Court of Justice of the European Union: Classification of promotional channels on video platforms

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In a ruling of 21 February 2018 (case C-132/17), the Court of Justice of the European Union (CJEU) explained that neither a video channel on a video platform (in this case, YouTube), on which Internet users can only view short promotional videos, nor videos posted on such platforms, can be classified as audiovisual media services in the sense of the Audiovisual Media Services Directive (AVMSD - 2010/13/EU).

The decision concerns a legal dispute between car manufacturer Peugeot Deutschland GmbH and the environmental and consumer protection organisation Deutsche Umwelthilfe e. V. Peugeot runs a channel on the YouTube platform, on which it posted a video lasting approximately 15 seconds with the title “Peugeot RCZ R Experience: Boxer” in early 2014. Deutsche Umwelthilfe brought an action against it before the Landgericht Köln (Cologne Regional Court - LG Köln), claiming that the failure to provide certain information on the new vehicle model being advertised in the video infringed Article 5(1) of the Verordnung über Verbraucherinformationen zu Kraftstoffverbrauch, CO2-Emissionen und Stromverbrauch neuer Personenkraftwagen (Regulation on consumer information on fuel consumption, CO2 emissions and energy consumption of new passenger cars - Pkw-ENVKV). Article 5(1) in conjunction with the first half of the first sentence of Article 5(2) Pkw-ENVK requires manufacturers and dealers to provide information on official fuel consumption and official specific CO2 emissions in advertisements for passenger cars. The same applies to promotional material distributed by electronic means and to advertising on electronic, magnetic or optical storage media.

The LG Köln upheld the action and the Oberlandesgericht Köln (Cologne Appeal Court) dismissed Peugeot’s appeal. In subsequent appeal proceedings, however, the Bundesgerichtshof (Federal Supreme Court) asked the CJEU for a preliminary ruling because the second half of the first sentence of Article 5(2) Pkw-ENVK exempts audiovisual media services within the meaning of Article 1(1)(a) AVMSD from the information obligations, so the outcome of the dispute depended largely on the interpretation of EU law.

The CJEU ruled that the disputed service should not be classified as an audiovisual media service and referred primarily to the definition in Article 1(1)(a) AVMSD in conjunction with the explanation provided in recital 22. This recital states that the definition of an audiovisual media service should cover mass media in their

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function to inform, entertain and educate the general public which, in the court's view, could not be regarded as the principal purpose of a promotional video channel, as required by the directive. Rather, the purpose of these videos was of a purely commercial nature, and to the extent that they could inform, entertain or educate viewers, they did so with the sole aim of achieving that purpose. Whether the other criteria of the definition of an audiovisual media service were met was irrelevant. The CJEU rejected Peugeot's assertion that Article 11 of the Charter of Fundamental Rights of the European Union had been breached through a difference in treatment between promotional videos and other videos on the grounds that promotional videos were not in a comparable situation to that of non-promotional programmes. Finally, such promotional videos could not be classified as audiovisual media services in the form of audiovisual commercial communications under Article 1(1)(a)(ii)(h), since they did not accompany and were not included in a programme in return for payment or for similar consideration or for self-promotional purposes. Rather, the Peugeot channel only contained individual videos that were independent of one another. According to the CJEU, the individual promotional images added by Peugeot at the beginning and end of its videos made no difference (in the sense, for example, that they amounted to commercial communications while the rest of the video could be considered as a programme), since they did not bring into question the promotional nature of the video as a whole.

Judgment of the Court of Justice of the European Union (Ninth Chamber) of 21 February 2018, case C-132/17

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