

# Exclusive Rights and Short Reporting

The following article:

## *Short Reporting Rights in Europe*

by Peter Matzneller

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## Foreword

2012 is often called a year of sports as both the Euro 2012 football championships and the Olympic Games will be held. Of course, there will be or have been world championships in other sports, such as the biathlon, ski flying, figure skating, indoor athletics, table tennis, windsurfing, billiards, cycling, badminton, ice hockey, speedway, shooting, orienteering, rowing, baseball, canoeing, wrestling, the triathlon, jujutsu, karate, dancing and swimming. To these may be added world title fights or matches, for example in boxing or chess, numerous European championships in various sports and even more numerous national championships, ATP tournaments, Formula I racing, FIS ski racing, football Champions League matches, etc.

Sports competitions are an important part of our culture and entertainment scene, which is why they are also an important aspect of the entertainment industry, and increasingly so. There are, of course, other events that attract considerable public interest. According to official statistics, they have in the past included the wedding of Prince Albert of Monaco, which probably aroused interest regardless of his bride's earlier successes as an Olympic swimmer. A papal visit, an open air concert or a televised debate between election candidates may, depending on the social context, become an event of high public interest, and the EU legislators and the Council of Europe have expressly determined that such an event must at least be made available to the public in the form of short extracts.

This basic idea may seem plain and simple but translating it into legal provisions and practical application appears difficult. The lead article makes this clear by explaining how the so-called right to short reporting affects the legal positions and business models of exclusive rights holders and how much scope the European provisions allow the various transposition models. Numerous national examples are provided to show the models that exist. The difficulties in transposing provisions often lie in the details. For example, the determination of when there is a high public interest in an individual case, which broadcaster must be approached to obtain access or in what form that access must be, or when, for what period and under what conditions access must be granted. More information on these questions is also contained in the Related Reporting section, which deals with the developments over the

last few months that are relevant for the right to short reporting. Anyone wishing to obtain a quick overview of the legal situation in Europe will find assistance in the ZOOM section with its tabular summary of legal sources and normative content.

Strasbourg, May 2012

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# Short Reporting Rights in Europe: European Legal Rules and their National Transposition and Application

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## I. Introduction

*Citius, altius, fortius* – having regard to the organisers of major sporting events, there is a temptation to add a further element to the original Olympic motto: *opulentius* – richer, more opulent. In addition to planning, preparing and holding competitions, organisations like the International Olympic Committee (IOC), the International Federation of Association Football (FIFA) or the Union of European Football Associations (UEFA) have long sought to maximise the extensive marketing of events. This begins with the grant of broadcasting (especially TV) rights and other media rights,<sup>1</sup> includes the relevant marketing measures and ends with various different licensing models that, for example, guarantee the exclusive sale of specific brands of drink in stadiums and fan zones.

The key word remains “attractiveness”: rule changes are introduced to make sports more enjoyable for spectators and more appealing for broadcasters, thus increasing revenues from ticket sales, sponsorship and, especially, the award of rights. While some adjustments are made for reasons associated with the sport itself (for example, increasing the size of table tennis balls to slow the game down or enabling points also to be won on the opponent’s serve in volleyball), when requirements are laid down regarding the measurements of the clothing of beach volleyball players this mainly has to do with questions of presentation and therefore ultimately economic considerations.

The focus of marketing activities is often the desire for exclusivity. The rightsholder<sup>2</sup> expects higher revenues as the large media companies are usually encouraged to participate with the relevant sums in an invitation to tender by offering them exclusive (mostly territorial) rights in the live or deferred transmission of an event in the broadcast media and on the Internet (referred to below in

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1) This article does not discuss whether and to what extent the situation with the grant of radio rights should be dealt with differently.

2) Rights in an event cannot be inferred from EU law. However, for various reasons it is possible to assume from domestic law that the event organiser is entitled to certain economic exploitation rights. Conceivable rights are, for example, rights of defence derived from the organiser’s right to exercise control over the premises or from rules relating to unfair competition or the right to lay down the terms and conditions for a television broadcast, as well as other aspects that may be determined by the organiser, such as the commercial use of the name of the event or setting up sales stalls at (or near) event venues. Broadcasting rights are usually (either directly or indirectly) sold to broadcasters (in the following referred to as licensees). For a more detailed discussion of the genesis of rights in sports events see Scheuer/Strothmann, *Sport as Reflected in European Media Law (Part I)*, IRIS plus 2004-4, pp. 2 ff. All IRIS plus issues quoted here are available at: [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/index.html](http://www.obs.coe.int/oea_publ/iris/iris_plus/index.html) (this link and all following references to internet sites were last checked on 19 April 2012).

general terms as “transmission rights”). The reporting television stations and other media providers acquire the high-priced unique selling position in order to attract as many television viewers or users as possible. From the legal point of view, especially with regard to diversity of opinion and the right to information, exclusive rights cannot be unreservedly welcomed, so European law contains several instruments for curbing the excessively restrictive allocation of rights and making it possible to freely receive important events and enabling the public to be informed about them, especially in the form of the right to short reporting.

## 1. Increased revenues from the grant of transmission rights

Before discussing the limits to exclusive rights in more detail,<sup>3</sup> I will briefly describe how rapidly the revenues from granting transmission rights in sports events have risen in the course of time, one reason for this being the increasingly diverse means of distribution available on and in addition to traditional television (such as pay-TV, IPTV, web streaming or mobile use).

While FIFA generated worldwide revenues totalling EUR 84 million from the allocation of transmission rights in the (men’s) football World Cup in France held just under 15 years ago in 1998,<sup>4</sup> it received approximately EUR 1.79 billion from the allocation of television rights in the 2010 World Cup in South Africa (960 million in Europe and 157 million in North America).<sup>5</sup>

The IOC recorded similar growth in its revenues from rights to transmit the Olympic Games: from just under EUR 0.7 million for the Innsbruck Winter Games in 1964, its revenues rose relatively constantly in the following years to reach EUR 15.4 million in Lake Placid in 1980 and, two Olympiads later, EUR 241.5 million in Calgary in 1988. After a slight fall at the Albertville Games in 1992 (EUR 217 million), its revenues continued to rise and finally reached their so far highest level of EUR 838 million at the 2010 Winter Games in Vancouver.<sup>6</sup> The rights to transmit the summer Olympics usually generate even higher revenues as they have a wider appeal. For example, as far back as the 1980 Olympics in Moscow the IOC’s income totalled EUR 65.4 million, the figure rising to slightly less than 300 million in the case of the 1988 Seoul Olympics. Its revenues reached the 1 billion euro mark for the first time in Sydney in the year 2000 and had increased to 1.3 billion by the time of the 2008 Beijing Games.<sup>7</sup> This means that revenues from the sale of transmission rights make up half of the IOC’s total income from organising the Olympics.<sup>8</sup>

Extending the Champions League qualifying phase and spreading the knockout rounds over more match days in the 2009/10 season led to a sudden one-third increase in UEFA’s revenues from transmission rights, which rose from EUR 621 million to EUR 836 million.<sup>9</sup> The increase in the number of participating teams from 16 to 24 for the Euro 2016 men’s football championships in France may therefore be seen from this perspective.

As is to be expected, the amounts paid in the individual national markets vary considerably. Whereas up to almost EUR 100 million (EUR 98 million in Italy, 91 million in Spain, 85 million in Germany) or even considerably more (179 million in the United Kingdom) is paid in the major

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3) See section I.2. of this article.

4) European Commission, *The European Model of Sport*, Discussion Paper of Directorate-General X (undated).

5) FIFA Financial Report 2010, p. 38, available at:

[http://www.fifa.com/mm/document/affederation/administration/01/39/20/45/web\\_fifa\\_fr2010\\_eng%5B1%5D.pdf](http://www.fifa.com/mm/document/affederation/administration/01/39/20/45/web_fifa_fr2010_eng%5B1%5D.pdf) (original figures in US dollars; converted into EUR on 28 February 2012 at a rate of 1.34 to 1).

6) IOC, Marketing: Media Guide, Vancouver 2010, p. 9, available at:

<http://www.olympic.org/Documents/Reports/EN/IOC-MEDIAGUIDE-2010-EN.pdf> (original figures in US dollars; for the conversion into EUR, see fn. 5).

7) IOC, Marketing: Media Guide, Beijing 2008, p. 5, available at:

[http://www.olympic.org/Documents/Reports/EN/en\\_report\\_1329.pdf](http://www.olympic.org/Documents/Reports/EN/en_report_1329.pdf) (original figures in US dollars; for the conversion into EUR, see fn. 5).

8) IOC, loc. cit. (fn. 6), S. 3; IOC, loc. cit. (fn. 7), p. 3.

9) UEFA Financial Report 2008/2009, p. 51, available at: [http://de.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/Publications/01/46/79/55/1467955\\_DOWNLOAD.pdf](http://de.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/Publications/01/46/79/55/1467955_DOWNLOAD.pdf); UEFA Financial Report 2009/2010, p. 22, available at: [http://de.uefa.com/MultimediaFiles/Download/uefaorg/Finance/01/61/07/95/1610795\\_DOWNLOAD.pdf](http://de.uefa.com/MultimediaFiles/Download/uefaorg/Finance/01/61/07/95/1610795_DOWNLOAD.pdf).

western European states for all transmission rights (pay-TV and free to air) in a Champions League season, UEFA generates much lower revenues in other states (e.g., EUR 0.2 million in Cyprus, 2 million in Ireland and 2.9 million in Belgium).<sup>10</sup> Based on the size of the population, it generally emerges that football generates per-capita revenues of substantially more than 1 euro in states where it traditionally enjoys great popularity – in contrast to states that are not known as footballing nations and where UEFA must be content with less than half a euro per inhabitant.

## 2. Barriers to exclusive rights in EU law

An important restriction emerges from EU competition law: it is not permitted to grant only one provider an entire package of rights consisting of live transmissions, recorded summaries and secondary and tertiary exploitation rights. The European Commission established this in 2005 in a case against the German League Association, which was told to offer unbundled packages of rights for a period not exceeding three seasons.<sup>11</sup> Moreover, in October 2011 the European Court of Justice (ECJ) ruled in the *Football Association Premier League v. Murphy* case on the legality of contracts under which a rightsholder awards a broadcaster exclusive licences. In these contracts, the broadcaster gave the rightsholder an undertaking not to make available any decoding devices that provided access to the encrypted programmes outside the area covered by the licence. The ECJ considered such clauses to be a restriction on competition, which is prohibited under Article 101 of the Treaty on the Functioning of the European Union (TFEU), as their purpose is the absolute territorial fragmentation of the internal market.<sup>12</sup>

In the same judgment, the ECJ also established that the principle of the free movement of services (Articles 56 ff. TFEU) can lead to restrictions on granting exclusive territorial licences. In its view, national rules prohibiting the sale, import and use of foreign decoding devices to protect contractually agreed exclusive territorial licences constitute a restriction on the free movement of services. In principle, this restriction may be justified by the aim of protecting the intellectual property rights involved in the case of sports events under domestic law. However, the Court pointed out, even if it is assumed that this was the intention of the legal rules at issue in the proceedings, the premium paid by the licensees to the rightsholders for the grant of absolute territorial exclusivity went beyond what was necessary to ensure appropriate remuneration for those rightsholders. There was therefore no necessity to protect such agreements, so that the measure was disproportionate and the justification for the restriction on the free movement of services was accordingly not acceptable.<sup>13</sup>

Finally, Audiovisual Media Services Directive 2010/13/EU (AVMSD)<sup>14</sup> provides for two instruments that are expressly designed to guarantee the basic rights to freedom of expression and freedom of information pursuant to Article 11 of the Charter of Fundamental Rights of the European Union.<sup>15</sup> Firstly, in Article 14 the Directive encourages states to take measures to ensure that major events of considerable importance for society can be watched by a substantial proportion of the public on free-to-air television.<sup>16</sup> Secondly – and this is the central theme (of the lead article) of this IRIS *plus* – Article 15 AVMSD, which was only introduced in 2007 with the revision of the Television without

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10) Gilles Tanguy, *Droits télé de la Champions League: La France à la traîne*, published at [http://footbiz.blog.capital.fr/index.php?action=article&id\\_article=422489](http://footbiz.blog.capital.fr/index.php?action=article&id_article=422489); Wikipedia, Broadcasting of sports events, available at: [http://en.wikipedia.org/wiki/Broadcasting\\_of\\_sports\\_events](http://en.wikipedia.org/wiki/Broadcasting_of_sports_events).

11) Decision of the European Commission of 19 January 2005, COMP/C-2/37.214, *Joint selling of the media rights to the German Bundesliga*, OJ. L 134 of 27 May 2005, p. 46.

12) ECJ, judgment of 4 October 2011, Cases C-403/08 and C-429/08, *Football Association Premier League and Others*, para. 146 (not yet included in official collection).

13) ECJ, loc. cit. (fn. 12), paras. 76-121. See also the discussion of the judgment by Stieper in *Multimedia und Recht* 2011, pp. 817 ff. and Ranke/Rossnagel in *Multimedia und Recht* 2012, pp. 152 ff.

14) 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 – codified version), OJ L 95 of 15 April 2010.

15) Recitals 48, 55 and 56 of the AVMSD.

16) On the details of reporting on major events, see Schoenthal, *Major Events and Reporting Rights*, IRIS *plus* 2006-4, pp. 2 ff.; Scheuer/Strothmann, *Sport as Reflected in European Media Law (Part II)*, IRIS *plus* 2004-6, S. 2 ff.

Frontiers Directive, obliges member states to ensure that for the purpose of short news reports any television broadcaster has access to events of high interest to the public that are transmitted on an exclusive basis.

It can therefore already be established at this point that EU law limits the grant of exclusive rights on three levels – and thus attempts to strike a balance between the interests of events organisers (especially the organisers of sports events) as rightsholders and the interests both of the media companies that exploit those rights and of the viewing public: firstly, EU competition law ensures that in transparent (competitive tendering) proceedings all interested users have equal access to rights and that the acquisition of exploitation rights by just one powerful media company is prevented. Secondly, EU law prohibits the unjustified grant of exclusive territorial licences, thus keeping the internal market open for television services. Thirdly, it prevents transmission rights being concentrated on the pay-TV market alone and limits restrictions on the citizens' access to relevant information by enabling the essential content of an event at least to be made available to all viewers in the form of short extracts.

In the following, the legal bases of the right to short reporting are explained from the point of view of European law (section II). Details are then provided of the transposition and application of the law and the relevant criteria in the EU member states plus the candidate country Croatia and the candidate countries “the former Yugoslav Republic of Macedonia”, Montenegro and Serbia (in all cases no negotiations are currently taking place) as well as in the member states of the European Economic Area, Iceland, Liechtenstein, Norway and (lastly) Switzerland (section III). Finally, the relevant conclusions are drawn (section IV).

## II. The provisions of European law relating to the right to short reporting

The right to short reporting is enshrined in the law of the Council of Europe, to be more precise in the European Convention on Transfrontier Television (ECTT),<sup>17</sup> and in the law of the European Union, namely the AVMSD. Both legal bases are described below.

### 1. Council of Europe

In the domestic law of the Council of Europe member states, two concepts were distinguished: a ban on the broadcasting of major events exclusively on pay-TV and the right to short reporting. Both have also been discussed in the European institutions. In the first version of the ECTT, Article 9, the principal aim of which was to prevent the exercise of exclusive rights in the case of major events, already implicitly (also) took up a position on the right to short reporting. The amending Protocol of 1 October 1998 separated the two concepts by introducing an Article *9bis* (Access of the public to events of major importance), thus changing the general thrust of the original Article 9. In the current version, Article 9 now expressly concerns access to information through news reporting.

Article 9 of the ECTT lacks the precision of its “sister provision” of EU law, Article 15 AVMSD, which was adopted much later. However, the Council of Europe Committee of Ministers defined a number of key elements in the original Article 9 in its Recommendation R (91) 5 of 11 April 1991<sup>18</sup> and explained their meaning. It also established several principles with which the member states should comply when drawing up their rules on short reporting rights and their application.

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17) European Convention on Transfrontier Television of 5 May 1989 (CETS No. 132), as amended by the Protocol of 1 October 1998 (CETS No. 171).

18) Recommendation R (91) 5 of the Committee of Ministers to Member States on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a transfrontier context, of 11 April 1991, available at: [http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%281991%29005&expmem\\_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%281991%29005&expmem_EN.asp)

The following key elements of the Council of Europe recommendation can be partially found in Article 15 AVMSD and in national provisions on the right to short reporting.

Access should be granted either to the licensee's signal<sup>19</sup> or to the event venue. In the case of events consisting of several self-contained elements, each element should be deemed an event within the meaning of Article 9 ECTT. In the case of events that take place over several days, the broadcaster seeking access is entitled to one short report per day. According to the recommendation, short reports should only be broadcast in regularly scheduled news bulletins, but on no account before the licensee has had an opportunity to report on the event. In the opinion of the Committee of Ministers, the broadcaster seeking access should not incur any costs for the right to make short reports. An obligation to make a payment towards the licensee's costs of acquiring the rights is expressly excluded. The recommendation also states that a short report already broadcast should not be reused, unless there is a direct link with another topical event.<sup>20</sup>

## 2. European Union

### 2.1. The right to short reporting under the AVMSD

Article 15 AVMSD essentially provides that a broadcaster (or an intermediary acting on its behalf) must be granted access to events of high interest to the public that are transmitted on an exclusive basis by another broadcaster (the licensee). This access must be granted on a fair, reasonable and non-discriminatory basis and be guaranteed by allowing the broadcaster seeking access to freely choose short extracts from the transmitting broadcaster's signal. However, the access can also be guaranteed by equivalent means, such as access to the event venue. The right of the broadcaster seeking access is limited to the use of extracts for general news programmes. The member states are called upon to define the modalities and conditions regarding the provision of such short extracts (e.g., their length, any time-limits applying and any compensation arrangements). However, the obligations that may be imposed on the broadcaster seeking access to pay compensation may not exceed the additional costs directly incurred in providing that access. Finally, the Directive provides that the broadcaster seeking access may only use the short extracts in its own on-demand services if it transfers the news bulletin transmitted on television to its on-demand service unchanged and on a deferred basis.

Apart from a number of explanatory remarks in the Recitals, no assistance is given on interpreting the right to short reporting enshrined in the AVMSD. By contrast, those events that, according to Article 14 AVMSD, are considered "events of major importance for society" and must be made available to the public at large on free-to-air television are regularly specified in lists drawn up by the member states, discussed by the contact committee set up in accordance with Article 29 AVMSD and, if approved, confirmed by a formal decision of the European Commission. In a discussion paper<sup>21</sup> the contact committee has drawn up guidelines on the individual provisions of Article 14 AVMSD. The possible contribution of these guidelines to the interpretation of the term "events of high interest to the public" is examined in the following discussion of the individual elements of the right to short reporting.

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19) The recommendation defines the term signal in section 2.1 (para. 34) of the explanatory memorandum as "the entirety of the pictures and sounds recorded or transmitted by a given broadcaster for the television broadcast of an event".

20) As an example, the recommendation cites in section 3 (para. 44) the further reporting on the games so far played by a team in a competition in the event of that team winning the championship.

21) Contact committee, Discussion Paper on Article 3a of the Television without frontiers Directive, DOC CC TVSF (2000) 6.

## 2.2. The individual elements of the right to short reporting

Several key concepts for establishing the extent and exercise of the right to short reporting can be determined from Article 15 AVMSD and Recitals 48 and 55 to 57 of the Directive. They at least provide the member states with some scope when drawing up provisions of domestic law.

- When the term “event of high interest to the public” is defined, national solutions may differ considerably from one another. As the AVMSD does not directly define this criterion for the right to short reporting, the only guidance is provided by Recital 49. As examples of events “of major importance for society” within the meaning of Article 14 AVMSD, it mentions the Olympic Games, the football World Cup and the European football championship, so it may be assumed that these sports events must at any rate be regarded as “events of high interest to the public” within the meaning of Article 15 AVMSD. It is up to individual countries not only to define “events of high interest to the public” but also to provide a list like the one mentioned in Article 14(1) AVMSD or to refer to the events stipulated in it.<sup>22</sup> However, it is questionable whether a state could simply apply the right to short reporting to the list referred to in Article 14(1) AVMSD because the term “of high interest” in Article 15 AVMSD is subject to a wider interpretation than “of major importance” in Article 14. If a state nonetheless chooses this option, it will be necessary to examine to what extent it improperly limits the scope of application of Article 15.
- The *exclusivity* element is not defined more closely in the Directive either. Unlike Article 14 AVMSD, the right to short reporting does not hinge on whether a specific event is only broadcast on pay-TV. It is sufficient for the existence of an exclusive arrangement under Article 15 AVMSD when any television station possesses exclusive rights in an event of high interest to the public.
- Another interesting aspect in addition to the determination of the two broadcasters involved (the one *seeking access* and the one *required to provide access*) is the role of the *intermediary* that exercises the right to short reporting in an individual case on behalf of the broadcaster seeking access (Recital 55, para. 1 AVMSD). The Directive does not grant that right in all cases in which an intermediary, such as a news agency, is involved but limits it to those cases in which an agency specifically acts for a broadcaster.<sup>23</sup>
- In the case of *cross-border situations*, the main consideration is the extent to which national provisions provide for a case in which one of the two broadcasters is established in another European country. In such a situation, the aforementioned differences in the definition of the “event of high interest to the public” may also lead to conflicts. For example, it is conceivable that a rights-holding broadcaster turns down a request for access from a broadcaster in another EU member state or a signatory to the ECTT with the argument that the event concerned is not of high interest to the public in its own country.
- Under Article 15(3) AVMSD, access to the transmitting broadcaster’s signal must in principle be granted. It is questionable whether the broadcaster seeking access is entitled to access the so-called “clean feed”.<sup>24</sup> Article 15(4) AVMSD permits as an alternative to access to the signal the establishment of an *equivalent system*, which, according to Recital 56, includes, inter alia, granting access to the event venue. Moreover, it is up to the television broadcaster to decide whether to conclude more detailed contracts. One possibility would, for example, be to provide limited access to summaries transmitted or produced in advance by the transmitting broadcaster.

22) The EU member states’ lists notified to and confirmed by the Commission are available at: [http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events\\_list/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events_list/index_en.htm)

23) Scheuer/Schoenthal, commentary on Article 3k AVMSD (now Article 15 AVMSD, codified version), in: Castendyk/Dommering/Scheuer, *European Media Law*, Alphen a/d Rijn: Kluwer Law International, 2008, para. 2.

24) The term “clean feed” is understood to mean a picture signal free from any programme-specific graphics (such as the programme logo or scores) and any other temporary insertions (such as scrolled text or the mention of names or references to events at the bottom of the screen). By contrast, a “dirty feed” consists of the signal with the relevant inserted information, which is normally sent from the event venue by the outside broadcasting unit for onward transmission to the broadcaster’s studio.

- According to Article 15(1) (and 4) AVMSD, the access must – irrespective of the way in which it is organised in practice – be granted on a *fair, reasonable and non-discriminatory basis*. It is left up to the member states to define these terms more closely and establish monitoring mechanisms. According to Recital 55, para. 1, the licensee should also lay down the actual terms for granting the access and communicate them in a timely manner before the event takes place so that interested parties have sufficient time to examine whether and under what conditions they wish to exercise the right.
- The definition of “short extracts” is also of considerable practical importance.<sup>25</sup> In this connection, Recital 55 mentions a guide figure of no more than 90 seconds.
- According to Article 15(5) AVMSD, the relevant extracts may only be used in *general news programmes*. The Directive does not define this term but Recital 55, para. 1 expressly includes sports channels among the beneficiaries of the right to short reporting.
- Another criterion that requires interpretation is *compensation* for licensees (if access is granted to the signal or material) and/or event organisers (for access to the event venue). The Directive merely states in Article 15(6) that any compensation must not exceed the additional costs directly incurred in providing access. A discussion is taking place on the extent to which this provision complies with the Charter of Fundamental Rights of the European Union (especially in regard to the right to property enshrined in Article 17 of the Charter).<sup>26</sup> The ECJ is currently dealing with this question,<sup>27</sup> which was referred to it by the Austrian *Bundeskommunikationssenat* (Federal Communications Chamber – BKS).<sup>28</sup>
- In addition, Article 15(6) AVMSD states that member states, irrespective of the criteria generally applicable, can define other *modalities and conditions* for the provision of short extracts – for example, time-limits regarding their transmission. Other conceivable possibilities are restrictions on repeat transmissions and requirements concerning the storage and archiving of the material, which essentially belongs to another broadcaster. Other possible provisions, such as the maximum length of short reports and any rules on compensation, are so important that they will be dealt with in the next section (III.6 and III.8 below).
- Finally, the Directive mentions the use of short reports in *on-demand services*. The heading to Chapter V, which deals with the right to short reporting, and the wording of Article 15 AVMSD (“television broadcasting”, “broadcaster”) make the relevance of the right to short reporting for providers of linear services clear. The Directive extends its importance to on-demand audiovisual media services: the use of short extracts in such nonlinear services is, according to Article 15(5) AVMSD, always permitted when the same media services provider offers the same general news programme on demand on a deferred basis.

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25) The AVMSD uses slightly different terms in Article 15 and in the Recitals (“shorts extracts”, “short news reports”) but they basically have the same meaning.

26) Inter alia, Wildmann/Castendyk, “Fußball im Europäischen TV”, *Multimedia und Recht* 2012, 78 ff.

27) ECJ, Case C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, OJ C 296 of 10 September 2011, p. 25.

28) Bundeskommunikationssenat, decision of 31 May 2011, Ref. 611.003/0004-BKS/2011, available at: <http://www.bundeskanzleramt.at/DocView.axd?CobId=43863>

### III. The transposition and application of the provisions of European law in European states

This section deals with the various criteria that, according to the provisions adopted by the Council of Europe and the EU, determine the right to short reporting and compares and analyses their transposition and application in the European states.<sup>29</sup> For the sake of clarity, these criteria are at the centre of the following discussion and the subheadings take them up as well.

#### 1. Event of high public interest

##### 1.1. When is there a high public interest?

Only some countries specifically define what events can be considered of high public interest. In this connection, Austria<sup>30</sup> emphasises that there must be a *general* interest in obtaining information. This is always the case when it is to be expected that the importance of the event means it will be given wide coverage in media reporting in Austria, a member of the European Economic Area or a signatory to the Council of Europe Convention on Transfrontier Television. In Denmark, events are regarded as being of high public interest if they possess news value, appeal to a large group of people and also interest individuals who normally do not follow these or similar events. In Italy, the right to short reporting applies to all events of general appeal to the television audience and a number of examples are mentioned, such as the Olympic Games or games involving the Italian national football team in the World Cup and the European championships. Surprisingly, the list also contains the America's Cup in sailing, the Road World Championships in cycling and international matches involving the Italian national basketball, volleyball and rugby teams.

For "the former Yugoslav Republic of Macedonia", Montenegro, Serbia and Hungary, on the other hand, the right to short reporting applies to events of major importance within the meaning of Article 14 AVMSD. Serbia understands these events to mean those of national importance for the citizens of the Republic of Serbia or any party signatory to the Council of Europe Convention on Transfrontier Television and instructs its broadcasting authority to draw up the relevant annual lists.<sup>31</sup> Montenegro dispenses with any qualifying adjectives and applies the right to short reporting to all major events and all other events of public importance. Hungary expressly applies the right to short reporting only to events on the list drawn up in accordance with Article 14 AVMSD and includes all events regarded in another EU member state as being of major importance for society.<sup>32</sup> These countries accordingly apply to the right to short reporting the criteria that trigger the ban

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29) The author wishes to thank the following individuals for the details they have provided on the transposition and application of short reporting rights in the states mentioned in brackets: *David Stevens*, Leuven Catholic University (Flemish Community of Belgium); *Elise Defreyne*, University of Namur (French Community of Belgium); *Raina Nikolova*, New Bulgarian University (Bulgaria); *Pirkko-Liis Harkmaa*, Advokaadibüroo Lepik & Luhaäär LAWIN (Estonia); *Kaarle Nordenstreng*, University of Tampere (Finland); *Pascal Kamina*, lawyer (France); *Alexandros Economou*, Broadcasting Council (Greece); *Ewa Komorek*, School of Law, Trinity College Dublin (Ireland); *Maja Cappello*, *Emilia Lamonica* and *Giorgio Greppi*, of the broadcasting regulator Agcom (Italy); *Nives Zvonaric*, Council for Electronic Media (Croatia); *Ieva Andersons*, Sorainen Law Office (Latvia); *Jurgita Iesmantaitė*, Radio and Television Commission (Lithuania); *Mark D. Cole* and *Jenny Metzendorf*, University of Luxembourg (Luxembourg); *Eugene Buttigieg*, University of Malta (Malta); *Andriana Skerlev-Cakar*, Broadcasting Council ("The former Yugoslav Republic of Macedonia"); *Daniela Seferovic*, Krug Communications & Media (Montenegro); *Amanda van Rij*, Ministry of Education, Culture and Science (Netherlands); *Krzysztof Woiciechowski*, University of Warsaw (Poland); *Eugen Cojocariu*, Radio Romania International (Romania); *Milos Zivkovic* and *Kruna Savovic*, Zivkovic Samardzic Law Office (Serbia); *Joan Barata i Mir*, Blanquerna Communications School (Spain); *Artus Rejent*, Ministry of Culture (Czech Republic); *Lorna Woods*, City Law School, City University, London (United Kingdom); *Iphigenia Michaelides*, Radio and Television Authority (Cyprus).

30) For readability reasons, the information provided on the laws applied by individual states is limited here to mentioning the name of the country concerned. A list of the titles of individual laws and/or statutory instruments will follow in the ZOOM section of this IRIS *plus*.

31) The lists are available at: <http://www.rra.org.rs/latinica/lista-dogadjaja-od-nacionalnog-interesa>

32) This unique extension of the principle of mutual recognition to the right to short reporting when dealing with cross-border situations is discussed in more detail in section III.3.

on the exclusive transmission of major events on pay-TV and thus limit the scope of application of Article 15 AVMSD.<sup>33</sup>

Other national provisions set the threshold for the right to short reporting much lower. For example, the Audiovisual Media Act of Belgium's French Community merely refers to a *public* event and defines this as one that is not private and for which there is no obstacle to its public accessibility. A similar approach is taken by Liechtenstein, which regards as relevant those events that are publicly accessible and of general informational interest. The United Kingdom applies the right to short reporting to any *current* event and Switzerland to any *public* event.

"The former Yugoslav Republic of Macedonia" and the Netherlands leave it up to the broadcaster seeking access to determine what events meet with substantial public interest and accordingly qualify for the right to short reporting (In "The former Yugoslav Republic of Macedonia" this applies in addition to the existing legal definition).

## 1.2. What is understood by the term "event"?

Differences in national legal systems may also emerge when defining the word *event*. For example, if each game of an entire match day is regarded as an individual event, then the access-seeking broadcaster has the right to extracts of a maximum of 90 seconds' duration for each game. However, if the match day itself is defined as a single event then the broadcaster could only report on the entire day in a piece lasting no more than 90 seconds.<sup>34</sup>

Only a few states mention this question. Austria, Denmark, Croatia, Malta, "the former Yugoslav Republic of Macedonia", Montenegro, the Netherlands, Romania and Slovakia state that the broadcaster seeking access may produce and broadcast one short report per day in the case of events that take place over several days. Apart from the Netherlands and Austria, these countries – and additionally Belgium's French Community – expressly state that each match of a series consisting of several individual events (such as the match days of a football league) is to be regarded as an individual event.<sup>35</sup> The provisions of the German *Rundfunkstaatsvertrag* (Interstate Broadcasting Agreement) are along the same lines: in the case of an event divided into several individual stages, each stage for which the organiser has charged for admission is considered an individual event. Italy is also guided by how the licensee deals with individual events and regards stages as individual events when the licensee clearly determines the beginning and end through its programming and transmission. On the other hand, in the Netherlands the entire match day of an event is considered a single continuous event.

In Austria, the *Verwaltungsgerichtshof* (Administrative Court) ruled, inter alia, in a legal dispute between the *Österreichischer Rundfunk* (Austrian Broadcasting Corporation – ORF) and the broadcaster *Premiere Fernsehen GmbH* in December 2005 that each individual game of the Austrian football league was to be regarded as a single event.<sup>36</sup> On the basis of this decision, the BKS issued a new decision in which, inter alia, it stipulated the maximum duration (90 seconds) and the permissible content of the short extracts in each case (especially goals, penalties awarded, match-deciding shots against the post or bar, fouls penalised with a red card, and spectator violence) and also laid down a compensation fee (EUR 1 000 per minute). Both parties appealed to the *Verfassungsgerichtshof* (Constitutional Court).<sup>37</sup>

33) A broad interpretation of the essentially narrower terms can on the other hand result in an appropriate scope of application with regard to the right to short reporting enshrined in the AVMSD. The Serbian lists, for example, comprise a large number of cultural events and include not only the Olympic and Paralympic Games but also international and national competitions in a wide range of sports, so that the practical implementation is again based on the term events of high public interest within the meaning of Article 15 AVMSD.

34) See also Scheuer/Schoenthal, op. cit. (fn. 23), para. 3.

35) On the significance of such a classification for the determination of "short extracts", see section III.6.

36) Verwaltungsgerichtshof, judgment of 20 December 2005, Ref. 2004/04/0199.

37) The fee issue is discussed in section III.8.

In its appeal judgment,<sup>38</sup> the Constitutional Court did not object to the classification of the matches as individual events, stating that it was not up to the Constitutional Court to decide between possible interpretations of the law if, as in the case in issue, one of the interpretations did not lead to an unconstitutional outcome.

## 2. Exclusive basis

As pointed out in section II.2.2, for an exclusive arrangement within the meaning of Article 15 AVMSD to exist it is sufficient for any television broadcaster to possess exclusive rights in an event of high public interest.

Individual states follow this approach in the national transposition process but without defining exclusivity more closely. Austria is an exception as it not only regulates contractually awarded exclusive rights but also obliges those broadcasters that de facto have the exclusive possibility of reporting on an event of general informational interest to grant a right to short reporting.

## 3. Broadcasters seeking access, intermediaries, and broadcasters obliged to grant access, as well as cross-border situations

Most states have enacted rules for cross-border situations that expressly grant access rights to foreign broadcasters. In doing so, they extend the scope of application either to EU member states, the European Economic Area or – additionally – signatories to the ECTT. Some states grant the right to short reporting to any television broadcaster no matter if it is licensed in Europe or elsewhere.

Several states point out, pursuant to Recital 55, para. 1 AVMSD, that broadcasters from another state should first seek access in their home country.<sup>39</sup> Hungary goes even further and refuses to allow a foreign broadcaster in whose country another broadcaster possesses exclusive rights for a particular event to obtain access from a licensee established in Hungary. Romania “limits” access from abroad by obliging Romanian broadcasters only to grant one broadcaster from each EU member state access to short extracts. Although the Serbian Broadcasting Act does not formally differentiate between Serbian and foreign broadcasters, it only applies the rules on short reporting rights, in accordance with the definition of the term “broadcaster”, to those broadcasters that possess a licence issued under the Serbian Broadcasting Act.

However, individual states have almost no express measures at their disposal for solving cross-border problems, even though such difficulties may, for example, arise owing to different interpretations of the term “event of high public interest”. This may lie in the fact that the Directive itself – unlike the mutual recognition of lists provided for by Article 14(3) AVMSD – contains no clear provisions for resolving such conflicts with respect to the right to short reporting.<sup>40</sup> Only Hungary – due to its close adherence to the regulatory content of Article 14 AVMSD – provides that access must be granted to events regarded in another member state as events of major importance for society and thus touches on the subject.

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38) Verfassungsgerichtshof, judgment of 1 December 2006, Cases B 551/06-13 and B 567/06-15.

39) Belgium’s French Community also makes the right conditional on a Belgian broadcaster being granted the same rights in the relevant member state under comparable terms.

40) The directive merely points out in paragraph 2 of Recital 55 that in transfrontier cases different laws should be applied sequentially (firstly, in the case of access to the short extracts, the law of the member state where the rightsholder is established; secondly, in the case of the transmission of the short extracts, the law of the member state where the broadcaster seeking access and wishing to transmit the short report is established). If a member state has set up an equivalent system for the access under Article 15(4) AVMSD (e.g., access to the event venue), the law of that member state should at any rate be applied.

#### 4. Guaranteed access

This criterion determines in particular in what way the reporting broadcaster should be given access to the desired information.

Most states follow the guidelines contained in the Directive and grant access to the signal and/or the event venue. Only in exceptional cases (Bulgaria, Croatia, Hungary, Italy and Latvia) does domestic law provide for access to the material produced and broadcast. In Poland, a licensee has no obligation to grant access to the signal when the broadcaster seeking access can attend the event venue and produce the relevant short reports itself.

Which of the alternatives explicitly mentioned in the Directive or equivalent systems are chosen by a state may also be determined by copyright considerations. While access to the broadcast material in principle leads to generally recognised rights to copyright payments,<sup>41</sup> access to the signal may result in claims on the basis of related rights.<sup>42</sup> However, such claims do not arise when only access to the event venue is granted – at any rate, from the point of view of EU law, which, as matters currently stand, does not provide any protection for intellectual property in the case of sports events.<sup>43</sup>

The regulatory context sometimes allows the conclusion to be drawn that the legislature's thinking has been motivated by copyright. For example, the rules on the right to short reporting in Finland, Iceland, Norway, Sweden and the United Kingdom are to be found in copyright legislation. These states evidently understand this right to be a form of the right to quote or as a "right" related to it, and therefore as a widely recognised exception<sup>44</sup> from copyright.

It is worth noting in this connection the opinion of a Dutch court on the relationship of national copyright law to media law when it comes to exercising the right to short reporting.<sup>45</sup> The regional public broadcasters had requested access to extracts for reporting purposes from Eredivisie C.V., the exclusive rightsholder, and Eredivisie Media & Marketing C.V., which markets the top Dutch men's football matches on television and the Internet. In preliminary relief proceedings, the court first established that the broadcaster seeking access could invoke the right to short reporting within the meaning of the Media Act and that this right enabled it in principle to be given access to the licensee's signal. However, the court went on, the exemptions from the requirement to obtain the rightsholder's consent for the dissemination of the extracts provided for in the Copyright Act and the Act on Related Rights were not applicable, so the court dismissed the claim for access to the material on the ground that, as they had not given authorisation to the regional broadcasters to disseminate short extracts of their footage, the rightsholders could not be obliged to grant such regional broadcasters access to the footage.<sup>46</sup>

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41) A programme produced by the rightsholder (duly edited and provided with a commentary) is the broadcaster's own intellectual creation and enjoys the protection provided, for example, by Article 13 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention, 1961) or Article 2(1) of the 1971 Revised Berne Convention (RBC) for the Protection of Literary and Artistic Works. The 1996 Copyright Treaty of the World Intellectual Property Organisation (WIPO) and the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organisation (WTO), which have been ratified by most European states, also refer to Article 2(1) RBC.

42) Currently, only Article 13 of the 1974 Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Satellite Convention) provides for the possibility of protecting a broadcaster's internally transmitted but not (yet) broadcast signal. Recommendation Rec(2002)7 of the Council of Europe Committee of Ministers on measures to enhance the protection of the neighbouring rights of broadcasting organisations, of 11 September 2002, urges member states to take measures to ensure that broadcasters enjoy adequate protection in relation to their pre-broadcast programme carrying signals; see Lucie Guibault/Roy Melzer, *The Legal Protection of Broadcast Signals*, IRIS plus 2004-10, pp. 2 ff.; see on this subject also Anne Yliniva-Hoffmann/Peter Matzneller, *The Legal Protection of Broadcasters*, IRIS plus 2010-5, pp. 7 ff.

43) ECJ, loc. cit. (fn. 12), para. 99.

44) Article 15(1)b of the 1961 Rome Convention expressly permits the contracting parties to exempt the use of short extracts for the purpose of reporting on current events from the need to obtain the rightsholder's consent.

45) *Rechtbank Utrecht* (Utrecht Court of Justice), injunction of 12 May 2010, Case 285245 / KG ZA 10-332. At the time this article was being written, no decision had yet been taken on the principal issue.

46) See also the minutes of the 32nd meeting of the Contact Committee on 16 June 2010, Doc. CC AVMSD (2010) 2, para. 10, 2nd bullet point, available at: [http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact\\_comm/32\\_minutes\\_en.pdf](http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/32_minutes_en.pdf).

## 5. Fair, reasonable and non-discriminatory access

Individual states mostly adopt the terms in the Directive without defining them any further. Greece, Italy, Slovenia, the Czech Republic and Cyprus refer in their laws to the licensee's obligation provided for in the AVMSD to lay down the actual terms for granting the access and communicate them in a timely manner. Only Italy explains the term "timely" and states that the notification must be given at the latest one week before the beginning of the event. Ireland requires broadcasters to draw up a self-regulation code. In Hungary, broadcasters are asked to reach a contractual agreement on the exercise of the right to short reporting.

## 6. Short extracts

The practical exercise of the right to short reporting depends on whether and in what detail individual countries define the term "short extracts". Most states have adopted the guide figure of 90 seconds mentioned in Recital 55 of the Directive. Some countries also sometimes allow broadcasters seeking access more time for a short report. For example, Belgium's Flemish Community and Cyprus usually permit a maximum duration of 180 seconds. While short reports in Denmark may in (unspecified) exceptional cases also last longer than 90 seconds, the Netherlands extend the maximum length to 180 seconds in the case of "decisive moments" in sports events.

This maximum duration of three minutes was laid down by the Italian broadcasting authority Agcom in an order further clarifying the right to short reporting, stating that the length of short reports on very short events should be no longer than 3% of the total duration.<sup>47</sup> However, this part of the order was set aside by the Latium Administrative Court,<sup>48</sup> which stated that, although it was true that the Directive largely established basic principles and left it up to the member states to provide for more detailed or stricter conditions, in those cases where, for the purpose of bringing about extensive harmonisation, it set out concrete parameters that had resulted from a careful balancing of conflicting interests (such as the maximum duration) it did not allow the member states to enact any different provisions.

Belgium's Flemish Community deviates particularly significantly from the guidelines in the AVMSD in the case of tournaments lasting several days. In such cases, news programmes may contain short reports lasting up to six minutes per sport and day. Short reports shown in current affairs programmes may even be up to 15 minutes in duration per sport and day.

By contrast, Hungary makes the permitted length of short reports dependent on the duration of the individual news programme: they may neither make up more than 10% of the programme in which they are shown nor exceed 50 seconds, although the parties involved may contractually provide for other maximum durations.

Belgium's Flemish Community, Austria, Denmark, Germany, Liechtenstein, Malta, Portugal and Sweden also stipulate that the length of a short report shall be determined by the time needed to provide the news content of the event. "The former Yugoslav Republic of Macedonia" has adopted a similar stance with its definition of the term "short report", according to which the report must enable the general public or relevant audience to form an adequate picture of the key aspects of an event. In order to avoid the danger of misleading reporting, Serbia stipulates that the images and sound made available must be authentic.

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47) Autorità per le garanzie nelle comunicazioni (Agcom), Appendix A to Decision No. 677/10/CONS of 17 December 2010, available at: <http://www.agcom.it/Default.aspx?message=visualizzadocument&DocID=5441>

48) Latium Administrative Court, Judgment No. 7844 of 13 July 2011, available at: [http://www.giustizia-amministrativa.it/DocumentiGA/Roma/Sezione%202/2011/201102401/Provvedimenti/201107844\\_01.XML](http://www.giustizia-amministrativa.it/DocumentiGA/Roma/Sezione%202/2011/201102401/Provvedimenti/201107844_01.XML). As the authority has lodged an appeal, the judgment is not yet final.

On the requirements concerning the content of short reports, the Austrian Constitutional Court adopted a clear position in the proceedings already described in section III.1.2 between ORF and Premiere Fernsehen GmbH and severely criticised the BKS for the way in which it had weighed up the conflicting interests involved,<sup>49</sup> stating that, instead of dealing in its decision with the question of whether reducing the maximum duration might have led to a reasonable balancing of interests, the BKS had tried to counter the excessive duration by setting guidelines relating to content. Although the BKS had recognised that a combined report on all events at least came close to a normal football report, by establishing content-related guidelines it had at the same time claimed a competence for itself that was not covered by the law. The BKS was not authorised to select specific scenes and thus influence the content of the short report. Based on Article 10 of the European Convention on Human Rights (ECHR), the court concluded that it was only up to the television broadcaster to select the scenes it considered interesting for its audience. The authority had therefore unjustifiably interfered with ORF's freedom of expression.

It may be concluded from this decision of the Austrian Constitutional Court that requirements concerning extracts for short reporting purposes going beyond formal and structural conditions are probably not compatible with recognised basic rights.

## 7. General news programme

States have a certain amount of scope for defining the term "general news programme" as the Directive itself does not do so, but most states adopt the wording of the Directive as it stands. Only Serbia does not limit its rules to a specific type of programme in which short reports may be shown.

In Denmark, a general news programme is one that reports on newsworthy events and deals with more than one subject or event. The programme may under (unspecified) circumstances also consist of reports on events belonging to a single category (e.g., sport). Italy has adopted a negative definition and excludes all programmes that are not scheduled on a regular basis or contain entertainment elements. In the Czech Republic, a general news programme is one made up of news, reports and interviews and devoted to current events in the areas of domestic and foreign policy, culture, public life, crime and sport – including a specific news block that regularly follows such a programme. Poland also permits the use of short reports in separate blocks of sports news.

Some countries and entities (Belgium's Flemish and French Communities, Bulgaria and Cyprus) expressly permit the broadcasting of short reports in current affairs programmes.

As already mentioned, the Directive permits short reports also to be broadcast on sports channels. This means that in borderline cases a short report broadcast by a sports channel may come close to being an entertainment sports programme. This is particularly the case when a state decides to regard each pairing from 18 or 20 teams in a national league as an individual event. In this case, a news programme that reports on all matches played on a particular day, together with interviews, the opening presentation and closing remarks and other information, may become so long in terms of time and content that it goes far beyond mere (short) reporting.<sup>50</sup> Individual states attempt to counter the danger of the abuse of the right to short reporting by expressly prohibiting the broadcaster seeking access from using short reports to make an entertainment programme (Denmark) or either to produce a separate programme in its own right or fill a large part of one programme with those reports ("the former Yugoslav Republic of Macedonia").

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49) Verfassungsgerichtshof, loc. cit. (fn. 38).

50) See on this also Schoenthal, op. cit. (fn. 16), p. 7.

## 8. Reimbursement of costs

The Directive does not provide for the licensee's right to claim from the broadcaster seeking access any reimbursement of costs incurred in addition to those arising directly in connection with the grant of that access. Holders of exclusive rights criticise this, saying that the exclusivity they have been granted loses some of its value when the television viewer or Internet user is not forced to view the programme they offer in order to obtain information on events of high public interest.<sup>51</sup> However, an objection raised against an additional obligation for the broadcaster seeking access to pay compensation is that any rights devaluation that might take place is cushioned in an appropriate manner by limiting the use of extracts to general news programmes.<sup>52</sup>

The German *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) argued in a broadcaster's favour when it was required to rule on the compatibility with the *Grundgesetz* (Basic Law) of a provision in a law of the *Land* of North Rhine-Westphalia on the right to short reporting.<sup>53</sup> In the court's view, the provision contained a disproportionate restriction on the freedom to exercise a trade or profession since the right to short reporting was free of charge. However, as it was a question of safeguarding a right of public importance, the determination of the charge should not be at the discretion of the event organiser. Instead, – and here the court considered the justified interests of the general public and of the broadcasters seeking access – the legislature was obliged to enact provisions ensuring that the right to short reporting was not undermined by excessive charges but remained accessible to all television broadcasters.<sup>54</sup>

As a result of this judgment, it was laid down in the German Interstate Broadcasting Agreement before the entry into force of the AVMSD that the event organiser “may call for a small charge appropriate to the character of the short report by way of compensation for the exercise of the right to short reporting on professionally organised events”. In a similarly worded provision, Liechtenstein also recognises the possibility of a small charge being made.

However, in return for its obligation to permit access, most states simply grant the organiser the right to payment of the actual costs incurred as a result of meeting that obligation. Bulgaria even provides for the access always to be free of charge – the reimbursement of costs is possible but should be an exception. On the other hand, Belgium's Flemish Community, which also permits short reports in current affairs programmes, enables the parties to take account in a compensation agreement of the costs incurred by the licensee in obtaining the rights.

As pointed out in section II.2.2 with respect to the various elements of the right to short reporting, the Austrian BKS doubts the compatibility of Article 15(6) AVMSD with the right to property enshrined in Article 17 of the EU's Charter of Fundamental Rights and has referred the question to the ECJ for a preliminary decision.<sup>55</sup> The subject of the proceedings before the BKS was a challenged decision of the Austrian broadcasting regulator *Kommunikationsbehörde Austria*, in which that authority interpreted the Austrian Television Exclusive Rights Act, which is closely modelled on the AVMSD, in such a way that it offered no scope for granting appropriate compensation over and above the direct costs of providing the access. In the authority's view, as the exclusive rightsholder had granted the broadcaster seeking access a free subscription for the programme concerned the access costs amounted to 0 euro. The BKS expressed doubts concerning the compliance with basic

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51) Cf. also Wildmann/Castendyk, op. cit. (fn. 26), p. 79. The authors speak in this connection of a transmission right *encumbered* by the right to short reporting. A different view is held by Michel/Brinkmann, “Kommentar zu § 5 RStV”, in Hahn/Vesting (eds.), *Beck'scher Kommentar zum Rundfunkrecht*, C.H. Beck, 2nd edit., 2008, marginal ref. 27. Here, the authors deny that significant economic disadvantages result for event organisers and rightsholders from the right to short reporting.

52) See for example the explanatory report to the Austrian government's bill to amend the Austrian *Fernseh-Exklusivrechtgesetz* (Television Exclusive Rights Act), No. 611, 24th Legislative Period, p. 83, available at: [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_00611/fname\\_180228.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_00611/fname_180228.pdf)

53) Bundesverfassungsgericht, judgment of 17 February 1998, Case 1 BvF 1/91, available at: [http://www.bundesverfassungsgericht.de/entscheidungen/fs19971111\\_1bvf000191.html](http://www.bundesverfassungsgericht.de/entscheidungen/fs19971111_1bvf000191.html)

54) Bundesverfassungsgericht, loc. cit. (fn. 53), marginal refs. 128, 130.

55) BKS, loc. cit. (fn. 28).

rights of a provision of the Directive that absolutely ruled out the possibility of an order issued by an authority to pay compensation. It could, the BKS said, be argued that compensation could be brought about by the member states by imposing other restrictions (such as the maximum duration or time-limits), so that financial compensation was unnecessary. However, in the light of the principle of proportionality the question arose as to whether provisions were necessary that made it possible to consider the circumstances of an individual case.

Irrespective of this particular issue, the proceedings before the BKS provide some guidance as to what may appear to be reasonable compensation. In an agreement valid until the entry into force of the Television Exclusive Rights Act, the parties involved had agreed on compensation for the costs of rights of EUR 700 per minute with per-second billing.

The legal dispute between ORF and Premiere (see sections III.1.2 and III.6), in which the Austrian Constitutional Court also expressed its opinion on the compensation fee of EUR 1 000 per minute laid down by the BKS, is highly illuminating. Premiere complained that this amount did not even come close to compensating it for the reduction in value of its exploitation rights brought about by the short reporting and was thus unconstitutional interference with its property and its freedom to carry on a business. On this, the Constitutional Court stated that the BKS had first of all set a figure for the signal production costs of EUR 5 per second, i.e. EUR 300 per minute. That meant that the remaining EUR 700 was compensation for the interference with Premiere's contractual rights. However, it was not the Constitutional Court's task to judge the accuracy of the assessment. After the decision previously taken by the Administrative Court, the BKS should have reconsidered the amount of financial compensation in relation to the maximum duration of the short reporting because those two elements were interconnected. The BKS, however, did not undertake a new evaluation and had therefore breached Premiere's right to equality before the law.

The Austrian Constitutional Court thus set clear limits on compensation levels laid down by the state or public authorities. When a particular amount is stipulated, the extent of the use must be taken into account. In the opinion of Germany's Federal Constitutional Court, the contractually established price levels for exploitation rights cannot simply be used as a basis for making an assessment since reports in a news bulletin have only limited entertainment value compared with the value on which the grant of the rights was based.<sup>56</sup>

## 9. Modalities and conditions

When the further modalities and conditions for the practical exercise of the right to short reporting are defined, various national features emerge.

In particular, rules on waiting periods, that is to say the periods between the broadcasting of the event by the holder of the exclusive rights and the short reporting by the broadcaster seeking access, present a very heterogeneous picture. Countries that provide for specific time-limits mostly prohibit the broadcasting of short reports as long as the licensee has not reported on the event in some form or other. This is, for example, the case in Belgium's Flemish Community,<sup>57</sup> Denmark, Romania and "the former Yugoslav Republic of Macedonia". However, the licensee's right to the first broadcast lapses 24 hours after the end of an event or, in the case of "the former Yugoslav Republic

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56) Bundesverfassungsgericht, loc. cit. (fn. 53), marginal reference 130.

57) In Belgium's Flemish Community, this applies only when access to the *signal* is granted. If the broadcaster seeking access has access to the event venue and makes its own film recordings, or if the rightsholder does not exercise its exclusive rights, the broadcaster seeking access is not subject to any time restrictions.

of Macedonia”, after the end of the first prime time following the event. Germany and Liechtenstein also expressly permit the broadcaster seeking access to put out a brief live transmission.<sup>58</sup>

In Belgium’s French Community, short reports may be shown no earlier than 20 minutes after the end of the event irrespective of when it is broadcast by the licensee. In Austria, the BKS has informed ORF that it may not broadcast a short report before the beginning of the transmission of an event by Premiere and no earlier than 30 minutes after the scheduled end of the match being reported on.

In Bulgaria, Malta, the Netherlands and Cyprus, short reports may only be broadcast within 24 hours of the end of an event.<sup>59</sup> In Portugal the period is 36 hours if no additional news items connected with the original event emerge and result in the time-limit beginning again. The Estonian Media Services Act only permits the use of short reports up to the day following the event.

Some states also limit the possibilities of repeating short reports, but individual rules vary considerably. In the Netherlands and Slovakia, unlimited retransmission is possible within 24 hours, while in Cyprus a short report may only be repeated three times in the same period. Denmark permits unlimited retransmissions as long as the event concerned still has news value. On the other hand, the repetition of short reports is only allowed in “the former Yugoslav Republic of Macedonia” and Sweden if there is a direct link to another current event. In Bulgaria too, retransmissions – apart from reports looking back on major events like the Olympic Games or the Eurovision Song Contest – are not permitted at all. Estonia leaves it up to the broadcasters to agree contractual terms on repeat broadcasts.

Most countries also require the source to be indicated. Bulgaria, Romania and Cyprus require the additional insertion of the licensee’s name or logo. In Austria, short reports must be clearly designated as such.

One rule is peculiar to Denmark: an explicit ban on the use of the licensee’s audio commentary in the short report.

## **10. Time-shifted offerings in on-demand media**

In the case of the authorisation to use short reports in non-linear services, most states base the wording of their rules on the provisions of the Directive (the *same* media service provider, the *same* news programme, *deferred* coverage).

Some countries (including Bulgaria, France, Italy and Poland) do not expressly regulate the use of short reports in non-linear services. However Estonia extends the right to all providers of non-linear audiovisual media services by simply making the provision of short extracts on demand conditional upon this not being done before a live news programme broadcast by the licensee.<sup>60</sup>

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58) This came about in Germany because when the right to short reporting was regulated in the Interstate Broadcasting Agreement in 1991 the *Länder* considered not only planned and organised events but also unforeseen events (such as accidents or natural disasters). According to the explanatory part of the Interstate Broadcasting Agreement, the signatories assumed that a recording with subsequent editing would be the rule in the case of events “as the aim is not to broadcast scenes and images as such but footage with value as information and news [and] there is only limited time available”. On the other hand, the signatories thought that in the case of unforeseen events it was more sensible “in the interests of providing up-to-date information to report directly on what is happening and on further developments”.

59) Romania also has this 24 period but relates it to the time of the first broadcast of the short reports.

60) The argument being that the *deferred* coverage criterion does not necessarily have to be interpreted to mean that it refers solely to the news programme of the broadcaster seeking access. The Directive also permits the interpretation that a media service provider must only wait until the rightsholder broadcasts a news programme.

The media regulator of Belgium's Flemish Community, *Vlaamse Regulator voor de Media* (VRM), ruled that the public broadcaster VRT had committed a breach of the rules<sup>61</sup> because it had made available summaries of the matches of the Belgian football league, for which the private broadcaster VTM possessed the exclusive rights, at its website *Sporza.be*. The authority established that the television station was only offering the sports part of its news programme at its website in a newly created section (Jupiler Pro League) and therefore not precisely the same programme that it had broadcast in its linear service.

## IV. Conclusions

The right to short reporting (Article 15 AVMSD and Article 9 ECTT) forms together with the ban on only broadcasting major events on pay-TV (Article 14 AVMSD and Article 9bis ETCC) a very important barrier in European law to the use of exclusive broadcasting rights. The Directive contains a number of fundamental provisions for ensuring the right to short reporting and calls on member states and the broadcasters concerned to detail the conditions necessary for the practical exercise of this right.

Despite the applicability of the right to short reporting to all events for which a broadcaster possesses the exclusive rights, national measures mainly focus on sports events. The importance of these events becomes particularly obvious in those states that provide for a list of individual events – similar to the one mentioned in Article 14 AVMSD – in the relevant rules.

Most European countries basically adopt the individual terms and concepts from the AVMSD without further defining them. This applies in particular to the criterion of fair, reasonable and non-discriminatory access and to limiting short reports to general news programmes. These generally worded criteria have only led a few countries to enact provisions of a more concrete nature. The same applies to the requirements concerning the use of short reports in on-demand services and to any arrangements concerning costs. Although such arrangements are very contentious among legal writers and in case law, member states basically accept the guidelines of the Directive and most rule out any rights to compensation over and above the actual access costs.

The mere adoption of the provision in the Directive can have a serious effect in cross-border situations. A national rule strictly based on the content of Article 15 AVMSD may result in no guarantee being given for a foreign broadcaster being granted access to events that are not of high public interest in the licensee's country. Insofar, there is a lack of arrangements such as the rule of mutual recognition of lists pursuant to Article 14 AVMSD.

In the case of the important term *of high interest to the public*, too, most states dispense with detailed explanations. Only a few states (including Denmark, Austria, Germany and Italy) lay down what events are likely to attract considerable interest. On the other hand, many eastern European countries (e.g., Bulgaria, "the former Yugoslav Republic of Macedonia", Serbia and Hungary) tend to equate "of high public interest" in the case of the right to short reporting to the term "of major importance for society" within the meaning of Article 14 AVMSD. If the latter term is not, as in the case of Serbia, given a broad interpretation, then equating the two increases the obstacles to the exercise of the right to short reporting and therefore limits the scope of Article 15 AVMSD.

Countries mainly take advantage of the leeway accorded to them when they define the term short extracts and establish the various rules relating to their use. In the case of the maximum duration of individual short extracts, states closely follow the guide figure mentioned in the Directive and usually only allow it to be departed from in exceptional cases, whereas a wide variety of approaches

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61) *Vlaamse Regulator voor de Media*, VMMA v. VRT, 2011/030, decision of 24 October 2011, available at: <http://www.vlaamseregulatormedia.be/media/17332/beslissing%202011-030.pdf>.

are adopted with regard to time-limits and rules on waiting periods. There is a clearly recognisable desire to strike a balance between the event organiser's interests and those of the broadcasters involved. The obligations imposed on the broadcaster seeking access (e.g., embargo periods), result from the exclusive arrangements granted the licensee. On the other hand, requirements to be met by licensees (e.g., the live or near-live transmission of the event) ensure the topicality of the reports of the broadcaster seeking access.

Countries adopt very different approaches to the possibility of repeat transmissions, ranging from unlimited repeats within a certain period or a precisely specified number of repeats to a ban with a few exceptions (especially in the case of annual reviews or reviews of competitions).

In the great majority of the countries studied, no significant problems or disputes are detectable regarding the practical application of the right to short reporting, which leads to the conclusion that there is trouble-free co-operation between licensees and broadcasters reporting on events. However, there is an impression that the various broadcasters are increasingly focusing their reporting on those sports and events for which they possess the exclusive rights. This practice may essentially be due to competition interests: on the one hand, they create a desire in their own audience to view their "own" sport and, on the other hand, they avoid arousing any interest in a sports event broadcast by a competitor. However, when even the licensee, with reference to contractual agreements with the traditional associations of sports event organisers, waives certain legal rights such as the use of its own short reports in on-demand services, these contractual agreements set certain standards in practice that may have an impact beyond the parties involved and thus reduce the effectiveness of the right to short reporting. That may, however, have adverse consequences for the general public, whose interest in obtaining information should, in the final analysis, above all be protected.