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**COMMISSION INTERPRETATIVE COMMUNICATION**

**ON CERTAIN ASPECTS OF THE PROVISIONS ON TELEVISED ADVERTISING  
IN THE “TELEVISION WITHOUT FRONTIERS” DIRECTIVE**

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## COMMISSION INTERPRETATIVE COMMUNICATION

### ON CERTAIN ASPECTS OF THE PROVISIONS ON TELEVISED ADVERTISING IN THE “TELEVISION WITHOUT FRONTIERS” DIRECTIVE

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## INTRODUCTION

This interpretative Communication concerns 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<sup>1</sup> as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (hereinafter the “television without frontiers Directive” or the “Directive”)<sup>2</sup>. This Directive establishes the legal reference framework for the free provision of television services in the European Union with a view to promoting the development of a European market in television and related services, including television advertising and audiovisual programme production.

The Directive coordinates, at Community level, national legislation in areas such as:

- determination of the law applicable to broadcasters;
- promotion of production and distribution of European works;
- public access to events of major importance;
- television advertising, teleshopping and sponsorship;
- protection of minors; and
- the right of reply.

With regard to television advertising, the television without frontiers Directive lays down provisions aimed at reconciling the principle of freedom to produce television advertising (an important, often vital, source of revenue, particularly for commercial “free-to-air” television broadcasters) with adequate protection for both audiovisual works and the general public (seen as both viewers and consumers). Article 3 of the Directive empowers the Member States to lay down more detailed or stricter rules for broadcasters under their jurisdiction.

To achieve this balance, the Directive lays down a number of key principles, including the principle of separation between editorial content and advertising<sup>3</sup>, the principle of insertion of advertising spots between programmes, with the possibility, subject to certain conditions, of inserting advertising spots during programmes<sup>4</sup>, hourly and daily limits on the amount of advertising<sup>5</sup>, rules on the protection of human dignity and of minors<sup>6</sup>, rules on sponsorship and teleshopping<sup>7</sup> and rules on public health restricting advertising for certain products (ban on advertising for tobacco and prescription drugs, restrictions on advertising for alcoholic beverages)<sup>8</sup>.

It should be noted that the provisions on advertising contained in the misleading advertising Directive<sup>9</sup> also apply. In the future, the EU consumer protection rules will also include the provisions of the recent proposal for a framework directive on unfair business-to-consumer commercial practices. The proposed framework takes a technology neutral

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<sup>1</sup> Official Journal L 298, 17.10.1989, p.23-30.

<sup>2</sup> Official Journal L 202, 30.07.1997, p.60-70.

<sup>3</sup> See Article 10 of the Directive.

<sup>4</sup> Article 11 of the Directive.

<sup>5</sup> Articles 18 to 19a of the Directive.

<sup>6</sup> Articles 12 and 16 of the Directive.

<sup>7</sup> Article 17 on sponsorship, Articles 18a and 19 on teleshopping.

<sup>8</sup> Articles 13, 14, 15 and 17.

<sup>9</sup> Directive 84/450/EEC as amended by Directive 97/55/EC

approach and is based on the country of origin principle, making it compatible with the approach of the television without frontiers Directive. The proposal makes clear that in case of sector-specific EU rules which also regulate the same area, it is those sector specific rules which will apply.

This Communication, which follows on from the Commission's Communication on the future of European regulatory audiovisual policy adopted on 15 December 2003<sup>10</sup>, aims to clarify how the relevant provisions of the Directive apply to certain forms and techniques of commercial communication which have emerged in parallel with technological and market developments. In doing so, the Commission is seeking to increase legal certainty for economic operators, Member States and consumers. In view of the fact that some provisions are open to interpretation and given the absence of relevant case law, the approach rests on the "*in dubio pro libertate*" principle.

During the 2003 public consultation on the review of the Directive in accordance with the work programme annexed to the report of 6 January 2003 on the application of the Directive (hereinafter the "fourth report")<sup>11</sup>, the majority of contributions from Member States, regulatory authorities and interested parties supported the idea of clarifying how the relevant provisions of the Directive apply to new advertising techniques. Similarly, there was a broad consensus in favour of considering these techniques compatible with the television without frontiers Directive<sup>12</sup>. The conclusions of the Italian Presidency following the informal Council of Ministers for Audiovisual Media in Syracuse<sup>13</sup> and the debates of the Contact Committee point in the same direction<sup>14</sup>.

In addition, the debates of the Contact Committee and the public consultation raised a number of questions with regard to the compatibility of certain emerging advertising practices, such as telepromotions, mini-spots or product placement, with the provisions of the Directive. These questions are, in turn, linked to the interpretation of key rules and concepts in the Directive, such as those relating to the separation between editorial content and advertising, "sponsorship", "surreptitious advertising", insertions or the amount of television advertising.

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<sup>10</sup> COM (2003) 784 final.

<sup>11</sup> Fourth report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers", COM(2002) 778 final, available at the following address:  
[http://europa.eu.int/comm/avpolicy/regul/twf/applica/comm2002\\_778final\\_en.pdf](http://europa.eu.int/comm/avpolicy/regul/twf/applica/comm2002_778final_en.pdf)

<sup>12</sup> All contributions of a non-confidential nature are available at the following address:  
<http://europa.eu.int/comm/avpolicy/regul/review-twf2003/contribution.htm>

<sup>13</sup> The conclusions are available at the following address:  
<http://www.comunicazioni.it/en/Img/8/Conclusioni%20in%20inglese.pdf>

<sup>14</sup> Committee set up under the aegis of the Commission pursuant to Article 23a of the television without frontiers Directive and charged, *inter alia*, with the task of facilitating the effective implementation of the Directive.

## BASIC PROVISIONS AND THEIR APPLICATION TO CERTAIN COMMERCIAL PRACTICES

### .1. Amount of television advertising

#### .1.1. Hourly amount

In the light of the original wording of the television without frontiers Directive, the Member States differed in their interpretation of the provision of Article 18 that “the amount of spot advertising within a given one-hour period shall not exceed 20%”. According to the sliding hour criterion adopted by some Member States, a broadcaster could not broadcast more than 20% advertising, regardless of the precise moment from which a given one-hour period was deemed to run. This interpretation amounted to an absolute ban on the broadcast of advertising for a continuous period of more than 12 minutes. However, according to the clock hour criterion adopted by other Member States, a reference hour constituted a period of 60 consecutive minutes, starting at minute 0 and ending at minute 59 (natural clock hour) or starting at any time after minute 0, for example where a broadcaster’s broadcasts start at 6.05 on any given day (overlapping clock hour). In this latter case, consecutive clock hours would run from 6.05 to 7.04, from 7.05 to 8.04, and so on.

Following the amendment of the Directive by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, Article 18(2) now refers to “the proportion of advertising spots and teleshopping within a given clock hour”. The Community legislator thus wanted to introduce the clock hour criterion without, however, specifying whether this was to be understood as a natural clock hour or an overlapping clock hour<sup>15</sup>. This intention on the part of the legislator is reflected in the different language versions of the Directive<sup>16</sup>.

This criterion allows advertising to be restricted to a maximum of 12 minutes during any given hour while offering greater flexibility to broadcasters with regard to the distribution of advertising spots. According to this interpretation, Article 18(2) of the Directive allows for continuous broadcasting of advertising over a period of more than 12 minutes. Such broadcasting could, for example, start at minute 50 of a given hour and end at minute 10 of the following hour.

The concept of **clock hour** used in Article 18(2) of the Directive can be understood as referring either to a natural clock hour, or to an overlapping clock hour. Pursuant to the logic of the natural clock hour the reference hours taken into account in the calculation of the hourly amount of television advertising represent periods of 60 consecutive minutes starting at minute 0 and ending at minute 59. In contrast, pursuant to the logic of the overlapping clock hour, the reference hours taken into account represent periods of 60 consecutive minutes that could start subsequently to minute 0 (e.g. the minute 8 of a given hour) and finish during the following hour (in our example, at the end of the seventh minute of the following hour).

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<sup>15</sup> On this point, see the Report on application of Directive 89/552/EEC and Proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM(95) 86 final, p. 41.

<sup>16</sup> See the French (“heure d’horloge”), English (“clock hour”), Swedish (“timme mellan hela klockslag”), Danish (“klokke time”), Spanish (“hora de reloj”), Italian (“oro d’orologio”), Portuguese (“hora de relógio”), German (“gerechnet ab einer vollen Stunde”) and Dutch (“klokuur”) versions.

This provides an example of the balance which the Directive aims to establish between the freedom to produce television advertising and the protection of the general public, given that such a measure allows a maximum of freedom (by comparison with the original version of the Directive) while facilitating the competent authorities' monitoring of the time limits for advertising.

## **.1.2. Daily amount**

The daily amount of authorised television advertising and teleshopping is defined as a proportion of daily transmission time. The latter concept is therefore key. According to Article 18(1) of the Directive, it is with reference to this concept that the 15% television advertising and 20% teleshopping spots, advertising spots and other forms of advertising are calculated<sup>17</sup>. In addition, the concept of “day” is used in Article 18a with reference to windows devoted to teleshopping broadcast by channels not exclusively devoted to teleshopping<sup>18</sup>.

Unlike the concept of hour, the concepts of “daily transmission time” and “day” are not defined in the Directive. In the television industry, the concepts of “day” or “daily transmission time” may be understood as referring to the calendar day or the programming day. A glance at a television programme will confirm that programming days may often start at, for example, 06.00 (and not at 00.00) and end at 05.00 the following day (and not at midnight).

The preparatory work also provides no indication on how these concepts of “day” and “daily transmission time” should be interpreted. These concepts will therefore be clarified in this Communication, “by reference to the purpose and general scheme of the regulation” of which they form part<sup>19</sup>. In this respect, note should be taken of the preliminary ruling of the European Court of Justice on the interpretation of Article 11 of the Directive, which covers insertions of advertising. In its ruling, the Court concluded, *inter alia*, that:

“It follows that, when a provision of Directive 89/552 imposes a restriction on broadcasting and on the distribution of television broadcasting services, and the Community legislature has not drafted that provision in clear and unequivocal terms, it must be given a restrictive interpretation.

Since Article 11(3) of Directive 89/552, as amended, imposes a restriction as regards the possibility of interrupting the transmission of audiovisual works by advertising, that restriction must be interpreted in the strictest possible sense”<sup>20</sup>.

This amounts to applying to the field of television services the customary principle of the restrictive interpretation of exceptions to or restrictions of the freedom to provide services<sup>21</sup>. Against this background, the Commission considers that the concepts of “daily transmission

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<sup>17</sup> Article 18(1) of the Directive.

<sup>18</sup> This Article provides that the maximum number of windows devoted to teleshopping broadcast by channels not exclusively devoted to teleshopping shall be eight per day and that their overall duration shall not exceed three hours per day.

<sup>19</sup> European Court of Justice, 9 January 2003, *Nani Givane and Others v. Secretary of State for the Home Department*, Case C-257/00, paragraph 37, ECR I.2003 p.345.

<sup>20</sup> European Court of Justice, 28 October 1999, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media AG*, Case C-6/98 (“ARD”), paragraphs 30 and 31, ECR I.1999, p.7599.

<sup>21</sup> European Court of Justice, 26 April 1988, *Bond van Adverteerders*, Case 352/85, paragraph 36, ECR 1988, p.2085.

time” and “day” may be calculated by reference to the programming day, which, in turn, may correspond to a calendar day (starting at 00.00 and ending at midnight) or differ from it (by, for example, starting at 06.00 and ending at 05.50 the following calendar day).

The Commission considers that the concepts of “daily transmission time” and “day” should be interpreted as referring to a **programming day**, which, in turn, may correspond to a **calendar day** or to a **separate programming day** starting, for example, at 06.00 and ending at 05.50 the following calendar day.

## .2. Form and presentation of television advertising and teleshopping (Article 10)

**Separation between advertising and editorial content.** Article 10 of the Directive contains a series of provisions on the form and presentation of television advertising and teleshopping. In particular, Article 10(1) of the Directive provides that advertising and teleshopping must be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means. In view of the similar wording of many provisions in the television without frontiers Directive and in the European Convention on Transfrontier Television (“Transfrontier Television Convention”)<sup>22</sup>, it may be useful to consider how the provisions have been interpreted in the framework of the Convention. In this respect, the Explanatory Report to the revised European Convention on Transfrontier Television (the “explanatory report”) specifies that the general interest purpose of this provision is to avoid any confusion between advertising or teleshopping programmes and the other items of the programme service<sup>23</sup>. Programmes which fail to observe this so-called principle of separation between advertising and editorial content are prohibited. This same principle of separation is behind the ban on surreptitious advertising and teleshopping.

**Advertising and isolated teleshopping spots.** Article 10(2) provides that isolated advertising and teleshopping spots must remain the exception. With this provision, the Community legislator has laid down a clear rule that advertising and teleshopping must be broadcast on screen, with limited scope for derogation. In this respect, the explanatory report provides that there may be circumstances where individual spots are permissible, in the case for example of a single long advertisement, or where the period available for advertising or teleshopping is very short, as between the rounds of a boxing or wrestling match, or where the broadcaster has insufficient advertising orders to permit a grouping of spots<sup>24</sup>.

**Mini-spots.** The advertising practice of using so-called mini-spots has emerged in connection with the transmission of football matches<sup>25</sup>. It consists of broadcasting an extremely short advertising spot during an incident. Without prejudice to the question of whether such incidents may be considered “intervals” within the meaning of Article 11(2), national authorities must ensure that the broadcast of mini-spots does not undermine the key principles on the form and presentation of television advertising laid down in Article 10 of the

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<sup>22</sup> The revised version of the Convention is available at the following address:  
[http://www.coe.int/T/F/Droits%5Fde%5FI%27Homme/Media/2%5FT%2DTT/2%5FTexte%5Fde%5FIa%5FConvention/PDF\\_E%20CETT.pdf](http://www.coe.int/T/F/Droits%5Fde%5FI%27Homme/Media/2%5FT%2DTT/2%5FTexte%5Fde%5FIa%5FConvention/PDF_E%20CETT.pdf)

<sup>23</sup> See the explanatory report as amended by the provisions of the Protocol which entered into force on 1 March 2002, paragraph 228, available at the following address:  
<http://conventions.coe.int/Treaty/EN/Reports/Html/132.htm>

<sup>24</sup> Explanatory report, *op. cit.*, paragraph 229.

<sup>25</sup> See the study by the European Audiovisual Observatory entitled “The Insertion of Short Advertisement spots during football matches”, available at the following address:  
[http://www.obs.coe.int/online\\_publication/expert/ad\\_football.html.en](http://www.obs.coe.int/online_publication/expert/ad_football.html.en)

Directive. In the first instance, it is up to the Member States to ensure that mini-spots are presented in a manner which complies with the basic principle laid down in Article 10(1) of the Directive that advertising “shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.” This principle has the purpose to allow the viewer to make a distinction between editorial content and commercial communications. In addition, the Member States must ensure that the broadcast of mini-spots is “the exception”, in accordance with the rule that isolated advertising must remain the exception (Article 10(2)).

### **3. Insertion of advertising and teleshopping (Article 11)**

Article 11 of the Directive stipulates that **advertising and teleshopping spots shall be inserted between programmes** or, provided certain specified conditions are fulfilled, may be inserted during programmes in such a way that the integrity and value of the programme, taking into account natural breaks in and the duration and nature of the programme, and the rights of the rights holders are not prejudiced. The Court has explicitly recognised that this Article not only protects the interests of the rights holders and broadcasters, but also protects the viewers from excessive advertising<sup>26</sup>. The conditions under which advertising may be inserted during certain programmes are specified by the Directive. Thus, Article 11(2) provides that in programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances containing intervals, advertising and teleshopping spots shall only be inserted between the parts or in the intervals. Article 11(3) provides further clarification with regard to the interruption of feature films and films made for television. Article 11(4) provides that where programmes, other than those covered by paragraph 2, are interrupted by advertising or teleshopping spots, a period of at least 20 minutes should elapse between each successive advertising break within the programme. Finally, Article 11(5) prohibits advertising during broadcasts of religious services and during news and current affairs programmes, documentaries, religious programmes and children’s programmes, when their scheduled duration is less than 30 minutes<sup>27</sup>.

**Sports programmes.** The Commission would like to clarify how the provisions of Article 11 apply to sports programmes. In this respect, it should be recalled that Article 11(2) applies only to “sports programmes... containing intervals”. The interval must be natural and recurring and directly linked to the structure of the performance or event, as suggested by the explicit reference to “similarly structured events and performances”. The explanatory report specifies that the notion of “autonomous part” during sports programmes must, generally speaking, correspond to natural breaks which are in keeping with the sport in question<sup>28</sup>. This does not cover single accidental breaks, since all conceivable programmes would otherwise be covered by Article 11(2) of the Directive and not only those specifically mentioned. For instance, concerning football, it follows from this interpretation that a corner, a free kick, a player replacement, etc., which does not entail a break in the game, does not constitute an interruption within the meaning of Article 11(2). This must be distinguished from the case where a period of break in the game related to these events is deducted and may be added to

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<sup>26</sup> European Court of Justice, 23 October 2003, *RTL Television GmbH v. Niedersächsische Landesmedienanstalt für privaten Rundfunk*, Case C-245/01 “RTL”, paragraph 64, not yet published in the Court Reports.

<sup>27</sup> It should be pointed out that, in the English language version of the 1989 Directive, the term used was “programmed duration”. In the 1997 amended Directive, this term has been replaced by “scheduled duration” so as to make it clear that the reference duration is that indicated in the broadcaster’s programme.

<sup>28</sup> Explanatory report, *op. cit.*, paragraph 247.

the prescribed duration. However, sports programmes which do not contain such natural breaks, such as cycle races, track races or Formula 1 races, fall within the scope of paragraph 4, which covers programmes other than those covered by paragraph 2.

**Sports programmes which do not contain breaks** within the meaning of Article 11(2) of the Directive are subject to the rule laid down in Article 11(4). As a result, a period of at least 20 minutes should elapse between each successive advertising break within the programme.

#### **.4. Telepromotions**

The Commission addressed the issue of telepromotions in its second report on the application of the Directive<sup>29</sup> in order to explain a judgment of the Court which concerned, *inter alia*, the amount of daily transmission time allowed for this type of advertising under the original television without frontiers Directive, prior to its amendment in 1997. As noted by the Commission at the time, telepromotions are a form of television advertising based on the interruption of studio programmes (especially game shows) by slots devoted to the presentation of one or more products or services, where the programme presenters momentarily swap their role in the games in progress for one as “promoters” of the goods or services which are the object of the advertising presentation.

The Commission considers that telepromotions are compatible with Article 10 of the Directive, provided they are kept quite separate from other parts of the programme service by optical and/or acoustic means enabling viewers to readily recognise their commercial nature.

It is for the competent national authorities to ensure compliance with the provisions of Article 10 of the Directive and to adopt the necessary implementing measures in that regard.

**Hourly duration.** It is worth reminding that teleshopping spots fall under the hourly and daily limits set by Article 18 of the Directive. In contrast, in its previously mentioned second report on the application of the Directive, the Commission has reminded that telepromotions that are other forms of advertising, fall under the daily limits provided by the Directive. It follows from Article 18(2) of the Directive that the proportion of **telepromotion spots** (like teleshopping and advertising spots) within a given clock hour shall not exceed 20%. However, the Article does not apply to **telepromotion** which is not presented in the form of spots but during a programme. When broadcast in that manner, following the case law of the Court, telepromotion must be regarded as another form of advertising. It follows that the rules on the hourly duration of advertising which apply to “advertising spots” and “teleshopping spots” are not applicable to telepromotion<sup>30</sup>.

Article 18(1) of the Directive on the authorised daily duration of advertising and teleshopping is applicable to telepromotion spots and programmes. However, Article 18(2) of

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<sup>29</sup> 2<sup>nd</sup> Report from the Commission to the Council, the European Parliament and the Economic and Social Committee, available at the following address:  
<http://europa.eu.int/comm/avpolicy/regul/twf/applica/156fr.htm>

<sup>30</sup> European Court of Justice, 12 December 1996, *Reti Televisive Italiane SpA (RTI), Radio Torre, Rete A Srl, Vallau Italiana Promomarket Srl, Radio Italiana Solo Musica Srl e.a. et Gete Srl v. Ministero delle Poste e Telecomunicazioni*, Joined Cases C-320, 328, 329, 337-339/94 (“RTP”), ECR I.1996, p.6471, paragraph 37.

the Directive on the maximum hourly duration of television advertising does not cover telepromotion presented during a programme.

## **.5. Surreptitious advertising**

Surreptitious advertising and surreptitious teleshopping are prohibited by Article 10(4) of the television without frontiers Directive. Article 1 of the Directive defines surreptitious advertising as “the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration”.

To be considered surreptitious advertising, the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services must meet three cumulative conditions: it must be intended by the broadcaster, it must be done to serve advertising and it must be capable of misleading the public as to its nature.

It follows from this definition that the Directive does not contain an absolute ban on all references in words or pictures to goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services. Such references remain integral to freedom of expression, particularly in today’s world in which brands play an important part.

Given that intentionality is a criterion for prohibiting surreptitious advertising, the distinction between surreptitious advertising and a lawful reference to goods, services, brands or names of economic operators can, in practice, be rather difficult for the national authorities to draw. With this in mind, the Commission considers it appropriate to apply the criterion of the “undue prominence” of the good, service, brand or company name. The undue nature may result from the recurring presence of the brand, good or service in question or from the manner in which it is presented and appear. In this regard, the content of the programmes in which the brand, good or service appears should be borne in mind (feature films, news programmes).

For example, the fact that a good is displayed prominently is, among others, a sign of surreptitious advertising when such a display is not warranted on the editorial grounds of the programmes, is the result of an influence on the content thereof for commercial purposes or is likely to mislead the public on the nature of such a presentation.

## **.6. Teleshopping**

Under the terms of the Directive, a channel may be exclusively devoted to teleshopping and broadcast teleshopping programmes all day long. The Commission has been asked to clarify how the rules of the Directive apply when two channels share the same frequency but hold separate licenses and one of these channels exclusively broadcasts teleshopping programmes (generally during the night). The Commission considers that sharing a frequency with another channel does not prevent a channel offering services such as teleshopping from being considered exclusively devoted to teleshopping and from consequently benefiting from the provisions of Article 19 of the Directive.

However, the two channels must hold separate licenses, be clearly distinguished from one another and not present any risk of confusion. In other words, they must make no reference to

each other's name or logo and must be clearly distinguished in both paper and electronic programme guides (EPG).

## NEW ADVERTISING TECHNIQUES

In its Communication on principles and guidelines for the Community's audiovisual policy in the digital age<sup>31</sup>, the Commission noted the emergence of new advertising techniques, such as split screen and virtual advertising, and the questions which they raise with regard to certain key rules laid down in the Directive, such as the prohibition of surreptitious advertising<sup>32</sup> and the need for a clear separation between advertising and other material<sup>33</sup>. In this respect, the Communication stressed that "the point is not to restrict the development of new advertising techniques but to ensure that basic principles...continue to apply".

At the Commission's request, a study into new advertising techniques was carried out by an independent consultant<sup>34</sup>. The main conclusions from this study were set out by the Commission in its fourth report. The study found that split screen, virtual and interactive advertising were not *per se* incompatible with the Directive. However, the situation differs significantly from one Member State to another with regard to actual use, relative importance and the approach adopted by national authorities.

Split screen advertising is prohibited in some Member States (Portugal and France), but allowed in others, including Germany and the United Kingdom, with Germany the only Member State to have adopted specific regulations in this area. Virtual advertising is prohibited in France, Portugal and Norway as contrary to the principles governing the insertion of advertising during programmes, but authorised in Greece and Spain, and even subject to specific regulations in the United Kingdom and Germany. According to the report, the United Kingdom is the only Member State to have adopted specific regulations on interactive advertising. Apart from the rules laid down by the Independent Television Commission (ITC)<sup>35</sup> and the code drawn up by the European Group of Television Advertisers (EGTA)<sup>36</sup>, with interactive advertising still at an experimental stage in the vast majority of Member States there appear to be no specific regulations applicable to interactive commercial services.

Moreover, the study revealed that the differences in the manner in which new advertising techniques are treated in national law are often the result of differences in interpretation of the key rules laid down in the Directive.

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<sup>31</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 14 December 1999, COM(1999) 657 final.

<sup>32</sup> Article 10(4).

<sup>33</sup> Article 10(1).

<sup>34</sup> Study by Bird & Bird and Carat Crystal available at the following address:

[http://europa.eu.int/comm/avpolicy/stat/bird\\_bird/pub\\_rapportfinal\\_en.pdf](http://europa.eu.int/comm/avpolicy/stat/bird_bird/pub_rapportfinal_en.pdf)

<sup>35</sup> UK monitoring body whose powers are now exercised by OFCOM. The ITC's guidance notes on interactive advertising are available at the following address:

[http://www.ofcom.org.uk/codes\\_guidelines/broadcasting/tv/vrs\\_code\\_notes/i\\_tv/?a=87101](http://www.ofcom.org.uk/codes_guidelines/broadcasting/tv/vrs_code_notes/i_tv/?a=87101)

<sup>36</sup> EGTA (European Group of Television Advertisers) code of conduct on commercial communication on the new interactive services, available at the following address: <http://www.egta.com/pages/EGTA-Code-DEF.fr.pdf>

## .1. Split screen

Split screen advertising consists of the simultaneous or parallel transmission of editorial content and advertising content. For example, one or more advertising spots appear in a window during the transmission of a programme in such a way that two separate images are visible on the screen. Provided the space set aside for advertising is not excessive, this technique enables the viewer to continue to watch the editorial programme during the transmission of an advertising spot.

In the framework of the Transfrontier Television Convention, the Standing Committee adopted an opinion according to which split-screen advertising is covered by the Convention, but it cannot be regarded as acceptable under the Convention, unless it satisfies the following criteria: (i) a clear and recognisable separation of programming and advertising content and (ii) full compliance with all the other requirements of the Convention, in particular Articles 7 (responsibilities of the broadcaster), 11 (general advertising standards), 12 (duration of advertising), 13 (form and presentation of advertising), 14 (insertion of advertising) and 15 (advertising of particular products)<sup>37</sup>.

The legal framework governing the split screen technique varies according to whether it is used for television advertising or to display the logo or name of the programme sponsor.

### .1.1. Split screen and television advertising

Article 1(c) of the Directive defines television advertising as any form of announcement broadcast in return for payment or for similar consideration to promote the supply of goods, services, rights and obligations in return for payment. Given that the split screen technique is used to broadcast such announcements, in terms of the Directive it must be treated in the same way as any other advertising announcement.

**Presentation (Article 10).** Traditionally, the separation between editorial content and commercial communications takes the form of a temporal separation: advertising is inserted between or during programmes and kept quite separate from these programmes by a screen which is identifiable by its optical or acoustic characteristics. It nevertheless follows from the letter and the spirit of the Directive that a temporal separation from the rest of the programme is not necessarily required if the acoustic or optical means used by the broadcaster produce the result sought by the legislator, namely to prevent the viewer from confusing advertising and editorial content.

A **spatial separation** by optical and/or acoustic means may comply with the rule on separation laid down in Article 10(1) of the Directive. In this respect, the separation must be such as to make advertising and teleshopping readily recognisable as such and kept clearly separate from other parts of the programme.

The principle of separation between advertising and editorial content should thus not be interpreted as prohibiting split screen advertising. However, such advertising must comply with the provisions on separation between editorial content and advertising laid down in Article 10 of the Directive. This implies that split screen advertising must be readily

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<sup>37</sup> Opinion No 9 adopted during the meeting of the Standing Committee on 29-30 April 2002, available at the following address:  
[http://www.coe.int/t/e/human%5Frights/media/2%5FT%2DTT/5%5FMeeting%5Freports/T-TT\(2002\)002%20E%20Report%2030e.asp#TopOfPage](http://www.coe.int/t/e/human%5Frights/media/2%5FT%2DTT/5%5FMeeting%5Freports/T-TT(2002)002%20E%20Report%2030e.asp#TopOfPage)

recognisable as such and kept clearly separate from other parts of the programme by acoustic or optical means aimed at preventing the viewer from mistaking advertising for editorial content. A spatial separation by optical and/or acoustic means is adequate, provided it identifies advertising clearly and enables the viewer to readily recognise it.

The split screen technique is generally used for broadcasting relatively short **advertising spots**. Advertising spots on a split screen must be treated in the same way with regard to Article 11 and 18 of the Directive as television advertising spots.

**Insertion (Article 11).** Article 11 aims to protect viewers against excessive advertising, on the one hand, to safeguard the integrity and economic value of programmes in the interest of the rights holders, on the other hand<sup>38</sup>. Therefore, **consent from the holders of the rights to the programme** during which split screen advertising is to be broadcast has to be obtained. Moreover, even in the case where the consent of the holders of the rights to the programmes has been obtained, and in order to protect the viewers against excessive advertising, split screen that might prejudice **the integrity of the audiovisual work** during which it is broadcast is *per se* incompatible with Article 11 of the Directive .

**Amount (Article 18).** The provisions of Article 18 on hourly and daily duration of advertising apply in full to split screen advertising. In this respect, the fact that split screen advertising spots and teleshopping spots within the meaning of Article 18(2) might only occupy a part of the television screen cannot justify more favourable treatment under these provisions.

**Advertising content.** Split screen advertising must comply with the provisions of Articles 12 and 16 on the protection of human dignity and of minors, as well as the rules laid down in Articles 13 and 15 concerning the prohibition or restriction of advertising for certain products.

Split screen advertising is compatible with the Directive, provided it is readily recognisable and kept quite separate from other parts of the programme by acoustic or optical means so as to prevent viewers mistaking advertising for editorial content. Split screen advertising must not prejudice the integrity of the programme during which it is broadcast. Split screen advertising is fully covered by the provisions of Directive on the presentation (Article 10), insertion (Article 11), duration (Article 18) and content (Articles 12 to 16) of advertising.

### **.1.2. Split screen advertising and sponsorship**

Article 1(e) of the Directive defines sponsorship as a any contribution made by a public or private undertaking to the financing of television programmes with a view to promoting its name, its trade mark, its image, its activities or its products<sup>39</sup>. According to the *RTL* judgment interpreting Article 17 of the Directive, Article 17(1)(b) of the Directive does not prohibit the insertion of the name and/or the logo of the sponsor at times other than the start or the end of the programme. As a result, in the light of this case law, the use of the split screen technique to show the logo and/or name of the sponsor during the broadcast of the sponsored programme is not prohibited<sup>40</sup>.

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<sup>38</sup> This is clear particularly from Article 11(1) and from the *RTL* judgment, Case No C-245/1, *op. cit.*

<sup>39</sup> See Article 1 of the Directive for definitions of these concepts.

<sup>40</sup> *RTL* judgment, *op. cit.*

Where the split screen technique is used to identify the programme sponsor, it must comply with the provisions of Article 17 of the Directive. In addition, although Article 17 is not explicit on this point, it follows from a systematic and teleological interpretation of the Directive that the presentation of the logo and/or name of the sponsor in a manner which might prejudice the integrity of the sponsored programme would be incompatible with the Directive. The infringement of the integrity of the programme is assessed in taking into account, in particular, the duration and the size of said presentation.

Finally, both the independent study and the discussions of the Contact Committee have highlighted differences in the way sponsorship is treated in national law, in particular with regard to the possibility of referring to the products of the sponsor or a third party. In this respect, Article 17 does not lay down a formal prohibition. Indeed, Article 1(e) even defines sponsorship as a means for the sponsor to promote his activities. However, it should nevertheless be noted that Article 17(1)(c) provides that programmes must not encourage the purchase or rental of the products or services of the sponsor or a third party. It follows from these provisions when taken together that, as a general rule, no explicit reference may be made to the products or services of the sponsor or a third party during the broadcast of sponsored programmes, except where such a reference serves the sole purpose of identifying the sponsor or making explicit the link between the programme and the undertaking sponsoring it.

During broadcasts of sponsored programmes, no explicit reference may be made to the products or services of the sponsor or a third party, except where such a reference serves the sole purpose of identifying the sponsor or making explicit the link between the programme and the undertaking sponsoring it.

## **.2. Interactive advertising**

Interactive advertising allows the viewer to supply information directly to the broadcaster via a return path or to interactively explore a chosen environment for as long as he wishes. In this connection, the Commission would like to refer to the EGTA code of conduct and the ITC guidance notes<sup>41</sup>.

As a service supplied on individual demand, interactive advertising is an information society service and thus outside the scope of the Directive<sup>42</sup>. Generally speaking, however, interactive advertising tends to be initiated by the viewer on the basis of an advertisement broadcast in the framework of a linear programme. A blinking banner appears during the advertising spot, inviting the viewer to click on his remote control to obtain further information. The viewer enters the interactive programme by sending a message to that effect from his remote control. It follows that, as long as the viewer has not voluntarily chosen to enter the interactive environment, the context is one of a linear broadcast of television programmes governed by the television without frontiers Directive.

Furthermore, when entering a commercial interactive environment from a linear programme, viewers are entitled to expect a level of consumer protection similar to that which they enjoy under the provisions of the television without frontiers Directive.

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<sup>41</sup> *Op. cit.*

<sup>42</sup> However, the protection afforded to consumers by the misleading advertising Directive extends to interactive advertising. Once adopted, the provisions of the recent proposal for a framework directive on unfair business-to consumer commercial practices will apply.

The television without frontiers Directive therefore applies to linear programmes from which the interactive programmes are accessed. This Communication provides an opportunity to clarify the practical implications of this situation.

First, in accordance with the principle of separation between advertising and editorial content, the interactive icon on which the viewer must click to access the interactive environment must be integrated into an advertising programme, itself kept separate and clearly distinguishable from the editorial content. This icon may be inserted during a traditional advertising spot or an advertising spot broadcast using the split screen technique. In the latter case, prior permission must be obtained from the rights holders<sup>43</sup>.

Secondly, when clicking on the interactive icon, viewers should not be guided straight to advertisements which are incompatible with the provisions of Articles 12 to 16 of the Directive.

Thirdly, given that Article 16 provides that advertising “shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity”, advertising spots broadcast between or during children’s programmes may not include icons enabling direct access to interactive advertising of the kind prohibited by Article 16. Similarly, given that Article 15 of the Directive lays down a series of restrictions on television advertising and teleshopping for alcoholic beverages, interactive advertising for alcoholic beverages which may be accessed directly from a linear programme must comply with the conditions governing television advertising and teleshopping for alcoholic beverages laid down in Article 15.

Finally, by analogy with the provisions of Article 10 on the recognisable nature of advertising, when entering a commercial interactive environment the viewer must be warned by appropriate optical and/or acoustic means so as to enable him to act on a voluntary and informed basis and not be misled about the commercial nature of the messages to which he will be exposed in the interactive environment. The viewer must thus be informed that by clicking on the interactive icon he will leave the linear environment governed, at Community level, by the “television without frontiers” Directive and enter a commercial interactive environment governed by the “electronic commerce” Directive<sup>44</sup>. This may be done by means of an intermediate advertising screen which appears at the first click, with the viewer being able to access the interactive programme only after a second click. It is for the Member States to lay down the appropriate measures for guaranteeing viewers adequate protection in this respect.

As long as the viewer has not entered the interactive environment, the context is one of a linear broadcast of television programmes governed by the television without frontiers Directive. This means that the provisions of the Directive apply with respect to the obligation to keep advertising separate from editorial content, to advertising content and to the protection of human dignity and of minors. However, when the viewer has chosen to enter the interactive environment on a voluntary and informed basis, the messages aimed at him are governed not by the provisions of the “television without frontiers” Directive, and in particular its provisions on the insertion (Article 11) and amount (Article 18) of advertising, but by those of the “electronic commerce” Directive. However, regardless of the linear or

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<sup>43</sup> See point 51 above.

<sup>44</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), OJ L 178, 17.07.2000, p.1-16.

interactive broadcasting method used, the Recommendation on the protection of minors and of human dignity should be observed<sup>45</sup>.

### **.3. Virtual sponsorship**

Virtual advertising involves using virtual techniques for inserting advertisements during broadcasts of sporting events, in particular, by replacing existing advertising boards on the field or by superimposing new (e.g., three-dimensional) images. Virtual advertising is the subject of an EBU memorandum<sup>46</sup> and an ITC guidance note<sup>47</sup>.

The Commission considers that this technique complies with the Directive. However, it must not affect the comfort and pleasure of the viewer<sup>48</sup>, adversely affect either the integrity or the value of the programmes or prejudice the interests of the rights holders<sup>49</sup>. The possibility of inserting such virtual advertising messages must take into account the necessary protection of these objectives of general interest.

Broadcasters and viewers must be informed in advance of the presence of virtual images, and the insertion of the latter is subject to prior permission from the organiser of the event being broadcast and the rights holders.

Where the broadcaster has a direct or indirect control and virtual advertising is inserted in return for payment or for similar consideration, such insertion is admissible, in particular within the framework of the retransmission of sports' events, insofar as it qualifies as sponsorship within the meaning of the Directive. To this extent, virtual advertising may be used, in particular during broadcasts of sporting events, only on the surfaces of the site or stadium where advertising may be materially affixed and, which are usually intended for such promotional purposes. Virtual advertising messages must not be more visible or conspicuous than those that are usually and materially displayed on site. Further, the provisions concerning sponsorship of articles 1 and 17 of the Directive in particular must be entirely complied with.

## **CONCLUSION**

The aim of this interpretative Communication is to specify how the provisions of the Directive apply to certain commercial practices and to new advertising techniques with a view to clarifying the rules and increasing the legal certainty for operators. It is without prejudice to the interpretation which may be given to the provisions and concepts in question by the European Court of Justice as the final arbiter of Community law.

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<sup>45</sup> Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, OJ L 270, p. 48.

<sup>46</sup> EBU (European Broadcasting Union) memorandum on virtual advertising, available at the following address: [http://www.ebu.ch/departments/legal/pdf/leg\\_virtual\\_advertising.pdf?display=EN](http://www.ebu.ch/departments/legal/pdf/leg_virtual_advertising.pdf?display=EN)

<sup>47</sup> ITC guidance note on virtual advertising, available at the following address: [http://www.ofcom.org.uk/codes\\_guidelines/broadcasting/tv/adv\\_spon/rules\\_amount\\_scheduling\\_adv/va\\_note?a=87101](http://www.ofcom.org.uk/codes_guidelines/broadcasting/tv/adv_spon/rules_amount_scheduling_adv/va_note?a=87101)

<sup>48</sup> The fact that the interests of the viewer as consumer are taken into account also transpires from the *RTL* judgment, *op. cit.*, paragraphs 62-65.

<sup>49</sup> *RTL* judgment, *op. cit.*, paragraph 52.

This Communication aims to clarify the existing rules laid down in the Directive, not create new ones. It is without prejudice to the outcome of the Commission's future work on a revision of the Directive and to the application of other rules laid down in Community law, such as those relating to copyright<sup>50</sup>.

In accordance with Article 3 of the Directive, this Communication does not prevent the Member States from laying down more detailed or stricter rules.

Finally, the Commission wishes to stress the potentially important role which codes of conduct and co-regulation may play in the practical implementation of the principles and rules of the Directive.

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<sup>50</sup> In particular Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.06.2001, p.10-19.