Court of Justice of the European Communities: Advocate General Jacobs Opts for the Gross Principle

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On 24 June 1999 Advocate General Jacobs delivered his Opinion with regard to case C-6/98, Arbeitsgemeinschaft Deutscher Rundfunksanstalten (ARD) v PRO Sieben Media AG (see IRIS 1998-3: 6 for the underlying dispute). The dispute concerns the interruption by advertisements of films shown on television, more precisely the method by which, under the «Television Without Frontiers» Directive, the permissible number of such interruptions is to be calculated, and arises from the wording of Article 11(3) of the Directive. According to this provision, the permissible number of interruptions is to be calculated by reference to a period referred to as the «scheduled duration».

The two different methods the applicants and the defendant respectively opt for are the «net principle» and the «gross principle». Under the former, the advertisements are not to be included in the duration of time according to which the permissible number of interruptions is calculated and, thus, the relevant duration relates only to the length of the film itself. Under the latter, the duration of the advertisements is to be included in such time, which would permit a greater number of interruptions than would be allowed under the net principle. As a consequence, the effect of Article 11(3) will depend on whether the gross principle or the net principle applies and the issue will be between more frequent, but shorter, interruptions under the gross principle and less frequent, but longer, interruptions under the net principle.

By considering the wording of the provision, Advocate General Jacobs admits that a normal, common-sense reading of Article 11(3) would lead to think that one first needs to ascertain the length of the film itself, and only then can determine how many interruptions there may be. Nonetheless he states that the provision can be read the other way and therefore the wording of the article provides no clear guidance.

With regard to the distinction between «duration» and «scheduled duration», the latter supporting the gross principle, he also analyses the legislative history of the directive and compares it with the wording of the European Convention on Transfrontier Television and the position taken by the Community institutions during the legislative process. His conclusion is that perhaps the legislation

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deliberately used an ambiguous formula. A systematic and teleological interpretation of Article 11(3), in the light of Chapter IV of the Directive («Television advertising, sponsorship and tele-shopping») and its general aims (protection of consumers as television viewers and the freedom of broadcasting activity), does not seem to give the Advocate General clear guidance in choosing between the two principles. While recognising that the gross principle would harm consumers, because it would permit programmes to be interrupted more frequently for advertisements and create high barriers to entry for potential new broadcasters, due to the wider availability of potentially cheaper advertising space, he argues that where a directive is open to two interpretations, it would be wrong to adopt the more restrictive one and therefore suggests that the provision should be interpreted as prescribing the gross principle on the ground that it is less restrictive.

As the «Television Without Frontiers» Directive is concerned with minimal harmonisation only, the Advocate General finally states that Member States are free, pursuant to Article 3(1), to provide for the net principle, with regard to broadcasters under their jurisdiction.

Opinion of Advocate General Jacobs delivered on 24 June 1999, Case C-6/98, Arbeitsgemeinschaft Deutscher Rundfunksanstalten (ARD) v PRO Sieben Media AG.

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