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# **Newspaper websites as audiovisual media services: The New Media Online GmbH preliminary ruling**

Irini Katsirea\*

**Keywords:** Electronic press regulation; Audiovisual Media Services Directive; convergence; regulatory authorities; Ofcom; Austria

## **Cases:**

New Media Online GmbH (C-347/14) EU:C:2014:347 (ECJ)

## **Abstract:**

In this preliminary reference, the Austrian Supreme Administrative Court asked the Court of Justice for its interpretation of the material scope of the Audiovisual Media Services Directive. In its balanced and pragmatic ruling, the Court rejected Advocate General Szpunar's Opinion, and held that compilations of short videos provided by newspaper websites may fall within the Directive's scope. This judgment constitutes a first step towards a levelling of the playing field online against the backdrop of the increased technological convergence between broadcasting and the press. It sends a strong message that a substantive, public interest driven approach should guide the interpretation and forthcoming revision of the Audiovisual Media Services Directive, not formalistic criteria or entrenched regulatory divides between different sectors.

## **Introduction**

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\* Reader in International Media Law, Department of Journalism Studies, University of Sheffield. This case note is based on research funded by the British Academy/Leverhulme Trust. For a more detailed discussion of the issues see I. Katsirea, "Electronic press: press-like or television-like?" (2015) IJLIT 1.

The Audiovisual Media Services Directive (AVMSD), the successor to the Television without Frontiers Directive (TwFD), was adopted in 2007 after a lengthy legislative process with the aim of extending the scope of the TwFD beyond traditional television to the so-called “on-demand” or “non-linear” audiovisual media services.<sup>1</sup> On-demand audiovisual media services (AVMS), defined as services “provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request”, are subject to a lighter regulatory regime compared to linear services on the ground that they are “different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society.”<sup>2</sup>

Nonetheless, the conception of on-demand services is heavily influenced by traditional television. Their principal purpose needs to consist in the provision of “programmes”, defined in Art. 1 (1) (b) AVMSD as “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.” The requirement of comparability is further unpacked in recital 24,

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<sup>1</sup> 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 [1989] OJ L298/23. For further aspects of the TwFD and of the AVMSD see I. Katsirea, *Public Broadcasting and European Law. A Comparative Examination of Public Service Obligations in Six Member States* (Alphen aan den Rijn: Kluwer, 2008); “The Television without Frontiers Directive” in K. Donders (ed.), *Palgrave Handbook on European Media Policy* (Basingstoke: Palgrave, 2014), pp. 297-311; T. Gibbons and I. Katsirea, “Commercial influences on programme content: The German and UK approaches to transposing the EU rules on product placement” (2012) 4 (2) JML 159.

<sup>2</sup> European Parliament and Council Directive 2010/13/EC of 10 March 2010 on the coordination of certain provisions laid down by law, regulation and administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1, Art. 1 (1) (g); rec. 58 (hereinafter referred to as AVMSD).

which explains that on-demand AVMS are TV-like when “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.” Nonetheless, the Directive, in an attempt to future-proof itself and so as to secure a level playing-field, specifies in the same recital that the notion of a “programme” should not be understood in a static but in a dynamic way, taking into account developments in television broadcasting, so as to “prevent disparities as regards free movement and competition”.

As hard though as the Directive may try to prevent such disparities, certain media sectors, notably the radio and the press, have vigorously resisted European regulation and have succeeded in remaining outwith its scope. It is the latter of these sectors that is at the heart of this case. Its exclusion from AVMSD regulation would have been unexceptional if newspapers were just “news” printed on “paper”. However, newspapers increasingly carry on their websites videos that are reminiscent of television, and which are particularly lucrative in terms of the advertising revenue they attract.<sup>3</sup> Nonetheless, recital 28 of the AVMSD includes a somewhat limply worded exhortation that “The scope of this Directive should not cover electronic versions of newspapers and magazines.” Ever since the Directive was enacted it has been a matter of contention whether this recital sought to completely exclude audiovisual material made available on the website of a print publication from its remit. Some argue that this is the case.<sup>4</sup> Others contend that the video sections of online newspapers and magazines

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<sup>3</sup> Reuters 2014 Digital News Report, <http://reutersinstitute.politics.ox.ac.uk/publication/digital-news-report-2014> , 13 (All internet sources were last visited 9 December 2015).

<sup>4</sup> R. Chavannes and O. Castendyk, Art. 1 AVMSD, in O. Castendyk, E. Dommering, A. Scheuer (eds), *European Media Law* (Alphen aan den Rijn: Kluwer, 2008), para. 28; open-ended P. Valcke, K. Lefever, *Media Law in the European Union* (Alphen aan den Rijn: Kluwer, 2012).

should be considered on-demand AVMS if they are sufficiently substantial and self-standing.<sup>5</sup> It is this very question that the present judgment finally sheds light upon.

### **Facts and context**

This case concerned *Tiroler Tageszeitung*, one of the most important regional dailies in Austria. *Tiroler Tageszeitung* operated a website under the name “*Tiroler Tageszeitung Online*”, which contained the newspaper’s online edition and was run by *New Media Online GmbH* (“*New Media Online*”). The website contained a separate Video section which included a catalogue of around 300 videos, between 30 seconds and a few minutes in length, based on material derived from the newspaper’s own content, from user-generated content and from material produced by local television. The videos could be searched by category, chronologically or by way of a full-text search. Some of them could also be accessed via links within articles in other parts of the website, while others had no direct connection to the website’s text material. The video section had the same design and general navigation system as the remainder of the website.

On 9 October 2012, the Austrian Communications Authority (*Kommunikationsbehörde Austria, KommAustria*), the regulatory authority for broadcasting in Austria, held that the newspaper’s video section constituted an on-demand audiovisual media service that was subject to the *Audiovisual Media Services Act*, the law implementing the *Audiovisual Media*

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<sup>5</sup> Ofcom Decision, Appeal by NewsGroup Newspapers Limited against a notice of determination by ATVOD that the provider of the service “Sun Video” that the provider of the service “Sun Video” has contravened section 368BA of the *Communications Act 2003*, 21 December 2011, [http://atvod.co.uk/uploads/files/Ofcom\\_Decision\\_-\\_SUN\\_VIDEO\\_211211.pdf](http://atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf), paras 78, 79. W. Schulz, *Zum Vorschlag für eine Richtlinie über audiovisuelle Mediendienste*, Arbeitspapiere des Hans-Bredow-Instituts Nr. 17 (Hamburg: Verlag Hans-Bredow-Institut, 2006), 12; D. Mac Síthigh, “Co-regulation, video-on-demand and the legal status of audio-visual media” (2011) 2 (1) *IJDT* 51.

Services Directive in Austria.<sup>6</sup> Consequently, this section would have to be notified to the authority in accordance with the reporting obligation instituted under that law.<sup>7</sup>

The respondent argued that the videos only were a subordinate element of the overall website, complementing its text-based offering. Therefore, the provision of programmes was not the principal purpose of the website. Moreover, the videos in question were not “television-like” in view of their short duration. KommAustria came, however, to the conclusion that the said videos were TV-like since they aimed to inform, entertain or educate, and they were comparable in form and content to programmes broadcast on television. A minimum duration was not required.

As regards the principal purpose of the service, KommAustria argued that it would be misguided to examine the entire range of services offered by a service provider. Instead, it was necessary to determine on the basis of quantitative criteria whether the provision of audiovisual content was the principal purpose of a service. For KommAustria, the crucial question in this context was whether the audiovisual offering in question – leaving other services offered by the same provider aside – performed an independent function. A provider could not escape regulation by arguing that only an extremely small part of its entire service was devoted to audiovisual material when this material was indeed independent. The presentation of this material in a subdomain or in a separate homepage was not decisive, but could at best be taken into account when assessing the domain’s independence. These considerations led KommAustria to conclude that the video section constituted an audiovisual

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<sup>6</sup> European Parliament and Council Directive 2010/13/EC of 10 March 2010 on the coordination of certain provisions laid down by law, regulation and administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1 (hereinafter referred to as AVMSD).

<sup>7</sup> Bundesgesetz über audiovisuelle Mediendienste (Audiovisuelle Mediendienste-Gesetz, AMD-G) of 31 July 2001, last modified by the 84. Federal Law of 23 May 2013, BGBl. I Nr. 84/2013, art 2 (3), (4); art 9 (2).

media service (AVMS) given that it could be used independently of the other website content.

New Media Online appealed this decision before the Federal Communications Senate (Bundeskommunikationssenat, BKS), the judicial body which was competent to review KommAustria's decisions in matters of broadcasting regulation until 31 December 2013. Since 1 January 2014 the BKS has been dissolved, and the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG) assumed its function as the appellate authority against KommAustria's decisions.<sup>8</sup> The BKS dismissed New Media Online's appeal by judgment of 13 December 2012.<sup>9</sup> The BKS held that there was no difference between the videos that were available on the appellant's website and similar programmes shown on linear TV. The law did not prescribe a minimum duration of programmes. Besides, many of the videos lasted more than a couple of minutes so that there was no material difference from traditional television. The BKS also agreed with KommAustria's "independent function" test and with its findings concerning the principal purpose of the website. It observed that the videos in question were stored in a subdomain that was exclusively devoted to audiovisual material and that could be consumed without recourse to any textual content. The audiovisual material did not merely serve to complement the text-based elements of the website but could be consumed independently.

New Media Online challenged the BKS's decision before Austria's Supreme Administrative Court (Verwaltungsgerichtshof). In 2014, the Supreme Administrative Court referred the question whether the AVMS Directive can be interpreted as meaning that the

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<sup>8</sup> Bundeskanzleramt Österreich, "Rundfunkbehörden. Kommunikationsbehörde Austria" at

<http://bundeskanzleramt.at>.

<sup>9</sup> Bundeskommunikationssenat, Tiroler Tageszeitung, GZ 611.191/0005-BKS/2012, 13 December 2012 at

<https://www.bundeskanzleramt.at/DocView.axd?CobId=49930>.

video section of a newspaper's electronic version is sufficiently comparable in form and content with television broadcasting and has the principal purpose of providing programmes, thus falling within the Directive's scope. Advocate General Szpunar delivered his Opinion on 1 July 2015. In his view, neither the website of a daily newspaper containing audiovisual material nor any section of that website constitutes an AVMS within the meaning of the Directive. In the following, we will outline the Advocate General's Opinion before discussing the judgment of the Court.

### **Opinion of Advocate General Szpunar**

Advocate General Szpunar rejected a broad definition of an AVMS that would encompass the video section of a newspaper website on three main grounds.

First, such a broad interpretation, supported though it might be by a literal reading of Directive 2010/13, is not consistent with the objectives pursued by the Directive. In his view, the Directive rules on non-linear services are merely a derivative of the rules on linear services, i.e. television. From this basic assumption the Advocate General extrapolated that its drafters only intended to include services, which are in direct competition with traditional television. The Advocate General held, curiously, that "it is difficult to find that television competes for a particular audience or audiences" given that it "offers very diverse content intended in principle for every conceivable audience".<sup>10</sup> In any event, he advocated a narrow interpretation of services which are in direct competition with television by limiting them to those which offer "the same content in a non-linear form" such as "feature-length films, television serials, sports events and the like".<sup>11</sup>

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<sup>10</sup> Opinion of Advocate General Szpunar in Case C-347/14, *New Media Online GmbH*, para. 47.

<sup>11</sup> AG Szpunar, paras 52, 58.

The inclusion of other services within the Directive's scope would be unwarranted. Such services are in particular multimedia websites, which owe their existence to the expansion of the internet and not to the technological development of television. These findings should also guide the interpretation of recital 28 in the preamble to the Directive according to which "electronic versions of newspapers and magazines" should be outwith its ambit. It should not be understood as a special treatment afforded to the electronic press but as an indication that multimedia portals in general should not be regarded as audiovisual media services. In its explanation as to why the Directive should not apply to multimedia portals the Advocate General also observed, rather incoherently, that the Directive applies to elements of a traditional television schedule, while non-linear programmes are selected on-demand by the user.<sup>12</sup>

Second, the inclusion within the scope of the Directive of a large number of websites with audiovisual content whose principal purpose is not the provision of such content would signify an undue restriction on the freedom of the internet. This restriction does not arise from the Directive as such given that programme requirements for the providers of on demand services are only minimal. It is the practice of national regulatory authorities to impose a registration requirement and even the payment of a fee or reporting obligations on regulated services that renders inclusion within the Directive's scope onerous. Moreover, in the Advocate General's view, the interpretation followed by the Austrian regulatory authority would place an excessive burden on such authorities in the Member States, rendering the Directive ineffective and endangering its uniform application.

Finally, the definition of an AVMS advocated by the Austrian regulatory authorities is prone to circumvention as it depends on the architecture of the internet portal in question,

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<sup>12</sup> AG Szpunar, para. 53.

more specifically on the collection of audiovisual content within a catalogue, not on the nature of the service in question. Whether content is collected in a catalogue or dispersed across a portal should not make a difference as regards its classification as an audiovisual media service.

Before concluding his Opinion the Advocate General was cautious enough to point out that the interpretation of the concept of an audiovisual media service he put forward was based on the Directive's current wording. A different interpretation that would better take account of the need to protect vulnerable interests at stake by subjecting audiovisual content online to regulation by law, on issues such as the protection of minors, advertising or the broadcasting of events of major importance for society, would require the Directive's amendment. The package of provisions on the digital single market could provide the springboard for such reconsideration of the need to regulate the internet at EU level. The Advocate General thus acknowledged the issue of the protection of vulnerable interests, but entrusted its materialisation to the EU legislature.

### **Judgment of the Court of Justice**

The Court declined to follow the Opinion of the Advocate General. It took a pragmatic, black-letter approach, and only alluded in passing to the underlying public policy interest on which its decision was founded. First, it answered the question in the affirmative whether videos contained in a newspaper website constitute "programmes" within the meaning of Art. 1(1) (b) of the Directive. Secondly, it turned to the question whether it is the principal purpose of such a service to offer audiovisual content. We will trace the Court's reasoning in its answer to the first question before turning our attention to the second one.

The crux of the first question is whether videos of a short duration contained in the subdomain of a newspaper website are comparable to television broadcasting. The referring

court expressed doubts in that regard given that television broadcasting does not traditionally offer compilations of short videos. However, the Court observed that Art. 1(1) (b) of the Directive defines a programme as “an individual item within a schedule or a catalogue...”, not as the entire schedule or catalogue established by a media service provider. The pertinent question to ask would be therefore whether a single short video within the video section is comparable to television broadcasting.

The Court answered this question in the affirmative on two grounds. First, it noted that the definition of a “programme” within Art. 1(1) (b) does not stipulate any minimum length, and that television programmes can be short.<sup>13</sup> Secondly, the Court turned to recital 21, which requires that audiovisual media services should have a “clear impact on a significant proportion of the general public”. The Court held that the videos contained in a newspaper website are likely to have such an impact, and that the access and selection by the user upon individual request are immaterial. After all, the viewing on-demand is quintessential to all non-linear audiovisual media services.<sup>14</sup> Furthermore, the Court took account of the Directive’s objective to create a level playing field between on-demand media and traditional television. The fact that some of the videos in question are produced by the regional radio broadcaster, Tirol TV, and are also available on its website led the Court to conclude that those videos compete with the services offered by regional radio broadcasters. The Court held that this did not only apply to news but also to culture, sports and entertainment.<sup>15</sup>

In answering the question as to the principal purpose of a newspaper website, the Court considered the meaning of recital 28. It rejected an interpretation of this recital in the sense that video sections are excluded *eo ipso* from the Directive’s scope if they are embedded

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<sup>13</sup> Case C-347/14, *New Media Online GmbH*, para. 20.

<sup>14</sup> Case C-347/14, para. 21.

<sup>15</sup> Case C-347/14, para. 23.

within a website operated by a publishing company. If this was the case, providers of audiovisual services could escape obligations incumbent upon them by integrating them within a multimedia portal operated by an online newspaper publisher.<sup>16</sup> The Court also argued that the decision of whether a certain service is “in or out” should not be made dependent on the totality of activities undertaken by a specific operator, but should instead focus on the specific service in question. Such an approach would be more conducive to legal certainty in cases where the undertaking’s activities straddle several fields, increase in scope or change in nature due to a merger with another undertaking.<sup>17</sup> At this point the Court finally proceeded to clarify the two main rationales for its decision: a market-driven and a public interest oriented one. It argued that the objectives of the creation of a level playing field in the audiovisual media services market and of consumer protection would also militate against a formalistic, sector-specific approach.<sup>18</sup>

As regards the more technical question whether the principal purpose of the service at issue is the provision of audiovisual content, the Court argued that it is necessary to examine whether the video content is independent of the written articles of the online newspaper or indissociably complementary to them. It left the final say on this matter to the referring court but gave certain clear pointers to guide its decision. First, the Court dismissed outright the notion that the architecture of the website in question should have a bearing on the classification of a service lest the Directive’s rules be prone to circumvention. This is the only point on which the Court agreed with the Advocate General. Secondly, the Court remarked that the videos in question were very rarely linked to press articles, and could in most cases be accessed and watched independently of the online newspaper’s written content. According

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<sup>16</sup> Case C-347/14, para. 29.

<sup>17</sup> Case C-347/14, para. 30.

<sup>18</sup> Case C-347/14, paras 32, 33.

to the Court, these were strong indications that the video section at issue constituted a distinct audiovisual media service that could fall within the Directive's scope.

### Comments

The question whether hybrid services such as newspaper websites providing video content can be classified as on-demand AVMS has troubled regulators in many EU jurisdictions for quite some time. The regulators of Denmark,<sup>19</sup> the Flemish Community of Belgium,<sup>20</sup> Slovakia<sup>21</sup> and Sweden<sup>22</sup> have qualified such services as AVMS. Other regulators such as the Dutch Commissariaat voor de Media have faced considerable resistance from the newspaper industry against the classification of their video sites as on-demand services.<sup>23</sup> The UK communications regulator, Ofcom, quashed a determination of its co-regulator, the Authority for Television on Demand (ATVOD), that the video section of the Sun newspaper website constituted an on-demand programme service.<sup>24</sup> After Ofcom's appeal ATVOD withdrew

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<sup>19</sup> E. Machet, "New Media & Regulation: Towards a Paradigm Shift? New Services and Scope: 'What's In, What's out Revisited'", Comparative Background Document, 35<sup>th</sup> EPRA Meeting, 31 May – 1 June 2012, Portorož, <http://www.epra.org>, p. 17.

<sup>20</sup> G. De Bueger, "Supervising On-demand Audiovisual Media Services: Best practices and Methodology", Comparative Background Document, 38<sup>th</sup> EPRA Meeting, 2-4 October 2013, Vilnius, <http://www.epra.org>, 6.

<sup>21</sup> Decision of the Council for Broadcasting and Retransmission of the Slovak Republic, No. 12-14/43.680 of 10 July 2012, <http://merlin.obs.coe.int/iris/2012/9/article38.en.html>.

<sup>22</sup> Granskningsnämnden för radio och tv, Decisions 12/00777 – 12/00780 of 29 October 2012 ,

<http://www.radioochtv.se/CaseDecisions/206404.pdf> (Helsingborgs Dagblad);

<http://www.radioochtv.se/CaseDecisions/206405.pdf> (Aftonbladet);

<http://www.radioochtv.se/CaseDecisions/206406.pdf> (Dagens Nyheter);

<http://www.radioochtv.se/CaseDecisions/206407.pdf> (Norran)

<sup>23</sup> De Bueger, "Best practices", p. 12. This resistance has not proved problematic given that video content is very limited in Dutch newspapers' online presence.

<sup>24</sup> This is the terminology used for an AVMS under s. 368A (1) of the Communications Act.

another seven determinations concerning audiovisual material on a number of other newspaper/magazine websites.<sup>25</sup>

Deciding whether online newspapers can be brought under the AVMS umbrella depends on the criterion of “principal purpose”. The “principal purpose” criterion is one of the seven cumulative criteria that an on-demand AVMS needs to meet.<sup>26</sup> It seeks to exclude all services “where any audiovisual content is merely incidental to the service” such as animated graphical elements or short advertising spots provided within a text-based website in an ancillary manner.<sup>27</sup> Turning the order of the questions posed to the Court around, we will consider this criterion first before devoting our attention to the question whether the videos available on the *Tiroler Tageszeitung* constituted “programmes”.

This criterion has proved very challenging in practice given that its application hinges on the definition of the relevant service: Is it the entirety of the website or just the section containing the audiovisual content? If the former is the case, when can the video content be held to be preponderant compared to the written text? And does the architecture of the website need to be borne in mind when answering these questions? In other words, does it matter whether the videos need to be accessed via a separate homepage or whether they are simply grouped together in a distinct section of the newspaper website? Closely linked to this issue is the relationship between the audiovisual and the text-based elements of the website. Is the characterisation as a service having the required principal purpose in doubt when there

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<sup>25</sup> Elle TV; Sunday Times Video Library; News of the World Video; Sun Video; Telegraph TV; Guardian Video; The Guardian YouTube Channel; FT Video; The Independent Video, <http://atvod.co.uk/complaints/determinations>.

<sup>26</sup> AVMSD, Art. 1 (1) (a) (i); See Chavannes and Castendyk, “Art. 1 AVMSD” in *European Media Law* (2008), para. 24.

<sup>27</sup> AVMSD, rec. 22.

are content/access links between the video content and other parts of the website, and how close do these links need to be?

Ofcom has accepted that all these factors have a bearing on the classification of a service as AVMS though none of them is determinative.<sup>28</sup> Also, the yardstick of assessment has been an issue of contention between Ofcom and ATVOD, the former rebuking the latter for not having taken sufficient account of the totality of what was provided on the Sun's website. The Austrian regulators, by contrast, consider that it would be misguided to examine the entire range of services offered by a service provider. Also, they attach little importance to the existence of a separate homepage or of links between the video content and accompanying articles nor to their respective volume. All that matters in their view is the comprehensibility of the video content without the aid of accompanying articles.<sup>29</sup>

The Advocate General apodictically denied that providing audiovisual content might be the principal purpose of a newspaper website. He argued that the video section as such could not possibly be the correct reference point lest the principal purpose criterion should lose all its meaning by becoming dependent on the website's architecture. The Advocate General's view has to be concurred with in so far as formalistic factors like the existence of a separate homepage should not be determinative.

Nonetheless, the collation of videos in a distinct catalogue has to be of importance for the determination of the relevant service. The Court's argument that a holistic approach based on the totality of the services provided by a certain operator would be detrimental to legal certainty and prone to circumvention is apposite. This very argument also militates against a

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<sup>28</sup> Ofcom, Sun Video, para. 82.

<sup>29</sup> Bundeskommunikationssenat, Tiroler Tageszeitung; see also the more recent case KommAustria, Styria Multimedia, KOA 1.950/13-044, 17 June 2013, <https://www.rtr.at/en/m/KOA195013044>.

quantitative approach based on the absolute numbers and viewing time of the audiovisual material. Otherwise one could easily escape regulation by embedding videos in a lot of text.<sup>30</sup> The Advocate General's objection is, however, presumably that an operator could equally circumvent the AVMSD rules by dispersing video content across the website's overall offerings. It is submitted that the application of the AVMSD rules would be weakened but not a priori excluded in such a situation. Provided that the videos could be made sense of independently, the characterisation of the entirety of the website as an AVMS would still be possible if it offered a predominantly video-based experience.

Having explored the application of the "principal purpose" criterion to a newspaper website, it is now time to turn to the question whether the videos offered on such a website are comparable to television broadcasting. The Advocate General's observations attest to a parochial understanding of television, which goes against the grain of the Directive's exhortation to interpret the concept of a television programme in a dynamic way.<sup>31</sup> Short video content is not just the hallmark of user-generated media like You Tube, but is also part and parcel of genres such as children or music programming on traditional television. The fact that viewers increasingly use their mobile phone as the first screen means that short-form content will become prevalent in future. Also, the crumbling of divides between television and online content with the expansion of smart TV is bound to render the criterion of "TV-

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<sup>30</sup> This is the reason why the quantitative approach has been rejected by other regulators such as the Dutch CvdM and the Belgian CSA. See M. Betzel, "Finetuning classification criteria for on-demand audiovisual media services: the Dutch approach" in IRIS Special, *The Regulation of On-demand Audiovisual Services: Chaos or Coherence?* (Strasbourg: European Audiovisual Observatory, 2011), p. 58; P. Valcke and J. Ausloos, "Audiovisual Media Services 3.0: (Re)defining the Scope of European Broadcasting Law in a Converging and Connected Media Environment" in K. Donders, K. Pauwels and J. Loisen (eds), *The Palgrave Handbook of European Media Policy* (Basingstoke: Palgrave Macmillan, 2014), p. 319.

<sup>31</sup> AVMSD, rec. 24.

likeness” progressively irrelevant. This together with the blurriness of this criterion is also the reason why the Dutch regulator pays little attention to it when deciding on which services are in or out.<sup>32</sup>

As regards the Advocate General’s ill-conceived remarks about the on-demand nature of the video content in question as a differentiating factor and about the lack of competition with television, the Court dismissed them out of hand. Indeed, audience research conducted for Ofcom in the past suggests that certain newspaper websites are in the grey area of possible competing options to linear television.<sup>33</sup> Moreover, the greatest level of misattribution as to the existence of regulatory protection is for video on news websites.<sup>34</sup> This misunderstanding throws into sharp relief the ostensible differences between press and broadcasting, which traditionally justify the historically disparate regulation of the two sectors.

Broadcasting, on account of its immediacy and intrusiveness, is subject to a much tighter corset of regulations than the press. However, electronic press with its plethora of audiovisual material has come to have the same potential to harm those general interests such as protection of minors, protection from incitement to hatred and consumer protection that underlie audiovisual regulation. The cross-fertilisation and occasionally the race between the press and social media, both striving to push the boundaries with violent and profane video content so as to attract viewers’ attention, underscore the urgency of a less siloed approach.

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<sup>32</sup> F.J.C. Blásquez, “On-demand Services: Made in the Likeness of TV?” in S. Nikoltchev, What is an On-Demand Service?, IRIS plus 2013-4 (Strasbourg: European Audiovisual Observatory, 2013), p. 18.

<sup>33</sup> Essential Research, “The regulation of video-on-demand: consumer views on what makes audiovisual services ‘TV-Like’ – a qualitative research report”, December 2009, <http://stakeholders.ofcom.org.uk/market-data-research/market-research/>.

<sup>34</sup> BDRC Continental, “Attitudes to online and on-demand content. 2014 Report”, April 2015, <http://stakeholders.ofcom.org.uk/market-data-research/other/internet/attitudes-to-on-demand-content>.

Also, legacy publications are increasingly willing to embrace native advertising, also by way of video content, imitating new online only publishers like BuzzFeed and the Huffington Post, even at a cost to their reputation.<sup>35</sup> Consequently, there is arguably a reasonable expectation of and need for regulatory protection in accordance with recital 24 AVMSD.

## **Conclusion**

The judgment of the Court in *New Media Online GmbH* has brought some welcome clarity as regards the scope of the AVMSD. First, it has clarified that recital 28 is not to be understood as a blanket exclusion of audiovisual material linked to a newspaper or a magazine. Given the clear pronouncement of the Court in this case, there will be little scope for retaining recital 28 in the revised AVMSD. This is an unwelcome development for the press sector, which, loath to surrender its autonomy not least as regards commercial communications, will undoubtedly try to find resourceful ways of closely interweaving its audiovisual and text offerings.

Secondly, the judgment is of wider relevance for the regulation of hybrid services online. It has laid some clear markers as to how to judge whether video content on a hybrid service constitutes the principal purpose of the service and is comparable to television broadcasting. In the past, Ofcom has held rather incongruently that a website could “provide a number of distinct services under cover of a single homepage”, but that the emphasis when deciding about the principal purpose should be on the entirety of the website.<sup>36</sup> This holistic approach

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<sup>35</sup> A. C. Bakshi, “Why and how to regulate native advertising in online news publications” (2015) 4 (3/4) *Journal of Media Law and Ethics* 4.

<sup>36</sup> Ofcom, *Sun Video*, fn. 57; See also Ofcom, *Everton TV*, 26 June 2013, paras 48, 49,

[http://www.atvod.co.uk/uploads/files/Everton\\_TV\\_Ofcom\\_Appeal\\_Decision.pdf](http://www.atvod.co.uk/uploads/files/Everton_TV_Ofcom_Appeal_Decision.pdf).

is not defensible anymore given that the Court has found the specific service in question to be the relevant object of assessment.

Moreover, the Court gave a rebuke regarding the emphasis often paid on formalistic factors such as the existence of a separate homepage. Undoubtedly, other such factors such as the branding and styling of a service would be equally irrelevant. This emphasis on the substance rather than the form of a certain service means that in future the net might need to be cast wider when assessing mixed media. One of many examples would be football club websites containing text-based news alongside football highlights and other video content for fans.<sup>37</sup>

Last but not least, the Court's finding that the length of a video clip is irrelevant should bring an end to the ambivalence in national regulators' verdicts and could lead to a reassessment of many a service specialising in the provision of short-form video content online. The view that the comparability of such videos to television broadcasting should depend on the genre to which they belong would hardly be sustainable in future.<sup>38</sup> The so-called "step-back" and the concomitant questions about a level-playing field, but also impact on the audience and expectations of regulatory protection, are pertinent questions to ask instead.<sup>39</sup>

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<sup>37</sup> See Ofcom, Everton TV, 26 June 2013,

[http://www.atvod.co.uk/uploads/files/Everton\\_TV\\_Ofcom\\_Appeal\\_Decision.pdf](http://www.atvod.co.uk/uploads/files/Everton_TV_Ofcom_Appeal_Decision.pdf).

<sup>38</sup> See Ofcom, Channel Flip, 14 December 2012,

[http://www.atvod.co.uk/uploads/files/Channel\\_Flip\\_appeal\\_decision.pdf](http://www.atvod.co.uk/uploads/files/Channel_Flip_appeal_decision.pdf), para. 59; Ofcom, Top Gear YouTube and Ofcom, BBC Food YouTube, <http://stakeholders.ofcom.org.uk/enforcement/on-demand-standards/scope-appeals/>, para. 41.

<sup>39</sup> AVMSD, rec. 11, 21, 24.

More fundamentally, the New Media Online judgment signals the need for a reassessment of the Directive's regulatory framework, which hitherto consists of uneven islands of regulation in a sea of unregulated content. This becomes increasingly unsustainable as video content proliferates online, and television becomes one of many competing audiovisual content providers. The guiding principle for future regulation cannot be a sector's privileged position, no matter how entrenched it is, but the socio-political impact of the content it offers and the opinion-forming power it yields.