



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

18 July 2013*

(Television broadcasting — Directive 2010/13/EU — Articles 4(1) and 23(1) — Advertising spots — National rule laying down a maximum percentage of broadcasting time which can be dedicated to advertising for pay-TV broadcasters which is lower than that laid down for free-to-air TV broadcasters — Equal treatment — Freedom to provide services)

In Case C-234/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Italy), made by decision of 7 March 2012, received at the Court on 14 May 2012, in the proceedings

Sky Italia Srl

v

Autorità per le Garanzie nelle Comunicazioni,

Intervening parties:

Reti Televisive Italiane (RTI) SpA,

Maria Iaccarino,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis (Rapporteur), J.-C. Bonichot, A. Arabadjiev and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 April 2013,

after considering the observations submitted on behalf of:

- Sky Italia Srl, by L. Torchia and R. Mastroianni, avvocati,
- Reti Televisive Italiane (RTI) SpA, by G.M. Roberti, G. Rossi, S. Previti, I. Perego and M. Serpone, avvocati,

* Language of the case: Italian.

— the Italian Government, by G. Palmieri, acting as Agent, and S. Varone, avvocato dello Stato,
— the European Commission, by G. Conte and C. Vrignon, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 16 May 2013,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 4(1) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services ('Audiovisual Media Services Directive') (OJ 2010 L 95, p. 1, and corrigendum OJ 2010 L 263, p. 15), of the general principle of equal treatment, of Articles 49 TFEU, 56 TFEU and 63 TFEU and of Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between Sky Italia Srl ('Sky Italia') and the Autorità per le Garanzie nelle Comunicazioni (the Italian Broadcasting Authority, 'AGCOM') concerning a decision of AGCOM which imposed a fine on Sky Italia for infringement of national legislation on television advertising.

Legal context

European Union law

- 3 Recitals 41, 83 and 87 in the preamble to the Audiovisual Media Services Directive state:

'(41) Member States should be able to apply more detailed or stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring that those rules are consistent with general principles of Union law. ...

...

(83) In order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction.

...

(87) A limit of 20% of television advertising spots and teleshopping spots per clock hour, also applying during "prime time", should be laid down. ...'
- 4 Article 4(1) of the Audiovisual Media Services Directive provides:

'Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law.'

- 5 Under Article 23(1) of that directive, '[t]he proportion of television advertising spots and teleshopping spots within a given clock hour shall not exceed 20%'.

Italian law

- 6 The provisions concerning the limits on the broadcasting time of television advertising are laid down in Article 38 of Legislative Decree No 177, consolidating the provisions on audiovisual and radio services (decreto legislativo n. 177 – Testo unico dei Servizi di Media audiovisivi e radiofonici) of 31 July 2005 (Ordinary Supplement to GURI No 208 of 7 September 2005), as amended and replaced by Article 12 of Legislative Decree No 44 of 15 March 2010 transposing Directive 2007/65/EC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (GURI No 73 of 29 March 2010, p. 33, 'Legislative Decree No 177/2005'), pursuant to which:

'1. The transmission of advertisements by the holder of the general public broadcasting service concession may not exceed 4% of weekly programming time and 12% of any one hour; any advertising in excess thereof, by a maximum of 2% in any hour, must be offset by a reduction in the preceding or following hour.

2. The transmission of television advertising spots by free-to-air broadcasters, including analogue broadcasters, at national level, other than the holder of the general public broadcasting service concession, may not exceed 15% of daily programming time and 18% of a given clock hour; any advertising in excess thereof, by a maximum of 2% in any hour, must be offset by a reduction in the preceding or following hour. ...

...

5. The transmission of television advertising spots by pay-TV broadcasters, including analogue broadcasters, may not, for the years 2010, 2011 and 2012, exceed 16%, 14% and 12%, respectively, of a given clock hour; any advertising in excess thereof, by a maximum of 2% in any hour, must be offset by a reduction in the preceding or following hour.

...'

The facts in the main proceedings and the questions referred for a preliminary ruling

- 7 By decision of 13 September 2011, AGCOM imposed a fine of EUR 10 329 on Sky Italia for an infringement of Article 38(5) of Legislative Decree No 177/2005.
- 8 AGCOM, inter alia, found that between 21.00 and 22.00 on 5 March 2011, the pay-TV station Sky Sport 1, edited by Sky Italia, had transmitted 24 television advertising spots, for a total duration of 10 minutes and 4 seconds, which is an hourly percentage of 16.78%, reduced to 16.44% after deducting the separation images. AGCOM therefore found that, in that clock hour, Sky Italia had exceeded, by more than the 2% giving rise to offsetting in the adjacent hours, the hourly television advertising limit of 14% imposed on pay-TV broadcasters under national legislation.
- 9 Sky Italia brought an action before the Tribunale amministrativo regionale per il Lazio seeking the annulment of AGCOM's decision, claiming, essentially, that it was unlawful as it was adopted under Article 38(5) of Legislative Decree No 177/2005, which, in its view, was contrary to European Union law.

10 Since it entertained doubts as to the compatibility of that national provision with European Union law, the Tribunale amministrativo regionale per il Lazio decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Must Article 4 of Directive [2010/13], the general principle of equality and the rules of the [FEU Treaty] relating to the free movement of services, the right of establishment and the free movement of capital be interpreted as precluding the rules in Article 38(5) of Legislative Decree No 177/2005 which lay down shorter hourly advertising limits for pay-TV broadcasters than those set for free-to-air broadcasters?
- (2) Does Article 11 of the [Charter], interpreted in the light of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950,] and the case-law of the European Court of Human Rights, and does the principle of pluralism in the media, in particular, preclude the rules in Article 38(5) of Legislative Decree No 177/2005 which lay down shorter hourly advertising limits for pay-TV broadcasters than for free-to-air broadcasters, distorting competition and creating – or rather strengthening – dominant positions in the television advertising market?’

Consideration of the questions referred

The first question

- 11 By its first question the referring court asks, in essence, whether Article 4(1) of the Audiovisual Media Services Directive and the principle of equal treatment and the fundamental freedoms guaranteed by the Treaty must be interpreted as precluding a national rule, such as that at issue in the main proceedings, which lays down shorter hourly television advertising limits for pay-TV broadcasters than those set for free-to-air broadcasters.
- 12 In that regard, it must be borne in mind that, on the basis of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), the amended version of which was consolidated by the Audiovisual Media Services Directive, the Court has already held that such a directive does not completely harmonise the rules relating to the areas to which it applies, but that it lays down minimum rules for broadcasts which emanate from the European Union and which are intended to be received within it (see Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraphs 29 and 44; Case C-222/07 *UTECA* [2009] ECR I-1407, paragraph 19; and Joined Cases C-244/10 and C-245/10 *Mesopotamia Broadcast and Roj TV* [2011] ECR I-8777, paragraph 34).
- 13 As is apparent from Article 4(1) of the Audiovisual Media Services Directive and from recitals 41 and 83 in the preamble thereto, in order to ensure that the interests of consumers as television viewers are fully and properly protected, the Member States have the option, as regards media service providers under their jurisdiction, to lay down more detailed or stricter rules and, in certain circumstances, different conditions, in the fields covered by that directive, provided that such rules are in compliance with European Union law and, in particular, with its general principles.
- 14 It follows that, where Article 23(1) of that directive provides that the proportion of television advertising spots and teleshopping spots within a given clock hour are not to exceed 20%, that provision does not preclude, within that threshold of 20%, the Member States from imposing different television advertising time-limits depending on the pay-TV or free-to-air nature of the broadcasters,

provided that the rules imposing those limits comply with European Union law and, in particular, with its general principles, which include, inter alia, the principle of equal treatment, and with the fundamental freedoms guaranteed by the Treaty.

- 15 In that regard, the Court has already held that the principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case C-550/07 P *Akzo Nobel Chemicals and Akros Chemicals v Commission and Others* [2010] ECR I-8301, paragraphs 54 and 55 and the case-law cited).
- 16 In order to determine whether pay-TV and free-to-air broadcasters are in a comparable situation, the comparability of two distinct situations must be assessed with regard to all the elements which characterise them and to the principles and objectives of the field to which the act relates (see, to that effect, Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECR I-3727, paragraph 32 and the case-law cited).
- 17 In that regard, the Court has already held that the protection of consumers, as television viewers, from excessive advertising is an essential aspect of the objective of the directives on the provision of audiovisual media services (Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, paragraph 27, and Case C-281/09 *Commission v Spain* [2011] ECR I-11811, paragraph 45).
- 18 As regards the principles and objectives of the rules on the television advertising limits laid down by the directives on the supply of audiovisual media services, the Court has held that such rules are intended to establish a balanced protection, on the one hand, of the financial interests of television broadcasters and advertisers, and, on the other hand, of the interests of rights holders, namely writers and producers, in addition to consumers as television viewers (see, to that effect, *Commission v Spain*, paragraph 44 and the case-law cited).
- 19 In the present case, as the Advocate General has noted in point 40 of her Opinion, the balanced protection of those interests differs according to whether or not the broadcasters transmit their programmes for payment.
- 20 The Court finds that, as regards the rules on the transmission time for television advertising, 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.
- 21 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 advertising on their methods of financing.
- 22 Moreover, the situation of viewers is objectively different depending on whether they use the services of a pay-TV broadcaster, to which they subscribe, or those of a free-to-air broadcaster. Subscribers have a direct commercial relationship with their broadcaster and pay to enjoy television programmes.
- 23 It follows that, in seeking a balanced protection of the financial interests of television broadcasters and of the interests of viewers in the field of television advertising, the national legislature was able, without infringing the principle of equal treatment, to set different hourly broadcasting limits on television advertising for pay-TV broadcasters and free-to-air broadcasters.

- 24 As regards the freedom to provide services set out in Article 56 TFEU, which is the only fundamental freedom of which account needs to be taken in relation to the dispute before the referring court, it must be borne in mind that the national rule at issue in the main proceedings is capable of constituting a restriction of that freedom. However, the Court has already held that the protection of consumers against abuses of advertising constitutes an overriding reason relating to the general interest which may justify restrictions on the freedom to provide services (see, to that effect, Case C-6/98 *ARD* [1999] ECR I-7599, paragraph 50). Such restrictions must still be applied so as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (see, *inter alia*, Case C-498/10 *X* [2012] ECR, paragraph 36).
- 25 As the Advocate General has noted in point 66 of her Opinion, the mere fact that the hourly television advertising limits are different depending on the pay-TV or free-to-air nature of the broadcasters does not indicate that a rule such as that at issue in the main proceedings is disproportionate having regard to the aim of protecting television viewers' interests. It is for the referring court, which has available all the evidence required in the case in the main proceedings, to determine whether the conditions referred to in the preceding paragraph of this judgment are satisfied.
- 26 Consequently, the answer to the first question is that Article 4(1) of the Audiovisual Media Services Directive, the principle of equal treatment and Article 56 TFEU must be interpreted as not precluding, in principle, a national rule, such as that at issue in the main proceedings, which lays down shorter hourly television advertising limits for pay-TV broadcasters than those set for free-to-air broadcasters, provided that the principle of proportionality is observed, which is a matter for the referring court to assess.

The second question

- 27 By its second question the referring court asks, in essence, whether Article 11 of the Charter precludes a national rule such as that at issue in the main proceedings.
- 28 In that context, the referring court asks whether the national rule relating to transmission times for television advertising is such as to infringe the fundamental principle of the freedom of expression and, in particular, the freedom and pluralism of the media within the meaning of Article 11(2) of the Charter, having regard to the distortions of competition between television broadcasters which that national rule may cause.
- 29 The referring court notes, in that respect, that Article 38(5) of Legislative Decree No 177/2005 is capable of distorting competition and of creating or strengthening dominant positions on the market for television advertising.
- 30 In that regard, the Court of Justice points out that the need to provide an interpretation of European Union law which will be of use to the national court makes it necessary that the referring court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6, and Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 57).
- 31 Those requirements are of particular importance in the area of competition, which is characterised by complex factual and legal situations (see *Telemarsicabruzzo and Others*, paragraph 7, and *Centro Europa 7*, paragraph 58).

- 32 However, in the present case, the order for reference has considerable gaps as regards the information concerning, in particular, the definition of the relevant market, the calculation of market shares held by the different undertakings operating on that market and the abuse of a dominant position alluded to by the referring court in its second question.
- 33 Consequently, the second question must be held to be inadmissible.

Costs

- 34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 4(1) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), as well as the principle of equal treatment and Article 56 TFEU must be interpreted as not precluding, in principle, a national rule, such as that at issue in the main proceedings, which lays down shorter hourly television advertising limits for pay-TV broadcasters than those set for free-to-air broadcasters, provided that the principle of proportionality is observed, which is a matter for the referring court to assess.

[Signatures]