Court of Justice of the European Union: Rules on Italy’s Stricter Hourly Advertising Limits for Pay-Tv Broadcasters

IRIS 2013-8:1/7

Amedeo Arena
Università degli Studi di Napoli "Federico II"

On 18 July 2013, the Second Chamber of the Court of Justice handed down its judgment in the Case C-234/12, Sky Italia v. AGCom. According to Italian law, pay-tv broadcasters are subject to a 14% hourly advertising limit and free to air broadcasters are subject to an 18% hourly advertising limit. In the proceedings before the Latium Administrative Court concerning a fine imposed on Sky Italia for the breach of the 14% threshold, the Court of Justice was requested to provide a preliminary ruling as to whether Directive 2010/13/EU (the Audiovisual Media Services Directive (AVMSD)) and EU primary law should be interpreted as precluding the Italian asymmetric hourly advertising limits for pay-tv operators (see IRIS 2012-7/29).

The Court, at the outset, noted that Article 4(1) of the AVMS Directive permits member states “to lay down more detailed or stricter rules and, in certain circumstances, different conditions, in the fields covered by that directive”. Accordingly, the provision, in Article 23(1) of the AVMS Directive, of a 20% limit for broadcasters without distinction did not pre-empt member states “from imposing different television advertising time-limits depending on the pay-tv or free-to-air nature of the broadcasters”.

Subsequently, the Court examined whether the general principle of equal treatment should be interpreted as precluding asymmetric rules for pay-tv broadcasters. It is worth reiterating that in her opinion (see IRIS 2013-6/3), Advocate General Kokott 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 whether the main aim of those provisions was the protection of consumers (as contended by the Italian Government and RTI, Italy’s largest free-to-air broadcaster) or allowing free-to-air broadcasters to secure a broader share of advertising revenues (as argued by the referring court and by Sky Italia).

The Court instead took the view that the situation of pay-tv and free-to-air broadcasters had to be considered in the light of the balance struck between the protection of consumers from excessive advertising and the financial interests of television broadcasters. In this respect, the Court noted that free-to-air broadcasters’ dependence on advertising revenues placed them in an objectively different situation vis-à-vis advertising limits relative to pay-tv broadcasters, which could also rely on subscription fees. Also, free-to-air television viewers were in an objectively different situation in comparison to pay-tv viewers, who “have a direct commercial relationship with their broadcaster and pay to enjoy television programmes”. Accordingly, the Court held that, in seeking a balanced protection of the interests of viewers and broadcasters, the Italian legislature could set different advertising limits for pay-tv and free-to-air broadcasters without infringing the principle of equal treatment.

However, the Court noted that the Italian asymmetric rules could constitute a restriction of the freedom to provide services under Article 56 TFEU. While the Court accepted that the protection of consumers against abuses of advertising constituted an overriding reason in the public interest that could justify such a restriction, it did not review compliance by the Italian rules with the principle of proportionality, leaving that assessment to the referring court.

Finally, the Court turned to the issue of whether the principle of freedom of expression and, in particular, the protection of media pluralism precluded the contested provisions. According to the referring court, Italian asymmetric advertising rules were capable of distorting competition by strengthening RTI’s dominant position on the market for television advertising. Although the Italian Communications Authority had published an in-depth sector inquiry on the television advertising market in the course of the proceedings (see IRIS 2013-2/31), the Court of Justice found that the order for reference contained insufficient information for it to enter a preliminary ruling. The Court thus dismissed that question as inadmissible.

The fate of Italy’s stricter advertising rules is thus in the hands of the Latium Administrative Court, which will determine whether those rules are suitable for protecting consumers against abuses of advertising and do not go beyond what is necessary for that purpose.

Judgment of the Court (Second Chamber) of 18 July 2013, Sky Italia Srl v. Autorità per le Garanzie nelle Comunicazioni, Case C-234/12

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0234:EN:NOT