Court of Justice of the European Union: Pay-to-view restriction on foreign TV channel now permissible

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On 4 July 2019, the Court of Justice of the European Union (CJEU) delivered a judgment on whether Lithuania's media authority could impose an obligation on all broadcasters requiring that a UK-based channel could be broadcast in Lithuania only in pay-to-view packages, as it had found that one of its programmes "contained information that incited hatred". The CJEU held that such a measure did not infringe Article 3(1) of the Audiovisual Media Services Directive (AVMSD), which provides that member states "shall not restrict retransmissions" of broadcasts from another member state.

The case concerned the Baltic Media Alliance (BMA), which is a UK-based company, and holds a licence from the UK Office of Communications (Ofcom) to broadcast the television channel NTV Mir Lithuania. The channel is broadcast in Lithuania, and the case arose in 2016, when the Lithuanian Radio and Television Commission (LRTK) delivered a decision concerning a programme broadcast on NTV Mir Lithuania. The programme concerned "collaboration of Lithuanians and Latvians in connection with the Holocaust and the allegedly nationalistic and neo-Nazi internal policies of the Baltic countries"; and the LRTK found that the programme "incited hatred on the basis of nationality". In its decision, the LRTK required broadcasters in Lithuania and "other persons providing Lithuanian consumers with services relating to the distribution of television channels via the internet", for 12 months, to broadcast or retransmit the channel NTV Mir Lithuania only in pay-to-view packages.

The BMA initiated legal proceedings seeking to quash the LRTK decision, arguing that it breached Article 3(1) of the AVMSD, as it "restricted the retransmission of a television channel from a [member state]". In this regard, the Vilnius Regional Administrative Court decided to refer a question to the CJEU for a preliminary ruling on whether imposing the obligation was consistent with Article 3 of the AVMSD.

Article 3(1) of the AVMSD provides that member states "shall ensure freedom of reception" and "shall not restrict retransmissions" of audiovisual media services from other member states for "reasons which fall within the fields coordinated by this Directive". This includes incitement to hatred, which is covered under Article 6 AVMSD. However, a member state may "provisionally derogate" from Article

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3(1)where: (a) the television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 6, (b) during the previous 12 months, the broadcaster has infringed the provision “on at least two prior occasions”, and (c) the broadcaster has notified the European Commission of the measures that it intends to take. The Commission must deliver a decision on whether the measure is compatible with EU law.

The CJEU first recognised that it was “common ground that the LRTK did not follow that procedure [under Article 3(2)] for the adoption of the decision of 18 May 2016” and that as such, the main question was whether the pay-to-view requirement imposed by the LRTK constituted a “restriction” of retransmissions, prohibited under Article 3(1).

The CJEU stated that the “wording” of Article 3(1) did not “in itself allow the nature of the measures covered by the provision to be determined”, and that instead the CJEU would examine its “objectives”, “context” and “EU law as a whole”. Applying this method of interpretation, the CJEU held that a national measure does not constitute a “restriction” of retransmission where it (i) “regulates the methods of distribution of a television channel” and (ii) does not “prevent the retransmission”. The CJEU noted that “consumers can still view it if they subscribe to a pay-to-view package” and that in its opinion, such a measure “does not restrict the retransmission”. The CJEU concluded that Article 3 AVMSD must be interpreted as meaning that imposing an obligation on broadcasters, and on distributors of TV channels or programmes via the Internet, to retransmit in that member state, for a period of 12 months, a television channel from another member state only in pay-to-view packages, is “not covered” by Article 3(1) AVMSD.

Judgment of the CJEU (Second Chamber), Case C-622/17, 4 July 2019

http://curia.europa.eu/juris/document/document.jsf?text=&docid=215786&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8688

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