Court of Justice of the European Communities Sees the Grossed-Up Principle as Settled in TV Directive

IRIS 1999-10:1/5

Alexander Scheuer
Institute of European Media Law (EMR), Saarbrücken/Brussels

The European Court of Justice (ECJ) decided in a judgement announced at the end of October that the "Television without Frontiers" Directive 89/552/EEC in the 97/36/EC version of 30 June 1997 is to be so construed that the calculation of scheduled transmission times for given programmes is to include advertising featured (the grossed-up principle). Member States are nonetheless free to lay down stricter rules in this regard for broadcasters coming under their jurisdiction, while abiding by other relevant provisions of Community law. The case brought before the ECJ under an interlocutory application by the Stuttgart Regional Court of Appeal concerned a dispute between the German group of public service broadcasters (ARD) and the private broadcaster (ProSieben) (See IRIS 1998-3: 6; IRIS 1999-7: 6). The ARD had pleaded, on considerations of competitiveness, that the application of the grossed-up principle by private broadcasters was in breach of the provisions of the Agreement between the Rundfunkstaatsvertrag (the Federal States on Broadcasting). The private broadcaster thus gained competitive advantage from this unlawful action. The defendant (ProSieben) objected that the Television Directive prescribed the grossed-up principle, so that the broadcasting legislator in Germany was not entitled to bring in tighter rules, in the form of what is known as the net principle, for broadcasters under his jurisdiction.

Just as Advocate General Jacobs had earlier argued in his final pleadings, the Court came to the conclusion that the wording of the disputed passage of Article 11 of the Directive is ambiguous. In these circumstances, it must be considered that a provision setting limits to such a basic freedom as the free transmission of television programmes must be clearly articulated. If it was not, it must be subject to strict interpretation and accordingly could only be construed as providing for the application of the grossed-up principle in calculating transmission times. Nonetheless, Member States were entitled to bring in stricter rules in accordance with Article 3 of the Directive for broadcasters under their jurisdiction. As regards the provisions of the Agreement between the Federal States on Broadcasting, it was not clear that the application of the net principle ran counter to other provisions of Community law.

In its final judgement, the Stuttgart OLG must consider how the provisions of the Agreement between the Federal States on Broadcasting and the implementing regional broadcasting laws are to be interpreted; since it has indicated that, like the lower court, it is inclined to favour the net principle, the case brought by ARD

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may still have some prospects of success.

Urteil des Gerichtshofs der Europäischen Gemeinschaften vom 28. Oktober 1999, Rechtssache C-6/98, Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) gegen ProSieben Media AG.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998CJ0006:de:PDF

Judgement by the European Court of Justice of 28 October 1999, case C-6/98, Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) vs. ProSieben Media AG.

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