Court of Justice of the European Union: Court rules on TV advertising in the context of Finnish approaches to “split screens” and “black seconds”

IRIS 2016-4:1/5

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On 17 February 2016, the Court of Justice of the European Union (CJEU) rendered its judgment (C-314/14) on television advertising. The ruling sheds light on the proper interpretation of the Audiovisual Media Services Directive (2010/13/EU; AVMSD). The preceding television directive from 1989 as amended in 1997 and 2007 was implemented by the Finnish Act on Television and Radio Operations (744/1998; TV and Radio Act) and amendments thereto. Subsequently, the provisions at issue of the TV and Radio Act have been codified in the Information Society Code (917/2014; ISC) (with minor amendments) which entered, to a large extent, into force on 1 January 2015 (see Chs 26 and 42 ISC).

The dispute between Viestintävirasto (Finnish Communications Regulatory Authority; FICORA) and Sanoma Media Finland Oy / Nelonen Media (Sanoma) derives from early in 2012 when FICORA declared infringing some of Sanoma’s practices regarding TV advertising, including those concerning screen-splitting, presentation of sponsor signs and duration of advertising breaks. Sanoma was found in breach of the TV and Radio Act: advertising was not kept distinct from programmes pursuant to Section 22(1) while advertising time exceeded the maximum time as prescribed by law, that is 12 minutes per clock hour, excluding, among others, sponsorship announcements (§ 29(1)-(2)). Commercial communication must be clearly recognisable (§ 21(1)). Separation of programmes and advertising may be established “by acoustic or optical means, or by spatial division” (§ 22(1)). These provisions transposed into Finnish law Articles 19(1) and 23(1)-(2) of the codified AVMSD respectively (Arts. 10(1) and 18(1)-(2) of directive 2007/65/EC). The directive thereby requires that advertising and teleshopping must be “readily recognisable and distinguishable from editorial content” and “kept distinct from other parts of the programme by optical and/or acoustic and/or spatial means” (Art. 19(1)). For its part, Article 23(1) includes a maximum proportion of 20% for TV advertising spots and teleshopping spots within a clock hour with exceptions, such as sponsorship announcements, in paragraph 2. Section 26(2) of the TV and Radio Act notes that sponsor signs must be presented clearly in the beginning or end of sponsored programmes while sponsored programmes must be clearly identified by inclusion of sponsor signs pursuant to Article 10(1)(c) AVMSD. Member States may impose more detailed or stricter rules complying with union law for AVMS providers under their jurisdiction (recital 41,

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83; Arts 4, 26).

Relying on its interpretation of the TV and Radio Act, FICORA deemed some programmes inadequately separated from advertising since split screens were used so as to show closing credits and a list of upcoming programmes simultaneously. The menu for upcoming programmes was not used in the place of or akin to break-bumpers. The screen was split between two programme types without express elements indicating the beginning of commercial breaks. Moreover, sponsor signs presented outside the sponsored programmes (i.e. otherwise than required by law) were to be regarded as advertising spots while ”black seconds” used to separate advertising spots from each other and from the upcoming programmes were to be included in the maximum advertising time. Thereby, TV channel Nelonen, operating under Sanoma’s umbrella, had the average advertising time of 12 minutes and 7 seconds per clock hour during a time frame in 2011. Sanoma was notified and ordered to amend its practices.

Sanoma appealed the FICORA decision to Helsinki Administrative Court which found in favour of FICORA. The dispute was then brought before the Supreme Administrative Court which stayed the proceedings and decided to request a preliminary ruling on the following issues: Since national law seems to present various means as alternatives it asked: Does Art. 19(1) AVMSD preclude national law being interpreted so as to exclude split screens realised as described above from the concept a break-bumper separating programmes from advertising? Taking into account the concept of “advertising spots” and since the AVMSD did not expressly link presentation of sponsor signs to sponsored programmes, the Court asked: Does Art. 23(2) AVMSD preclude interpretation whereby sponsor signs presented outside the sponsored programs are included in the maximum permissible time allotted to advertising thus classified as advertising spots pursuant to Art. 23(1)? Moreover, in view of Art. 23(1) AVMSD and taking into account the minimum nature of the directive, may national law be interpreted in a manner which includes “black seconds” to the maximum permissible advertising time? With regard to Article 19(1) AVMSD, the CJEU noted that an individual means of separation despite its nature must in itself meet the minimum requirements of the said article where not accompanied by other means. National law does not have to require the means to be executed together. For their part, sponsor signs presented outside the sponsored programmes must be included in the maximum advertising time pursuant to Article 23(1); sponsor signs not fulfilling the requirements of Article 10(1) AVMSD cannot fall within the scope of Article 23(2). Taking into account the objective of the provision, Article 23(1) indeed requires the inclusion of “black seconds” in the maximum time where the national legislator has not opted for a more stringent limit; the time reserved for programmes cannot drop below 80% within a given clock hour.

As a background, FICORA had issued guidance (2004; updated 2011) of a non-binding nature on the duration and placement of advertisements so as to clarify

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its interpretation of the law. FICORA had also published its non-binding stance on screen-splitting in 2010.

Judgment of the Court (Fourth Chamber) in Case C-314/14 Sanoma Media Finland Oy-Nelonen Media v. Viestintävirasto, 17 February 2016

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5d452caad59e24c0fbdd1a4a5166439f3.e34KaxiLc3qMb40Rch0SaxuSbxj0?text=&docid=174425&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=964488

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Supreme Administrative Court, KHO 2014:116, 27 June 2014

Viestintäviraston mainonnan kestoa ja sijoittelua koskeva ohjeistus, 31.1.2004, päivitetty 22.3.2011

https://www.viestintavirasto.fi/attachments/Mainonnan_kestoa_ja_sijoittelua_koskeva_ohje.pdf

FICORA's guidance on duration and placement of advertisements

Viestintäviraston kannanotto jaetun kuvaruudun käytöstä mainonnassa, 1162/9220/2010, 21.12.2010

https://www.viestintavirasto.fi/attachments/Viestintaviraston_kannanotto_jaetun_kuvaruudunkaytosta.pdf

FICORA's stance on the use of split screens in advertising

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