

Broadcasting highly interesting football extracts for low (or no) cost: the European Court rules

The Court of Justice of the European Union (“CJEU”) has upheld the limit imposed by European law on the costs that broadcasters can charge for the use of their exclusive content in short news reports on events of high interest to the public, such as football matches.

The CJEU has handed down its judgment in *Sky Österreich GmbH (“Sky”) v Österreichischer Rundfunk (“ORF”)*, dealing with Sky’s right to exclusively broadcast Europa League football matches versus the right of ORF (an Austrian public broadcaster) to use short extracts from the football matches in its news reports.

The Audiovisual Media Services (“AVMS”) Directive authorises any broadcaster established in the EU to produce short news reports on events of high interest to the public, even where those events are subject to exclusive broadcasting rights held by others. The holder of the exclusive broadcasting rights can only request compensation corresponding to the additional costs which it directly incurred in providing access to the signal – not a price which reflects the high value of the extract. The question was whether the AVMS Directive was compliant with another piece of European law, the Charter of Fundamental Rights of the European Union.

Background

Sky acquired the exclusive right to broadcast Europa League matches in the 2009/2010 season in Austria, spending several million euros each year on licensing fees and production costs.

During that football season, Sky entered into an agreement with ORF granting it the right to produce short news reports using its exclusive content. The deal was that ORF should pay €700 a minute for the reports which it broadcast. However, in 2010 ORF asked KommAustria, the Austrian communications regulator,

to declare that it should not have to pay Sky any more than the costs incurred directly by the provision of access to the signal, in accordance with the AVMS Directive. KommAustria agreed with ORF, even though in this particular case no costs were directly incurred in providing access to the satellite signal. Sky’s costs in acquiring and maintaining the exclusive rights could not be taken into consideration and it had to allow ORF to broadcast the extracts for free.

Following appeals, the case ended up in front of the CJEU. Sky was faced with the plain words of the AVMS Directive and it argued that the limit on the amount it could charge ORF clashed with the Charter of Fundamental Rights of the European Union which (amongst other things) guarantees the right to property and the freedom to conduct a business.

The decision

The CJEU has now found in ORF’s favour, since it has held that the AVMS Directive is indeed compatible with the Charter.

On the protection of property, the decision turned on a question of timing. When Sky bought the rights in August 2009, EU law already contain the limit on what it could charge others for short news reports. So Sky could not say that it had a pre-existing entitlement to exercise the Europa League rights free of that limit which was then being jeopardised.

On the other hand, the Court held that the AVMS Directive did encroach upon another Charter right, the freedom to conduct a business, since it prevented Sky from deciding on the price to charge and using that to obtain a contribution to its costs of acquiring the rights. The judgment did not go Sky’s way, however, since the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic

activity in the public interest. Here, the limitation on Sky's freedom to conduct business was proportionate and justified. It sought to safeguard the fundamental freedom to receive information and to promote pluralism of the media, itself guaranteed by the Charter and in the public interest.

The AVMS Directive provision is subject to various safeguards: it only relates to general news programmes (not e.g. sports or entertainment programmes), the short extracts should not exceed 90 seconds and their source must be indicated. Broadcasters like Sky could factor in the need to give low-cost (or free, as here) access to short extracts when negotiating to buy rights in the first place. This meant that the provision struck the right balance and complied with the Charter.

Judgment of the Court (Grand Chamber) of 22 January 2013 in *Sky Österreich GmbH v Österreichischer Rundfunk*.

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