[IT] Constitutional Court rules that shorter hourly advertising limits for pay-TV broadcasters are not in breach of Italian Constitution

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On 29 October 2015, by decision no. 210/2015, the Constitutional Court ruled on the constitutional legitimacy of Article 38(5) of Legislative Decree no. 177/2005 (Consolidated Text of the audiovisual and radio media services) as amended in 2010, which states that pay-TV channels are subject to hourly advertising limits shorter than those which apply to free-to-air broadcasters. The Constitutional Court ruled that this provision is in full accordance with the Italian Constitution.

Article 38 provides stricter limits than those provided by Directive 2010/13/EU. The difference between the limit provided for pay-TV, which could broadcast advertising up to a maximum of 12% of each hour, and the one provided for free-to-air channels, 18%, was not stipulated by the European Directive, but established by national rules.

In 2012, TAR Lazio, the Regional Administrative Court of Lazio, made a request to the Court of Justice of the European Union (CJEU) for a preliminary ruling in order to establish whether different hourly advertising limits for broadcasters are compliant with the principle of equal treatment and the freedom of the media. By its judgment dated 18 July 2013 in Case C-234/12, the Court of Justice stated that Italian legislation on television advertising is compliant with European Union law, provided that national courts ensure that the principle of proportionality is respected (see IRIS 2013-8/7).

The Court of Justice underlined that there are two different kinds of interests which should be balanced in the audiovisual sector: the interests of broadcasters, typically financial, and the protection of consumers, as viewers, from excessive advertising, which is an essential aspect of the objective of the Audiovisual Media Services Directive. In addition, the Court finds that the financial interests of pay-TV broadcasters are different from those of free-to-air broadcasters. Whilst the former generate revenue from subscriptions taken out by viewers, the latter do not benefit from such a direct source of financing, and must finance themselves either by generating income from television advertising, or by other sources of financing. Such a difference is, in principle, capable of placing pay-TV broadcasters in a situation which is objectively different, having regard to the economic effect of the rules relating to the transmission time for television

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advertising on their methods of financing.

After the decision of the CJEU, on 17 February 2014, TAR Lazio made an application to the Constitutional Court raising the question of the constitutional legitimacy of Article 38(5). Consequently, the Constitutional Court ruled that Article 38 is lawful because it serves to achieve a balance of the interests between those of the broadcasters and those of the television viewers. Starting with this consideration, the Constitutional Court examined three questions of TAR Lazio, and ruled that they have not been deemed acceptable.

The question regarding Article 3 of the Constitution (reasonability and equality) was declared inadmissible. Indeed the acceptance of the question might have resulted in the loss of any advertising limits for pay-TV: paradoxically, this result would aggravate the disparity of treatment.

With reference to Article 41 of the Constitution (freedom of enterprise), the question was declared groundless: the limit imposed by Article 38(5) to freedom of enterprise of pay-TV is justified by consumer, competition and pluralism protections.

The last question concerns the misuse of powers: according to TAR Lazio, the Government exceeded the power granted by the Parliament, which delegated to the Government implementation of the Audiovisual Media Service Directive, but did not extend this to the ability to introduce any differentiated advertising limit between pay-TV and free-to-air broadcasters. This violation of the limits of the power delegated to the Government would be in breach of Article 76 of the Constitution. The Constitutional Court also rejected this argument, based on the ruling of the Court of Justice about the ratio of the matter. Indeed the Government had a broad mandate to implement the Directive: it could enact not only the “necessary” amendments, but even those which are “opportune”. In addition, in accordance with the case law of the Constitutional Court, when the Government is empowered by the Parliament to implement a European Directive, the boundaries of the legislative power delegated to the Government are marked by the principles laid down by the Directive. Since the Directive allows Member States to establish more detailed rules, including shorter hourly advertising limits, the Italian Government had the power to introduce stricter limits for pay-TV broadcasters, consistent with the decision of the EU Court of Justice.

Corte Costituzionale, sentenza n.210 del 29 Ottobre 2015

http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2015&numero=210

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