

Court of Justice of the European Union: Advocate General considers newspaper website containing video not covered by AVMS Directive

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On 1 July 2015, Advocate General Szpunar delivered his opinion in Case C-347/14, New Media Online GmbH, which was a preliminary reference from an Austria court asking whether a newspaper's website containing video is covered by the EU's Audiovisual Media Service Directive. In the advocate general's opinion, neither a newspaper's website with audiovisual material, nor any section of such a website, is an "audiovisual media service" under the directive.

The case concerned the *Tiroler Tageszeitung* newspaper's website ("*Tiroler Tageszeitung Online*"), which was operated by the Austrian company New Media Online. The newspaper's website had a "video" section, which included a catalogue of around 300 videos, varying in length from several seconds, to several minutes, and included its own material, user-general videos, and local television material. In 2012, Austria's communications regulator (Kommunikationsbehörde Austria) held that the video section of the website was an "on-demand audiovisual media service" under the Austrian law transposing the EU directive (Bundesgesetz über audiovisuelle Mediendienste). The ruling was appealed to Austria's Supreme Administrative Court (Verwaltungsgesetzhof), and in 2014, that court referred the question to the EU Court of Justice for a preliminary ruling.

The advocate general's opinion begins with the definition of an audiovisual media service under article 1 of the directive: a service 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". The opinion then notes that the Austrian regulator had followed a "broad definition" of audiovisual media services, and admitted that "a literal reading" of the directive "may suggest" the regulator's interpretation was "correct". But according to the advocate general, there were a "number of flaws" in such a "broad interpretation", as it was incompatible with the "intention of the legislature" and the "objectives of the directive".

First, the "intention in including non-linear services within the scope" of the directive was "to ensure undistorted competition between similar kinds of economic activity by subjecting them, at least in essence, to similar rules. In my

view, that objective should not be interpreted broadly so as to include within the scope of the rules services which are not in direct competition with television broadcasting". Second, the regulator's interpretation meant including within the scope of the directive "a large number of persons who operate websites with audiovisual content but the basic purpose of whose activity is not to offer audiovisual services within the meaning of the directive". This would mean "an enormous challenge to regulatory authorities" in the EU. Third, such an interpretation would make "application of the directive dependent on the architecture of the specific website", as only content "collected in a catalogue" would be an audiovisual media service. According to the advocate general "whether or not a service falls within the scope of the directive should be determined by the nature of the service and not the architecture of the internet portal on which it is offered".

Finally, the advocate general held that an internet portal, such as *Tiroler Tageszeitung Online*, was not an audiovisual media service under the directive because: (a) "it is not the result of the technological development of television, but an entirely new phenomenon linked primarily with the increase in the bandwidth of telecommunication networks"; (b) the principal purpose of an audiovisual media service was "to provide programmes, that is to say the element of a traditional television schedule"; and (c) the EU legislature in the directive's preamble expressly pointed out, "albeit in an anachronistic manner", that "it did not intend to include within its scope internet information portals". The advocate general concluded that the directive "should be interpreted as meaning that neither the website of a daily newspaper containing audiovisual material nor any section of that website constitutes an audiovisual media service within the meaning of that directive". The advocate general's opinion is not binding on the EU Court of Justice, and the court will now consider the opinion, in addition to the parties' submissions, and deliver its judgment at a later date.

Opinion of Advocate General Szpunar, Case C-347/14 New Media Online GmbH, 1 July 2015

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=165435&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=17553>

