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Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

21 February 2018 (\*)

(Reference for a preliminary ruling — Freedom to provide services — Directive 2010/13/EU — Definitions — Concept of ‘audiovisual media service’ — Scope — Channel available on YouTube for videos promoting new passenger cars)

In Case C-132/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 12 January 2017, received at the Court on 14 March 2017, in the proceedings

**Peugeot Deutschland GmbH**

v

**Deutsche Umwelthilfe eV,**

THE COURT (Ninth Chamber),

composed of C. Vajda (Rapporteur), President of the Chamber, E. Juhász and C. Lycourgos, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Peugeot Deutschland GmbH, by L. Pechan and H. Prange, Rechtsanwälte,
- Deutsche Umwelthilfe eV, by J. Schütt, Rechtsanwältin,
- the European Commission, by G. Braun and K.-P. Wojcik, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,  
gives the following

## **Judgment**

1 The present request for a preliminary ruling concerns the interpretation of Article 1(1)(a) 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).

2 The request has been made in proceedings between Peugeot Deutschland GmbH and Deutsche Umwelthilfe eV concerning the publication by Peugeot Deutschland GmbH, on the video channel which it runs on the YouTube internet service, of a short video concerning a new passenger car model without providing information in that video on the official fuel consumption and official CO<sup>2</sup> emissions of that model.

## **Legal context**

### **EU law**

3 Recital 22 of Directive 2010/13 states:

‘For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as emails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. ...’

4 Article 1(1) of that directive provides:

‘For the purposes of this Directive, the following definitions shall apply:

(a) “audiovisual media service” means:

(i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication;

(b) “programme” means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of

programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

...

(e) "television broadcasting" or "television broadcast" (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

...

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

(h) "audiovisual commercial communication" means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement;

...'

5 Article 6 of Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO<sup>2</sup> emissions in respect of the marketing of new passenger cars (OJ 2000 L 12, p. 16), as amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008 (OJ 2008 L 311, p. 1), ('Directive 1999/94') is worded as follows:

'The Member States shall ensure that all promotional literature contains the official fuel consumption and the official specific CO<sup>2</sup> emission data of the passenger car models to which it refers in accordance with the requirements of Annex IV.

Member States shall, as appropriate, provide for promotional material other than the promotional literature referred to above to indicate the official CO<sup>2</sup> emission data and the official fuel consumption data of the specific car model to which it refers.'

6 The concept of 'promotional literature' is defined in Article 2, point 9, of Directive 1999/94 as 'all printed matter used in the marketing, advertising and promotion of vehicles to the general public. It includes, as a minimum, technical manuals, brochures, advertisements in newspapers, magazines and trade press and posters'.

7 Point (c) of the first subparagraph of Article 9(2) of that directive provides that the Commission is to take measures aimed at 'establishing recommendations in order to enable the application of the principles of the provisions on promotional literature referred to in the first paragraph of Article 6 [of the directive] to other media and material'.

8 The Commission Recommendation of 26 March 2003 on the application to other media of the provisions of Directive 1999/94 concerning promotional literature (OJ 2003 L 82, p. 33) states, in

the second indent of the second paragraph of Article 4, that it does not apply to television broadcasting services covered by Article 1(a) of 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), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) and repealed by Directive 2010/13.

9 Article 1(a) of Directive 89/552, as amended by Directive 97/36, defined the concept of ‘television broadcasting’. As of the subsequent amendment of that directive by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 332, p. 27), that provision laid down a definition of the concept of ‘audiovisual media service’ that was in essence identical to that provided for in Article 1(1)(a) of Directive 2010/13.

### **German law**

10 Paragraph 5 of the Verordnung über Verbraucherinformationen zu Kraftstoffverbrauch, CO<sup>2</sup>-Emissionen und Stromverbrauch neuer Personenkraftwagen (Regulation on consumer information on fuel consumption, CO<sup>2</sup> emissions and energy consumption of new passenger cars) of 28 May 2004 (BGB1. I, p. 1474; ‘the Pkw-ENVKV’) provides:

‘(1) Manufacturers and dealers which produce, provide for the production of, distribute or use in any other way promotional literature must ensure that information is provided in that literature on the official fuel consumption and the official specific CO<sup>2</sup> emissions of the new passenger car models to which that literature refers in accordance with Section I of Annex 4.

(2) The first sentence of paragraph 1 applies *mutatis mutandis* to:

1. promotional material distributed by electronic means;
2. advertising on electronic, magnetic and optical storage media;

radio broadcasting services and audiovisual media services within the meaning of Article 1(1)(a) of Directive 2010/13 are excluded from this (...)

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

11 Peugeot Deutschland markets vehicles in Germany under the Peugeot brand. It runs a video channel on the YouTube internet service on which, on 17 February 2014, it posted a video of approximately 15 seconds in length with the title ‘Peugeot RCZ R Experience: Boxer’.

12 Deutsche Umwelthilfe brought an action against Peugeot Deutschland before the Landgericht Köln (Regional Court, Cologne, Germany), claiming that the failure to provide, in that video, information on the official fuel consumption and official specific CO<sup>2</sup> emissions of the new vehicle model being advertised infringed Paragraph 5(1) of the Pkw-ENVKV.

13 That court upheld the action brought by Deutsche Umwelthilfe and the Oberlandsgericht Köln (Higher Regional Court, Cologne, Germany) dismissed Peugeot Deutschland’s appeal against that ruling.

14 Seised of an appeal on a point of law (‘Revision’) against that judgment, the referring court observes that the outcome of the dispute in the main proceedings depends on whether the provision

of a promotional video channel for new passenger car models on YouTube constitutes an ‘audiovisual media service’ within the meaning of Article 1(1)(a) of Directive 2010/13. If that were the case, Peugeot Deutschland would be exempt from the obligation imposed by Paragraph 5(1) of the Pkw-ENVKV to provide information in those videos on the official fuel consumption and official specific CO<sup>2</sup> emissions of the models concerned, by reason of the second half of the first sentence of Paragraph 5(2). That exemption would be based on the Commission Recommendation of 26 March 2003 on the application to other media of the provisions of Directive 1999/94/EC concerning promotional literature, that recommendation being itself based on point (c) of the first subparagraph of Article 9(2) of that directive.

15 The referring court takes the view that the video and the YouTube channel at issue in the main proceedings do not constitute an ‘audiovisual media service’ within the meaning of Article 1(1)(a) (i) of Directive 2010/13. Even if that video were to be regarded as a ‘programme’ within the meaning of Article 1(1)(b), the principal purpose of that channel is, however, not the provision of programmes in order to inform, entertain or educate the general public, as required under Article 1(1)(a)(i).

16 With regard to the question of whether that video and that channel come under Article 1(1)(a) (ii) of Directive 2010/13, the referring court is uncertain as to whether, given the definition of ‘audiovisual commercial communication’ provided in Article 1(1)(h), the video at issue in the main proceedings is part of a ‘programme’, within the meaning of Article 1(1)(b), comparable to television broadcasts.

17 In those circumstances, the Bundesgerichtshof (Federal Court of Justice, Germany) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does a person who runs a video channel on the YouTube internet service on which internet users can view short advertising videos for new passenger car models operate an audiovisual media service within the meaning of Article 1(1)(a) of Directive 2010/13?’

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

18 By its question, the referring court asks, in essence, whether Article 1(1)(a) of Directive 2010/13 must be interpreted as meaning that the definition of ‘audiovisual media service’ covers either a video channel, such as that at issue in the main proceedings, on which internet users can view short promotional videos for new passenger car models, or a single such video considered in isolation.

19 In that regard, in the first place, the definition of ‘audiovisual media service’ in Article 1(1)(a) (i) of that directive specifies, *inter alia*, that it is a service which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public.

20 Those specific features of programmes, for the broadcasting of which Directive 2010/13 provides a regulatory framework, are set out in greater detail in recital 22 of that directive, which states that the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public.

21 However, a promotional video channel on the YouTube internet service, such as that at issue in the main proceedings, cannot be regarded as having as its principal purpose the provision of programmes in order to inform, entertain or educate the general public.

22 Without it being necessary to determine whether a promotional video constitutes a programme as referred to in Article 1(1)(a)(i) of Directive 2010/13 and defined in Article 1(1)(b), it is clear that the purpose of such a video is to promote, for purely commercial purposes, the product or service advertised.

23 In that regard, to the extent that a promotional video can inform, entertain or educate viewers, as Peugeot Deutschland claims, it does so with the sole aim of, and as a means of, achieving the promotional purpose of the video in question.

24 Therefore, even in the event that a promotional video channel on YouTube were to satisfy the other criteria and display the features of an audiovisual media service referred to in Article 1(1)(a)(i) of Directive 2010/13, its promotional purpose suffices to exclude it from the scope of that provision.

25 That finding is not called into question by Peugeot Deutschland's assertion that such an exclusion amounts to a difference in treatment of its promotional videos as against programmes which do not have any advertising purpose, which, it submits, is contrary to Article 11 of the Charter of Fundamental Rights of the European Union enshrining the freedom of expression and information.

26 In that regard, it suffices to note that the argument that the principle of equal treatment requires the inclusion of a promotional video channel, such as that at issue in the main proceedings, within the scope of Article 1(1)(a)(i) of Directive 2010/13 is based on the false premiss that those videos are, in the light of the objective which they pursue, in a comparable situation to that of non-promotional programmes.

27 In the second place, the audiovisual media service referred to in Article 1(1)(a)(ii) of Directive 2010/13 consists of 'audiovisual commercial communication'. 'Audiovisual commercial communication' is defined, in turn, in paragraph 1(h) of that article as 'images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement'.

28 However, a video such as that at issue in the main proceedings cannot be regarded as accompanying or being included in a programme in return for payment or for similar consideration or for self-promotional purposes. Inasmuch as a video channel, such as that run by Peugeot Deutschland, contains solely videos, such as the video at issue in the main proceedings, which are individual elements independent of one another, it cannot reasonably be argued that that video accompanies or is included in a 'programme', within the meaning of Article 1(1)(h) of Directive 2010/13.

29 Furthermore, Peugeot Deutschland's argument that the images pursuing advertising purposes are situated at the beginning and at the end of the video at issue in the main proceedings and, therefore, accompany or are included in that video, which itself constitutes a programme, cannot be accepted.

30 The view cannot be taken that the EU legislature, in using the words ‘accompany’ and ‘be included’, regard being had to their ordinary meaning, was referring to individual images that are part of or even central to a programme. A video such as that in the present case is promotional in its entirety and it would be artificial to assert that only the images at the beginning and the end of that video pursue advertising purposes.

31 It follows that, by virtue of the information that an audiovisual commercial communication, as defined in Article 1(1)(h) of Directive 2010/13, consists of images accompanying or included in a programme, a promotional video, such as that at issue in the main proceedings, is excluded from the scope of Article 1(1)(a)(ii) of that directive.

32 In the light of the foregoing considerations, the answer to the question referred is that Article 1(1)(a) of Directive 2010/13 must be interpreted as meaning that the definition of ‘audiovisual media service’ covers neither a video channel, such as that at issue in the main proceedings, on which internet users can view short promotional videos for new passenger car models, nor a single video of that kind considered in isolation.

### **Costs**

33 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 (Ninth Chamber) hereby rules:

**Article 1(1)(a) 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 (the Audiovisual Media Services Directive) must be interpreted as meaning that the definition of ‘audiovisual media service’ covers neither a video channel, such as that at issue in the main proceedings, on which internet users can view short promotional videos for new passenger car models, nor a single video of that kind considered in isolation.**

[Signatures]

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\* Language of the case: German.