Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 May 2013[1]

Case C-234/12

Sky Italia Srl

(Request for a preliminary ruling from the Tribunale amministrativo regionale per il Lazio (Italy))

(Directive 2010/13/EU — Audiovisual media services — Limitation of transmission time for television advertising — Stricter national rules for pay TV than for free-to-air TV — General principle of equal treatment under EU law — Fundamental freedoms of the European internal market — Freedom and pluralism of the media)

I – Introduction

1. Advertising hits the screens of most European televisions at fairly regular intervals. This television advertising, which is generally regarded by viewers as an annoying interruption to the programme, has long since been an economic factor which should not be underestimated and represents an important source of revenue for broadcasters. It is not therefore surprising that it repeatedly gives rise to legal disputes.

2. In order to provide proper protection for the interests of viewers and to create as level a playing-field as possible for all broadcasters established within Europe, EU law prescribes a maximum transmission time of 20% of a given hour for television advertising. That provision is contained in the Audiovisual Media Services Directive (Directive 2010/13/EU[2]), which replaced the old 'Television Without Frontiers' Directive (Directive 89/552/EEC).[3]

3. Stricter national rules on television advertising are permitted within the limits set by EU law. Italy availed itself of this possibility by imposing different maximum transmission times for television advertising on pay-TV broadcasters and free-to-air broadcasters. Thus, in 2011 a maximum of 14% of a given hour could be devoted to advertising on Italian pay TV, whilst that figure was 18% on free-to-air private TV.

1 — Original language: German.

2 — 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).

3 — 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). That directive was replaced by Directive 2010/13 with effect from 5 May 2010.

4. When one evening one of Sky Italia's pay-TV stations transmitted more television advertising than was permitted under national law, the competent supervisory authority imposed a fine on that undertaking. Sky Italia has now brought proceedings against that authority and claims in particular that the Italian rules are incompatible with EU law. Reti Televisive Italiane (RTI), which belongs to the Mediaset group and is the largest private broadcaster of free-to-air TV in Italy, is also participating in the main proceedings.

5. The parties to the main proceedings are in dispute in particular as to whether different maximum transmission times for television advertising are compatible with the general principle of equal treatment under EU law and whether they are likely to impair the freedom and pluralism of the media.

II – Legislative framework

A – *EU law*

6. The particular element of EU secondary legislation to which this case relates is Directive 2010/13, Chapter VII 'Television advertising and teleshopping' of which contains the following Article 23(1):

'The proportion of television advertising spots and teleshopping spots within a given clock hour shall not exceed 20%.'

7. Article 4(1), which is part of Chapter II 'General provisions' of Directive 2010/13, is also relevant:

'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.'

8. Reference should also be made to recitals 8, 10, 41, 83 and 87 in the preamble to Directive 2010/13, which read as follows:

'…

(8) It is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole.

…

(10) … Bearing in mind the importance of a level playing-field and a true European market for audiovisual media services, the basic principles of the internal market, such as free competition and equal treatment, should be respected in order to ensure transparency and predictability in markets for audiovisual media services and to achieve low barriers to entry.

…

(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. …

…'

B – *National law*

9. The relevant Italian legislation is Legislative Decree [4] No 177 of the President of the Republic of 31 July 2005 ('Legislative Decree 177/2005') consolidating the provisions on audiovisual and radio services, [5] Article 38 of which ('maximum transmission time') was revised with effect from 30 March 2010 [6] and, since then, has included the following provision:

'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.

…'

III – Facts and main proceedings

10. By Decision No 233/11/CSP of 13 September 2011, the Italian Autorità per le Garanzie nelle Comunicazioni (AGCOM) [7] imposed a fine of EUR 10 329 on the broadcaster Sky Italia Srl for an infringement of the maximum transmission times for television advertising. [8]

4 — Decreto legislativo.

5 — GURI No 208 of 7 September 2005, Ordinary Supplement No 150.

6 — The provision was revised by Article 12 of Legislative Decree No 44 of 15 March 2010 (GURI No 73 of 29 March 2010), which is also known as the 'Romani decree'.

7 — Communications Regulatory Authority.

8 — Also 'the contested decision'.

11. According to AGCOM's findings, between 21.00 and 22.00 on 5 March 2011, Sky Italia transmitted a total of 24 television advertising spots on its pay-TV station Sky Sport 1, the total duration of which was 10 minutes and 4 seconds, which is more than 16% of the hourly programming time. Consequently, in that time period the permitted maximum transmission time for television advertising, which at that time, under Article 38(5) of Legislative Decree 177/2005, was 14% of a given clock hour, was exceeded by more than two percentage points.

12. Sky Italia has now brought an action against the contested decision at the Tribunale amministrativo regionale per il Lazio.[9] Sky Italia essentially claims that the decision is unlawful because its legal basis, in the form of Article 38(5) of Legislative Decree 177/2005, is contrary to EU law.[10]

IV – Request for a preliminary ruling and procedure before the Court

13. The Tribunale amministrativo regionale per il Lazio[11] has doubts as to the compatibility of the national legal basis with EU law. By order of 7 March 2012, it therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 4 of Directive 2010/13/EU, the general principle of equality and the rules of the Treaty on the Functioning of the European Union 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 for free-to-air broadcasters?

(2) Does Article 11 of the Charter of Fundamental Rights of the European Union, interpreted in the light of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 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?'

14. Sky Italia, RTI, the Italian Government and the European Commission submitted written observations and presented oral argument in the proceedings before the Court. The hearing took place on 10 April 2013.

V – Assessment

15. The two questions asked by the Tribunale amministrativo regionale per il Lazio seek to clarify whether EU law prevents the Member States from providing for different maximum transmission times for television advertising in their national law, depending on whether that advertising is transmitted on pay TV or on free-to-air private TV.[12] Whilst the first question examines this problem from the perspective of the equal treatment of broadcasters and with reference to the fundamental freedoms of the European internal market, the second question focuses on the aspect of freedom and pluralism of the media.

9 — Lazio Regional Administrative Court.

10 — In addition, Sky Italia is also alleging infringements of national law, which are not, however, relevant for the purposes of answering the present request for a preliminary ruling.

11 — Also 'the referring court'.

12 — Hereinafter, for the sake of simplicity, I will mainly refer only to 'different maximum transmission times for television advertising'.

16. In the context of both questions, I will restrict my analysis to exploring the relationship between pay-TV broadcasters and free-to-air private TV broadcasters. By contrast, the specific situation of public broadcasters is irrelevant for the purposes of answering the present request for a preliminary ruling.

A – *First question*

17. By its first question, the referring court is essentially seeking to ascertain whether different maximum transmission times for television advertising, as provided for in Italian law, are compatible with Article 4 of Directive 2010/13, with the principle of equal treatment and with various fundamental freedoms of the European internal market.

1. Admissibility

18. RTI expresses doubts in two respects as to the admissibility of this first question.

19. First of all, in the view of RTI, the issue of the compatibility of the contested Italian rule with Article 4 of Directive 2010/13 and with the general principle of equal treatment under EU law cannot arise a priori since, with Article 38 of Legislative Decree 177/2005, Italy merely availed itself of the possibility accorded to it to adopt stricter national rules on television advertising. In this connection RTI refers to a 'window of discretion' within which the Italian State acted.

20. This argument is not convincing. Article 4(1) of Directive 2010/13 defines the margin of discretion which EU law gives the national legislature to adopt any stricter national rules. If, as is the case here, a national court considers that it is faced with the question whether national law adheres to the limits of the margin of discretion accorded by Article 4(1) of Directive 2010/13 or exceeds those limits, a reference may be made to the Court on the interpretation of that provision of the directive.

21. The Court may also be questioned in this connection with regard to the general principle of equal treatment under EU law.

22. This is clear from the very wording of Article 4(1) of Directive 2010/13, according to which the Member States are expressly permitted to adopt stricter national rules only 'provided that such rules are in compliance with Union law'. The requirements of EU law with which the national rules must be in compliance under Article 4(1) of Directive 2010/13 include, in addition to the fundamental freedoms of the European internal market,[13] the general principles of Union law,[14] not least of which is the principle of equal treatment.[15]

23. The setting of maximum transmission times for television advertising is also part of the implementation of Union law within the meaning of Article 51(1) of the Charter of Fundamental Rights. Directive 2010/13 requires the Member States to prescribe such maximum transmission times within the framework stipulated by EU law of up to 20% of a given clock hour. If a national legislature takes measures to implement that obligation, as happened in Italian law with the 14% maximum transmission time for advertising on pay TV (for 2011), it is required to comply with EU fundamental rights including the general principle of equal treatment under EU law.

13 — See recital 10 in the preamble to Directive 2010/13: '… the basic principles of the internal market, such as free competition and equal treatment, should be respected …'; see also, specifically with regard to the fundamental freedoms, Case C-6/98 *ARD* [1999] ECR I-7599, paragraph 49, and Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785, paragraph 31.

14 — Recital 41 in the preamble to Directive 2010/13.

15 — See Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraphs 31 and 32; Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 56; and Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraphs 35 and 41.

24. Second, RTI complains that the referring court has substantiated its first question regarding the possible infringement of fundamental freedoms of the European internal market only very little.

25. However, this objection does not hold either. RTI is correct that the statements on the fundamental freedoms in the order for reference are extremely brief. Nevertheless, it is sufficiently clear from the order for reference that the referring court considers the fundamental freedoms to be infringed for the same reasons as the general principle of equal treatment. It is not an issue of the admissibility of the request for a preliminary ruling whether this is actually true, but concerns the substantive assessment of the question referred.

26. All in all, the first question is therefore admissible.

2. Substantive assessment

27. Under Article 23(1) of Directive 2010/13, the proportion of television advertising within a given clock hour may not exceed 20%. Recital 87 in the preamble to the directive makes clear that this limit also applies during 'prime time'. This is intended to establish a balanced protection of the financial interests of television broadcasters and advertisers, on the one hand, and the interests of rights holders, namely writers and producers, and of consumers as television viewers, on the other. [16]

28. It is also clear from Article 4(1) of Directive 2010/13 that the Member States may go below this maximum transmission time for television advertising by requiring that media service providers under their jurisdiction transmit less than 20% television advertising per hour.

29. Contrary to the view taken by Sky Italia, Article 4(1) is not an exception which must be given a strict interpretation, but a general provision which is characteristic of Directive 2010/13 as a whole, as is shown by the fact it is enshrined in Chapter II of the directive ('General provisions'). Lastly, Article 4(1) of Directive 2010/13 reflects the fact that the EU audiovisual media services legislation only has the character of minimum harmonisation. [17] This is confirmed not least by the preamble to Directive 2010/13, in particular by recitals 41 and 83.

30. Contrary to the view taken by Sky Italia, it is also not possible to infer from Directive 2010/13 a general prohibition of graduated national rules on the maximum transmission time for television advertising which distinguish between different categories of broadcasters. Indeed, Article 4(1) of that directive expressly permits the Member States to adopt not only *stricter*, but also *more detailed* rules for media service providers under their jurisdiction. This is even clearer in recital 83 in the preamble to the directive, which is relevant to the interpretation of Article 4(1), according to which, with specific regard to television advertising, the Member States should retain the right 'in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction'. [18]

31. Against this background, it cannot be assumed that Directive 2010/13 categorically precludes different maximum transmission times for television advertising depending on the type of broadcaster.

16 — Case C-245/01 *RTL Television* [2003] ECR I-12489, paragraph 62, and Case C-281/09 *Commission* v *Spain* [2011] ECR I-11811, paragraph 44, which both concerned Article 18(1) of Directive 89/552, which corresponds to the present Article 23(1) of Directive 2010/13.

17 — See also Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraphs 29 and 44; Case C-222/07 *UTECA* [2009] ECR I-1407, paragraphs 19; and Joined Cases C-244/10 and C-245/10 *Mesopotamia Broadcast* [2011] ECR I-8777, paragraph 17, which concerned Directive 89/552.

18 — See also Case C-52/10 *Eleftheri tileorasi and Giannikos* [2011] ECR I-4973, paragraph 35, which concerned Directive 89/552.

32. It must still be examined, however, whether a rule like the Italian provision in Article 38 of Legislative Decree 177/2005 is in compliance with other Union law, as is expressly prescribed by the last clause of Article 4(1) of Directive 2010/13. The referring court has serious doubts as to the compatibility of the Italian rule with the general principle of equal treatment under EU law (see immediately below, section a) and with various fundamental freedoms of the internal market (see below, section b).

a) The general principle of equal treatment under EU law

33. The principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union [19] and thus enjoys the status of a fundamental right of the European Union.

34. According to settled case-law, that principle requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. [20]

35. In that connection, the elements of different situations and their comparability must in particular be determined and assessed in the light of the aim and purpose of the provision which makes the distinction in question. [21] The principles and objectives of the field to which the act relates must also be taken into account. [22]

36. In the present case, it must be considered, having regard to the aims of Article 38 of Legislative Decree 177/2005, whether the unequal treatment of pay-TV broadcasters and free-to-air broadcasters by the Italian legislature with regard to maximum transmission times for television advertising is based on differences between the broadcasters and the television broadcasts transmitted by them or – if not – whether there is an objective justification for that unequal treatment.

37. As far as can be seen, Legislative Decree 177/2005 does not, as such, make any clear statement on the aims pursued by its Article 38. Nevertheless, indications of the aims pursued can also be seen from the context in which a rule was adopted. [23]

38. According to the referring court, Article 38 of Legislative Decree 177/2005 has two conceivable objectives: first, consumer protection (see immediately below, section i), on which AGCOM focuses in particular in the contested decision, and, second, possibly intended more favourable treatment of free-to-air private TV broadcasters compared with pay-TV broadcasters (see below, section ii). It must therefore be examined for both aspects whether pay-TV broadcasters and free-to-air private TV broadcasters are in a comparable situation and whether their unequal treatment under a rule like the Italian provision constitutes an infringement of the general principle of equal treatment under EU law.

19 — Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* ('*Akzo Nobel*') [2010] ECR I-8301, paragraph 54; see also Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7, and Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57.

20 — Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-127/07 *Arcelor Atlantique and Lorraine and Others* ('*Arcelor*') [2008] ECR I-9895, paragraph 23; and *Akzo Nobel*, cited in footnote 19, paragraph 55.

21 — *Arcelor*, cited in footnote 20, paragraph 25; Case C-221/09 *AJD Tuna* [2011] ECR I-1655, paragraph 93; Case C-176/09 *Luxembourg* v *Parliament and Council* [2011] ECR I-3727, paragraph 32.

22 — See *Arcelor*, cited in footnote 20, paragraph 26, and *Luxembourg* v *Parliament and Council*, cited in footnote 21, paragraph 32.

23 — See Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraphs 56 and 57; Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraphs 44 and 45; and Case C-341/08 *Petersen* [2010] ECR I-47, paragraphs 39 and 40.

i) The principle of equal treatment with regard to consumer protection

39. The protection of consumers, as viewers, from excessive advertising is an essential aspect of the objective of the Audiovisual Media Services Directive, as it was previously of the 'Television Without Frontiers' Directive. [24]

40. As the Italian Government and RTI in particular have rightly stated, the required balance between the interests of consumers on the one hand and broadcasters and advertisers on the other is different on pay TV than on free-to-air private TV. As a rule, pay-TV stations offer viewers specific programming, in particular certain films, entertainment programmes and broadcasts of sports events, which are not available, or are not available in the same way, on free-to-air private TV. The viewer has already paid a contractual fee to receive those pay-TV stations as part of his individual subscription with the broadcaster in question. The viewer can therefore reasonably expect to be confronted with much less advertising on pay TV than on free-to-air private TV, which he does not generally have to pay a separate fee to receive and whose predominant – or even exclusive – source of financing is advertising.

41. This objective difference between pay TV and free-to-air private TV can legitimately be used as the basis in national law for differentiated rules on maximum transmission times for television advertising.

42. Sky Italia and the Commission object that there is no need for such special protection against excessive advertising for viewers of pay-TV stations. In the Commission's view, if the viewers in question are annoyed by the advertising transmitted on pay TV, they can adequately protect their own interests by refraining from taking out a subscription with the pay-TV broadcaster in question or by terminating an existing contractual relationship.

43. However, such an objection does not hold in the present context. It is up to Member States to determine whether and to what extent they rely on the simple interaction of supply and demand or, for reasons of consumer protection, adopt additional measures going beyond the minimum harmonisation of Directive 2010/13. It is for each Member State itself to assess the degree of consumer protection to be sought in its territory, whilst that degree of protection can naturally differ from one Member State to the next. [25]

44. If a Member State decides, pursuant to Article 4(1) of Directive 2010/13, to adopt stricter maximum transmission times for television advertising than the Union legislature laid down with the 20% limit in order to protect consumers as viewers, that Member State may take into account the differing interests of individual groups of viewers.

45. It is immaterial in this connection that viewers of pay-TV stations possibly represent only a minority of television viewers. The only relevant factor is the need for protection of the respective consumers as television viewers, regardless of whether they form a large or a small group numerically, a minority or a majority.

46. All in all, from the perspective of consumer protection, television advertising on pay TV and television advertising on free-to-air private TV are therefore different situations. If different rules are laid down for such different situations for the purposes of consumer protection, this is not contrary to the principle of equal treatment, but consistent with that principle.

24 — *RTL Television*, cited in footnote 16, paragraphs 64 and 70, and Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, paragraph 27.

25 — See – in the sphere of the fundamental freedoms – Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 27 and 51, and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 58.

ii) The principle of equal treatment with regard to possibly intended more favourable treatment of free-to-air private TV broadcasters

47. It must still be examined whether regard is also had to the general principle of equal treatment under EU law in respect of the second possible aim of the Italian rule. That aim, which the referring court even describes at various points as 'the main objective of the national rules in question' is 'to ensure that free-to-air broadcasters receive greater advertising revenue'.

48. It should be noted, first of all, that the sale of airtime for television advertising takes place on a separate market. That market must be distinguished from the retail market on which television programmes are ultimately broadcast. It cannot therefore be automatically inferred merely from the fact that there may be objective differences between broadcasters on the retail market from the perspective of viewers [26] that such differences also exist at the preceding level of the marketing of airtime for television advertising. On the contrary, there is no evidence of such differences in the present case, either from the perspective of the broadcasters themselves or from the perspective of advertisers.

49. Television broadcasters are in direct competition with one another, in the marketing of airtime for television advertising, for advertising customers and thus ultimately for revenue to finance their television programming. This is true irrespective of whether or not television advertising is their exclusive source of revenue. All broadcasters are therefore in a comparable situation as regards the marketing of airtime for television advertising.

50. As regards advertisers, it is likewise not directly relevant to them whether their advertising spots are broadcast on pay TV or on free-to-air private TV. The most important factor for advertising customers is what price they have to pay for the airtime purchased and whether they can reach the correct target group with their advertising with the largest possible audience.

51. Consequently, the situation of broadcasters is essentially comparable with regard to the marketing of airtime for television advertising both from the perspective of the broadcasters themselves and from the perspective of advertisers. Their unequal treatment by the Italian legislature, which lays down different maximum transmission times for television advertising, would therefore require an objective justification from this perspective.

52. Such a justification for different maximum transmission times cannot be found solely in the Italian legislature's desire 'to ensure that free-to-air broadcasters receive greater advertising revenue'.

53. There may be situations in which a Member State may legitimately adopt support measures in favour of disadvantaged broadcasters in order to ensure the diversity of television content, in particular to ensure high-quality free-to-air television programming.

54. However, no such need for support measures is apparent in the present case. According to the order for reference, there is at present no competitive disadvantage for private broadcasters of free-to-air, nationally broadcast television in Italy. Quite the opposite, according to the referring court, the largest private supplier of free-to-air TV on the Italian market for television advertising in any event holds a dominant position.

26 — See above, points 40 and 41 of this Opinion.

55. If, under such circumstances, a national legislature intends to ensure that free-to-air broadcasters receive greater advertising revenue, this idea runs counter to the fundamental aims of Directive 2010/13, which seeks to help to ensure free competition and equal treatment between broadcasters and to create a level playing-field between broadcasters. [27] It is incompatible with these aims laid down by EU law to accord favourable treatment, without an objective reason, to a certain group of broadcasters compared with other broadcasters in respect of their financing from television advertising. [28]

iii) Interim conclusion

56. As has been shown, the examination of a rule like the Italian provision on the basis of the general principle of equal treatment under EU law will have a different result depending on the aim which it pursues.

57. If the protection of consumers against excessive television advertising is the focus, different maximum transmission times for television advertising on pay TV and on free-to-air private TV are compatible with the principle of equal treatment. If, on the other hand, the focus is the desire to ensure that private broadcasters receive greater advertising revenue and thus better financing, the principle of equal treatment prohibits provision being made for different maximum transmission times for television advertising on pay TV and on free-to-air private TV for that purpose.

58. It is for the referring court to examine which of the two possible legislative aims is foremost in Article 38 of Legislative Decree 177/2005 and to draw the necessary inferences with regard to the general principle of equal treatment.

b) The fundamental freedoms of the European internal market

59. In addition to the general principle of equal treatment under EU law, in this first question the Tribunale amministrativo regionale per il Lazio also asks the Court about various fundamental freedoms of the European internal market, in particular freedom to provide services (Article 56 TFEU), freedom of establishment (Article 49 TFEU) and free movement of capital (Article 63(1) TFEU). In the view of the referring court, a breach of the principle of equal treatment 'inevitably' entails the restriction of those fundamental freedoms and a distortion of competition.

60. In principle, the abovementioned internal market rules militate against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise of the fundamental freedoms guaranteed by the Treaty. [29] No such restriction exists, however, where the effects of a measure are too uncertain and indirect to be able to impair the exercise of those fundamental freedoms. [30]

61. As regards freedom of establishment and free movement of capital, first of all, it is difficult to see any connection between these two fundamental freedoms and maximum transmission times for television advertising as applied in Italy. These maximum transmission times for pay TV in Italy are lower than for free-to-air private TV. Nevertheless, the effects of such a difference in the airtime for

27 — Recital 10 in the preamble to Directive 2010/13.

28 — The situation might be different only where the legislative measure does not, in reality, seek to accord favourable treatment to private free-to-air broadcasters, but to compensate for some disadvantage which those broadcasters suffer compared with other broadcasters. There is absolutely no evidence of this in the present case, however.

29 — See, inter alia, Case C-212/06 *Gouvernement de la Communauté française and gouvernement wallon* [2008] ECR I-1683, paragraph 45, and Case C-518/06 *Commission* v *Italy* [2009] ECR I-3491, paragraph 62.

30 — Case C-211/08 *Commission* v *Spain* [2010] ECR I-5267, paragraph 72.

advertising – at least according to the information available to the Court – appears to be too uncertain and indirect to be able to influence seriously any investment decisions by foreign broadcasters or foreign investors on the Italian television market. A restriction of freedom of establishment or of free movement of capital cannot therefore be taken to exist.

62. On the other hand, State regulation of the maximum transmission time for television advertising like that which applies in Italy constitutes a restriction on freedom to provide services, since it limits the possibility for Italian broadcasters in general and for pay-TV broadcasters in particular to broadcast advertisements for the benefit of advertisers established in other Member States. [31]

63. The Court has consistently held [32] that a restriction of the fundamental freedoms guaranteed in the Treaties is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest. If that is the case, the restriction must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it.

64. In this regard, the same considerations apply as were set out above in connection with the general principle of equal treatment. Thus, any intention by the legislature 'to ensure that free-to-air broadcasters receive greater advertising revenue', i.e. a purely economic consideration, cannot normally be regarded as a legitimate aim capable of justifying a restriction on freedom to provide services in the field of television advertising. [33] On the other hand, the protection of consumers as viewers against excessive advertising has been recognised as constituting an overriding reason relating to the general interest which may justify restrictions on freedom to provide services. [34] It is for the referring court alone to determine which of these aims is served by a rule like the Italian provision.

65. Should the referring court, like AGCOM in the contested decision, conclude that Article 38 of Legislative Decree 177/2005 seeks to protect consumers as viewers against excessive advertising, it will have to examine whether the restriction of the maximum transmission time for television advertising on pay TV to 14% of a given hour, which applied in 2011, was appropriate and necessary to achieve that aim.

66. On the basis of the information available to the Court in the present case, there is nothing to suggest that the contested limitation of the maximum transmission time for television advertising on pay TV is not proportionate having regard to the aim of consumer protection. In particular, the fact that the maximum transmission times for television advertising on pay TV and on free-to-air private TV are different does not, in itself, indicate that a rule like the Italian provision is inconsistent. As has already been discussed, [35] that difference is based on objective factors.

B – *Second question*

67. By its second question, the referring court is essentially seeking to ascertain whether different maximum transmission times for television advertising, as provided for in Italian law, are compatible with the freedom and pluralism of the media if they distort competition and create or strengthen a dominant position in the television advertising market.

31 — Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 50, and *ARD*, cited in footnote 13, paragraph 49; similarly Case C-429/02 *Bacardi France* [2004] ECR I-6613, paragraph 35, and *Corporación Dermoestética*, cited in footnote 13, paragraph 33, with regard to the prohibition of certain kings of television advertising.

32 — See, inter alia, Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 101; see also *Commission* v *Italy*, cited in footnote 29, paragraph 72.

33 — See above, points 51 and 52 of this Opinion.

34 — *ARD*, cited in footnote 13, paragraph 50; see also *De Agostini and TV-Shop*, cited in footnote 31, paragraph 53, and *Mesopotamia Broadcast*, cited in footnote 17, paragraphs 48 and 49.

35 — See above, in particular points 40 and 41 of this Opinion.

1. Admissibility

68. The Commission and RTI express doubts as to the admissibility of this question. I consider those doubts to be justified.

69. Contrary to the view taken by RTI, the second question cannot be rejected on the ground that it concerns only national law. The freedom and pluralism of the media is also a principle of EU law which is now enshrined, not least, in Article 11(2) of the Charter of Fundamental Rights. The Court may in principle be questioned on the interpretation of that principle by way of the preliminary ruling procedure.

70. However, as the Commission rightly states, any request for a preliminary ruling must contain a minimum amount of information on the facts of the main proceedings so that the parties to the preliminary ruling proceedings can submit meaningful observations and the Court can give a useful answer to the questions referred. [36] This is especially important where the key to the outcome of the main proceedings is assessing the conditions of competition between undertakings.

71. In the present case the request for a preliminary ruling contains insufficient information on the relevant markets and on the prevailing circumstances on those markets for the Court to be able to give a useful answer to the second question.

72. Consequently the Court should declare the second question to be inadmissible.

2. Substantive assessment

73. In the alternative, I will offer the following general remarks on the second question.

74. The principle of the freedom and pluralism of the media, as laid down in Article 11(2) of the Charter of Fundamental Rights, is of great importance in a democratic society. [37] Directive 2010/13 also pursues the aim of preventing restrictions on pluralism and freedom of televised information. [38]

75. In view of the importance of television advertising for the financing of television broadcasting activities, it cannot be ruled out a priori that there will be a distortion of competition between broadcasters if some of them are less able to utilise this source of financing than others because of the particular transmission time limitations imposed on them.

76. However, the question whether different maximum transmission times for television advertising actually result in such a distortion of competition between the various types of broadcasters depends on a number of factors, not least how much the broadcasters in question are reliant on advertising as a source of financing and from which other sources, if necessary, they are able to finance their television programming.

77. The fact that a broadcaster has a particularly strong position with regard to the marketing of airtime for television advertising does not, in itself, mean that other broadcasters could not be in effective competition with it vis-à-vis viewers with regard to their respective television programming.

78. Furthermore, not every change in the conditions of competition between broadcasters necessarily results in an impairment of the freedom and pluralism of the media.

36 — Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraphs 6 and 7; Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraphs 22 and 25 to 32; and Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraphs 57 and 58.

37 — See also Case C-283/11 *Sky Österreich* [2013] ECR, paragraph 52.

38 — Recital 8 in the preamble to Directive 2010/13.

79. Article 11(2) of the Charter of Fundamental Rights does, however, preclude a national provision governing television broadcasting activities which is capable of significantly distorting competition between broadcasters and thereby creating the serious risk of an impairment of the freedom and pluralism of the media.

VI – Conclusion

80. In the light of the foregoing considerations, I suggest that the Court answer the questions referred for a preliminary ruling by the Tribunale amministrativo regionale per il Lazio as follows:

(1) A national rule which lays down, below the maximum transmission time of 20% of a given clock hour prescribed in Article 23(1) of Directive 2010/13/EU, shorter hourly advertising limits for television advertising on pay TV than on free-to-air private TV is

— incompatible with Article 4(1) of the directive in conjunction with the general principle of equal treatment under EU law and with Article 56 TFEU in so far as it pursues the aim of ensuring that free-to-air TV broadcasters receive higher advertising revenue, even though they do not have an apparent competitive disadvantage;

— compatible with Article 4(1) of the directive in conjunction with the general principle of equal treatment under EU law and with Article 56 TFEU in so far as it pursues the aim, in a proportionate manner, of protecting consumers as viewers against excessive television advertising.

It is for the national court to examine which of these two aims are pursued by the national rule and, if it pursues both aims, which is foremost.

(2) Articles 49 TFEU and 63(1) TFEU do not preclude such a rule.