Court of Justice of the European Union: Advocate General Gives Opinion on the Definition of Advertising

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On 7 April 2011 Advocate General Yves Bot delivered his opinion on case C-281/09 of the European Commission v. Spain on the question of the legal definition of television advertising spots and other forms of advertising under the EU's Television without Frontiers (TWF) Directive. The question arose when Spain was accused by the European Commission of failing to comply with the advertising rules of the TWF Directive. Article 18 of the Directive imposes an upper time limit of 12 minutes per clock hour to the transmission of television advertising spots and teleshopping, while other forms of advertising are only affected by the daily ceiling of 15% of the total daily transmission time permitted for all advertising regardless of type. According to the Commission, Spanish law currently defines the concept of "advertising spot" too narrowly. As a result, various common forms of advertising (namely, advertorials, telepromotions, sponsoring spots and micro-slots) are taken as falling outside the 12-minute/hour limit. Instead, under Spanish law, they are subject to a different limit of 17 minutes/hour. The Directive does not define the terms "advertising spots" or "other forms of advertising".

The AG observed that the content of the notion of "other forms of advertising" should be sought within the provisions of the Directive itself. Other forms of advertising that can be identified within the Directive and differentiated from advertising spots would be sponsoring messages in accordance with the definition of Art. 1 (e) of the Directive. Thus, according to the AG, sponsoring spots could be included in the notion of "other forms of advertising".

However, the AG suggests that the interpretation of the terms adopted by Spain in practice negates the efficacy of the adopted time limits, since it would permit advertisers to easily bypass the hourly limit by means of slight adjustments to the form of advertising they adopt. Moreover, the AG concludes that, in order to ensure the goal of limiting the transmission of advertising during peak hours thus protecting viewers against excessive advertising, the two terms should be defined in a single harmonized manner across the EU. Member State authorities cannot be permitted to determine the meaning of advertising, if equal treatment of audiovisual organisations, regardless of the Member States in which they are located, is to be achieved. Accordingly, the AG concludes that the Commission justifiably claims that the four forms of advertising identified should adhere to the 12-minute/hour time limit, including sponsoring, unless such sponsoring does not

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encourage the purchase of specific products or services of the sponsor.

Opinion of Advocate General Yves Both, 7 April 2011, Case C-281/09, European Commission v. Kingdom of Spain

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