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### **Satellite television and the home of the broadcast**

*C-290/21 Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger Reg. Gen. mbH (AKM) v Canal+, EU:C:2022:711 (AG), EU:C:2023:424*

The 1990s saw the rapid development of satellite television across Europe, and in 1993 the European Economic Community<sup>1</sup> enacted the Satellite and Cable Directive.<sup>2</sup> The purpose of the Directive was to make it clear who had to obtain a copyright licence when a work was broadcast by satellite and to indicate how much should be paid for those rights. The Directive came up with the idea of attaching liability to the person who introduced the program-carrying signal into the “uninterrupted chain of communication” between its origin and the paying public.<sup>3</sup> In summary, it provided that the authorisation to transmit the copyright work was only required in the country where the signal was sent from earth to the satellite. This is commonly called the “country of uplift approach” or the “emission theory”.<sup>4</sup> Critically, the Directive made it clear that the authorisation to transmit the copyright work should take into account the footprint of the satellite transmission.<sup>5</sup>

This model was based on the premise that one broadcaster would be responsible for everything from start to finish, but over time television distribution has become more complicated. In C-290/21 *AKM v Canal* (“*AKM*”)<sup>6</sup> the Court was concerned with “satellite packages” which involve the aggregation of multiple signals. The most obvious combination being free to air channels and subscription (encrypted) channels.<sup>7</sup> It is possible for anyone (with a satellite receiver) to view the free to air channels<sup>8</sup> but it is necessary to have a decoder card (or access key) to view the encrypted channels.<sup>9</sup> In *AKM*, the Court had to consider whether satellite package providers were covered by the emission theory (one authorisation to rule them all) or whether the provider needed to obtain authorisations in every country where the decoder cards (or codes) were made available.

Critically, it was not the first time this issue had been considered by the Court and so in many respects this case was a rerun of C-431/09 *Airfield v SABAM* (“*Airfield*”)<sup>10</sup> albeit the outcome was different. In *Airfield*, the Court considered whether there was a communication by satellite and whether the provision of a decoder was making a work available to a new public. These issues returned in *AKM* along with some guidance on how the remuneration should be determined where a work is transmitted by satellite.

#### *Communication by satellite*

The rule that the satellite broadcast is deemed to only take place in the Member State of uplift (the emission theory) or as the Advocate General called it, “the broadcasting Member State principle”<sup>11</sup> is intended to provide legal certainty and an adequate level of protection to rights holders.<sup>12</sup> It means that where a communication satisfies the necessary requirements of “the broadcasting Member State principle” then only the copyright law of that Member State applies to the entire communication.<sup>13</sup> The rule was, the Advocate General suggested, to both remove obstacles caused by the territoriality of copyright, but also to provide safeguards to copyright holders by designating an operator as responsible for the entire communication.<sup>14</sup> It means, for

example, that if a communication is made from Austria which satisfies all the necessary requirements then only Austrian copyright law applies to the transmission even where it can be received in many (or even all) other Member States.

The necessary requirements for “the broadcasting Member State principle” to apply and so for the transmission to be a single communication to the public are as follows.<sup>15</sup> First, it is triggered by an “act of introducing” program-carrying signals, carried out “under the control and responsibility of the broadcasting organisation”; secondly, those signals are introduced “into an uninterrupted chain of communication leading to the satellite and down towards the earth”; thirdly, the signals are “intended for reception by the public”; and finally, where the signals are encrypted, the means for decrypting the broadcast are “provided to the public by the broadcasting organisation or with its consent”.<sup>16</sup>

In *AKM* the Advocate General opined that the program-carrying signal could be introduced into a “chain of communication” by the broadcasting organisation either directly or, by a third party, with the organisation’s consent. In other words, once transmitted the organisation is assuming responsibility for the communication<sup>17</sup> and everything that entails.<sup>18</sup> A corollary of there being a single act of communication is that responsibility for that act cannot be shared.<sup>19</sup> This means, the Advocate General stated, that the control over the copyright relevant aspects of the communication<sup>20</sup> must be *total* for the responsibility to exist.<sup>21</sup> But it does not mean *physical* control over the entire communication: control can come from the ability to set contractual terms with a satellite package provider.<sup>22</sup> The Court did not address the issue of control directly, but nothing in its judgment diverged from what the Advocate General put forward.

Once of the key aspects of rule is that it must be an “uninterrupted” communication. In *AKM* the Advocate General took the view that what is originally transmitted by the original provider of the signal must be that intended for reception by the public and any steps taken to delay or alter the transmission would mean it ceased to be “uninterrupted”.<sup>23</sup> The reference to “alteration” must mean the content of the program itself being altered – such as adding commercials or subtitles – rather than the signal being coded or decoded. This is because it had already been established in *Airfield* that a broadcasting organisations receiving signals, possibly decoding them, re-scrambling them and beaming them up to the satellite concerned is a customary technical activity and therefore does not break the “uninterrupted chain of communication”.<sup>24</sup> Furthermore, it is suggested that any alteration or addition must be *during* the transmission of the signal and not something added by the receiving device (e.g. automatic subtitles generated by a television set).

The no alteration rule did not affect another issues before the Court, namely the fact that multiple broadcasting organisations could have their signals combined into one signal before being sent to the satellite (e.g. the free to air signal and the encrypted signal). The Advocate General simply took the view that this one transmission is in effect little more than multiple transmissions running side-by-side.<sup>25</sup> And, once more, there is nothing in the Court’s reasoning suggesting he was incorrect in his assessment.

Critically, to benefit from the broadcasting Member State principle, it is not necessary for the broadcasting organisation to carry out the communication *itself* provided it has control over it.<sup>26</sup> This means certain tasks in arranging the broadcast can be entrusted to others – such as satellite package providers.<sup>27</sup> Strangely, at one point the Advocate General inverted the relationship between the provider and the broadcaster. The broadcaster was not providing a

service to the package provider (to transmit its package by satellite), rather the broadcasting organisation was *delegating* the content provision aspect to the provider. But later in his opinion the relationship is switched back as the package was acknowledged to enable the receipt of multiple single transmissions from different broadcasting organisations. The package being considered as an intrinsic part of the “uninterrupted communication” of each one.<sup>28</sup> The Court elided any complex explanation of the relationship between package provider and broadcasting organisation and concluded by saying little more than the copyright law of the country of uplift was the only one that applied and that the satellite package provider need not get an authorisation in respect of any other Member State.

#### “New publics”

In *Airfield* despite the Court finding that there was only one single and indivisible communication to the public by satellite, it went on to conclude that a satellite package provider needed to get a separate authorisation from the broadcasting organisation.<sup>29</sup> The reasoning adopted in *Airfield* was that the provision of a decoder to view the encrypted signal was making the content of that signal – the television programs – available to a new public.<sup>30</sup> While there may appear to be some logic to this approach because a viewer could not watch the program at all until they got a decoder from Airfield, it ignores the fact that without the decoder there is no public at all. The original public and the new public are therefore the same. So it is the viewer with a decoder who was taken into account when the original authorisation was given to broadcast the work.<sup>31</sup> Furthermore, this basic rationale is not affected where the decoder gives access to multiple broadcasters’ signals. In each case, the decoding is the end of each of those signals and not a new transmission.<sup>32</sup>

Despite the Advocate General’s strident criticism of this aspect of *Airfield*, the Court did not expressly overturn its previous decision.<sup>33</sup> Instead, it seamlessly side-stepped it by concluding that satellite package providers must obtain the authorisation of the right holders only in the Member State in respect of which the program-carrying signal is introduced into the chain of communication (i.e. the country of uplift).<sup>34</sup> It is difficult to see how this conclusion is compatible with *Airfield*, but the approach the Court adopted in *AKM* does appear to be the right one.

#### *Assessing the licence fee*

The very purpose of the Satellite and Cable Directive was to ensure that where the necessary requirements were met there would be only one communication.<sup>35</sup> One communication means one payment. Indeed, the Directive expressly refers to a single payment being made to cover the actual exploitation of the work (and not just the use in the country of uplift).<sup>36</sup> So while the broadcasting organisation has to get an authorisation to cover the actual effect of the communication,<sup>37</sup> it falls to the collecting societies (and the right holders) to find suitable solutions to determine the level remuneration that should be paid when the broadcast can be accessed in multiple Member States.<sup>38</sup> Only where there is an interruption so it ceases to be an “uninterrupted communication” is a new authorisation needed.<sup>39</sup>

A final, and interesting, point was what should happen where the licence agreed for the “single” communication did not take account of the actual audience. The answer was where the parties have been honest and provided each other with information, nothing can be done. The right holders simply agreed to a bad deal. This is the case even where the right holder in Member

State A may have no connection with the right holder in Member State B and so has no interest in obtaining more money to share out. On the other hand, where incorrect information was used to obtain the authorisation, then it makes the authorisation for the whole broadcast invalid.<sup>40</sup> But even then, only the right holder in the country of uplift has a right to sue for infringement.

### Conclusion

The conclusion in *AKM* is one which closely aligns with business practices and the terms of the Directive. In many respects, it corrects the approach put forward by the Court in *Airfield*. While there are some mental gymnastics needed to get to the outcome, the final result that a satellite package provider only needs to seek permission in the country of uplift achieves the legal certainty and clarity at the heart of the Directive.

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<sup>1</sup> The predecessor of the European Union.

<sup>2</sup> Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (it is amended by Directive (EU) 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programs: but not in a relevant way: C-290/21 *AKM v Canal*, EU:C:2022:711, [45]). The Directive was a follow on from the earlier Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (the Television without Frontiers Directive).

<sup>3</sup> Directive 93/83/EEC, art 1(2)(a) and (b).

<sup>4</sup> As to this rule see, C-290/21 *AKM v Canal*, EU:C:2023:424, [27].

<sup>5</sup> Directive 93/83/EEC, Recital (17)

<sup>6</sup> EU:C:2022:711 (“AG”), EU:C:2023:424 (“Court”).

<sup>7</sup> The Advocate General considered these to be two separate and primary broadcasts: AG [65]. Also see AG, [73] (questioning the idea that a high-definition program might be the retransmission of a standard definition program).

<sup>8</sup> Court, [12].

<sup>9</sup> AG, [11] and [12]; C-431/09 *Airfield v SABAM*, EU:C:2011:648, [11] and [12] (“*Airfield*”). The AG took opined that the absence of these models during the negotiations of the Directive were immaterial as to whether the Directive applied or not: AG [42] and [43].

<sup>10</sup> EU:C:2011:648.

<sup>11</sup> AG, [24]

<sup>12</sup> Court, [31]; AG, [26].

<sup>13</sup> AG, [28].

<sup>14</sup> Court, [32]; AG, [39].

<sup>15</sup> These originate from *Airfield*, [52] and are given in slightly different terms by AG, [27]. They are a simplification of Directive 93/83/EEC, art 1(2).

<sup>16</sup> *Airfield*, [52] adopted by the Court, [22]. The Advocate General expressed it differently: AG, [27].

<sup>17</sup> AG, [31].

<sup>18</sup> AG, [37].

<sup>19</sup> AG, [39] (one presumes this is subject to accessory liability rules).

<sup>20</sup> AG, [38].

<sup>21</sup> AG, [36]

<sup>22</sup> AG, [37]. For instance, that the provider will obtain the necessary clearances for any work transmitted.

<sup>23</sup> AG [33].

<sup>24</sup> *Airfield*, [60 and 61]; AG [31].

<sup>25</sup> AG, [44] (rejecting the initial transmission argument) and [66].

<sup>26</sup> AG, [43].

<sup>27</sup> AG, [43].

<sup>28</sup> AG, [60].

<sup>29</sup> *Airfield*, [69] to [83].

<sup>30</sup> *Airfield*, [77] to [80].

<sup>31</sup> Expressed differently, but see AG, [50] and [58] (and this is represented by the subscription fee, [59]).

<sup>32</sup> AG, [60].

<sup>33</sup> Indeed, it seemed to directly endorse it: Court, [29].

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<sup>34</sup> Court, [30].

<sup>35</sup> AG, [55].

<sup>36</sup> Directive 93/83/EEC, Recital (17); *Airfield*, [71 and 73]; Court, [24].

<sup>37</sup> Court, [26].

<sup>38</sup> Court, [28].

<sup>39</sup> Court, [25] and [29].

<sup>40</sup> AG, [56].