Court of Justice of the European Union: Advocate-General Decides Compensation Rule in Short Reporting Law Does Not Breach Fundamental Rights

IRIS 2012-7:1/3

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On 12 June 2012, Advocate-General Bot delivered his opinion to the Court of Justice of the European Union (ECJ) in case C-283/11. The case concerned a reference for a preliminary ruling from the Austrian Bundeskommunikationssenat (Federal Communications Board - BKS) concerning the compensation rule applicable when exercising the right to short reporting in the sense of Article 15(6) of the Audiovisual Media Services Directive 2010/13/EU (AVMSD). The Directive states that any compensation may not exceed the additional costs directly incurred in providing access to short extracts.

In a legal dispute between Sky Österreich and Österreichischer Rundfunk (Austrian public service broadcaster - ORF), the BKS had expressed doubt over whether the provision of the Directive was compatible with the Charter of Fundamental Rights of the European Union - particularly the freedom to conduct a business enshrined in Article 16 and the right to property described in Article 17 of the Charter. The BKS thought that the Directive's provision fundamentally excluded the possibility for national authorities to assess cases on an individual basis. Such authorities could not, therefore, award compensation in excess of basic access costs to a broadcaster which had to grant short reporting rights to another broadcaster. In view of the proportionality principle, it was necessary to consider whether a rule should be introduced, allowing individual circumstances to be examined (see IRIS 2011-8/11).

In his analysis, the Advocate-General firstly found that the aforementioned fundamental rights had been infringed, since broadcasters that held exclusive rights to the transmission of an event of high interest to the public could no longer freely decide on the price they charged for access to short extracts. The compensation arrangements in this provision prevented, in particular, television broadcasters from having other television broadcasting organisations that wished to use short extracts contribute to the acquisition costs of those exclusive rights. These arrangements could also have a negative impact on the commercial value of exclusive rights.

The Advocate-General then stated that one of the objectives of the disputed provision was to fully and properly safeguard the fundamental right to information

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and the interests of viewers in the EU. In order to review proportionality, it was therefore necessary to weigh various fundamental rights. In the Advocate-General's opinion, the compensation arrangements in Article 15(6) of the Directive were not only appropriate for attaining the objective pursued, but also did not go beyond what was necessary to achieve it. The provision promoted the dissemination of information on events of high interest to the public, in particular by broadcasters that did not have considerable financial resources available to them. It favoured, by the same token, the emergence of a European opinion and information area within which the freedom to receive information and media pluralism were guaranteed. Failure to limit compensation would be detrimental to the effectiveness of the right to short news reports, since such a limit was the cornerstone of the mechanism put in place by Article 15 of the Directive. Limiting compensation also ensured that all television broadcasters could exercise the right on an equal footing. In the light of the increased prices they had to pay to acquire exclusive transmission rights, the lack of such a limit could mean that the price charged to produce short news reports would reach such proportions as to deter broadcasters from exercising their right.

The Advocate-General also stated that the compensation rule could only be accurately understood if viewed in close conjunction with the conditions and limits laid down by the Union legislature in relation to the right to short reporting. These particularly included the fact that it was limited to "events of high interest to the public" and to "general news programmes", rules on the maximum length of short reports and the obligation to indicate the source. In the Advocate-General's view, these conditions helped to mitigate the infringement of the freedom to conduct business and of the right to property of the holders of exclusive transmission rights.

On these grounds, the Advocate-General concluded that, when adopting Article 15(6) of the Directive, the Union legislature had weighed the different fundamental rights at stake in a balanced manner. Examination of the question referred had not therefore disclosed any factor such as to affect the validity of this provision of the Directive.

Opinion of the Advocate-General (C-283/11) of 12 June 2012

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