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## THE OFFER OF SHORT VIDEOS AVAILABLE ON THE INTERNET AS AUDIOVISUAL MEDIA SERVICE

### *Abstract*

*One of the greatest challenges that lawmakers all over the world, particularly in the European Union and its Member States face, is establishing the legal framework of turnover on the internet. Variety that has been unknown until recently and almost indefinite amount of available information, absence of state borders that could significantly limit the flow of information, the easiness of internet users' providing any kind information to almost indefinite number of recipients, and eventually separation of virtual, digital from the real world- demand development of new legal tools that often are based on completely new grounds. Besides, that reality changes with speed that far surpasses the ability of lawmakers to respond to the changes. Applying the rules of analog world in the digital era results in a number of difficulties. Dilemmas of institutions in charge of supervision of enforcement of rights and market regulation are certainly a part of the difficulties. Thus, in this work the author will analyse the valid decision of the European Court of Justice regarding provision that is the offer of short videos available on internet, and their qualification as audiovisual media services.*

**Key words:** Directive 2010/13; audiovisual media service; internet; videos; television broadcasting.

### 1. INTRODUCTION

Audiovisual sector influences both individuals and companies to great extent, which makes it a core part of the European creative and digital economy. Traditional audiovisual media services, such as television, and on-demand audiovisual media services offer significant possibilities for employment in the European Union, particularly in small and medium enterprises, and increase economic growth and investments.<sup>1</sup> After the

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<sup>1</sup> S. Lučić, *Ovlašćenje autora na pravičnu naknadu u slučaju umnožavanja autorskog dela za privatnu upotrebu*, Glasnik prava, God. VI, br. 3 (2015), 22-23.

Directive 2007/65 was enacted, audiovisual media space has significantly changed due to the media convergence. New ways of development of content and ways of approach to consumers, the beneficiaries of the content have been created, so media have faced numerous changes in this field.<sup>2</sup> The Audiovisual Media Services Directive that was enacted in 2010 defined the issues such as participation and responsibilities of all market participants, promotion of European acts, advertising and protection of minors.

The Directive 2010/13 of the European Parliament and of the Council 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) provides a legal framework for the subject matter analysed in this work. However, for proper understanding of the dispute, it is necessary to take into account not only provisions of the Directive, but also some of the recitals in preamble that give insight into what application area lawmaker had intended for the Directive. Therefore, the definition of audiovisual media service, for the purposes of this Directive, covers only audiovisual media services, both television broadcasting and on-demand audiovisual media services that are the services of mass media that are intended for reception and can have an explicit influence on significant part of general public. Its application area should be limited to services as per the description given in Treaty on the Functioning of the European Union; therefore all kinds of economic activities should be included, including the activities of public services. On the other hand, it must not include the activities that are not primarily economic and those that are not competition for television broadcasting, such as private websites and services consisting of providing or distribution of audiovisual media content developed by private beneficiaries for the purposes of sharing and exchange within interest groups.<sup>3</sup> On-demand audiovisual media service (non-linear audiovisual media service) stands for audiovisual media service provided by a media service provider for watching program at a time chosen by the beneficiary, at the individual request of beneficiary and based on the program catalogue chosen by the media service provider. The application area of this Directive does not include electronic versions of newspapers and magazines.

Reference for a preliminary ruling referring to the interpretation of Article 1, Paragraph 1, Item (a, subitem i) and Item (b) of the Directive 2010/13 was made referring to the dispute between New Media Online

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<sup>2</sup> *Ibid.*

<sup>3</sup> See recital 21 in preamble of the Directive on Audiovisual Media Services.

GmbH, with headquarters in Innsbruck (Austria) and Federal Communications Commission regarding the decision of the Austrian Regulatory Authority referring to the estimation of a part of the services that prosecutor proposed in the main proceedings as “on-demand audiovisual media services”, which were, as a result, obliged to report, as prescribed by adequate regulations. In the aim of correct understanding of the dispute that is a subject matter of this work, facts will be provided in the continuation.

## **2. FACTS, PROCEDURE, QUESTIONS REFERRED**

The prosecutor regulates internet newspaper “Tiroler Tageszeitung online” (<http://www.tt.com>) in the main proceedings. A link on subdomain <http://video.tt.com> was on the website, which mostly contained text articles, on the day when the facts were made in the main proceedings. The link was called “Video” (hereinafter referred to as “video subdomain”) and it led to a website on which more than 300 videos were available on the search catalogue.

Videos that were posted on the internet in the described manner were actually arranged news of various duration, from 30 seconds to several minutes long, referring to various topics, such as local news and events, questions on popular topics asked to passersby, sport events, movies announcements, “do it yourself”, activities for children and readers’ videos selected by editorial staff. Only a small number of videos offered on video subdomain were related to the articles posted on the website of Tiroler Tageszeitung newspaper.

The decision referring to the video subdomain, made on November 9, 2012 by the Austrian Regulatory Authority, prescribed that the prosecutor provided on-demand audiovisual media services in terms of jointly enforced Provisions of the Article 2, Items 3 and 4 of the Austrian Law on Audiovisual Media Services (hereinafter referred to as: AMD-G) that were obliged to report as per the Article 9, Paragraph 1 of AMD-G.<sup>4</sup> The video subdomain was of television nature and was autonomous in respect of the rest of the Tiroler Tageszeitung newspaper website. Its main purpose was providing programs aiming to inform, entertain or educate public. Thus, according to the Austrian Regulatory Authority, the video subdomain lies within the application of AMD-G and its regulatory demands.

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<sup>4</sup> Law on Audiovisual Media Services (Audiovisuelle Mediendienste-Gesetz, BGBl. I, 84/2001).

The prosecutor denied the decision in the main proceedings and filed a complaint to Federal Communications Board.<sup>5</sup> The Board rejected the complaint by the decision made on December 13, 2012 for reasons named by the Austrian Regulatory Authority. The prosecutor in the main proceedings then filed a complaint to the Administrative Court. The prosecutor claimed that audiovisual media content available on the video subdomain were just an addition to its main web page and did not have a form of audiovisual media service. Besides, the prosecutor presumed that short videos available within the video subdomain, according to their form and content, were not comparable to the service of television broadcasting.

The Court's dilemma was whether the videos could be qualified as „program“ as per Article 1, Paragraph 1 (b) of the Directive 2010/13. More precisely, whether the videos from the main proceedings are in accordance with the request given in the named Provision that prescribes that videos' form and content is to be comparable to the form and content of television broadcasting. The Court in question starts from the premise that comparability of the inquired service with the television broadcasting can be assumed in case that kind of service is provided within the latter. However, Court's doubts are based in the fact that the service in question consists of the offer of short videos that match short sequences of news and such do not exist on „classic“ television.

Secondly, the Court that filed the request raises a question whether the service that is the subject matter of the main proceedings, has a program aiming to inform, entertain or educate public, as its main purpose. According to the Courts' opinion, the Directive 2010/13 does not provide a clear answer to the question whether a service should be qualified as audiovisual media service in terms of the „main purpose“ based on the entire variety of services of service providers, or separate inquiry of each service is necessary. The named Court presumes that the purpose of the Directive benefits to the second approach, since otherwise service provider could, in that case, omit services from the area of application of the Directive by increasing the range of services. Under these circumstances, the Appellate Court decided to terminate the proceedings and to refer the following questions to the Court:

„1. Should Article 1(1) (b) of Directive 2010/13 be interpreted as meaning that the form and content of a service under examination can be considered to be sufficiently comparable to the form and content of television broadcasting if such services are also offered in television broadcasting which

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<sup>5</sup> Bundeskommunikationssenat – the highest authority for radio broadcast, with HQ in Vienna.

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 an assessment of the principal purpose of a service offered in the electronic version of a newspaper can be based on a subsection mainly providing a collection of short videos, which in other sections of that website are used only to supplement text articles in the online newspaper?"

### **3. HISTORICAL DEVELOPMENT OF THE DIRECTIVE 2010/13**

Even though European Court of Justice treated television broadcasting as a service as per the Contract on EEC in 1974, that field was not of interest to lawmakers of the European Union until 1980s. That fact was in direct connection to the circumstance that classic earth television was dependent on the availability of radio frequencies. Those radio frequencies were granted to some television stations by states that, at the same time, gave them concessions for broadcasting exclusively on the territory of their states. Thus, the significance of these television services was small abroad. That circumstance has changed with the appearance of cable, and even more, satellite television. The new technologies not only increased the number of channels, but also made the channels available to recipients in other countries beside the state where the HQ of the television station was. That started the creation of joint market of television services. Law-making began with the Green Book made by the Commission in June 14, 1984 on topic „Television without Frontiers“. The outcome of that work was the Directive called „Television without Frontiers“. <sup>6</sup> That Directive regulated the principle of the availability of a country's television broadcasting on the territory of other Member States. In return, the Directive defined the minimal standards, mandatory for all television stations in the Union, for quantitative and qualitative limitations of advertising, sponsorship, television sales, minors' protection and public policies, as well as the right to reply. The principles provided by the Directive in terms of determining court jurisdiction of some State Members guaranteed that only one country is in charge of each TV station, thus the station is responsible only to the Regulatory Authority of the country. Besides, as per the Directive, TV stations were in obligation to promote European actions. When the Directive „Television without

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<sup>6</sup> The Directive 89/552 on the adjustment of particular Provisions regulated by Laws and other regulations of Member States regarding the television broadcasting.

Frontiers“ was modified in 1997, the State Members were granted the ability of choosing the events whose broadcasting must not be reserved only for commercial televisions.<sup>7</sup> The boost of technology from the area of electronic media, that took place on a crossing from one century to another, caused not only further increasing of a number of traditional television broadcasting offer, but also the appearance of new audiovisual media services, particularly various on-demand media services. Special novelty, both from the perspective of new contents offer and from the perspective of availability to beneficiaries, was internet as the new medium of the 21 century. The technological prosperity was followed by gradual change of behaviour and expectations of beneficiaries. While the legal status remained intact, the novelties caused increasingly strong disturbance of the audio-visual media services market competition. In terms of that, the Commission filed for changes in its Fifth Report on the application of the Directive 89/552 and Communication on the future of the European regulatory audio-visual policies. After the implementation of a voluminous counselling process, the work was completed and the Commission proposed a draft of the Directive on the modification of the Directive 89/552. The proposal was, even though slightly modified, eventually accepted as the Directive 2007/65. The Directive 2007/65 significantly changed the Directive 89/552. In the first place, the name of the Directive was changed, which was the result of the usage of new terminology in which they no longer spoke about television broadcasting services but audiovisual media services instead. Material legal Provisions of the Directive were significantly modified and liberalized, particularly in the area of advertising and other forms of promotion of goods and services. However, the most important change for the Dispute, which is a subject matter of this work, is broadening of the application field of the Directive on, so called, non-linear audiovisual media services, colloquially called „on-demand audiovisual media services“. Those services were, in the most elemental manner, regulated by the Provisions on the protection of minors and public policy, on advertising and promotion of European actions. The more thorough rules are pertaining to linear audiovisual media services, that is the traditional television broadcasting. The Directive 2010/13 is actually the refined text of the Directive 89/552 after the changes brought about with the enacting of the Directive 2007/65.<sup>8</sup>

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<sup>7</sup> See the Directive 97/36 on the modification of the Directive 89/552.

<sup>8</sup> On the development of rights of the European Union in terms of audiovisual media services, see more at M. Burri-Nenova, *The New Audiovisual Media Services Directive*:

Supervening from the abovementioned, the rules on non-linear audiovisual media services provided in the Directive 2010/13 are only derived from the Provisions on linear audiovisual media services, that is the television broadcasting. The definition of audiovisual media services in the Directive, particularly the definition of non-linear audiovisual media services, must be, considering the history of its development, interpreted with consideration of the reality of information society.

### **3.1. The definition of audiovisual media services in the context of information society**

Along with the abovementioned changes of television broadcasting, a new phenomenon, sometimes considered revolutionary, was developing—the appearance and expansion of worldwide information network, the internet. After only several decades, the internet developed from the point of technical curiosity intended for limited circle of experts, into a public and everyday means for work, education and entertainment. A number of various activities, partially or entirely, were transferred to the internet: electronic mail takes the place of traditional correspondence, web portals extrude newspapers, e-shopping replaces visits to shops in real world, etc. Internet also brought along many new perspectives characteristic only for that medium, such as new forms of communication like forums or social networks, of which the most popular are Facebook and Twitter.

„Internetization“ did not stop with the audiovisual media services. The development of the, so called, broadband internet through the multiple acceleration of data transfer, enabled the distribution of traditional audiovisual, both linear and non-linear, media services through the internet (Internet Protocol Television, IPTV) on one hand, and created almost infinite number of new service providers and new types of audiovisual media services on the other.

Another aspect relevant to these examinations and at the same time connected to the broadband internet is multimedia. In analog era and at the beginning of the internet development, word, sound and image, moving images in particular, were relatively strictly separated one from another. Newspapers and books were the sources of written word sometimes supported by photographs or drawings, radio was strictly audio medium, while movies and television were audiovisual media, that is they combined

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*Television Without Frontiers, Television Without Cultural Diversity, Common Market Law Review, Vol. 44 (2007), 1689, 1693, etc.*

moving images and sound. The internet provides public distribution of content that incorporates the three forms of transmission in a unity. Therefore, web portals are not limited to text, but they can support it with illustrations and audiomaterial, science and education institutions can enrich the content of lectures with videos, sport clubs can illustrate the sport reports with videos, etc.

Beside the text, every reputable web portal contains graphic and audiovisual elements that are, to variable extent, connected to the rest of the portal content. These elements can be constituent parts of written texts, but they also may be independent as well. Apart from that, websites are designed in a manner that the audiovisual elements are sorted out in separate subpages, which are parts of thematic areas, or they make a completely separate heading, typically named as „video“ or „TV“ (even though it is not the television, that is the linear media service).

From the legal perspective, the question remains whether the audiovisual media contents of this kind can be considered as audiovisual media services, and if not, where the boundary should be set.<sup>9</sup> The application of the Directive in terms of these contents creates a dilemma, thus there are differences in law-making and the practice of regulatory authorities of some Member States.<sup>10</sup> This situation is contrary to the request for unified application of Provisions of the Directive on the whole territory of the European Union.

#### **4. ANSWERS TO THE QUESTIONS REFERRED**

The Court that filed the request basically raises the question whether the term „program“, as per the Article 1, Paragraph 1 (b) of the Directive 2013/13, should be interpreted in a manner that it contains the offer on the subdomain of short videos that represent short sequences of local news, sport or entertainment on newspaper website. It should be pointed out that, according to the statement of the Court that filed the request, videos that are the subject of the main proceedings, conform to the sequences of news of various duration and with various topics. The named videos refer to the

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<sup>9</sup> 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, 7.

<sup>10</sup> J. Metzendorf, *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*, Vol. 5 (2014), Issue 2, 88.



reports on local events, particularly from the area of politics, culture, sports and economy. In terms of that, the Court that filed the request expresses dilemma whether the offer of short videos that correspond to the short sequences of local news, sports or entertainment, are comparable to the television broadcasting as per the Article 1, Paragraph 1 (b) of the Directive 2010/13, taking into account that such compilation of short videos has not been offered on traditional television broadcasting so far.

Upon the fact consideration, the Court answered that the term “program” as per Article 1, Paragraph 1 (b) of the Directive 2010/13 should be interpreted as providing short videos that correspond to short sequences of local news, sports and entertainment on the subdomain of newspaper website.

The Court that filed the request raises the second question- the main purpose of videos provided on electronic version of newspapers should be determined based on which criteria, as per Article 1, Paragraph 1. Item a, Subitem i of the Directive 2010/13?

In terms of that, the Directive 2010/13 says that the electronic version of newspapers, despite the audiovisual elements that it contains, should not be considered as audiovisual media service in case those audiovisual elements are incidental parts and their purpose is only to complement written articles. The recital in preamble 22 of the Directive 2010/13 provides the principle according to which the services “whose audiovisual content is incidental part and not its main purpose” do not fall under the definition of the “audiovisual media service” as per the Article 1, Paragraph 1, Item a, Subitem i of the Directive. The recital in preamble 28, on the other hand, provides that “electronic versions of newspapers and magazines” are not within its field of application. The Austrian Authorities thus decided that the website of the prosecutor in the main proceedings is not an audiovisual media service. However, according to the claim of the European Court of Justice, recital in preamble 28 of the Directive 2010/13 cannot be interpreted in a way that audiovisual media services should be systematically excluded from the area of application of the Directive just because service provider of website is a newspaper publisher. If videos on website fulfil the conditions to be qualified as on-demand audiovisual media services, they do not lose the quality of on-demand audiovisual media services for a single reason that they are available on the newspaper website. Namely, according to the statement of the Luxembourg Court, the approach that would generally exclude the services provided by daily newspapers from the application of the Directive, due to their multimedia character without estimating the “main purpose” of the service from one case to another, does not take into

consideration the variety of possible situations and bears a risk of service providers that actually provide the audiovisual media services as per the Article 1, Paragraph 1, Item a, Subitem I of the Directive, using portals with multimedia information for avoiding the application of the Law in that field.

Furthermore, individualized approach based on the qualities of service providers that takes into account all the services offered by service providers in order to estimate their individual purpose on the grounds of which the service provider would be either included or excluded from the application of the Directive 2010/13 for all the services provided through its website, does not provide us with the possibility of adequately estimating specific situations such as those in which society acts in various domains, increases the range of its activities or connects to other societies.

In terms of that, according to the statement of the Court, it should be pointed out that one of the major purposes of the Directive 2010/13, in terms of recital in preamble 10, is achieving equal conditions for competition on the audiovisual media services market.

Consequently, the estimate of the “main purpose” of a website does not depend on whether the website, taken as a whole, is in accordance with the main action of the society or with the action that has a less important role for the society.

Taking into consideration the abovementioned views, the Court’s answer to the second question was that the Article 1, Paragraph 1 (a), Subitem i of the Directive should be interpreted in a manner that the ground for estimation of the main purpose of videos available on the electronic version of newspapers should be the examination of the fact whether the service, as such, has a content and function independent from the service provider- newspaper activity and is not only inseparable addition to the activity, particularly due to the connection of audiovisual and textual offer. The Court that filed the request should base the estimation on these grounds.

## **5. APPLICATION OF THE DIRECTIVE 2010/13 ON AUDIOVISUAL MEDIA ELEMENTS OF INTERNET PORTALS**

The Austrian Regulatory Authority gave a wide-range interpretation of the term “audiovisual media services” in its decision pertaining to the main proceedings, starting from the point that that kind of services are audiovisual contents offered on the website of „Tiroler Tageszeitung Online“ in the “Video” heading. Even though that point of view can be defended based on

the Directive 2010/13, that kind of expansion of the application of the Directive has many deficiencies. First of all, it is not compatible with the aims that lawmaker wanted to accomplish by enacting the Directive on Audiovisual Media Services. As stated above, the Provisions on non-linear audiovisual media services of this Directive were only derived from the Provisions pertaining to linear services, that is the traditional television.<sup>11</sup> The explanation of the draft Directive 2007/65 and recitals in preamble of the Directive 2010/13 provide that the expansion of application of the regulation to non-linear audiovisual media services should prevent the competition among similar economic sectors, in a way that the same rules are applied to them, at least regarding the basic issues. Our opinion is that the aim cannot be interpreted to that large an extent, as if that regulation covered the services that are not in direct competition with television broadcasting.

Also, the interpretation given by the Austrian Regulatory Authority in the main proceedings provides that great number of economic entities succumb to the Provisions of the Directive on Audiovisual Media Services, and those provide websites with audiovisual content even though their main activity is not providing audiovisual media services in terms of the Directive. The obligations imposed by the Directive to non-linear service providers are not heavy, but when the services succumb to the Provisions whose aim is the application of the Directive, in the practice of national Regulation Authorities it means at least obligation of registration, and in some Member States other obligations as well, such as paying taxes (United Kingdom) or submitting reports (France). Even if the registration itself cannot be considered as business permission, it still results in the fact that a significant part of the internet business society succumbs to administrative supervision, which might create an impression that the freedom of that media is limited.

The intention to extend the administrative supervision to a wider area of internet would, at the same time, represent a great challenge for Regulatory Authorities in Member States, mainly due to the small capacities needed in order to create websites with any kind of content, including audiovisual content as well. The efforts to apply wide area of regulation might result in the Directive losing efficiency even in the area intended by the Provisions.

Finally, the view of the Austrian Regulatory Authority makes the application of the Directive dependent on the organization of a concrete website. According to that view, audiovisual media service exists only in case it is a part of the audiovisual contents catalogue. If, on the other hand, the

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<sup>11</sup> Traditional in terms of the content and program scheme, but not in terms of the distribution technique.

contents are spread on different parts of the portal, they are considered its integral parts, and not separate services, so they do not succumb to the Provisions of the Directive. According to our opinion, that is only a technical solution that must not affect the application of the Directive. The decision whether a service succumbs to the Directive must be based on the nature of the service instead the structure of internet portal that provides the service.

It is not disputable that the text of the Directive 2010/13 may contribute to the interpretation of the Austrian Regulatory Authority or at least to the fact it is about the possible interpretation of the Directive. However, that interpretation can hardly be in connection with the lawmaker's intentions. For the abovementioned reasons, it does not serve either the efficient accomplishment of the aims of the Directive, or contribute to its unified application in all Member States.

The Directive on Audiovisual Media Services did not turn out to be progressive, even though the intention of the Directive's author was.<sup>12</sup> Many of its formulations are either incorrect or do not fit the reality of the broadband internet. However, we are of opinion that the dynamic interpretation of the Provisions of the Directive may enable the Directive to keep its original meaning, even in the up to date internet world.

## **6. THE ELEMENTS OF DEFINITION OF AUDIOVISUAL MEDIA SERVICE UNDER THE DIRECTIVE 2010/13**

Audiovisual media service has been defined in the Article 1, Paragraph 1 (a) of the Directive 2010/13 and some of the terms used in the definition have been defined in further Subitems of the same Article. Non-linear media service has been defined in Article 1, Paragraph 1 (g) of the Directive. Legal framework, which defines the field of application of the Directive 2010/13, also consists of some of its recitals in preamble that either directly pertain to the definitions of the Article 1, or generally can be applied to its field of application.

As per the Article 1, Paragraph 1 (a), Subitem i of the Directive 2010/13, in terms of its recital in preamble 29, audiovisual media service must meet the following criteria:

- economic nature
- editorial responsibility of media service provider
- preparation of audiovisual media services as the main purpose

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<sup>12</sup> 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, 265.

– preparation of the program with the aim of informing, entertaining and educating public through electronic communication network.

Recital in preamble 29 of the Directive 2010/13 provided that those features, along with the features named in other recitals in preamble, should be simultaneously present in order to qualify a service as audiovisual media service as per the Directive. In our opinion, that indicates that it was lawmaker's intention to include only specific kinds of services in the definition, thus to include only these services in the area of application of the Directive. That view contributes to the restrictive interpretation of the audiovisual media services term.

The first feature includes the services as per the Treaty on the Functioning of the European Union, that is the services provided within economic activities. As per the recital in preamble 21 of the Directive 2010/13, its application should not include "private websites and services that consist of providing or distribution of audiovisual media services developed by private beneficiaries with the aim of sharing and exchange within interest groups". At issue are private websites of all kinds developed and maintained by private entities without economic interest, such as blogs and video blogs, as well as portals like You Tube.

The website of a printed newspaper, such as „Tiroler Tageszeitung Online“, serves as an economic activity without any doubt, thus the first feature can be applied. However, such a distinction will not always be as obvious. Namely, it often happens that advertisements are placed on the most popular private websites with compensation, thus they become sources of profit for authors, and a kind of economic activity as well. On the other hand, professional channels (so called *branded channels*) show up on portals like You Tube and their contents are not created by beneficiaries. The question whether the Directive 2010/13 can be applied to these contents and to what extent as well, remains to be a challenge for National Regulatory Authorities and Courts.

The feature of electronic communication networks is not particularly helpful for public either, in terms of distinguishing the area of application of the Directive 2010/13 from the wanted perspectives. Internet is an electronic communication network *par excellence* and all the contents that do not fall under any group of beneficiaries are available to the public. Providing program in order to report, entertain or educate is not a selective feature either, since it covers almost every possible audiovisual media content, particularly if the content is aiming to be commercial and public.

The definition of joint responsibility in the Article 1, Paragraph 1 (c) of the Directive 2010/13 is very broad- not in terms of the responsibility for the

content of each provided audiovisual material (“program” according to the terminology of the Directive), but only in terms of the choice and organization of the contents within the service. Namely, the feature basically serves only to make a difference between the media services service providers and economic entities that guarantee the transmission of data (such as cable TV or Internet service providers).

For the correct understanding of the subject matter of the dispute that has been analysed in this work, it is necessary to research two features whose interpretation was requested by the Austrian Court as well. According to the abovementioned features, audiovisual media service exists only if its main purpose is providing of audiovisual contents. The Austrian Regulatory Authority considered the video catalogue placed on the website as a separate service in its decision in the main proceedings. The main purpose of a service determined in such a way is providing audiovisual contents. However, the feature of the main purpose in terms of that interpretation does not make any sense since, as mentioned before, the area of application of the Directive seems dependent on the structure of a particular website in a particular moment.

Article 1, Paragraph 1 of the Directive 2010/13 contains the definition of a program. It is the adjusted definition and its original form was in the original version of the Directive 89/552. In accordance with that, program is a separate item in the schedule within linear services or catalogue of non-linear services. Furthermore, the form and content of program must be comparable to the form and content of television broadcasting. That distinction refers to the lawmaker’s intention to exclude audiovisual media contents that are not typically broadcasted on television from the area of application of the Directive.

Besides the general definition of audiovisual media services, the Article 1, Paragraph 1 (g) of the Directive 2010/13 provides the definition of non-linear audiovisual media services (referred to as on-demand audiovisual media services). According to that definition, a beneficiary can choose programs within non-linear audiovisual media service, from the catalogue chosen by media service provider and watch them at any time. Based on that, it seems that the Austrian Regulatory Authority concluded that since there was a video catalogue on „Tiroler Tageszeitung Online“ website, the website (that is, the part of the website that contains the catalogue) represented the on-demand audiovisual media service.

However, we are of opinion that the term *catalogue* should not be given that much of importance in the interpretation of the definition. The definition provided in Article 1, Paragraph 1 (g) of the Directive is a reflection of the

definition of linear audiovisual media service (that is, the television broadcasting) provided in the same Paragraph under the Item (e). The catalogue in the non-linear audiovisual media service is equivalent to the "schedule", program timeframe in the linear audiovisual media service. Non-linear audiovisual media service differs from the linear audiovisual media service in that fact that the programs are not provided at a given time schedule but are available to the beneficiary at any time. Therefore, there must be a catalogue from which the beneficiaries will choose the programs. However, that request must not be understood in a way that the very existence of a catalogue means that the service is audiovisual media service in terms of the Directive 2010/13.

Further implications of the application of the Directive 2010/13 to non-linear audiovisual media services are provided in recitals in preamble of the Directive. Thus, as per the recital in preamble 24, non-linear audiovisual media services must be "similar to television broadcasting", that is, they must be intended for the same audience as television broadcasting.

However, it is hard to assume that the television is intended only for a specific group or groups of beneficiaries. It provides a wide range of contents intended for all possible groups of beneficiaries, satisfying their needs for reporting, entertainment and education. The recital in preamble represents the intention of a lawmaker to provide the balanced competition among economic entities operating in various areas, through applying similar Provisions on them, at least in terms of the elementary issues. For that reason, the similarity of non-linear audiovisual media services with the television broadcasting should be understood in a limited way: in accordance with the intention of the lawmaker, the Directive 2010/13 is applied only to the extent to which the development of telecommunication technology enables providing of the same contents in non-linear form, which could have been provided only through television broadcasting earlier, that is within linear audiovisual media service. As opposed to that, the intention of the lawmaker was not to expand the area of application of the regulation to innovations that appear along with the internet expansion, particularly the broadband internet, such as the arrival of multimedia websites. The second sentence of the recital in preamble 24 of the Directive confirms our conclusion and states that the term "program" is to be interpreted in a dynamic way, taking into consideration the development of the television broadcasting. That condition actually means that the application of the Directive in terms of non-linear audiovisual media services is to take into consideration the development in the area of linear audiovisual media services that are the main subject of the Directive. Non-linear audiovisual media services are not to be taken as

independent regulatory area of the Directive. That actually caused that all the new kinds of audiovisual media services that may not have anything in common with the linear audiovisual media services (television broadcasting) are to be covered.

As stated above, as per the recital in preamble 28 of the Directive 2010/13, electronic versions of newspapers and magazines do not fall under the application of the Directive. That recital in preamble should also be viewed from the perspective of the development of information society services. At the same time, services of mechanical transmission of hard copy versions of newspapers and magazines to the internet are not in question here. First of all, that kind of a service could not contain the audiovisual media service, which, by its nature, is not available in the domain of hard copy media. Secondly, the decrease of the number of newspaper and magazine websites that post solely the articles from hard copy editions, has been noticed. Those portals are rather comprehensive, containing a larger variety of materials than hard copy editions, particularly audiovisual material.

That is particularly in case when it comes to daily newspapers whose websites typically are in the form of portals containing information in terms of news, analyses, more through articles, etc. „Tiroler Tageszeitung Online“ website is just an example of such a portal. Besides, portals of that kind function not only within newspapers, but they also can be owned by television or radio stations, particularly the portals with news, or they function only as internet portals. All those portals have their own specificities, but their general structure and contents are similar. Therefore, treating internet portals that contain information in a different way only because they are owned by newspapers or magazines would be unjustified and present an unequal treatment. Thus, in our opinion, the recital in preamble 28 of the Directive 2010/13 should have been interpreted as the intention of lawmaker to exclude all kinds of internet portals with multimedia information, that is, those that, among other, provide multimedia contents, from the area of application of the Directive.

## **7. CONCLUSION**

The Audiovisual Media Services Directive (2010/13/EU) sets forth rules for provision of audiovisual media services, which include television broadcasts as well as on-demand audiovisual media services. Most of the requirements under the directive, such as time limitations on advertising, apply only to television broadcasts. This essentially has to do with traditional



television channels, where the programme schedule is set by the broadcaster (linear services).

But a certain set of basic obligations also apply to on - demand services which may compete with traditional television. This involves for example identification of advertising and requirements for the ad content, product placement, sponsored programmes, and protection of minors.

In practice, the classification of a specific service as an on - demand audiovisual media service can be doubtful, particularly when the service offers video materials online. One of these disputed instances was considered by the Court of Justice of the European Union in *New Media Online GmbH v Bundeskommunikationssenat* (Case C - 347/14), interpreting for the first time the concept of "audiovisual media service."

The judgment of the Court of Justice is of great importance not only for the growing number of newspapers that have expanded their online editions to include sections with video materials, but also potentially other online services offering various types of materials - so long as they take editorial responsibility for the content. Unfortunately, the court did not explain more extensively when the connection between videos and the text context of the site is strong enough to exclude the application of the directive.

Thus there is a risk that videos by certain bloggers or vloggers, for example, could be classified as on - demand audiovisual media services, particularly if they conduct economic activity on a certain scale and target their programmes to the general public. Treating short video clips as programmes, and requiring the catalogue of such videos to be examined on their own merits apart from the overall content of the website, could result in a significant expansion of the application of the Audiovisual Media Services Directive.

## REFERENCES

- Burri-Nenova, M., *The New Audiovisual Media Services Directive: Television Without Frontiers, Television Without Cultural Diversity*, Common Market Law Review, Volume 44 (2007).
- Blázquez, C., Javier, F., *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.
- Lučić, S., *Ovlašćenje autora na pravičnu naknadu u slučaju umnožavanja autorskog dela za privatnu upotrebu*, Glasnik prava, God. VI, br. 3 (2015).
- Metzdorf, J., *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 5 (2014), Issue 2.

*The Offer of Short Videos Available on the Internet as Audiovisual Media Service*

Reding, V., *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.

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)

Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 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