Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 1 July 2015 [1]

Case C-347/14

New Media Online GmbH

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(Freedom to provide services — Provision of audiovisual media services — Audiovisual Media Services Directive — Article 1(1)(a), (b) and (g) — Concepts of 'programme' and 'audiovisual media service' — Short videos available on a newspaper website)

Introduction

1. '*Koń jaki jest, każdy widzi*' (We all know what a horse is). Thus read one of the definitions contained in the first Polish encyclopaedia, published in the eighteenth century. [2] The problem of defining an audiovisual media service in the internet context, which is the subject of the present case, might seem similar — intuitively everyone is capable of identifying such a service. However, when it comes to describing it in legal language, it is difficult to find terms which are at the same time sufficiently clear-cut and comprehensive.

2. I believe that this stems from the fact that defining a legal framework for the functioning of the internet is one of the main challenges currently facing the legislature as well as the judiciary of all the countries of the world, including the European Union and its Member States. The unprecedented variety and virtually infinite quantity of information available, the lack of State borders as significant barriers to the flow of that information, the ease of producing any information on any subject and its reach to a virtually unlimited number of recipients, and, finally, the detachment of the virtual, digital world from the material world — all this calls for new legal instruments, often built on entirely new bases. [3] In addition, that reality is changing at a huge speed, significantly outstripping the legislature's ability to react to it, in particular in democratic countries. Applying rules devised for an analogue reality in the digital age is causing a number of difficulties. The present case provides an illustration of the dilemmas with which the bodies responsible for monitoring compliance with market law and regulations are confronted.

1 — Original language: Polish.

2 — B. Chmielowski, *Nowe Ateny*, Lwów 1745-1746, p. 475.

3 — A perfect example of how much our current legal categories fail to keep up with the new reality is the helplessness with which we classify the sale of the dematerialised content of books (e-books) as a 'service' (see judgments in *Commission* v *France*, C-479/13, EU:C:2015:141, and *Commission* v *Luxembourg*, C-502/13, EU:C:2015:143).

Legal framework

EU law

3. The legal framework for the present case as regards EU law is formed by the provisions of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).[4] The interpretation sought by the referring court requires account to be taken not only of the provisions of the directive subject to the interpretation but also several recitals in its preamble which indicate the scope of the directive intended by the legislature.

4. Recitals 11, 21, 22, 24, 28 and 29 in the preamble to Directive 2010/13 are worded as follows:

'(11) It is necessary, in order to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services).

…

(21) For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.

(22) For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. …

…

(24) It is characteristic of on-demand audiovisual media services that they are "television-like", i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of "programme" should be interpreted in a dynamic way taking into account developments in television broadcasting.

4 — OJ 2010 L 95, p. 1.

…

(28) The scope of this Directive should not cover electronic versions of newspapers and magazines.

(29) All the characteristics of an audiovisual media service set out in its definition and explained in recitals 21 to 28 should be present at the same time.'

5. The reference from the national court relates essentially to the interpretation of some of the definitions in Directive 2010/13. Those definitions are to be found in Article 1 of that directive. It provides as follows:

'1. For the purposes of this Directive, the following definitions shall apply:

(a) "audiovisual media service" means:

(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is 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 within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

…

(b) "programme" means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

…

(g) "on-demand audiovisual media service" (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;

…'

Austrian law

6. Directive 2010/13 was transposed into Austrian law by the Bundesgesetz über audiovisuelle Mediendienste (Federal Law on audiovisual media services; 'the AMD-G').[5] The definitions of audiovisual media service, on-demand audiovisual media service and programme are to be found in Paragraph 2(3), (4) and (30) of the AMD-G. They have a similar wording to the corresponding definitions contained in Directive 2010/13.

5 — BGBl. I No 84/2001, as subsequently amended.

7. Under Paragraph 9(1) of the AMD-G:

‘Television operators, unless they are subject to the licence requirement pursuant to Paragraph 3(1), and providers of on-demand media services shall report their activity to the regulatory authority no later than two weeks before commencement of the activity.’

Facts, procedure and questions referred

8. New Media Online GmbH, a company incorporated under Austrian law (‘New Media Online’), operates the website of the *Tiroler Tageszeitung* under the name Tiroler Tageszeitung Online.[6] That website contains, together with other content, a separate section entitled ‘Video’ which, at the time of the facts of the main proceedings, included a catalogue of around 300 videos. Those videos, whose length varied from tens of seconds to several minutes, were more or less linked thematically to the other content of the website, and originated from various sources (its own material and material produced by local television or supplied by users of the website, etc.).

9. By decision of 9 October 2012, the Kommunikationsbehörde Austria (the Austrian regulatory authority) found that the ‘Video’ section on the website Tiroler Tageszeitung Online was an on-demand audiovisual media service within the meaning of the AMD-G, which was covered by the reporting obligation under Paragraph 9(1) of that law.

10. New Media Online brought an action against that decision before the Bundeskommunikationssenat (Federal Communications Tribunal, the judicial body competent for telecommunications matters), which dismissed it by judgment of 13 December 2012. That judgment was in turn challenged by New Media Online before the Verwaltungsgerichtshof (Supreme Administrative Court).

11. In those circumstances, the Verwaltungsgerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Should Article 1(1)(b) of Directive [2010/13] be interpreted as meaning that a service under examination can be considered to have the necessary comparability of form and content with television broadcasting if such services are also offered in television broadcasting which can be regarded as mass media and which are intended for reception by, and could have a clear impact on, a significant proportion of the general public?

(2) Should Article 1(1)(a)(i) of Directive [2010/13] be interpreted as meaning that, in case of electronic versions of newspapers, the assessment of the principal purpose of a service offered can be based on a subsection providing a collection of mainly short videos, which in other sections of the website are used only to supplement text articles in the online newspaper?’

12. The request for a preliminary ruling was received by the Court Registry on 18 July 2014. Written observations were submitted by New Media Online, the Swedish Government and the European Commission. New Media Online and the Commission were represented at the hearing, which took place on 22 April 2015.

6 — www.tt.com.

Analysis

13. The referring court seeks an interpretation of two of a number of criteria which make it possible to regard a service as an audiovisual media service within the meaning of Directive 2010/13. I do not deny the importance of those two criteria. However, in my view the present case concerns more general issues relating to the scope of the directive with respect to content which is publicly available via the internet. Therefore, I would also like to propose a more general approach to the issue raised by the national court. That is particularly advisable since in the present case the Court will have an opportunity for the first time to rule on the interpretation of the concept of audiovisual media service within the meaning of the above directive.

14. I would like to precede the considerations on that matter with a brief reminder of the history of the provisions of EU law on audiovisual media. [7]

History of Directive 2010/13

15. Although the Court ruled that television broadcasting constitutes a service within the meaning of the Treaty as far back as 1974, [8] that area was not of interest to the Community legislature until the 1980s. That was because traditional terrestrial television was dependent on the availability of the radio spectrum. That spectrum was administered by States, which allocated them to individual television stations by granting them licences to broadcast in a territory limited to the territory of the country concerned. Therefore, television services had only very limited cross-border importance.

16. The situation changed with the development of cable television, and especially satellite television. The new technology made it possible not only to increase significantly the number of television channels, but also to reach an audience beyond the State in which the broadcaster was established. That in turn opened up the way to creating a single market in television services.

17. The Commission's Green Paper on television without frontiers of 14 June 1984 [9] was the introduction to the *travaux préparatoires*. They resulted in the 'Television Without Frontiers Directive'. [10] That directive laid down the principle of the free reception of television programmes broadcast from one Member State to the territory of the other Member States. In return the directive lay down minimum rules — binding on all Community broadcasters — on the qualitative and quantitative restrictions on advertising, sponsorship, teleshopping, protection of minors and public policy, and the right of reply. The rules laid down in the directive on the jurisdiction of the individual Member States over the broadcasters ensured that every broadcaster was subject to the law and regulatory authorities of only one State. In addition, the directive imposed on broadcasters obligations regarding the promotion of European works. The 1997 amendment of the Television Without Frontiers Directive [11] introduced in particular the ability of the Member States to identify events the broadcasting of which cannot be reserved solely to pay channels.

7 — I understand that as meaning the rules on content broadcast using audiovisual media. As they do not form part of the subject-matter of the present case, I am omitting the rules on the functioning of telecommunications networks and access to them and the provisions on information society services other than audiovisual services, copyright protection, etc.

8 — Judgment in *Sacchi*, 155/73, EU:C:1974:40, paragraph 6.

9 — Television Without Frontiers, Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable (COM(84) 300 final).

10 — Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23). See, on that subject: C. Mik, *Media masowe w europejskim prawie wspólnotowym*, Toruń 1999, pp. 239-243.

11 — Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC (OJ 1997 L 202, p. 60).

18. Sudden technological progress in the field of electronic media at the turn of the century enabled not only a further significant quantitative increase in the traditional television offering, but also the appearance of new kinds of audiovisual services and all kinds of on-demand services. A particular phenomenon was the development — both in terms of the content on offer and accessibility for users — of the internet as the new medium of the twenty-first century. That technological development was linked also to a gradual change in users' behaviour and expectations. In an unchanged legal situation those new phenomena led to an ever-increasing competitive imbalance on the market in audiovisual services.

19. The need for change was pointed out by the Commission in its Fourth Report on the application of Directive 89/552[12] and its Communication on the future regulation of European audiovisual policy.[13] Following on from the work carried out and broad consultation the Commission submitted a proposal for a directive amending Directive 89/552.[14] It was adopted, with slight amendments, as Directive 2007/65.[15]

20. That directive significantly amended Directive 89/552. Firstly, the actual title of the directive was changed, as a result of a change of terminology — one no longer speaks of television activity but rather of audiovisual media services. The substantive provisions of the directive, in particular those concerning advertising and the other forms of promotion of goods and services, underwent radical transformation towards liberalisation. However, from the point of view of the present case the most significant change was the extension of the scope of the provisions of the directive to 'non-linear audiovisual services', commonly referred to as 'on-demand services'. Those services were the subject — to a very basic degree — of the provisions on the protection of minors and public policy, advertising, and support for European productions. The more detailed rules relate to linear services, that is to say traditional television. Directive 2010/13 constitutes the consolidated text of Directive 89/552 following the amendments incorporated by Directive 2007/65.[16]

21. As is evident from the above, necessarily very brief description, the rules in Directive 2010/13 on non-linear audiovisual services are merely a derivative of the rules on linear services, that is to say television. In the light of this history, I consider it necessary to interpret the definition in the directive of audiovisual media services, including non-linear services, in the reality of the information society.

Definition of audiovisual media services in the context of the information society

Development of the internet and audiovisual media services

22. In parallel with the development of television described above there was another evolution, sometimes described as a revolution, namely the emergence and development of a worldwide information network, that is to say the internet. Over the course of several decades the internet developed from a technical curiosity for a narrow circle of specialists to a universal and commonplace instrument for work, education and entertainment. A number of types of activity have moved to the

12 — Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC 'Television without Frontiers' (COM(2002) 778 final).

13 — Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — The Future of European Regulatory Audiovisual Policy (COM(2003) 784 final).

14 — COM(2005) 464 final.

15 — Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 2007 L 332, p. 27).

16 — See, on the evolution of EU law on audiovisual services, for example: K. Chałubińska-Jentkiewicz, *Audiowizualne usługi medialne. Reglamentacja w warunkach konwersji cyfrowej*, Warsaw 2013, pp. 78-118; M. Burri-Nenova, 'The New Audiovisual Media Services Directive: Television *Without* Frontiers, Television *Without* Cultural Diversity', *Common Market Law Review*, volume 44(2007), p. 1689 (p. 1693 et seq.).

web in part or in full: email is replacing traditional correspondence, information portals are replacing newspapers, e-commerce is replacing shops in the real world, dating portals are replacing marriage bureaux, and so on. However, the internet has also given rise to a large number of new phenomena peculiar to that medium, such as new forms of communication in the shape of discussion forums or community portals, such as the most well known, Facebook and Twitter.

23. The phenomenon of 'internetisation' did not bypass audiovisual services. In particular, the development of 'broadband internet' — by repeatedly increasing data transmission speeds — enabled, on the one hand, the spread of traditional audiovisual services, linear and non-linear, via the internet network ('Internet Protocol Television' or 'IPTV'), and, on the other, the emergence of a virtually unlimited number of new providers and new varieties of audiovisual services.

24. Another phenomenon which is relevant from the point of view of the present considerations, namely that of multimedia, is also connected with broadband internet. In the analogue age and at the beginning of the internet's development, word, sound, and image, in particular moving image, were fairly clearly separated from one another. Newspapers and books were the source of the written word, possibly illustrated with photographs or drawings, radio was a purely sound medium and cinema and television an audiovisual medium, that is to say one linking the moving image and sound. The internet enables the public communication of content covering those three types of communication as a single whole. Thus internet information portals are not confined to producing dry text but can illustrate it and complement it with video material, academic and training establishments can enrich their written teaching content with recordings of lectures, sports clubs can illustrate match reports with video recordings, and so forth.

25. At present every self-respecting internet portal offers, in addition to written and graphic material, audiovisual elements which are associated to a greater or lesser degree in terms of topic with the rest of the portal. Those elements may form an integral part of the written texts but may also be of an independent nature. Regardless of that, in the architecture of websites those audiovisual elements are usually gathered in separate subpages which constitute either elements of individual thematic sections of a portal or an entirely separate section, normally described as 'video' or, alternatively, 'TV' (even though it essentially is not television, that is to say a linear service).

26. Therefore, from a legal point of view the question arises whether all audiovisual content of that kind must be regarded as constituting audiovisual media services, and if not, where is the line to be drawn. The scope of the application of the directive to such content gives rise to uncertainty and is defined differently in the legislation and the practice of the regulatory authorities of the individual Member States.[17] This situation is contrary to the requirement that the provisions of the directive be applied uniformly throughout the territory of the Union.

Application of Directive 2010/13 to audiovisual elements of internet portals

27. In the decision at issue in the main proceedings the Austrian regulatory authority followed a broad definition of audiovisual media services by regarding as such a service a catalogue of audiovisual content offered on the Tiroler Tageszeitung Online webpage in the 'Video' section.

28. Although justification for that view can be found in Directive 2010/13, I can see a number of flaws in such a broad interpretation of the scope of that directive.

17 — See, for example.: F.J. Cabrera Blázquez, 'On-demand Services: Made in the Likeness of TV?', in: *What Is an On-demand Service*, IRIS-Plus 2013-4, European Audiovisual Observatory, Strasbourg 2013, p. 7; J. Metzdorf, 'The Implementation of the Audiovisual Media Services Directive by National Regulatory Authorities. National Responses to Regulatory Challenges', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, volume 2(2014), p. 88.

29. Firstly, it does not appear to me consistent with the objectives which the legislature sought to attain by adopting the Audiovisual Media Services Directive.[18] As I pointed out above, the rules in that directive on non-linear audiovisual services are merely a derivative of the rules on linear services, that is to say traditional television (traditional in the sense of content and scheduling of programmes, not the technical means of broadcasting). According to the grounds for the proposal for Directive 2007/65[19] and the preamble to Directive 2010/13,[20] the intention in including non-linear services within the scope of the rules is 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.

30. Secondly, the interpretation followed by the Austrian regulatory authority in the main proceedings means including within the scope of the Audiovisual Media Services 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. Although the obligations arising from Directive 2010/13 are only minimal for the providers of non-linear services, in the practice of national regulatory authorities the inclusion of those services within the scope of the rules implementing that directive entails at least a registration requirement and in some Member States additional obligations, such as payment of a fee (United Kingdom) or reporting obligations (France). Even if such registration is not in the nature of authorisation to carry on an activity, it means that a significant proportion of activity carried out on the internet is included within the scope of administrative supervision, which may be construed as a restriction on the freedom of that medium to operate.

31. Seeking to include too many aspects of the functioning of websites within the scope of administrative monitoring would also — given the ease with which websites can be created and any content, including audiovisual content, placed on them — pose an enormous challenge to regulatory authorities in the Member States. Therefore, an attempt at excessively broad regulation might render the directive ineffective, even in the area for which it was in fact intended.

32. Thirdly and finally, the position put forward by the Austrian regulatory authority makes application of the directive dependent on the architecture of the specific website. According to that interpretation, only audiovisual content collected in a catalogue constitutes an audiovisual media service within the meaning of the directive. If, on the other hand, the same content is dispersed across other areas of the portal, it is regarded as an integral part thereof and not as a separate service, and consequently is not subject to the rules of the directive. However, I consider that that is only a particular technical solution, which should not affect the application of the directive. 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.

33. I do not deny that a literal reading of Directive 2010/13 may suggest that the interpretation followed by the Austrian regulatory authority is correct, or that it is in any event one of the permissible interpretations of that directive. However, it does not appear to me that that interpretation is compatible with the intention of the legislature. I also consider, for the reasons set out above, that it does not allow the objectives of the directive to be attained effectively and does not contribute to its uniform application in all the Member States.

18 — Depending on the period concerned, I understand that title as meaning Directive 89/552 following the amendments incorporated by Directive 2007/65, or Directive 2010/13.

19 — COM(2005) 646 final.

20 — See recitals 11 and 24 in the preamble to Directive 2010/13.

34. The Audiovisual Media Services Directive did not prove to be 'future-proof' as its creators had intended.[21] Much of the wording contained in it is imprecise or not adapted to the reality of broadband internet. However, I do consider that by interpreting its provisions in a dynamic way it is possible to give it a correct meaning in the current, rapidly changing, internet reality.

Elements of the definition of audiovisual service under Directive 2010/13

35. The definition of audiovisual media service is to be found in Article 1(1)(a) of Directive 2010/13, and some of the terms used in that definition were in turn defined in other points of the same article. Non-linear media service was defined in Article 1(1)(g) of that directive. The legal framework defining the scope *ratione materiae* of Directive 2010/13 is made up of a number of other recitals in its preamble which relate directly to the definitions contained in Article 1 or more generally to the scope of the directive.

36. In accordance with Article 1(1)(a)(i)[22] of Directive 2010/13, in conjunction with recital 29 in its preamble, an audiovisual media service must satisfy the following criteria:

— economic nature,

— the provider's editorial responsibility,

— the principal purpose in the form of providing visual content,

— the provision of programmes,

— informational, entertainment or educational nature,

— public availability,

— broadcasting using an electronic communications network.

37. Recital 29 in the preamble to Directive 2010/13 emphasises that only if all those criteria and all the characteristics set out in the other recitals are present at the same time can a service be regarded as an audiovisual media service within the meaning of that directive. In my view, that indicates the legislature's intention that that definition, and thus the scope of the directive, should cover only the kinds of service expressly set out. That militates in favour of a narrow interpretation of the definition of audiovisual media services.

38. According to the first of the above criteria, what is concerned is services within the meaning of the Treaty, and therefore services in the nature of economic activity. According to recital 21 in the preamble to Directive 2010/13, it is to exclude from its scope 'private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest'. That relates primarily to any kind of private site set up and operated by private individuals without any economic purpose, including blogs and video blogs and services such as YouTube.

21 — V. Reding, 'The Audiovisual Media Services Directive: the Right Instrument to Provide Legal Certainty for Europe's Media Business in the Next Decade', *ERA Forum*, 2006-2, p. 265.

22 — Article 1(1)(a)(ii) of Directive 2010/13 also counts audiovisual commercial communication among audiovisual media services, but I will pass over that aspect as it does not relate to the subject-matter of this Opinion.

39. The website of a periodical which also appears in a paper version, such as the Tiroler Tageszeitung Online portal, is certainly economic in nature and therefore satisfies the above criterion. Consequently, I note here merely in passing that at present the dividing line will not always be as clear as it might seem. On the one hand, paid advertising on the most popular private websites is an increasingly frequent phenomenon, which makes them a source of income for their creators, and is therefore a kind of economic activity. On the other hand, professional channels ('branded channels'), which are not content created by users, are appearing on YouTube-like services. The question whether and to what extent Directive 2010/13 can apply to that kind of communications will be the next challenge for the national regulatory authorities and courts.

40. The criteria relating to broadcasting using an electronic communications network and to public availability [23] will not be particularly helpful in defining the scope of Directive 2010/13 as regards the aspect of interest here. The internet is an electronic communications network par excellence, and everything which is not reserved on it to a specific group of users, is publicly available. Similarly, the informational, entertainment or educational nature of the content communicated is not a particularly selective criterion, since it covers almost every conceivable spectrum of audiovisual content, particularly if that content is also intended to be commercial and public in nature.

41. Editorial responsibility was defined in Article 1(1)(c) of Directive 2010/13 in very broad terms. It is not responsibility for the content of each communicated item of audiovisual material ('programme' in the terminology of the directive) but only the selection of such material and its organisation in connection with a service. That criterion is essentially intended merely to distinguish providers of content from persons supplying a data transfer service (such as the providers of cable television networks or internet connections).

42. That leaves for consideration the two criteria for which the referring court seeks interpretation. In accordance with the criterion relating to principal purpose, only a service whose principal purpose is to communicate audiovisual content is an audiovisual service. In the decision at issue in the main proceedings the Austrian regulatory authority regarded the catalogue of video material placed on the internet as a separate service. The principal purpose of the service thus described is necessarily to provide audiovisual content. However, on that interpretation the criterion relating to principal purpose loses all meaning, since — as I have noted above — it makes the scope of the directive dependent on the architecture of a specific website at a specific time.

43. Programme is defined in Article 1(1)(b) of Directive 2010/13. It is an adaptation of the definition contained in the original wording of Directive 89/552. It defines a programme as an individual item within a schedule of programmes in a linear service or within a catalogue in a non-linear service. In that regard a programme must have a form and content comparable to the form and content of television broadcasting. That proviso is yet another indication that it was not the intention of the legislature to include audiovisual content which is not normally present in television within the scope of the directive.

44. In addition to the definition of audiovisual media services in general, Directive 2010/13 contains in Article 1(1)(g) a definition of non-linear services (described as on-demand services). According to that definition, as part of a non-linear service users can choose and view at any time programmes from a catalogue selected by the service provider. It would appear that the Austrian regulatory authority considered in the decision at issue in the main proceedings that, since there is a catalogue of video clips on the Tiroler Tageszeitung Online website, that site (or rather the part of the site containing that catalogue) is an on-demand audiovisual media service.

23 — Final two indents in point 36 of this Opinion.

45. However, I consider that in reaching an interpretation of that definition excessive weight should not be attached to the concept of catalogue. The definition in Article 1(1)(g) of the directive is a reflection of the definition of linear audiovisual service (or television broadcasting) which in turn is to be found in point (e) of that paragraph. A catalogue is the equivalent in the context of a non-linear service of a 'programme schedule', that is to say the arrangement of programmes in time, in the context of a linear service. A non-linear service differs from a linear service precisely by the fact that programmes are not *broadcast* at a particular time but rather are *downloaded* by the user at any time. There must therefore be a catalogue from which that user will be able to select the item of interest to him. However, that should not be interpreted as meaning that the existence of a catalogue means that the service concerned constitutes an audiovisual media service within the meaning of Directive 2010/13.

46. Further indications as to the scope of Directive 2010/13 in relation to non-linear audiovisual services may be found in the preamble to the directive.

47. According to recital 24, non-linear media services must be 'television-like', that is to say they compete for the same audience. However, it is difficult to find that television competes for a particular audience or audiences. It offers very diverse content intended in principle for every conceivable audience, satisfying their need for information, entertainment and education. That recital must be regarded instead as an expression of the legislature's concern about maintaining undistorted competition between similar kinds of economic activity by subjecting them, at least in essence, to similar rules. Consequently, the television-like nature of non-linear services must be treated strictly — it was the intention of the legislature for Directive 2010/13 to apply only in so far as the development of new telecommunications technologies made it possible to offer, in non-linear form, the same content which previously had only been available on television, that is to say as part of a linear service. However, it was not the intention of the legislature to extend the scope of that provision to new phenomena connected with the spread of the internet, in particular broadband internet, such as the emergence of multimedia websites.

48. This conclusion is not precluded by the rest of recital 24 in the preamble to Directive 2010/13, according to which the concept of 'programme' should be interpreted in a dynamic way, taking into account developments in television broadcasting. That indication merely means that the scope of the directive's application to non-linear services should be linked to the development of the basic regulatory subject-matter the directive, which is linear services. Non-linear services should not become a separate regulatory subject-matter of the directive. That would make it necessary to include an ever-increasing number of types of audiovisual content which may have nothing in common with linear television broadcasting.

49. Finally, according to recital 28 in the preamble to Directive 2010/13, its scope should not cover 'electronic versions of newspapers and magazines'. In my view, that expression should also be read in the light of the current state of the development of information society services. Therefore, it does not relate to services consisting of a mechanism for transferring the paper content of newspapers and magazines to the internet. Firstly, there would in any event be no room in such a service for audiovisual content, which is absent by its very nature in paper media. Secondly, the websites of newspapers and magazines based solely on the publication in electronic form of articles placed in paper versions are on the decline. Now they are frequently extensive portals containing a considerably greater amount of material of various kinds, including audiovisual material, than the paper versions. This relates in particular to daily newspapers, whose websites generally take the form of information portals containing up-to-date news, analytical material, in-depth specialist sections, and so on. An example of such a portal is precisely the Tiroler Tageszeitung Online website. Furthermore, portals of that kind operate not only under the aegis of newspapers but may also be owned by television or radio stations, in particular those of an informative nature, or may operate solely as internet portals. Each of those categories of portal has its own specific characteristics, but their general structure and content are similar. Therefore, I consider that different treatment of certain internet portals of an informative

nature, merely because they are owned by newspapers or magazines, would be unfounded and result in unequal treatment. Consequently, recital 28 in the preamble to Directive 2010/13 must be interpreted as an indication that the legislature's intention was to exclude from the scope of that directive all kinds of internet information portals which are multimedia in nature, that is to say contain audiovisual content among other things.

Answer to the questions referred

50. The national court refers questions concerning interpretation of the criterion relating to principal purpose and the concept of 'programme'[24] in the context of a dispute over the classification of part of the Tiroler Zeitung Online website containing audiovisual content as an audiovisual media service within the meaning of Directive 2010/13. However, in essence the question is whether that directive applies to internet information portals of a multimedia nature, that is to say which contain both written and photographic material and also audio or audiovisual material.

51. In my view, the following conclusions relevant to the answer to the question referred follow from the foregoing considerations.

52. Firstly, Directive 2010/13 is a direct consequence of the development of the rules of EU law on television, and its purpose is merely to include within the scope of the rules services which are in direct competition with television, that is to say those offering the same content in a non-linear form.

53. Secondly, the principal purpose of an audiovisual media service within the meaning of Directive 2010/13 is to provide programmes, that is to say the elements of a traditional television schedule (programme schedule in the terminology of the directive), but in the case of a non-linear service those programmes are not provided at a particular time, but rather on demand by the user.

54. Thirdly, in the preamble to the directive the legislature expressly pointed out — albeit in an anachronistic manner from the point of view of today's level of development of internet technology — that it did not intend to include within its scope internet information portals.

55. Therefore, an internet portal of this kind, such as the Tiroler Tageszeitung Online website, does not meet the requirements for being regarded as an audiovisual media service within the meaning of the directive. Firstly, the emergence of multimedia internet portals containing audio and audiovisual material in addition to written content and photographs 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. Secondly, the multimedia nature of portals such as the Tiroler Tageszeitung Online website does not permit the audiovisual content placed on it to be analysed separately from the rest of the portal, even if those audiovisual materials are collected in a separate section of the portal. The essence of a multimedia service is the combination of different forms of communication — word, image and sound — and the specific architecture of the portal is merely a secondary technical aspect. Thirdly and finally, such a multimedia internet portal is the current form of what the legislature, when working on the Audiovisual Media Services Directive, could still describe as the 'electronic version of newspapers or magazines'.

56. In the light of the foregoing, I consider that Article 1(1)(a)(i) of Directive 2010/13 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.

24 — See points 36, 42 and 43 of this Opinion.

57. I would also like to point out that I do not share the concerns that such an interpretation of the directive will allow persons who are actually providing audiovisual media services to pass themselves off as multimedia information portals and thus circumvent the law governing that area. Naturally, the application of the provisions adopted on the basis of Directive 2010/13 by the national regulatory authorities of the Member States requires an assessment of the character of the services which exist on the market for the purpose of classifying them, or not, as audiovisual media services within the meaning of the directive. No provisions of law, not even the most precise, will replace that assessment in individual cases; moreover, that is so in every area of the law. However, possible difficulties arising therefrom cannot justify an interpretation of the directive as in practice covering all current audiovisual content on the Internet, thereby going beyond the scope of regulation sought by the legislature.

58. At this juncture we return to the horse which was mentioned at the very beginning. The fact that in theory it is difficult to come up with an abstract definition of an audiovisual media service does not mean that in practice it will not be easy to identify such a service. The great majority of services of that kind of service offer feature-length films, television serials, sports events and the like on websites. This is therefore the kind of communication which can easily be classified as typical television communication. Uncertainties must, however, be dispelled in accordance with the purpose of the Audiovisual Media Services Directive, so that it is not applied to multimedia websites. Therefore, the only websites to be regarded as audiovisual media services must be those which undoubtedly satisfy all the criteria of such a service.

59. It is clear that the interpretation which I am proposing concerns the definition of audiovisual media service on the basis of the wording of Directive 2010/13 currently in force. That directive is the result of the evolution of legal solutions devised for television broadcasting and — as one of its authors has pointed out [25] — is of the twentieth century. But that does not mean that content placed on the internet, including audiovisual content, cannot or must not be subject at all to regulation by law, including the provisions of EU law, on matters such as the protection of minors and public policy, advertising, or the rules on the broadcasting of important events. However, I consider that those provisions must be adapted to the specific characteristics of the internet, in particular to its multimedia nature. An occasion to do so may be provided by the work on the new package of provisions on the digital market which was announced recently by the Commission. [26]

Conclusion

60. In view of the foregoing considerations, I suggest that the Court give the following answer to the questions referred by the Verwaltungsgerichtshof:

Article 1(1)(a)(i) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services 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.

25 — F.J. Cabrera Blázquez, op.cit., p. 25.

26 — Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A Digital Single Market Strategy for Europe, COM(2015) 192 final.