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Information Society and Media Directorate-General
Audiovisual, Media, Internet
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Mr Ross Biggam
Director General
Association of
Commercial Television in Europe

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Dear Ross,

Subject: Interpretation of Article 18 of 89/552/EEC Directive, as amended by 2007/65/EC Directive.

Thank you for your letter of 20 May 2008 concerning the press release on the pending infringement case against Spain and the provisions of the Directive on duration of advertising.

The approach taken by the Commission in this case follows the case law of the Court of Justice and the Commission interpretative communication of April 2004¹.

The Court decided in its RTI judgement (C-320/94) that forms of promotion such as telepromotions, which "require more time than spot advertisements on account of their method of presentation" should benefit from the same daily limit as the one applicable to direct offers to the public (telehopping)². As a result, more time consuming forms of promotion were not to be submitted to the same time limits as those applicable to

¹ Commission Interpretative communication relating to certain aspects of the rules of the "Television Without Frontiers" Directive concerning televised advertising, OJ (2004/C 102/02)

² In point 15 of the *judgement*, telepromotions were defined as follows: "telepromotions can be identified by the fact that, while suitable breaks clearly distinguish them from their editorial context, nevertheless there is generally an element of visual continuity and they are more time-consuming than spot advertising owing to the inclusion of entertainment and/or games"

advertising and teleshopping spots. Conversely, short forms of promotion presenting the same characteristics as advertising spots³ should be subject to the same limits.


This is confirmed by the Commission interpretative communication which specifies that telepromotion spots, unlike telepromotions presented during a programme, are subject to the rules on advertising and teleshopping spots⁴.

In the case of Spain, the monitoring report which supports this infringement case has shown that some short forms of advertising such as "*microespacios publicitarios*", "*publirreportajes*", "*anuncios de telepromotion*" or "*anuncios publicitarios de patrocinio*", were not counted by the Spanish government in the hourly limit of 12 minutes while, according to our analysis, they present all the characteristics of an advertising spot. For more information on this pending case, we kindly refer you to the press release⁵.

While this case is based on the provisions of the Television Without frontiers Directive, we also are of the view that the Audiovisual Media Services Directive should certainly not have the effect of restricting broadcasters from continuing legitimate existing practices. The rule on the hourly limit, which has been retained, should be construed following the lines of reasoning developed in both the RTI case and the interpretative communication.

Pursuant to Article 10 of the Treaty, we remind you that it is the tasks of the national authorities in the first place to ensure that the relevant rules of the Directive are properly enforced. Therefore, the national authorities are responsible for determining on a case by case basis under which category (long lasting form of advertising or advertising spot) a particular form of promotion should fall. As guardian of the Treaty, the Commission has the responsibility to ensure, in the general interest of the Community, that national authorities give effect to the Treaty and to secondary law. In this context, the Commission may decide to act against Member States for failure to fulfil their obligations following a complaint or on the basis of its own monitoring exercise, should this be appropriate, as in the Spanish case.

We hope we have replied to your question. We are, of course, also available for a meeting.



Gregory Paulger

³ In point 31 of the RTI judgement, spots advertisement were *defined as follows*: "*forms of promotion usually lasting a very short time, having a very strong suggestive impact, generally appearing in groups at varying intervals during or between programmes, and produced either by those who supply the products or services or by their agents, rather than by the broadcasters themselves*"

⁴ See in this respect, paragraph 28 of the Commission Interpretative communication

⁵

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/700&format=HTML&aged=0&language=EN&guiLanguage=en>