[IT] ECJ to Vet the Italian stricter hourly Advertising Limits for Pay-TV

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On 7 March 2012 the Second Chamber of the Regional Administrative Court of Latium referred to the European Court of Justice (ECJ) for a preliminary ruling on the question as to whether Directive 2010/13/EU (the AVMS Directive) and EU primary law should be interpreted as precluding the asymmetric hourly advertising limits for pay-tv operators provided by Italian law.

The so-called Romani Decree, adopted by the Italian Government to implement the AVMS Directive (see IRIS 2010-4/31), includes a number of provisions having no exact match in the AVMS Directive. In particular, Article 38, para. 5, of the Consolidated Law on Audiovisual and Radio Media Services (CLARMS) as amended by the Romani Decree provides that pay-tv operators must comply with a hourly advertising limit of 16% in 2010, 14% in 2011, and 12% from 2012 onwards.

The order for reference by the Regional Administrative Court of Latium was adopted in the context of legal proceedings brought by the Italian pay-tv operator Sky Italia against the Italian Communications Authority (Agcom) to challenge the validity of Agcom decision no. 233/11/CSP establishing a breach by Sky Sport 1 of the advertising limits for pay-tv operators and imposing a fine.

According to Agcom, the goal of the contested legislation is to safeguard the interests of pay-tv users, who are subject to a double burden: the payment of a fee to the pay-tv operator and the exposure to advertising. The referring court, however, raised doubts as to whether such a differential degree of protection for pay-tv users is in line with EU legislation applicable to audio-visual media services. In particular, the referring court noted that the protection of viewers from excessive advertising is a legitimate goal insofar as it extends to all viewers, without distinction as to their willingness to pay for the enjoyment of audiovisual media services.

In the referring court’s view, therefore, the contested legislation’s real aim is to increase the advertising revenues of free-to-air operators by limiting the sale of advertising by pay-tv operators. That aim, however, is not envisaged by the AVMS Directive: unlike local broadcasters, whose particular situation is expressly acknowledged by the Directive, free-to-air broadcasters are not at a comparative disadvantage relative to pay-tv operators, thus no asymmetric regulatory

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measures are required under the AVMS Directive.

Moreover, the referring court questioned the consistency of the contested legislation with the principle of freedom of expression, as enshrined in the EU Charter of Fundamental Rights and in the European Convention on Human Rights. While the referring court conceded that the freedom of expression can be balanced against other imperative social requirements, it did not regard the increase of free-to-air broadcasters' advertising revenues as a goal warranting the imposition of asymmetric regulatory obligations upon pay-tv operators.

Furthermore, the referring court noted that the Italian contested legislation, by unjustifiably discriminating against pay-tv operators, substantially impinges upon internal market fundamental freedoms by hindering the sale of advertising space by pay-tv operators to companies established in other member States, by making the establishment in Italy of additional pay-tv operators less attractive, and by reducing the incentives for EU investment in Italian pay-tv operators.

Finally, the referring court observed that the contested legislation significantly distorts competition by diverting advertising demand from pay-tv operators to free-to-air broadcasters, which can ensure comparably broader visibility and reach to advertised services, products, and brands.

The referring court, therefore, resolved to stay proceedings and to seek a preliminary ruling from the ECJ as to whether the AVMS Directive, the principle of equality, the principle of freedom of expression, and the internal market fundamental freedoms should be interpreted as precluding national legislation, such as that at issue in the main proceedings, setting out stricter hourly advertising limits for pay-tv operators relative to their free-to-air counterparts, thereby distorting competition and facilitating the creation or the strengthening of dominant positions in the television advertising market.

Tribunale Amministrativo Regionale per il Lazio (Seconda Sezione), ordinanza del 7 marzo 2012, ricorso n. 9422/2011

http://www.giustizia-amministrativa.it/DocumentiGA/Roma/Sezione%202/2011/201109422/Provvedimenti/201203639_08.XML

Regional Administrative Court of Latium (Second Chamber) Order of 7 March 2012, application no. 9422/2011, 7 March 2012

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