

[DE] Federal Supreme Court decides that YouTube promotional channels and videos are not audiovisual media services

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In a judgment of 13 September 2018 (I ZR 117/15), the Bundesgerichtshof (Federal Supreme Court - BGH) decided that neither a video channel operated for promotional purposes on the YouTube Internet platform nor a video available on that channel constitute an audiovisual media service in the sense of the Audiovisual Media Services Directive (AVMSD - 2010/13/EU). In the specific case heard by the BGH, this meant that a video advertising new cars on a YouTube promotional channel had to contain information on the vehicles' official fuel consumption and CO² emissions because the relevant obligation in 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) only exempted audiovisual media services from the information obligations.

The decision follows 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, claiming that the failure to provide information on the official fuel consumption and CO² emissions of the new vehicle model advertised in the video infringed Article 5(1) of the Pkw-ENVKV, which required such information to be provided. However, Peugeot Deutschland GmbH had claimed that the exemption from information obligations for audiovisual media services under Article 5(2) Pkw-ENVKV should apply. Although the lower-instance courts agreed with the plaintiff, the BGH asked the Court of Justice of the European Union (CJEU) for a preliminary ruling. On 21 February 2018 (case C-132/17, see IRIS 2018-4:1/6), the CJEU decided that a YouTube promotional channel could not be classified as an audiovisual media service in the sense of Article 1(1)(a) AVMSD, referring primarily to the purely commercial nature of the service, whose function to inform, entertain or educate viewers was secondary at best. Such videos could also not be classified as audiovisual media services in the form of audiovisual communications since they were not included in a programme.

These findings formed the basis of the BGH's decision to reject Peugeot's appeal against the ruling of the 6th civil chamber of the Oberlandesgericht Köln (Cologne Appeal Court) of 29 May 2015. The principal purpose of the YouTube channel was not to offer programmes designed to inform, entertain or educate the general public via electronic communications networks, but to advertise goods or services for purely commercial purposes. It therefore did not meet the definition contained in Article 1(1)(a)(i) AVMSD. This interpretation of EU law was also compatible with Article 11 of the EU Charter of Fundamental Rights, since the different treatment of promotional videos and non-promotional programmes was justified on the grounds that they had different objectives. The videos could also not be classified as audiovisual media services in the form of audiovisual commercial communications (Article 1(1)(a)(ii) in conjunction with (h) AVMSD). The video channel only contained individual videos that were independent of one another and therefore did not constitute or form part of a programme. Furthermore, since the video as a whole was promotional in nature, it could not be seen as a programme and the individual images added at the beginning and end could not be classified as an audiovisual commercial communication.

The federal legislator will now need to decide whether to respond to the inclusion of video-sharing platforms like YouTube within the scope of the recently amended AVMSD by extending the exemption set out in Article 5(2) Pkw-EnVKV.

Urteil des BGH vom 13.9.2018, Rechtssache I ZR 117/15

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=89033&pos=0&anz=1>

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