

**Court of Justice EU, 22 January 2013, Sky Österreich v ORF**



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**EU Charter of Fundamental Rights and transitional directive implementation:**

- [Article 16 \(freedom to conduct a business\) and article 17 \(acquired legal position\) of Charter do not preclude limited compensation for short news reports of major events under article 15\(6\) of Audiovisual Media Services Directive: priority is given to the public access to information over contractual freedom](#)

An economic operator, such as Sky, which, after the entry into force of Directive 2007/65 on 19 December 2007, has acquired exclusive broadcasting rights by means of a contract – on 21 August 2009 in this instance – cannot, in the light of European Union law, rely on an acquired legal position, protected by Article 17(1) of the Charter, as the Member States were required to transpose that directive, which they might do at any point and had to do by 19 December 2009 at the latest.

In the light, first, of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and, second, of the protection of the freedom to conduct a business as guaranteed by Article 16 of the Charter, the European Union legislature was entitled to adopt rules such as those laid down in Article 15 of Directive 2010/13, which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom.

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**Court of Justice EU, 22 January 2013**

(V. Skouris, K. Lenaerts, A. Tizzano, M. Ilešič, T. von Danwitz (Rapporteur) and J. Malenovský, Presidents of Chambers, A. Borg Barthet, U. Løhmus, J.-C. Bonichot, C. Toader, J.-J. Kasel, M. Safjan and D. Šváby)

JUDGMENT OF THE COURT (Grand Chamber)

22 January 2013 (\*)

*“Directive 2010/13/EU – Provision of audiovisual media services – Article 15(6) – Validity – Events of high interest to the public that are subject to exclusive*

*broadcasting rights – Right of access of broadcasters to such events for the purpose of making short news reports – Limitation of possible compensation for the holder of the exclusive right to additional costs incurred in providing such access – Charter of Fundamental Rights of the European Union – Articles 16 and 17 – Proportionality”*

In Case C-283/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundeskommunikationssenat (Austria), made by decision of 31 May 2011, received at the Court on 8 June 2011, in the proceedings

Sky Österreich GmbH

v

Österreichischer Rundfunk,

THE COURT (Grand Chamber), composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič, T. von Danwitz (Rapporteur), J. Malenovský, Presidents of Chambers, A. Borg Barthet, U. Løhmus, J.-C. Bonichot, C. Toader, J.-J. Kasel, M. Safjan and D. Šváby, Judges, Advocate General: Y. Bot, Registrar: A. Impellizzeri, Administrator, having regard to the written procedure and further to the hearing on 24 April 2012, after considering the observations submitted on behalf of:

– Sky Österreich GmbH, by G. Engin-Deniz, Rechtsanwalt,

– Österreichischer Rundfunk, by S. Korn, Rechtsanwalt,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the Polish Government, by M. Szpunar, acting as Agent,

– the European Parliament, by R. Kaškina and U. Rösslein, acting as Agents,

– the Council of the European Union, by R. Liudvinavičiute-Cordeiro and J. Herrmann, acting as Agents,

– the European Commission, by G. Braun, S. La Pergola and C. Vrignon, acting as Agents, [after hearing the Opinion of the Advocate General at the sitting on 12 June 2012,](#)

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the validity of Article 15(6) 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) (OJ 2010 L 95, p. 1, and corrigendum OJ 2010 L 263, p. 15).

2 The request has been made in proceedings between Sky Österreich GmbH (‘SKY’) and Österreichischer Rundfunk (‘ORF’) concerning the financial conditions under which the latter is entitled to gain access to the satellite signal to make short news reports.

**Legal context**

**European Union law**  
**Directive 2007/65/EC**

3 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) was amended by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 332, p. 27). Article 1(9) of the latter directive introduced Article 3k into Directive 89/552, which provides for the right for broadcasters, for the purpose of short news reports, to use short extracts from the transmitting broadcaster's signal of events of high interest to the public, to which the transmitting broadcaster has acquired broadcasting rights on an exclusive basis.

4 As regards possible compensation, Article 3k(6) provided that such compensation could not exceed the additional costs directly incurred in providing access.

5 In accordance with the first subparagraph of Article 3(1) of Directive 2007/65, Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 19 December 2009.

6 Pursuant to Article 4 of Directive 2007/65, the directive entered into force on the day following its publication in the Official Journal of the European Union, that is, on 19 December 2007.

#### **Directive 2010/13**

7 Directive 89/552, as amended by Directive 2007/65, was repealed by Article 34(1) of Directive 2010/13, recital 48 in the preamble thereto states:

*'Television broadcasting rights for events of high interest to the public may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming across the [European] Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union [("The Charter")].'*

8 Recital 55 in the preamble to Directive 2010/13 reads as follows:

*'In order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the [European] Union are fully and properly protected, those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking due account of exclusive rights. Such terms should be communicated in a timely manner before the event of high interest to the public takes place to give others sufficient time to exercise such a right. ... Such short extracts may be used for EU-wide broadcasts by any channel including dedicated sports channels and should not exceed 90 seconds. The right of access to short extracts should apply on a trans-frontier basis only where it is necessary. Therefore a broadcaster should first seek access from a broadcaster established in the same Member State having exclusive rights to the event of high interest to the public. The notion of general news*

*programmes should not cover the compilation of short extracts into programmes serving entertainment purposes. ...'*

9 Article 15 of that directive provides:

*'1. Member States shall ensure that for the purpose of short news reports, any broadcaster established in the [European] Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.*

*2. If another broadcaster established in the same Member State as the broadcaster seeking access has acquired exclusive rights to the event of high interest to the public, access shall be sought from that broadcaster.*

*3. Member States shall ensure that such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal with, unless impossible for reasons of practicality, at least the identification of their source.*

*4. As an alternative to paragraph 3, Member States may establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means.*

*5. Short extracts shall be used solely for general news programmes and may be used in on-demand audiovisual media services only if the same programme is offered on a deferred basis by the same media service provider.*

*6. Without prejudice to paragraphs 1 to 5, Member States shall ensure, in accordance with their legal systems and practices, that the modalities and conditions regarding the provision of such short extracts are defined, in particular, any compensation arrangements, the maximum length of short extracts and time limits regarding their transmission. Where compensation is provided for, it shall not exceed the additional costs directly incurred in providing access.'*

#### **National law**

10 Paragraph 5(4) of the Federal Law on Exclusive Television Broadcasting Rights (Bundesgesetz über die Ausübung exklusiver Fernsehübertragungsrechte) ('Fernseh- Exklusivrechtegesetz'), BGBl. I, 85/2001], provided, until 30 September 2010, that in the absence of an amicable agreement between the broadcasters concerned, the Bundeskommunikationssenat was to decide whether the right to make short news reports should be granted to a television broadcasting organisation and, where necessary, under what conditions.

11 As of 1 October 2010, Paragraph 5(4), read in conjunction with Paragraph 5(2), provides that the broadcaster which has acquired the exclusive broadcasting rights to an event of general interest from the point of view of information and which is required to grant to any broadcaster which requests the right to make short news reports from its signal for broadcasting purposes is entitled only to the reimbursement of the additional costs directly incurred in providing access to the signal.

12 The Bundeskommunikationssenat was created by the Federal Law on the creation of the Kommunikationsbehörde Austria and the Bundeskommunikationssenat (Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria und eines Bundeskommunikationssenates, BGBl. I, 32/2001 'the KOG'), in order to review the decisions of the Kommunikationsbehörde Austria (the Austrian communications regulator, 'KommAustria') and to exercise judicial review over ORF as a collegiate authority with a judicial component within the meaning of Paragraph 20(2) of the Federal Constitutional Law (Bundes-Verfassungsgesetz).

13 Paragraph 36(1) to (3) of the KOG, in the version in force at the time of the facts of the dispute in the main proceedings, provides:

*'1. A Bundeskommunikationssenat responsible for monitoring the decisions of KommAustria ... shall be set up at the Federal Chancellery.*

*2. The Bundeskommunikationssenat shall decide at last instance on appeals against decisions of KommAustria ..., with the exception of appeals concerning administrative penalties.*

*3. The decisions of the Bundeskommunikationssenat may not be set aside or varied by administrative action. Appeals against its decisions may be brought before the Verwaltungsgerichtshof [Administrative Court].'*

14 Paragraph 37(1) and (2) of the KOG provides:

*'1. The Bundeskommunikationssenat shall consist of five members, of whom three must belong to the judiciary. The members of the Bundeskommunikationssenat shall perform their duties independently and are not bound by any directions or instructions. The Bundeskommunikationssenat shall elect a chairperson and a deputy chairperson from the members who belong to the judiciary.*

*2. The members of the Bundeskommunikationssenat shall be appointed by the Federal President upon proposal of the Federal Government for a term of six years. For each member a substitute member shall be appointed to take the place of a member prevented from fulfilling his obligations.'*

15 According to Paragraph 20(2) of the Federal Constitutional Law:

*'The legislature may free a body*

*...*

*3. created as a collegiate authority required to decide at last instance, the decisions of which may not be annulled or varied by administrative procedure, and which comprises at least one judge,*

*...*

*of its obligation to comply with instructions issued by a body which is of higher rank. ...'*

**The dispute in the main proceedings and the question referred for a preliminary ruling**

16 Sky has been authorised by KommAustria to broadcast via satellite the coded digital television programme 'Sky Sport Austria'. By a contract of 21 August 2009, Sky acquired exclusive rights to broadcast Europa League matches in the 2009/2010 to 2011/2012 seasons in Austrian territory. Sky states that

it spends several million euros each year on the licence and production costs.

17 On 11 September 2009, Sky and ORF entered into an agreement granting ORF the right to produce short news reports and providing for the payment of EUR 700 per minute for such reports. As regards that remuneration, the parties limited the duration of the validity of the agreement to the entry into force of the amendment to Article 5 of the Federal Law on the Exercise of Exclusive Broadcasting Rights, namely 1 October 2010.

18 At the request of ORF, made in November 2010, KommAustria decided that Sky was required, as the holder of exclusive broadcasting rights, to grant ORF the right to produce short news reports, but was not entitled to demand remuneration greater than the additional costs directly incurred in providing access to the satellite signal, which were non-existent in this case. At the same time, it determined the conditions under which ORF could exercise that right. Both parties appealed against that decision before the Bundeskommunikationssenat.

19 In its order for reference, the Bundeskommunikationssenat refers, in so far as concerns the admissibility of the request for a preliminary ruling, to [the judgment in Case C-195/06 Österreichischer Rundfunk \[2007\] ECR I-8817](#), and considers that it should also be regarded, in the present case, as a court or tribunal within the meaning of Article 267 TFEU, given that the same rules of jurisdiction apply in the present case as in the case which gave rise to that judgment.

20 On the substance, the Bundeskommunikationssenat considers that the right to produce short news reports constitutes an interference with the right to property, as laid down in Article 17 of the Charter, of the broadcaster which has acquired, on a contractual basis, broadcasting rights relating to an event of high interest to the public on an exclusive basis ('the holder of exclusive broadcasting rights').

21 Referring, in particular, to Article 52(1) of the Charter, the Bundeskommunikationssenat questions whether a provision of a directive which prevents the authorities of a Member State from providing for compensation for such an interference with the right to property is consistent with the principle of proportionality. It considers that the fact that Article 15(6) of Directive 2010/13 provides that the Member States are required to define the modalities and conditions relating to the right to produce short news reports cannot make up for such an inference. The Bundeskommunikationssenat considers that, in the light, in particular, of the principle of proportionality, it is necessary to adopt a rule allowing account to be taken of the circumstances of the case and, in particular, the subject-matter of the exclusive broadcasting rights and the amount paid by the holder to acquire those rights in order to calculate appropriate compensation.

22 According to the Bundeskommunikationssenat, Article 15 of Directive 2010/13 is particularly

contestable where exclusive broadcasting rights were acquired prior to the entry into force of that directive, whereas the application for the right to make short news reports was made after the entry into force of the national provision transposing Article 15 of the directive.

23 In that context, the Bundeskommunikationssenat refers to decisions of the Bundesverfassungsgericht (German Federal Constitutional Court) and of the Verfassungsgerichtshof (Austrian Constitutional Court) in which it has been considered that the granting of a right to make short news reports free of charge is disproportionate and, as a result, infringes professional freedom, within the meaning of Article 12 of the German Basic Law (Grundgesetz), and the right to property, within the meaning of Article 5 of the Austrian Basic Law on the general rights of citizens (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger) and Article 1 of Additional Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952 ('the Additional Protocol').

24 In those circumstances, the Bundeskommunikationssenat decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

*'Is Article 15(6) of [Directive 2010/13] compatible with Articles 16 and 17 of the Charter ... and with Article 1 of [the Additional] Protocol ...?'*

#### **Consideration of the question referred**

##### **Admissibility**

25 At the outset, it is necessary to verify the classification, in the context of this case, of the Bundeskommunikationssenat as a court or tribunal for the purposes of Article 267 TFEU and, consequently, whether the request for a preliminary ruling is admissible.

26 In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by European Union law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (Case C-196/09 Miles and Others [2011] ECR I-0000, paragraph 37 and the case-law cited).

27 The Court has already had the opportunity to determine, in the case which gave rise to [the judgment in Österreichischer Rundfunk](#), whether the Bundeskommunikationssenat is a court or tribunal for the purposes of Article 234 EC. In that regard, it held, [in paragraphs 19 to 21 of its judgment](#), that, on the basis of the provisions relating to the establishment and functioning of the Bundeskommunikationssenat, applicable in that case, that body had to be considered to be a court or tribunal for the purposes of Article 234 EC.

28 In the present case, provisions regarding the establishment and functioning of the

Bundeskommunikationssenat are applicable which are identical in content to those which were applicable in [the case which gave rise to the judgment in Österreichischer Rundfunk](#). In those circumstances, the Bundeskommunikationssenat must be considered to be a court or tribunal for the purposes of Article 267 TFEU also in the present case.

29 It is apparent from the foregoing that the request for a preliminary ruling made by the Bundeskommunikationssenat is admissible.

##### **Substance**

30 By its question, the Bundeskommunikationssenat requests the Court, in essence, to examine the validity of Article 15(6) of Directive 2010/13 in the light of Articles 16 and 17(1) of the Charter and Article 1 of the Additional Protocol. In particular, it asks whether Article 15(6) amounts to an infringement of the fundamental rights of the holder of exclusive broadcasting rights, since the holder of those rights is required to authorise any other broadcaster, established in the European Union, to make short news reports, without being able to seek compensation exceeding the additional costs directly incurred in providing access to the signal.

##### **Article 17 of the Charter**

31 Article 17(1) of the Charter provides that *'[n]o one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'*

32 Article 15(1) of Directive 2010/13 provides that, for the purpose of short news reports, any broadcaster established in the European Union must have access to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction. Pursuant Article 15(3) thereof, in principle, such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal. Article 15(6) of the directive states that, where compensation is provided for the holder of the exclusive audiovisual broadcasting rights, it shall not exceed the additional costs directly incurred in providing access to the signal.

33 Rules with an identical content to those set out in the preceding paragraph were already contained in Article 3k of Directive 89/552, as amended by Directive 2007/65.

34 In those circumstances, the question arises as to whether the guarantees provided in Article 17(1) of the Charter extend to audiovisual broadcasting rights acquired contractually. The protection granted by that article does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity (Joined Cases C-120/06 P and C-121/06 P FIAMM and Others v Council and Commission [2008] ECR I-6513, paragraph 185 and the case-law cited), but applies to rights with an asset value creating an established legal

position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit.

35 It is true that exclusive broadcasting rights are granted, on a contractual basis, to broadcasters for consideration, enabling the latter to broadcast certain events on an exclusive basis, thereby precluding other broadcasters from transmitting those events in any way. Thus, those rights must not be regarded as constituting mere commercial interests or opportunities, but as having asset value.

36 However, in the light of the circumstances of the case in the main proceedings, the question arises as to whether the exclusive rights at issue constitute an established legal position within the meaning of paragraph 34 above.

37 In that regard, since the entry into force of Directive 2007/65, namely on 19 December 2007, European Union law requires the Member States to guarantee the right of broadcasters to make short news reports on events of high interest to the public which are subject to exclusive broadcasting rights, without the holders of such a right being able to demand compensation exceeding the additional costs directly incurred in providing access to the signal.

38 In the light of that European Union legislation, which the Member States are required to transpose into their respective national laws, a contractual clause, such as the one at issue in the main proceedings, cannot confer an established legal position on a broadcaster, protected by Article 17(1) of the Charter, enabling it to exercise its broadcasting right autonomously, as referred to in paragraph 34 above, in the sense that it could demand compensation exceeding the additional costs directly incurred in providing access to the signal, contrary to the mandatory provisions of Directive 2007/65.

39 An economic operator, such as Sky, which, after the entry into force of Directive 2007/65 on 19 December 2007, has acquired exclusive broadcasting rights by means of a contract – on 21 August 2009 in this instance – cannot, in the light of European Union law, rely on an acquired legal position, protected by Article 17(1) of the Charter, as the Member States were required to transpose that directive, which they might do at any point and had to do by 19 December 2009 at the latest.

40 In those circumstances, a holder of exclusive broadcasting rights relating to events of high interest to the public cannot rely on the protection afforded by Article 17(1) of the Charter.

#### **Article 16 of the Charter**

41 Article 16 of the Charter provides that '*[t]he freedom to conduct a business in accordance with European Union law and national laws and practices is recognised*'.

42 The protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition, as is apparent from the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article

52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter (Case see DEB [2010] ECR I-13849, paragraph 32).

43 In addition, the freedom of contract includes, in particular, the freedom to choose with whom to do business (see, to that effect, Joined Cases C-90/90 and C-91/90 Neu [1991] ECR I-3617, paragraph 13), and the freedom to determine the price of a service (see, to that effect, Case C-437/04 Commission v Belgium [2007] ECR I-2513, paragraph 51, and Case C-213/10 F-TEX [2012] ECR I-0000, paragraph 45).

44 The consequence of Article 15 of Directive 2010/13, as is apparent from [points 35 and 37 of the Opinion of the Advocate General](#), is that the holder of exclusive broadcasting rights cannot decide freely with which broadcasters it may wish to enter into an agreement regarding the granting of the right to make short news reports. Similarly, in the light of Article 15(6) of that directive, in relation to which the referring court has requested a preliminary ruling, the holder of exclusive broadcasting rights cannot decide freely on the price to be charged for access to the signal for the purpose of making short news reports. That provision prevents, in particular, the holder of such a right from making broadcasters which produce short news reports contribute to the costs of acquiring exclusive broadcasting rights. In those circumstances, Article 15(6) amounts to interference with the freedom to conduct a business of holders of exclusive broadcasting rights.

45 However, in accordance with the Court's case-law, the freedom to conduct a business is not absolute, but must be viewed in relation to its social function (see, to that effect, Joined Cases C-184/02 and C-223/02 Spain and Finland v Parliament and Council [2004] ECR I-7789, paragraphs 51 and 52, and [Case C-544/10 Deutsches Weintor \[2012\] ECR I-0000, paragraph 54 and the case-law cited](#)).

46 On the basis of that case-law and in the light of the wording of Article 16 of the Charter, which differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter, 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.

47 That circumstance is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the principle of proportionality to be implemented.

48 In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

49 In that regard, the Court notes that Article 15(6) of Directive 2010/13 does not affect the core content of the freedom to conduct a business. That provision does

not prevent a business activity from being carried out as such by the holder of exclusive broadcasting rights. In addition, it does not prevent the holder of those rights from making use of them by broadcasting the event in question itself for consideration or by granting that right to another broadcaster on a contractual basis for consideration or to any other economic operator.

50 In so far as concerns the proportionality of the interference found to exist, the Court recalls that, according to settled case-law, the principle of proportionality requires that measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-343/09 *Afton Chemical* [2010] ECR I-7027, paragraph 45, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR I-0000, paragraph 71 and the case-law cited).

51 In that regard, the Court notes, first of all, that the marketing on an exclusive basis of events of high interest to the public is increasing and liable to restrict considerably the access of the general public to information relating to those events. It is in that connection that Article 15 of Directive 2010/13 seeks, as is apparent from recitals 48 and 55 in the preamble thereto, to safeguard the fundamental freedom to receive information, guaranteed under Article 11(1) of the Charter, and to promote pluralism of the media in the production and programming of information in the European Union, protected under Article 11(2) of the Charter.

52 The safeguarding of the freedoms protected under Article 11 of the Charter undoubtedly constitutes a legitimate aim in the general interest (see, to that effect, Case C-250/06 *United Pan-European Communications Belgium and Others* [2007] ECR I-11135, paragraph 42), the importance of which in a democratic and pluralistic society must be stressed in particular (see, to that effect, Case C-336/07 *Kabel Deutschland Vertrieb und Service* [2008] ECR I-10889, paragraph 33, and Case C-163/10 *Patriciello* [2011] ECR I-0000, paragraph 31). That importance is particularly evident in the case of events of high interest to the public. It must thus be found that Article 15 of Directive 2010/13 does pursue an objective in the general interest.

53 Similarly, Article 15(6) of Directive 2010/13 is appropriate for the purpose of ensuring that the objective pursued is achieved. That provision puts any broadcaster in a position to be able to make short news reports and thus to inform the general public of events of high interest to it which are marketed on an exclusive basis, by guaranteeing those broadcasters access to those events. That access is guaranteed to them irrespective of their commercial power and financial capacity, on the one hand, and the price paid to acquire the exclusive broadcasting rights, the

contractual negotiations with the holders of such rights and the scale of the events at issue, on the other.

54 Next, so far as concerns the necessity of such legislation, the Court notes that a less restrictive measure could have consisted in providing compensation to holders of exclusive broadcasting rights in excess of the costs directly incurred in providing access to the signal, with a view, in particular, to making broadcasters which make short news reports contribute to the cost of acquiring those exclusive rights.

55 However, it is apparent that less restrictive legislation would not achieve the objective pursued by Article 15(6) of Directive 2010/13 as effectively as the application of that provision. A regulation providing for compensation to holders of exclusive broadcasting rights exceeding the costs directly incurred in providing access to the signal and calculated on the basis of additional criteria such as, in particular, the price paid to acquire such rights and/or the scale of the event at issue could, inter alia, depending on the method used to determine the amount of compensation to be paid and the financial capacities of the broadcasters wishing to gain access to the signal, deter or even prevent certain broadcasters from requesting access for the purpose of making short news reports and thus considerably restrict the access of the general public to the information.

56 By contrast, Article 15(6) of Directive 2010/13 guarantees any broadcaster access to the event, which is to be provided, in accordance with Article 15(1), in compliance with the principle of equal treatment and is entirely independent of the circumstances referred to in the preceding paragraph, thereby providing any broadcaster with the opportunity to make short news reports.

57 In those circumstances, the European Union legislature could legitimately consider that legislation providing for compensation to holders of exclusive broadcasting rights exceeding the costs directly incurred in providing access to the signal would not have achieved the objective pursued as effectively as legislation such as Article 15(6) of Directive 2010/13, which limits any compensation to the amount of those costs and that, consequently, such legislation was necessary.

58 Finally, as regards the possible disproportionate nature of Article 15(6) of Directive 2010/13, the referring court asks, in essence, whether the obligation of the Member States, laid down in that provision, to define the modalities and conditions regarding the right to make short news reports appropriately balances the requirements resulting from the fundamental freedom to receive information and those resulting from the freedom to conduct a business. It considers that only a rule providing for payment of compensation which takes account, in particular, of the subject-matter of the exclusive broadcasting rights at issue and the sum paid by the holder to acquire those rights should be regarded as proportionate.

59 In that regard, it should be noted that the European Union legislature was required to strike a balance between the freedom to conduct a business, on the one hand, and the fundamental freedom of citizens of the European Union to receive information and the freedom and pluralism of the media, on the other.

60 Where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them (see, to that effect, Case C-275/06 Promusicae [2008] ECR I-271, paragraphs 65 and 66, and Deutsches Weintor, paragraph 47).

61 By establishing requirements relating to the use of extracts from the signal, the European Union legislature has ensured that the extent of the interference with the freedom to conduct a business and the possible economic benefit which broadcasters might draw from making a short news report are confined within precise limits.

62 Article 15(5) of Directive 2010/13 provides that short news reports on the event being exclusively retransmitted may not be produced for any kind of television programme, but only for general news programmes. Thus, the use of extracts from the signal in programmes serving entertainment purposes, which have a much greater economic impact than general news programmes, is ruled out, in accordance with recital 55 in the preamble to Directive 2010/13.

63 In addition, pursuant to that recital and Article 15(6) of Directive 2010/13, the Member States are required to define the modalities and conditions regarding the provision of extracts from the signal used by taking due account of exclusive broadcasting rights. In that regard, it is apparent from Article 15(3),(5) and (6) and from recital 55 that those extracts must, inter alia, be short and that their maximum length should not exceed ninety seconds. Similarly, the Member States are required to define the time limits regarding the transmission of those extracts. Finally, broadcasters producing a brief news report must, in accordance with Article 15(3), identify the source of the short extracts used in their reports, which is likely to have a positive effect in terms of publicity for the holder of the exclusive broadcasting rights at issue.

64 Moreover, as noted in paragraph 49 above, Article 15 of Directive 2010/13 does not prevent holders of exclusive broadcasting rights from charging for the use of their rights. Furthermore, the absence of a possibility of refinancing through set-off and any reduction in the commercial value of those exclusive broadcasting rights may, in practice, be taken into account during contractual negotiations relating to the acquisition of the rights at issue and be reflected in the price paid for that acquisition.

65 By contrast, in so far as concerns the rights and interests which Article 15 of Directive 2010/13 seeks to protect, it should be noted that the marketing on an

exclusive basis of events of high interest to the public is, as noted in paragraph 51 above, increasing and may significantly restrict the access of the general public to information relating to those events.

66 In the light, first, of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and, second, of the protection of the freedom to conduct a business as guaranteed by Article 16 of the Charter, the European Union legislature was entitled to adopt rules such as those laid down in Article 15 of Directive 2010/13, which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom.

67 In those circumstances, the European Union legislature was lawfully entitled to impose the limitations on the freedom to conduct a business contained in Article 15(6) of Directive 2010/13 in relation to holders of exclusive broadcasting rights and to consider that the disadvantages resulting from that provision are not disproportionate in the light of the aims which it pursues and are such as to ensure a fair balance between the various rights and fundamental freedoms at issue in the case.

68 It is apparent from all of the above that consideration of the question raised has not disclosed any factor of such a kind as to affect the validity of Article 15(6) of Directive 2010/13.

#### **Costs**

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

#### **On those grounds, the Court (Grand Chamber) hereby rules:**

Consideration of the question raised has not disclosed any factor of such a kind as to affect the validity of Article 15(6) 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).

\* Language of the case: German.

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#### **OPINION OF ADVOCATE GENERAL BOT**

delivered on 12 June 2012 (1)

Case C-283/11

Sky Österreich GmbH

v

Österreichischer Rundfunk

[Reference for a preliminary ruling from the Bundeskommunikationssenat (Austria)]

*“Directive 2010/13/EU – Right of television broadcasting organisations to access, for short news*

*reports, to events of high interest to the public that are subject to exclusive transmission rights – Limitation of compensation to additional costs occasioned by the provision of such access – Compatibility with Articles 16 and 17 of the Charter of Fundamental Rights of the European Union – Proportionality”*

1. This reference for a preliminary ruling requests the Court to evaluate the conformity with fundamental rights, in this case, the freedom to conduct a business and the right to property, of Article 15(6) 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). (2)

2. Article 15 of the Directive confers on broadcasters the right to make short news reports on events of high interest to the public which are transmitted on an exclusive basis by a television broadcasting organisation. To this end, broadcasters are allowed access to the signal emitted by the body that holds the exclusive transmission rights in order to enable them to choose the short extracts that will make up their news reports.

3. Article 15(6) of the Directive lays down the rule that where, in the implementation of the right thus granted to broadcasters, compensation is provided for, it may not exceed the additional costs directly incurred in providing access to short extracts.

4. In connection with the last mentioned provision, this reference for a preliminary ruling raises the question of reconciling requirements relating to the protection of various fundamental rights, namely the freedom to conduct a business and the right to property on the one hand, and the freedom to receive information and media pluralism on the other.

## **I – Legal background**

### **A – Union Law**

5. Recital 48 in the preamble to the Directive states:

*‘Television broadcasting rights for events of high interest to the public may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming across the European Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.’ [(3)]*

6. Recital 55 states as follows:

*‘In order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the Union are fully and properly protected, those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking due account of exclusive rights. Such terms should be communicated in a timely manner before the event of high interest to the public takes place to give others sufficient time to exercise such a right. Such short*

*extracts may be used for EU-wide broadcasts by any channel including dedicated sports channels and should not exceed 90 seconds. ...*

*The concept of general news programmes should not cover the compilation of short extracts into programmes serving entertainment purposes. ...’*

7. Recital 56 states that:

*‘... Member States should facilitate access to events of high interest to the public by granting access to the broadcaster’s signal within the meaning of this Directive. However, they may choose other equivalent means within the meaning of this Directive. Such means include, inter alia, granting access to the venue of these events prior to granting access to the signal. Broadcasters should not be prevented from concluding more detailed contracts’.*

8. Article 14(1) of the Directive provides as follows:

*‘Each Member State may take measures in accordance with Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or nonnational, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due time. In so doing the Member State concerned shall also determine whether these events should be available by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage’.*

9. Article 15 of the Directive provides as follows:

*‘1. Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction. [...]*

*3. Member States shall ensure that such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster’s signal with, unless impossible for reasons of practicality, at least the identification of their source.*

*4. As an alternative to paragraph 3, Member States may establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means.*

*5. Short extracts shall be used solely for general news programmes and may be used in on-demand audiovisual media services only if the same programme is offered on a deferred basis by the same media service provider.*

*6. Without prejudice to paragraphs 1 to 5, Member States shall ensure, in accordance with their legal systems and practices, that the modalities and conditions regarding the provision of such short extracts are defined, in particular, with respect to any*

compensation arrangements, the maximum length of short extracts and time limits regarding their transmission. Where compensation is provided for, it shall not exceed the additional costs directly incurred in providing access.'

**B – National law**

10. For the purposes of the transposition of the Directive, the Federal Law on the exercise of exclusive television broadcasting rights (Bundesgesetz über die Ausübung exklusiver Fernsehübertragungsrechte (Fernseh-Exklusivrechtgesetz)) (4) was amended in 2010. (5) Article 5 of the FERG provides:

'(1) A broadcaster which has acquired exclusive broadcasting rights to an event of general interest from the point of view of information shall, on request, grant to any broadcaster established in a Contracting Party to the Agreement on the European Economic Area or in a Contracting Party to the European Convention on Transfrontier Television of 5 May 1989, on fair, reasonable and non-discriminatory terms, the right to produce short news reports for the latter's own broadcasting purposes. A general interest from the point of view of information shall exist where, owing to its significance, the event may be expected to enjoy extensive coverage in media reporting in Austria or in another Contracting Party referred to in this provision.

(2) The right to produce short news reports shall include the right to record the signal of the broadcaster who is subject to the obligation under subparagraph 1, and to produce and broadcast or provide a short news report under the conditions laid down in subparagraphs 3 to 5.

(3) Exercise of the right to produce short news reports shall be subject to the following conditions:

1. Reporting shall be restricted to the production of short news reports appropriate to the event;

2. The short news report may be used only in general news programmes;

3. The broadcaster benefiting from the right may freely select the content of the short news report from the signal of the broadcaster subject to the obligation;

4. The permissible duration of the short news report shall be determined by reference to the time needed to convey the news content of the event and, unless otherwise agreed, shall not be more than 90 seconds;

5. If the event extends over more than one day, the right to produce short news reports shall include the daily distribution of a short news report;

6. In any event, the short news report may not be broadcast or provided before the start of the broadcast by the broadcaster subject to the obligation under subparagraph 1;

7. The broadcaster benefiting from the right shall clearly designate the short news report as such and identify the source.

(4) Unless otherwise provided for, the television broadcasting organization which bears the obligation laid down in paragraph 1 can only claim a refund for the additional costs incurred directly by the provision of access.[...]

(6) When a television broadcasting organization so requests, the television broadcasting organization on which the duty laid down in paragraph 1 is imposed, must state, in sufficient time before the beginning of the event, the conditions under which it is willing to grant, by contract, the right to produce short news reports.

(7) A television broadcasting organization which calls for the granting of the right provided for in paragraph 1 can apply to the regulatory authority in order to assert this right.[...]

(8) Where a procedure under subparagraph 6 cannot be concluded in a timely manner on account of the particular topicality of the event, the regulatory authority may, at the request of one of the broadcasters concerned, give a ruling *ex post facto* on whether and under what conditions a right to produce short news reports should have been granted. In the event that a right to produce short news reports should have been granted, damages may be sought from the broadcaster subject to the obligation, in accordance *mutatis mutandis* with paragraph 3 (7) to 9 of this law. [...]

**II – Main proceedings and questions referred for a preliminary ruling**

11. This reference for a preliminary ruling stems from a dispute between Sky Österreich GmbH ('Sky') and the Österreichischer Rundfunk ('ORF').

12. ORF is a public body whose object is to carry out the public-law tasks entrusted to it by the federal law on Austrian broadcasting (Bundesgesetz über den Österreichischen Rundfunk). (6) ORF's tasks are to provide not only sound and television broadcasting programmes, but also online contributions related to those programmes.

13. Sky has been authorised by the Kommunikationsbehörde Austria (Austrian regulatory authority in the field of communication, 'KommAustria'), to broadcast via satellite the coded digital television programme 'Sky Sport Austria'. By a contract of 21 August 2009, the latter acquired exclusive rights to broadcast from time to time UEFA Europa League matches in the 2009/2010 to 2011/2012 seasons within the licence territory of Austria. Sky has stated that it had to spend a sum of several million euros each year on the licence and production costs.

14. On 11 September 2009, Sky and ORF entered into an agreement granting the ORF the right to produce short news reports and providing for the payment of EUR 700 per minute for such reports.

15. By letter dated 4 November 2010, ORF asked KommAustria to declare that Sky was required to grant it the right to produce short news reports on Europa League games involving Austrian teams as from 1 October 2010, without ORF having to pay it remuneration greater than the additional costs incurred directly by the provision of access to the signal.

16. By decision of 22 December 2010, KommAustria held that, as the exclusive right holder, Sky is under an obligation to grant ORF the right to produce short news reports and is not entitled to the reimbursement of any costs beyond the additional costs directly incurred in providing access to the signal. It also laid down the

conditions under which this right could be exercised by ORF. Among those, it was stated that the additional costs incurred directly by the provision of access to the satellite signal were zero in this case.

17. Both parties appealed this decision to the Bundeskommunikationssenat (Federal Superior Council for Communication) (Austria).

18. In its appeal, Sky argued, inter alia, that the obligation under Article 15(6) of the Directive and Article 5(4) of the FERG to grant the right to make short news reports for no consideration contravenes the Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms, (7) and Austrian constitutional law. Sky emphasised, in particular, that Article 15(6) of the Directive systematically – i.e. without establishing differences between the exclusive rights in question – precludes any compensation for the limitation to which the exclusive rights are subject. This would, most of the time, produce results that are seriously unfair. When the right of ownership is restricted, Article 17(1) of the Charter and the principle of proportionality require verification on a case-by-case basis as to whether compensation should be paid. Sky argues that, in the present case, the grant of the right to make short news reports considerably restricts its right to property.

19. With regard to the jurisdiction of the Court to answer the question referred for a preliminary ruling, the Bundeskommunikationssenat refers, in its order for reference, to the judgment in *Österreichischer Rundfunk* (8) and observes that the same rules apply in this case. In these circumstances, it should be classified as a ‘court or tribunal’ for the purposes of Article 267 TFEU.

20. On the substance, the Bundeskommunikationssenat considers that it is essentially a case of determining whether it is permissible under primary Union law for Sky to be required to grant ORF the right to produce short news reports without being entitled to charge a fee in excess of the reimbursement of the additional costs directly incurred in providing access. According to the Bundeskommunikationssenat, the question arises as to whether the infringement of the fundamental right protected by Article 17 of the Charter entailed by such obligation is consistent with the principle of proportionality.

21. In this context, it cites decisions of the Verfassungsgerichtshof (Constitutional Court) (Austria) (9) and of the Bundesverfassungsgericht (Federal Constitutional Court) (Germany) (10) which reviewed national rules comparable to the Union rules at issue in the present case and considered that the granting without consideration of the right to make short news reports was disproportionate and therefore in breach, respectively, of the right to property under Article 5 of the Basic Law on the general rights of citizens (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger) and Article 1 of Protocol No 1 to the ECHR, and professional freedom, under Article 12 of the Basic Law (Grundgesetz).

22. The Bundeskommunikationssenat questions whether it is not necessary, taking into account, in particular, the principle of proportionality and those decided cases, to adopt a rule allowing account to be taken of the circumstances of the case and, in particular, the subject-matter of the exclusive right in question and the amount paid by the holder for the acquisition of that right in order to calculate compensation. According to the Bundeskommunikationssenat, Article 15(6) of the Directive proves to be particularly problematic where the exclusive right was acquired before the entry into force of this provision, whereas the application for the grant of the right to make short news reports was made after the entry into force of the national provision transposing Article 15 of the Directive.

23. For those reasons, the Bundeskommunikationssenat decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling: *‘Is Article 15(6) of [the Directive] compatible with Articles 16 and 17 of the Charter ... and with Article 1 of Protocol No 1 to the [ECHR]?’*

24. Written observations were lodged by Sky, ORF, the German and Polish governments, the European Parliament, the Council of the European Union and the European Commission. A hearing was held on 24 April 2012.

### III – My analysis

25. This reference for a preliminary ruling asks the Court to assess the compliance of Article 15(6) of the Directive with the fundamental rights protected by Articles 16 and 17 of the Charter, that is to say, freedom to conduct a business, on the one hand, and the right to property, on the other.

26. More specifically, it is a question of determining whether the fact that Article 15(6) of the Directive limits compensation for the provision of short extracts relating to events of great interest to the public to the additional costs incurred directly in providing access to those short extracts constitutes a justified interference with freedom to conduct a business and the right to property of television broadcasters who hold the exclusive rights to the transmission of such events.

27. Article 16 of the Charter provides that *‘[t]he freedom to conduct a business in accordance with Community law and national laws and practices is recognised’*. *The explanations relating to this Article specify that the latter ‘is based on Court of Justice caselaw which has recognised freedom to exercise an economic or commercial activity [(11)] and freedom of contract [(12)], and on Article 119(1) and (3) [TFEU], which recognises free competition.’* (13)

28. Article 17 of the Charter provides, in paragraph 1, that *‘Everyone has the right to own, use and dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.’* The explanations

related to this article indicate that it corresponds to Article 1 of Additional Protocol No 1 to the ECHR. Thus, under Article 52(3) of the Charter, the right of property protected by Article 17 of the Charter has the same meaning and scope as under the ECHR. (14)

29. It is clear from the case-law of the Court that the right to property, like the right freely to exercise an economic activity, is one of the general principles of law of the Union. However, those principles are not absolute but must be viewed in relation to their social function. Consequently, restrictions may be imposed on use of the right to property, and the right to freely pursue an economic activity, provided that those restrictions correspond to objectives of general interest pursued by the Union and do not constitute, with regard to the objective pursued, a disproportionate and intolerable interference affecting the very substance of the rights thus guaranteed. (15)

30. In line with this case-law, Article 52(1) of the Charter lays down the rules relating to the limitations that can be made to the rights and freedoms recognized by the Charter. Article 52(1) thus accepts that limitations may be imposed on the exercise of rights such as the right to property and the freedom to conduct a business set out in Articles 17 and 16 of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

31. I will examine, first, whether the provisions contained in Article 15(6) of the Directive infringe the rights recognized by Articles 16 and 17 of the Charter. If so, it will then be necessary to verify whether such an infringement is justified.

#### **A – Infringement of the rights recognised by Articles 16 and 17 of the Charter**

32. The object of Article 15 of the Directive is to provide, in favour of any television broadcasting organisation established in the Union, for the right to short extracts in order to be able to produce short news reports on events of high interest to the public.

33. Pursuant to this Article, and according to the detailed rules adopted by the Member States for its transposition, the television broadcasting organisations which hold the exclusive rights to transmission on such events are required to allow the other television broadcasting organisations freely to choose the short extracts that will make up their short news reports. Specifically, it may be either access to the signal sent by the primary broadcaster, or access to the place where the event concerned takes place. (16)

34. It is clear that such a constraint on television broadcasters who hold exclusive rights of transmission has the effect of limiting the manner in which they might wish to exploit such rights.

35. From the perspective of freedom to conduct a business, of which freedom of contract forms part, the immediate consequence of Article 15 is that television broadcasters who hold exclusive transmission rights

can no longer decide freely with which bodies they may wish to enter into an agreement for access to short extracts. In other words, they may no longer grant licences to operators of their choice with a view to turning rights to extracts to account.

36. From the perspective of the right to property, this article has the effect of limiting the use that broadcasters who hold exclusive transmission rights may wish to make of their property. If we refer to the case-law of the European Court of Human Rights, that article can be assimilated to a control of the use of the property within the meaning of Article 1(2) of Additional Protocol No 1 to the ECHR. It is clear from the case-law of that court that the concept of control of the use of property is understood as meaning a measure which, whilst not entailing transfer of ownership, seeks to ‘limit or control’ the use of property. (17) By requiring broadcasters who hold exclusive transmission rights to allow certain uses of the subject-matter of those rights, in this case, access to short extracts with a view to the production of brief news reports, Article 15 of the Directive is in my view controlling the use of property in such a way as to interfere with their right of ownership.

37. More specifically as to Article 15(6) of the Directive, there is an infringement of the freedom to conduct a business and the right to property inasmuch as, the compensation of the right to short extracts being limited to the additional costs incurred directly by the provision of access, broadcasters who hold exclusive rights to the transmission of an event of high interest to the public can no longer freely decide on the price they charge for access to short extracts. The arrangements for compensation in this provision prevent, in particular, those bodies from having other television broadcasting organisations which wish to use short extracts contribute to the acquisition costs of those exclusive rights. The way those arrangements are structured may also have a negative impact on the commercial value of exclusive rights.

38. Having established infringement of freedom to conduct a business and the right of property, we must now consider whether it is justified under Article 52(1) of the Charter.

#### **B – Justification of the infringement of the rights recognised by Articles 16 and 17 of the Charter**

39. I would observe, first, that the infringement of the rights recognized by Articles 16 and 17 of the Charter must be regarded as ‘provided for by law’ within the meaning of Article 52(1) of the Charter. In fact, under the terms of Article 15(6) of the Directive, when compensation is provided for, it is not to exceed the additional costs incurred directly by the provision of access to short extracts.

40. Next, as to whether the infringement of the rights protected is in order to safeguard an objective of general interest recognized by the Union or the need to protect the rights and freedoms of others, I would observe that the right to short extracts provided for in Article 15 (6) of the Directive meets the concern, stated by the EU legislature in recital 48 of the Directive, ‘to

promote pluralism through the diversity of news production and programming across the Union and to respect the principles recognised by Article 11 of the [Charter]’.

41. In addition, in recital 55 of the Directive, the right of television broadcasting organisations to use short extracts in news programmes is linked to the goal of ‘safeguard [ing] the fundamental freedom to receive information and [ensuring] that the interests of viewers in the Union are fully and properly protected.’ (18)

42. By framing one of the ways in which the right to short extracts may be exercised, namely the compensation payable to the primary broadcaster, Article 15(6) of the Directive pursues the objectives set out in recitals 48 and 55, that is to say, in particular, the freedom to receive information and media pluralism. These objectives are themselves closely related to one of the more general objectives of the Directive, which, as specified in recital 11, is to facilitate the emergence of a single European information space.

43. The freedom to receive information and media pluralism are components of freedom of expression. (19) The latter is one of the general principles of EU law (20) and is among the fundamental rights guaranteed by the legal order of the Union. (21)

44. Freedom of expression and information are enshrined in Article 11 of the Charter. Article 11(1) provides that ‘[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’. Besides, Article 11(2) of the Charter provides that ‘[t]he freedom and pluralism of the media shall be respected’. The explanations relating to Article 11 of the Charter specify that it corresponds to Article 10 of the ECHR.

45. The reason for the infringement of the rights recognised by Articles 16 and 17 of the Charter having thus been identified, it is now necessary to verify whether the limitation on the rights enshrined by these two articles is proportionate to the legitimate aim pursued. As this aim is primarily the need to protect another fundamental right, namely the freedom to receive information and media pluralism, the review of proportionality which I shall now conduct calls for the weighing of several fundamental rights. The issue is therefore whether, in adopting Article 15(6) of the Directive, the EU legislature achieved a fair balance between the right to property and the freedom to conduct a business, on the one hand, and the freedom to receive information and media pluralism, on the other.

46. With this in mind, my analysis will be guided by several considerations.

47. According to settled case-law, the principle of proportionality, which is one of the general principles of Union law, requires the means employed by a Union provision to be appropriate for attaining the objective pursued and not to go beyond what is necessary to achieve it. (22)

48. In regard to justification of restrictions on the use of the right to property, the Court has indicated, referring

to the jurisprudence of the European Court of Human Rights, that the means employed must be reasonably proportionate to the aim pursued. According to the Court of Justice, it must therefore be determined whether the balance has been maintained between the requirements of the general interest and the interest of persons invoking the protection of their right to property. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard to both choosing the means of implementation and ascertaining whether their consequences are justified in the public interest for the purpose of achieving the objective of the legislation in question. (23)

49. Furthermore, by analogy with what the Court’s held in *Germany v Parliament and Council*, (24) the Community legislature must be allowed a broad discretion in an area such as that involved in this case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue. (25)

50. The proportionality of the restriction on the right to property and the freedom to conduct a business contained in Article 15(6) of the Directive must be verified in the light of the wide margin of discretion conferred on the Union legislature.

51. In addition, this review should be conducted taking into account the nature of the Directive, which does not seek complete harmonisation of the rules relating to the areas it covers, but enacts only minimum requirements. (26) I note, in this regard, that the EU legislature lays down in Article 15 of the Directive a number of general rules governing the right to short extracts while leaving it to the Member States to define the terms and detailed conditions on the provision of these short extracts. (27)

52. Finally, according to the case-law of the Court, fundamental rights within the Union must be safeguarded in the context of its structure and objectives. (28) In this connection, several recitals in the preamble to the Directive stress that it contributes, in its field, to the completion of the internal market. Thus, recital 2 of the Directive refers to the need to ‘ensure the transition from national markets to a common programme production and distribution market’ and recital 11 states that the application of at least a basic tier of coordinated rules to all audiovisual media services helps ‘to ... complete the internal market and facilitate the emergence of a single information area.’ (29) It is important that this dimension be taken into account when balancing the various fundamental rights at issue, because the limiting of compensation for providing a right to short extracts in the context of protecting fundamental rights does not arise in the same terms, nor does it necessarily call for the same response, depending on whether it is considered solely in the context of a Member State or by taking account

of the requirements for completion of the internal market.

53. The application of that analytical approach to this case leads me to conclude not only that Article 15(6) of the Directive is able to achieve the aim sought, namely to ensure the freedom to receive information and media pluralism, but also that it does not go beyond what is necessary to achieve this aim.

54. In regard to the capacity of the last sentence of Article 15(6) of the Directive to guarantee the freedom to receive information and media pluralism, I believe that this provision, by limiting the amount of compensation which may be claimed by primary broadcasters from secondary broadcasters, is such as to develop the dissemination of information relating to events that are of great interest to the public, in particular by broadcasters who do not have considerable financial resources available to them. Such a provision favours, by the same token, the emergence of a European opinion and information area within which the freedom to receive information and media pluralism are guaranteed.

55. Concerning the need to limit compensation, I see this as the cornerstone of the mechanism put in place by the EU legislature in Article 15 of the Directive; its absence would be detrimental to the effectiveness of the right to short news reports.

56. Limiting compensation to the additional costs directly incurred in providing access has the advantage of putting all television broadcasters on an equal footing. By not allowing holders of exclusive transmission rights to pass on to bodies requesting extracts the costs of acquisition of such rights, Article 15(6) of the Directive precludes a prohibitive price from being charged for short extracts, in particular in relation to events likely to attract the attention of a large part of the population and in respect of which the exclusive rights holders will have had to spend large sums of money to acquire transmission rights. It follows that all television broadcasters, whether private or public, whether endowed with major financial resources or not, enjoy the right, under the same conditions, to produce short news reports on events of high public interest.

57. To leave determination of the amount of compensation to free negotiation between the primary and secondary broadcasters would have the disadvantage of putting the holders of exclusive rights in a position of strength, especially when the event in question is of particular importance. In addition, in the light of the increased prices they have to pay to acquire exclusive transmission rights, there is a risk that the price charged to secondary broadcasters who wish to produce short news reports may reach such proportions as to deter them from exercising that right. This could be detrimental to the objective of informing as many persons as possible about events of high public interest. In addition, the exclusion of television broadcasters from coverage of such events would have a negative effect on the pluralism of information, because it would limit the collection and dissemination of information to

the largest organisations, to the detriment of their smaller competitors and viewers.

58. That is why I believe that the alternative solution, namely for the EU legislature to provide only for the granting of appropriate compensation without the limit provided for in Article 15(6) of the Directive, would not have been as effective in achieving the objectives sought by establishing a right to short news reports.

59. Merely stipulating appropriate compensation, without fixing a harmonised limit, would lead to costs being determined on a case-by-case basis, following differing procedures in each Member State, which could potentially be an obstacle to the free flow of information and therefore to the emergence of the single information area sought by the Union legislature in recital 11 to the Directive. Limiting compensation to expenses directly incurred in the provision of access allows the problems of determination of costs and any ensuing litigation to be avoided to a great extent. This is the most effective way of avoiding the dissemination of information being partitioned between the Member States and according to the economic importance of television broadcasters.

60. By opting for a solution in keeping with its desire to contribute to the completion of the internal market and bring about the emergence of a single information area, the EU legislature has thus succeeded in reconciling the different regulatory approaches of the Member States, while safeguarding the useful effect of the new harmonised right.

61. In this context, the EU legislature was in my view right to choose not to introduce into the last sentence of Article 15(6) of the Directive distinctions according to whether the compensation is paid by a public or private broadcasting agency, or whether such a body exercises, under the law of the Member State in which it is established, a public-service mission. Such distinctions would have, in fact, been in contradiction with the commitment expressed by the EU legislature to put all of the operators of television broadcasting on an equal footing in the exercise of their right to obtain short news reports. (30) In addition, restricting the field of application of the last sentence of Article 15(6) of the Directive only to broadcasters which, by virtue of the law of the Member State in which they are established, exercise a public-service mission would not have enabled the objectives of establishing a right to short news reports to be attained so effectively, since it would leave aside those who primarily benefit from the capping of the compensation, namely secondary broadcasters with limited financial means who none the less, whatever their nature or the legal missions entrusted to them, participate in a significant way in a wide dissemination of information within the Member States. (31)

62. The solution adopted by the Union legislature to my mind achieves a fair balance between protecting the freedom to conduct a business and the right to property of organisations holding exclusive transmission rights on the one hand, and the freedom to receive information and media pluralism on the other. Indeed, I

do not consider that, in the light of the benefits of the system established by the Union legislature with a view to protecting these last two fundamental rights, the interference with the freedom to conduct a business and of the right to property of organizations holding exclusive transmission rights is excessive.

63. In this respect, it is important to note that the Union legislature has attached to the right to short news reports a number of conditions and limits which help to mitigate the infringement of the freedom to conduct a business and of the right to property of television broadcasters who hold exclusive transmission rights.

64. Among those conditions and limits, I note that the right to short news reports does not apply to all events without distinction for which exclusive transmission rights have been granted; Article 15(1) of the Directive states that they must be ‘events of high interest to the public’.

65. In addition, the extracts provided may be used solely for ‘general news programmes’ under the terms of Article 15(5) of the Directive, and only for the purpose of ‘short news reports’, as provided for in Article 15(1) of the Directive. According to the fifty-fifth recital of the latter, ‘[t]he concept of general news programmes should not cover the compilation of short extracts into programmes serving entertainment purposes’. It is clear from these provisions that there is a crucial difference between the televised broadcast of an event for entertainment purposes and the broadcasting of the key moments of the event for the purposes of information. (32) The television broadcasting organisation retains full control of the commercial exploitation of its exclusive rights for the purpose of entertainment. The diminution in the commercial value of these rights must therefore, to this extent, be viewed in context.

66. In addition, Article 15(3) of the Directive specifies that secondary broadcasters must indicate the source of the extracts that they use in their news reports. As the Commission rightly observes in its written observations, the publicity received by the organisation which holds the exclusive rights contributes to the proportionality of the compensation scheme established under Article 15(6) of the Directive, because that publicity has an economic value which benefits that organisation whenever a short news report is broadcast. (33)

67. Article 15(6) of the Directive also attests to the fact that the Union legislature weighed the various fundamental rights in a balanced way. In order to limit the interference with the freedom to conduct a business and the right to property of the television broadcasting organisation which holds the exclusive rights to transmission, this provision requires the Member States to ensure that rules on the maximum length of short extracts and the periods during which they are to be broadcast are defined. Recital 55 of the Directive provides guidance for the Member States in this regard in stating that short extracts should not exceed 90 seconds.

68. The fact that under Article 15(6) of the Directive it is for the Member States to determine the detailed terms and conditions for the provision of short extracts leads me to the view that the weighing of the different fundamental rights present is a matter not only for the EU legislature, but also for the Member States. In other words, the mechanisms to find the right balance between the different fundamental rights at stake are not only in the Directive itself – mainly through the use of conditions and of the abovementioned limits that govern the right to short news reports – but also result from the adoption by the Member States of national provisions transposing the Directive and its application by the national authorities. In this respect, according to the case-law of the Court, it is for the Member States, in the transposition of the Directive, to ensure that they adopt an interpretation of the Directive which allows a fair balance to be struck between the different fundamental rights protected by the legal order of the Union. Further, when implementing the measures transposing that directive, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that directive but also make sure that they do not interpret it in such a way as to conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality. (34)

69. In my view, on the adoption of measures transposing the Directive, the Member States must strive to take into account fundamental rights, by putting in place the instruments necessary so that the additional costs incurred directly by the provision of access can be the subject of a compensation and the detailed terms and conditions on the provision of short extracts, in particular with regard to maximum duration and transmission periods, are defined so as to minimise the interference with the freedom to conduct a business and the right of property of the television broadcasting organisation which holds the exclusive rights to transmission. I note, in this regard, that the Austrian law transposing Article 15 of the Directive is testimony to the search by the national legislature for a fair balance between the different fundamental rights at issue.

70. Having regard to all those elements which contribute to providing a framework for the right to short news reports and the detailed arrangements for implementation, I believe that the limitation of the compensation due to the television broadcasting organisation which holds the exclusive rights to transmission affects its freedom to conduct a business and right to property in a proportionate manner. In other words, in view of the way Article 15 of the Directive is framed, the taking into account of just the additional costs incurred directly by the provision of the access (35) is, in my view, sufficient to prevent the right to short news reports being an excessive burden on the primary broadcasters.

71. If, conversely, that article had been so structured as not to subject the right to short news reports to any limitation, the infringement could be regarded as

disproportionate. The wording chosen by the EU legislature in the last sentence of Article 15(6) of the Directive cannot therefore be correctly construed if it is not viewed in close correlation with the provisions that govern the right to short news reports. (36)

72. All of these elements lead me to consider that, when adopting Article 15(6) of the Directive, the Union legislature weighed the different fundamental rights at stake in a balanced manner.

73. I note that a similar analysis has been adopted within the Council of Europe. Thus, the European Convention on Transfrontier Television, signed in Strasbourg on 5 May 1989, provides, in Article 9, for the possibility for the Contracting Parties to introduce a right to extracts in the case of events of high interest to the public. (37) Recommendation No R (91) 5 of the Committee of Ministers to Member States of 11 April 1991 (38) provides, in paragraph 4.1 of its section on the financial terms, that, ‘unless otherwise agreed between them, the primary broadcaster should not be able to charge the secondary broadcaster for the short report. In any case, no financial charge should be required of the secondary broadcaster towards the cost of television rights’. Paragraph 4.2 of this recommendation states that, ‘if the secondary broadcaster is granted access to the site, the event organiser or site owner should be able to charge for any necessary additional expenses incurred’. The explanatory report on the recommendation mentioned in particular, in explaining paragraph 4.1 of the recommendation, that ‘secondary broadcasters, notably those with limited resources, should be guaranteed the possibility of having access to a short report on an equal footing.’ (39)

74. The approach chosen by the EU legislature also seems to accord with the case law developed by the European Court of Human Rights with regard to Article 1(2) of Additional Protocol No 1 to the ECHR. That court subjects the use of the property to a review of proportionality in the course of which it verifies, as with expropriation, that the assessment by the national legislature is not manifestly devoid of any reasonable basis. (40) Thus an interference must strike a fair balance between the imperatives of the general interest and those of safeguarding the fundamental rights of the individual. The European Court of Human Rights requires a reasonable relationship of proportionality between the means employed and the aim pursued. In so doing, the Court recognises that the legislature enjoys a wide margin of appreciation, with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public interest by the concern to achieve the aim of the law in question. That balance is lost if the person concerned has been required to bear an individual and excessive burden. (41) That court also ruled that, when a measure controlling the use of property is in issue, the lack of compensation is one of the factors to be taken into account in establishing whether a fair balance has been achieved, but is not in

itself sufficient to constitute a violation of Article 1 of Additional Protocol No 1 to the ECHR. (42)

75. I note, moreover, that, in EU law, there are provisions reflecting the idea that a minimal impairment of the right of property does not systematically call for compensation. Thus, the thirty-fifth recital of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (43) states with regard to the possible exceptions or limitations to those rights, that ‘[i]n certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.’ (44) In addition, the Court was able to consider, in the case of agricultural policy and about alleged violations of the right to property, that there is no general principle in EU law that requires the granting of compensation in all circumstances. (45)

76. In adopting Article 15(6) of the Directive, the Union legislature in my view struck an acceptable compromise between the granting free of charge of a right to short extracts and the financial participation of secondary broadcasters in the costs of acquisition of the exclusive rights of transmission. In providing that the additional costs incurred in the provision of access must not be charged to the broadcasters holding the exclusive rights to transmission, this provision ensures that the right to short extracts does not constitute a financial burden on them. The fact that they cannot earn a profit from the provision of short extracts is to my mind justified by the need to protect the freedom to receive information and the pluralism of the media, by thereby promoting the emergence of a single information area.

77. The decisions of the Bundesverfassungsgericht and the Verfassungsgerichtshof which are mentioned by the referring court (46) cannot alter my assessment.

78. While the reasoning advanced by these two courts differs slightly, what principally emerges is that the right to short news reports should not be granted free of charge and that it should therefore give rise to the payment of reasonable remuneration or appropriate consideration. In this perspective, it is envisaged that the cost of acquisition of the exclusive rights should be taken into account. These two courts also indicate that such consideration should not be fixed at a level such as to deter the right to produce short news reports.

79. The approaches adopted by the Bundesverfassungsgericht and by the Verfassungsgerichtshof do not seem to me automatically transferable to the review of the validity of Article 15(6) of the Directive in the light of Articles 16 and 17 of the Charter. First, I have already explained the reasons why my assessment follows closely the way Article 15 of the Directive is structured and with particular reference to the conditions and limits determining the right to short news reports and delimiting its scope.

80. Secondly, I would recall that fundamental rights within the Union must be protected within the framework of its structure and objectives. It follows

that the weighing of the different fundamental rights at stake does not necessarily call for the same response at national or EU level. In the present case, I consider, for the reasons set out above, that the requirements relating to the completion of the internal market and to the emergence of a single information area militated in favour of the adoption by the EU legislature of a compromise between the granting of a free right to short extracts and the financial participation by secondary broadcasters to the costs of acquisition of exclusive transmission rights.

81. With regard, finally, to the concern expressed by the referring court with respect to the temporal aspect of the application of the limitation of the compensation in a situation such as that at issue in the main proceedings, it should be recalled that Sky acquired, by contract of 21 August 2009, the exclusive right to retransmit on Austrian territory some matches of the Europa League for the seasons 2009/2010 to 2011/2012. On 11 September 2009, Sky and the ORF concluded an agreement granting to the ORF the right to make short news reports on this event. I note that these two dates are after the date of entry into force of the Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, (47) which introduced into Directive 89/552/CEE, (48) the provisions relating to the right to short news reports; according to the first recital, the Directive's purpose was merely to codify the rules contained in Directive 89/552. As Directive 2007/65 entered into force, under Article 4, on 19 December 2007, Sky and the ORF were aware, in 2009, of the establishment at Union level of a harmonised right to short news reports and were in a position to anticipate forthcoming regulatory changes at national level.

#### IV – Conclusion

82. In the light of the foregoing considerations, I propose that the Court should reply as follows to the question referred to it by the Bundeskommunikationssenat: Examination of the question referred has not disclosed any factor such as to affect the validity of Article 15(6) 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).

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1 – Original language: French.

2 – OJ 2010 L 95, p. 1, 'the Directive'.

3 – 'The Charter'.

4 – BGBl. I, 85/2001.

5 – BGBl. I, 50/2010, 'The FERG'.

6 – BGBl. I, 83/2001.

7 – Signed at Rome on 4 November 1950 (the 'ECHR').

8 – Case C-195/06 [2007] ECR I-8817.

9 – Judgment of 1 December 2006.

10 – Judgment of 17 February 1998.

11 – See Case 4/73 Nold v Commission [1974] ECR 491, paragraph 14, and Case 230/78 Eridania [1979] ECR 2749, paragraphs 20 and 31.

12 – See, inter alia, Cases 151/78 Sukkerfabriken Nykøbing [1979] ECR I, paragraph 19 and C-240/97 Spain v Commission [1999] ECR I-6571, paragraph 99.

13 – See explanatory remarks on Article 50 of the Charter of Fundamental Rights (OJ 2007 C 303, p. 17 [31]).

14 – Ibid.

15 – See Joined Cases C-154/04 and C-155/04 Alliance for Natural Health and Others [2005] ECR I-6451, paragraph 126 and the case-law cited. See also Case T-68/08 FIFA v Commission [2011] ECR II-0000, paragraph 143.

16 – See recital 56 of the Directive.

17 – See ECHR judgment in Sporrøng and Lönnroth v Sweden of 23 September 1982, Series A No 52, paragraph 65. See also ECHR, judgment of 19 December 1989, Mellacher and Others v Austria of 19 December 1989, Series A No 169, paragraph 44. The Court has also referred to the concept of control of use of property [see, inter alia, judgment of 12 May 2005 in Case C-347/03 Regione Autonoma Friuli-Venezia Giulia and ERSA [2005] ECR I-3785, paragraphs 124 and 125.

18 – As stated in the summary document drafted by the Commission in July 2005 for the Liverpool audiovisual conference entitled 'Right to information and right to short extracts', the issues in relation to the introduction of a right to extracts were as follows. First of all, 'the lack of coordination of legislative, regulatory or agreements for the provision ... of extracts ... puts at risk the cross-border movement of news programmes and the exercise of the fundamental right to information'. secondly, 'the absence of any right [to] extracts ... may constitute a threat to pluralism, many of the broadcasters in the Union ... having neither the technical means ... nor sufficient financial means to bear the cost of the systematic commercialisation of exclusive distribution rights in certain major media events'.

19 – I note that Article 10 of the ECHR includes not only the right to communicate but also to receive information, See *Observer and Guardian v United Kingdom*, judgment of 26 November 1991, Series A No 216, paragraph 59, and *Guerra and Others v Italy*, judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, paragraph 53 .

20 – Case C-260/89 ERT [1991] ECR I-2925, paragraph 45.

21 – Case C-250/06 United Pan-Europe Communications Belgium and Others [2007] ECR I-11135, paragraph 41.

22 – See, inter alia, Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-0000 paragraph 74.

23 – Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission* [2008] ECR I-6351, paragraph 360 and case-law cited.

24– Case C-380/03 [2006] ECR I-11573.  
25 – Paragraph 145 and the case-law cited.  
26 – Case C-227/07 UTECA [2009] ECR I-1407, paragraph 19. See also in that connection recital 11 and Article 4(1) of the Directive.  
27 – See, in this sense, the statement of the Council’s reasons, at II B vi of Common Position (EC) No 18/2007 of 15 October 2007 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to the adoption of a directive of the European Parliament and of the Council amending Directive 89/552/EEC of the Council aimed at the coordination of certain laws, regulations and administrative provisions of the Member States relating to the exercise of television broadcasting activities (OJ C 307E, p. 1).  
28 – Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, paragraph 4.  
29 – See also, along the same lines, recital 10 of the Directive that stressed the importance of a ‘true European market for audiovisual media services’.  
30 – See recital 55 and Article 15(1) of the Directive according to which access to short extracts must be afforded under non-discriminatory conditions.  
31 – In this connection, I note that, according to figures published recently by the European Audiovisual Observatory, local and regional channels account for approximately 40 per cent of the total available channels in Europe (see press release of 29 March 2012 available at <http://www.obs.coe.int/about/oea/pr/mavise-miptv2012.html>).  
32 – See, in this regard, Schoenthal M., ‘The right of retransmission of major events’, IRIS plus, legal observations of the European Audiovisual Observatory, 2006-04. The author notes that ‘short and informative reports [are] limited to key moments of an event’ and that ‘a gradual mounting of suspense, which provides the distinctive charm of a sporting event, is solely reserved to the actual broadcast transmission’ (p. 3).  
33 – Paragraph 43, particularly note 19.  
34 – See Cases C-275/06 Promusicae [2008] ECR I-271, paragraph 68, and C-461/10 Bonnier Audio and Others [2012] ECR I-0000 paragraph 56.  
35 – As to the costs incurred by the television broadcasting organization which holds the exclusive broadcasting rights, ORF said that, even when the body which enjoys the right to make short news reports has access to the satellite signal (for example, through direct satellite interception), the granting of this right gives rise to appreciable work for the organisation whose duty it is to grant the said right (verification of the right, establishment, where appropriate, of an agreement on conditions, supervision of compliance with legal and contractual arrangements, etc.).  
36 – See, in this regard, communication from the Commission to the European Parliament in accordance with Article 251(2), second paragraph, of the EC Treaty concerning the Council’s common position on the adoption of a proposal for a directive of the

European Parliament and of the Council amending directive 89/552/EEC of the Council for the coordination of certain laws, regulations and administrative provisions of the Member States relating to the exercise of television broadcasting activities (‘Audiovisual Media Services directive’) [COM(2007) 639 final]:

*‘This wording was chosen to ensure that the right to short reporting cannot be construed as a mandatory licence which would have given the receiving broadcasters wider rights. This solution is largely supported by all stakeholders, broadcasters as well as rights owners’.*

37 – According to the explanatory report on this convention, this article is founded in the public’s right to receive information and is intended to ensure that the exercise of this right is not called into question in a transfrontier context. Another objective is to ensure the pluralism of information sources in the framework of transfrontier television.

38 – Recommendation on the right to extracts on major events that are the subject of exclusive rights for TV broadcasting in a transfrontier context.

39 – Paragraph 47.

40 – See on this point Sudre, F., *Droit européen et international des droits de l’homme*, PUF, Paris, 10th edition, 2011, p. 655 et seq.

41 – See ECHR judgment in *Brosset-Triboulet and*

42 – *Ibid* (paragraph 94).

43 – OJ 1992 L 167, p. 10.

44 – It is interesting, in this respect, to compare Article 15 of the Directive with Article 5(3)(c) of Directive 2001/29, which allows the Member States to provide for exceptions or limitations to the rights provided for in Articles 2 and 3 of this directive (respectively, right of reproduction, and right of communication to the public of works and the right to make available to the public other protected items) ‘use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author’s name, is indicated, unless this turns out to be impossible’. See also in the same vein, Article 10(1)(b) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

45 – Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] I-7411, paragraph 85.

46 – See point 21 of this Opinion.

47 – 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).

48 – 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).