Advocate General: Opinion on Italy's Stricter Hourly Advertising Limits for Pay-tv

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On 16 May 2013, Advocate General Kokott delivered her opinion in Case C-234/12, Sky Italia v. AGCom concerning the issue of whether Directive 2010/13/EU (the AVMS Directive) and EU primary law should be interpreted as precluding the Italian asymmetric hourly advertising limits for pay-tv operators. Under Italian law pay-tv broadcasters are subject to a 14% hourly limit, whereas free-to-air commercial broadcasters must comply with an 18% hourly limit.

The referral to the ECJ originates in a dispute before the Latium Regional Administrative Court (TAR Lazio) in which Sky Italia impugned a decision by the Italian Communications Authority (AGCom). In its decision, AGCom found that one of Sky Italia's pay-tv stations had infringed the 14% hourly limit and imposed a €10,329 fine on the broadcaster. Reti Televisive Italiane (RTI), Italy's largest free-to-air broadcaster, which has a dominant position on the television advertising market, intervened in the main proceedings as well as before the ECJ.

AG Kokott first dealt with the interpretation of Article 4(1) of the AVMS Directive, which enables Member States to lay down "more detailed or stricter rules" for broadcasters subject to their jurisdiction. Contrary to RTI's contention, the AG took the view that such a provision does not grant Member States a "window of discretion" within which national rules are to be regarded as per se legal. By the same token, the AG rejected Sky Italia's argument that Article 4(1) of the AVMS Directive lays down a general prohibition on graduated national rules that distinguish between different categories of broadcasters.

AG Kokott then noted that the examination of the Italian provisions on the basis of the general principle of equal treatment under EU law had a different result depending on those provisions' main aim - which was for the referring court to determine. If the focus of the Italian rules were the protection of consumers against excessive advertising, then differentiated rules for pay-tv and free-to-air broadcasters would be compatible with the principle of equal treatment, because pay-tv viewers have already paid a contractual fee and may reasonably expect to be confronted with less advertising than on free-to-air TV. If, instead, the focus of the Italian provisions were to ensure that free-to-air broadcasters receive greater advertising revenues, then those provisions would be at variance with the principle of equal treatment, insofar as pay-tv and free-to-air broadcasters are in

a comparable situation (they both compete on the market of airtime for television adverting) and no competitive disadvantage exists to warrant asymmetric rules in favour of free-to-air broadcasters.

The AG then looked at the Italian rules against the background of EU internal market fundamental freedoms. While the effects of such rules on investment decisions by foreign broadcasters or investors appeared too uncertain and indirect to result in a restriction of the freedom of establishment or the free movement of capital, those rules did constitute a restriction on the freedom to provide services. In this connection, AG Kokott reiterated her proposition that while ensuring free-to-air broadcasters greater advertising revenues did not constitute a legitimate justification, the goal to protect viewers from excessive advertising could justify the restriction caused by the Italian rules, provided those rules are appropriate and necessary to achieve that aim. Again, AG Kokott left that determination to the referring court.

The AG finally turned to the question of whether the Italian rules were compatible with the principle of media pluralism to the extent that they distorted competition by creating or strengthening a dominant position in the television advertising market. AG Kokott took the view that the request for a preliminary ruling contained insufficient data on the relevant market for the ECJ to answer that question, which accordingly should have been declared inadmissible. In the alternative, AG Kokott averred that the principle of media pluralism precludes national provisions capable of significantly distorting competition between broadcasters, but added that not every change in the conditions of competition necessarily resulted in an impairment of media pluralism.

Opinion of Advocate General Kokott delivered on 16 May 2013, Sky Italia v. AGCom, Case C-234/12

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