implications for any news organisations hosting audiovisual content on their websites. The CJEU ruled that videos under a subdomain of a newspaper website could fall under the definition of a "*programme*" within the Audiovisual Media Services Directive 2010/13 ('**the AVMSD**') in a decision that notably differs from the approach taken by the Advocate General, as well as the general approach currently taken by Ofcom in the UK. This is despite a clear recital in the AVMSD that "*electronic versions of newspapers and magazines*" are excluded from its scope.

## What is the AVMSD?

The AVMSD governs the provision and distribution of audiovisual media services across Europe, outlining a variety of rules (for example, requirements regarding commercial communications) which are designed to establish a single internal market in audiovisual media services. The idea is to ensure fair competition within Europe and to ensure that the market is safe for consumers.

The AVMSD applies to services under the editorial responsibility of a media service provider, the principal purpose of which is the provision of programmes to inform, entertain or educate the general public through electronic communications networks.

Audiovisual media services are characterised as television broadcast services (i.e. television channels) or 'television-like' on-demand services, with the regulatory framework differing slightly depending on which of the two services is applicable.

The consequence of an audiovisual work being termed a "*programme*" under the AVMSD is that those programmes fall to be regulated under the Directive's terms.

## Background

The proceedings involved an Austrian online newspaper, 'Tiroler Tageszeitung online', which featured in its website a link to a video subdomain containing access to more than 300 edited videos of varying lengths on a diverse range of subjects (including local news and events, sporting events and film trailers). In October 2012 the Austrian communications authority found that the newspaper was providing an on-demand audiovisual service through the video subdomain, and therefore fell within the scope of the AVMSD and its regulatory requirements.

The matter was appealed to the Austrian Verwaltungsgerichtshof (Administrative Court), who referred two questions to the CJEU to determine:

- (1) whether the videos in question could be classified as a "*programme*" within the meaning of Article 1(1)(b) of the AVMSD and, more specifically, whether the video collection at issue complied with the requirement set out in that provision that its form and content must be comparable to those of television broadcasting; and
- (2) whether the "*principal purpose*" of the service at issue was the provision of programmes to inform, entertain and educate, and whether an assessment of that depends upon the full range of the service provider's services or whether a separate examination of each service may be envisaged.

## **The CJEU decision**

In July this year, the Advocate General handed down his Opinion that neither the website of a newspaper containing audiovisual material, nor any section of that website, constituted an audiovisual media service within the meaning of the AVMSD. The CJEU, however, did not agree.

First, the CJEU ruled that the concept of a "*programme*" within the meaning of the AVMSD should be interpreted as including, under the subdomain of a newspaper's website, the provision of videos of short duration considering local news bulletins, sports and entertainment clips.

The CJEU made it clear that the fact that the videos were short did not preclude them from being a "*programme*" within the AVMSD. Importantly, the question was whether video clips could be compared to the "*form and content*" of television broadcasting, not whether a complete compilation of short videos could be compared to a schedule of a television broadcaster.

In addition, the Court held that, like a television broadcast programme, the videos were aimed at a mass audience and the manner in which the videos were selected was the same as in the context of on-demand audiovisual services.

The CJEU highlighted that the purpose of the Directive was to apply the same rules to companies working within a particularly competitive landscape and to prevent on-demand audiovisual media services engaging in "*unfair competition*" with traditional television broadcasting. In this case, given some of the videos within the subdomain were produced by a regional radio broadcaster, Tirol TV, the videos could be said to compete with services offered by traditional radio broadcasters.

Second, the CJEU said that an assessment of the "*principal purpose*" of a service making available videos in an electronic newspaper must focus on whether that service has content and form which is "*independent*" of the journalistic activity of the operator of the website and is not merely a complement to it, in particular, as a result of the links between the audiovisual content and the text of the website. In other words, a video section which meets the conditions to be classed as an on-demand audiovisual media service does not lose that classification simply by virtue of its accessibility within a newspaper's website.

Notably, although the CJEU made clear that such an assessment was a matter for the referring court, it observed the lack of integration between the journalistic content of the newspaper's website and the video subdomain. Few articles were linked to the video clips and the majority of clips could be accessed regardless of whether journalistic content on the website was consumed; the Court considered these to be factors which "*tend to show*" that the video subdomain could be regarded as having form and content independent to the journalistic activity of the newspaper's website, and therefore constituting a distinct service.

## **What next?**

The CJEU's decision has implications for newspapers and magazines providing audiovisual content online, who should consider examining the level of integration between their main website and any audiovisual content on that website. Ensuring dependency between the audiovisual content and the website means that it is less likely that the AVMSD applies.

Notably, the decision highlights a different approach from Ofcom's approach in the UK, which has been to consider the principal purpose of the website as a whole, whether the principal purpose is to provide audiovisual material and then whether the service is like television. Although Ofcom has made clear that it is possible for newspaper and magazine operators to offer on-demand programme services, typically, video sections of news websites have been considered a principal part of the website itself and so not subject to regulation. It will be worth keeping a close eye on whether this approach shifts in coming months.

The CJEU decision comes in the wake of a recently closed consultation by the European Commission ('**the Commission**') on the AVMSD, which is expected to shape a comprehensive review of the Directive, due to take place in 2016, as part of the Commission's Digital Single Market Strategy. Part of that discussion surrounds whether the scope of the AVMSD should be

widened (to include, for example, video-sharing platforms and intermediaries) to take account of the rapid developments within the media sector since the adoption of the AVMSD and to make the Directive fit for purpose in the digital age. Following this decision, the CJEU seems to be one step ahead.

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