European Commission: Imposing Swedish ban on alcohol advertising on two UK broadcasters is not compatible with EU law

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On 31 January 2018, the European Commission decided that Sweden's intention to impose a ban on alcohol advertising on two UK-based broadcasters that target mainly Swedish audiences is not compatible with EU law. This is the first Commission decision to be based on Article 4 of the Audiovisual Media Services Directive (2010/13/EU) (AVMSD).

Under the AVMSD, the laws applicable to a broadcaster are determined on the basis of the country-of-origin principle. According to this principle, a broadcaster must comply only with the rules of the EU member state in which it is established, even if it broadcasts to other member states. Therefore, in this case, the UK-based broadcasters were only subject to UK law, which does not contain a ban on alcohol advertising. As a result, the broadcasters could legally broadcast commercial alcohol advertisements to Sweden, where a ban on alcohol exists.

Article 4 of the AVMSD allows a member state to impose stricter measures against a broadcaster established in another member state if that broadcaster "provides a television broadcast which is wholly or mostly directed towards its territory". Several conditions must be met before such stricter measures can be imposed. Most importantly, the member state must assess whether the broadcaster in question established itself in another member state in order to circumvent stricter rules that would have otherwise been applicable; and obtain a Commission decision recognising that the relevant measures are compatible with EU law.

In support of its decision that Sweden's intention to impose a ban on alcohol advertising on two UK-based broadcasters is not compatible with EU law, the Commission highlighted that the burden of proof that the broadcasters were trying to circumvent Sweden's stricter rules lies with Sweden. The Commission held that Sweden had not met the burden of proof. Relying on the case law of the Court of Justice of the European Union the Commission also noted that "it is compatible with the country-of-origin principle and the [principle of] freedom of establishment that a company chooses its place of establishment in a Member State other than that in which revenues are made".

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This decision demonstrates the importance of the country-of-origin principle - the cornerstone of the legal framework under the AVMSD. The Commission's proposal for the revision of the Directive of 25 May 2016 maintains this principle (see IRIS 2016-6/3). This proposal is currently under negotiation in the so-called trilogue meetings by the Council, European Parliament and the European Commission.

Commission Decision of 31 January 2018 on the incompatibility of the measures notified by the Kingdom of Sweden, pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services

http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=49644

European Commission, Press release, "Commission decides that the Swedish intention to impose a ban on alcohol advertising on two UK broadcasters is not compatible with EU rules", 31 January 2018

https://ec.europa.eu/digital-single-market/en/news/commission-decides-swedish-ban-alcohol-advertising-not-compatible-eu-rules

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