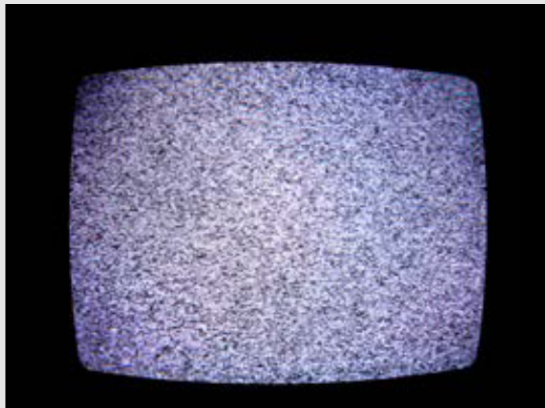


**Court of Justice EU, 24 November 2011, European Commission v Spain**



**ADVERTISING**

**Failure to fulfill obligations under Television Broadcasting directive by allowing advertising which exceeds maximum limit of 20% of transmission time**

- Declares that, by tolerating a situation in which the broadcasting of certain types of advertising, such as advertorials, telepromotion spots, sponsorship credits and micro-ads, on Spanish television channels has a duration which exceeds the maximum limit of 20% of the transmission time within a clock hour, as laid down in Article 18(2) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997, the Kingdom of Spain has failed to fulfil its obligations under Article 3(2) of that directive.

Source: [curia.europa.eu](http://curia.europa.eu)

**Court of Justice EU, 24 November 2011**

(A. Tizzano, President of the Chamber, M. Safjan, M. Ilešič, E. Levits, and M. Berger (Rapporteur))

JUDGMENT OF THE COURT (First Chamber)

24 November 2011 (\*)

(Failure of a Member State to fulfil obligations – Directive 89/552/EEC – Television broadcasting – Advertising spots – Transmission time)

In Case C-281/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 22 July 2009, European Commission, represented by L. Lozano Palacios and C. Vrignon, acting as Agents, with an address for service in Luxembourg, applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg, defendant,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by S. Behzadi-Spencer and S. Hathaway, acting as Agents,

intervener,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan, M. Ilešič, E. Levits, and M. Berger (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the [Opinion of the Advocate General at the sitting on 7 April 2011](#),

gives the following

**Judgment**

1 By its action, the Commission of the European Communities asks the Court to declare that, by tolerating flagrant, repeated and serious infringements of the rules set out in Article 18(2) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('Directive 89/552'), the Kingdom of Spain has failed to fulfil its obligations under Article 3(2) of that directive, read in conjunction with Article 10 EC.

**Legal context**

**European Union law**

2 The 27th recital in the preamble to Directive 89/552 states that '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 ...'.

3 Article 1 of Directive 89/552 provides:

*'For the purpose of this Directive:*

*...*

(c) *"television advertising" means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;*

*...*

(e) *"sponsorship" means any contribution made by a public or private undertaking not engaged in television broadcasting activities or in the production of audio-visual works, to the financing of television programmes with a view to promoting its name, its trade mark, its image, its activities or its products;*

(f) *"teleshopping" means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment.'*

4 Article 3(2) of Directive 89/552 provides:  
*'Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction comply with the provisions of this Directive.'*

5 Under Article 17(1) of that directive:  
*'Sponsored television programmes shall meet the following requirements:*

(a) *the content and scheduling of sponsored programmes may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster in respect of programmes;*

(b) *they must be clearly identified as such by the name and/or logo of the sponsor at the beginning and/or the end of the programmes;*

(c) *they must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services.'*

6 Article 18 of Directive 89/552, in its original version, provided:

*'1. The amount of advertising shall not exceed 15% of the daily transmission time. However, this percentage may be increased to 20% to include forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services, provided the amount of spot advertising does not exceed 15%.*

*2. The amount of spot advertising within a given one-hour period shall not exceed 20%.*

*...'*

7 Following its amendment by Directive 97/36, Article 18 of Directive 89/552 provides:

*'1. The proportion of transmission time devoted to teleshopping spots, advertising spots and other forms of advertising, with the exception of teleshopping windows within the meaning of Article 18a, shall not exceed 20% of the daily transmission time. The transmission time for advertising spots shall not exceed 15% of the daily transmission time.*

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

*3. For the purposes of this Article, advertising does not include:*

– *announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes;*

– *public service announcements and charity appeals broadcast free of charge.'*

#### **National law**

8 Directive 89/552 was incorporated into the Spanish legal order by Law 25/1994 of 12 July 1994 (BOE No 166 of 13 July 1994, p. 22342), as amended by Law 22/1999 of 7 June 1999, Law 15/2001 of 9 July 2001, and Law 39/2002 of 28 October 2002 ('Law 25/1994').

9 The Spanish authorities apply the legislation on advertising in accordance with the interpretation criteria relating to advertising broadcasts applied by the Sub-directorate-general for contents of the Information

Society as part of its inspection and monitoring services (criterios interpretativos de emisiones publicitarias aplicados por la subdirección general de contenidos de la S. I. en sus servicios de inspección y control), of 17 December 2001 ('the interpretation criteria').

10 On page 5 of the interpretation criteria, under the heading 'Forms of presentation of television advertising', a distinction is made between 'spots' and 'other forms of advertising', a distinction which, according to those criteria, 'has significant consequences in relation to the restrictions on the duration of a given broadcast time'.

11 On page 25 et seq. of the interpretation criteria, the restrictions applicable to advertising in relation to duration are stated as follows:

*'Limit per hour*

*In each clock hour of the day, the broadcasting time available to advertising in all its forms and to teleshopping spots shall not exceed 17 minutes. Subject to the limits stated above, the time available to advertising spots and to teleshopping spots, excluding self-promotional advertising, shall not exceed 12 minutes in the same period.'*

12 The daily limits are set as follows in the interpretation criteria:

*'The total broadcasting time allocated to advertising in all its forms and to teleshopping, with the exception of teleshopping programmes governed by paragraph 3 of this article, shall not represent more than 20% of the daily broadcasting time. The broadcasting time allocated to advertising spots shall not represent more than 15% of the total daily broadcasting time.'*

13 The interpretation criteria specify the levels of the daily limits as follows:

*'Advertising (in all its forms) and teleshopping spots: 20% of the daily broadcasting time. This restriction shall apply to advertising in all its forms and to all forms of teleshopping, with the exception of teleshopping programmes. Advertising spots: 15% of the daily broadcasting time. This restriction shall not apply to other forms of advertising or to teleshopping spots and programmes.'*

14 The interpretation criteria define advertising spots as follows:

*'Spot: an audiovisual advertisement of short duration (normally between 10 and 30 seconds) independent of programming. A stock production (maintained in durable form) capable of being re-broadcast.'*

15 The interpretation criteria define 'other forms of advertising' as follows:

*'Advertorial: an advertisement of a duration longer than a spot, generally with a story line, informative or descriptive. Also a stock production capable of being re-broadcast although, given its specific characteristics of duration and story line, it is generally not re-broadcast. Telepromotion: an advertisement associated with a programme which uses the same set, the same props, the same staging and/or the same costumes as the programme with which it is associated. A 'fluid' production which is intended to be re-broadcast not independently but solely in connection with the re-*

*broadcasting of the programme in which it occurred. Given that telepromotions of the same product in successive broadcasts of a programme correspond to different recordings (those of the different episodes of the programme), they are never identical. A telepromotion may consist of an announcement which is entirely oral by the presenter to the extent that that announcement has an advertising objective. ... Sponsorship credits: at the request of certain television companies, the previous Secretary-General with responsibility for communications decided that a particular type of spot – the ‘euroclaqueta’, which is a name used by one company – in which the sponsorship of a programme and the advertising of the sponsor are effected simultaneously, is to be included among other forms of advertising, provided that it satisfies the following three conditions:*

- *maximum duration of 10 seconds;*
- *broadcast immediately before or after the programme in question;*
- *production features which are clearly distinct from the production of conventional spots. ...*

*Micro-ad slots: micro-slots containing advertising announcements shall be considered to be an “other form of advertising” where their duration is greater than 60 seconds and where they do not consist of a mere accumulation of spots with a vague common theme’.*

#### **The pre-litigation procedure and the procedure before the Court**

16 The Commission instructed Audimetrie, an independent consulting company, to carry out a study of the programming of several major Spanish television channels over a reference period of two months in 2005. Having found that, as it believed, a number of infringements of Articles 11 and 18 of Directive 89/552 had been committed, the Commission sent to the Kingdom of Spain a letter, dated 26 January 2007, in which it requested the Kingdom of Spain to submit its observations on the results of that study.

17 Following a meeting, held on 13 March 2007, of Commission staff and the Spanish authorities, the Kingdom of Spain sent to the Commission a letter from the Directorate General for the development of the Information Society of the Ministry for Industry, Tourism and Commerce, which contained more detailed information on the practice followed by the Spanish authorities. The Commission inferred from that reply that the Kingdom of Spain had failed to fulfil its obligations under Article 3(2) of Directive 89/552. Consequently, the Commission sent to the Kingdom of Spain a letter of formal notice, dated 11 July 2007, inviting it to submit its observations within a period of two months.

18 In that letter, the Commission raised three grounds of complaint, the first being that the Kingdom of Spain had failed to fulfil its obligations by restrictively defining the concept of ‘advertising spots’ referred to in Article 18(2) of Directive 89/552, while interpreting the concept of ‘other forms of advertising’ so broadly that it included certain types of advertising which, in the Commission’s opinion, fall to be classified as advertising spots. Since the other grounds of

complaint were later abandoned by the Commission, they have no relevance to this case.

19 The Kingdom of Spain replied to that letter of formal notice by letter dated 26 October 2007, annexing a report from the Ministry for Industry, Tourism and Commerce. As regards the concept of ‘advertising spot’, the Kingdom of Spain maintained that there continued to be differences of opinion on the interpretation of that concept.

20 Taking the view that it was clear from that reply that the Kingdom of Spain had not adopted the measures required to ensure compliance with the obligations laid down in Article 18(2) of Directive 89/552, on 8 May 2008 the Commission sent a reasoned opinion to the Kingdom of Spain and called on it to take the necessary measures to comply with the directive within the period of two months from the date of service.

21 As the Commission found the reply provided in that regard by the Kingdom of Spain on 8 September 2008 to be unsatisfactory, it decided to bring the present action.

22 The Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, which has intervened in support of the defendant Member State, contend that this action should be dismissed.

#### **The action**

##### **Arguments of the parties**

23 It must be borne in mind that the Commission’s action relates to four types of advertising broadcast on the Spanish television channels, namely advertorials, telepromotions, sponsorship credits and micro-ads. The Commission considers that the broadcast in Spain of those four types of advertising falls within the scope of the concept of ‘advertising spots’. Conversely, the Kingdom of Spain takes the view that these constitute ‘other forms of advertising’, and that, as such, they qualify for broadcasting time which is subject to different hourly and daily limits.

24 The Commission claims that it can be inferred from the judgment in Joined Cases C-320/94, C-328/94, C-329/94 and C-337/94 to C-339/94 RTI and Others [1996] ECR I-6471 that there is a presumption that, in principle, any type of advertising broadcast between programmes or during breaks constitutes an ‘advertising spot’ within the meaning of Directive 89/552, and, consequently, is subject to the hourly limit laid down in Article 18(2) of that directive. Only the markedly greater length of certain types of advertising, required by the way in which they are presented, would exceptionally justify such types of advertising not being subject to that limit.

25 The Commission thus considers that the four types of advertising at issue do not generally have a duration which markedly exceeds that of conventional advertising spots. The Commission adds that, where that is not the case, the explanation is in no respect to be found in features which are inherent in the way in which those types of advertising are presented, given that these are similar, if not identical, to those of conventional advertising spots.



26 In the light of those considerations, the Commission claims that the four types of advertising at issue fall within the scope of the concept of advertising spots. More specifically, as regards advertorials, it is clear from the study conducted by Audimetrie that these are broadcast between programmes or during breaks, and their broadcasting frequency is identical to that of advertising spots. Further, advertorials are similar to certain advertising spots in terms of their duration and suggestive impact.

27 As regards telepromotion, the Commission states that its action is directed only against telepromotion spots. These have a brief duration, approximately one minute, which cannot be regarded as a duration significantly longer than that of conventional advertising spots. Further, telepromotion spots have the characteristic of being ‘stock announcements’ which, while they may be associated with a particular programme, because of the presence of certain actors and particular visual elements, are entirely independent of those programmes. Further, they are broadcast in advertising breaks and, like conventional advertising spots, are designed to be re-broadcast, as they very frequently are.

28 As regards sponsorship credits, the Commission bases its action on the relevant definition in the interpretation criteria, according to which these are a particular type of advertising spot, namely the ‘euroclaqueta’, in which the sponsorship of a programme and the advertising of the sponsor are effected simultaneously, with the result that the public is encouraged to purchase the goods or services of the sponsor. However, the Commission points out that, under Article 17 of Directive 89/552, classification as ‘sponsorship’ is subject to the condition that the announcement contains no encouragement to purchase the goods or services offered by the sponsor.

29 As regards micro-ads, the Commission again relies on their definition in the interpretation criteria, which state that micro-ads containing advertising announcements are considered to be an ‘other form of advertising’ where their duration is greater than 60 seconds and where they do not consist of a simple accumulation of advertising spots with a vague common theme. However, the Commission claims that the technical features of presentation and the characteristics of these micro-ads do not at all require that they be longer in duration than conventional advertising spots.

30 Consequently, according to the Commission, it has been established that the Kingdom of Spain has failed to fulfil its obligations, because, since the four types of advertising at issue have been considered to be ‘other forms of advertising’ and not to be ‘spot advertising’, they have been broadcast on the Spanish television channels for up to 17 minutes per hour, a duration which, according to the Commission, exceeds by 50 % the maximum limit of 12 minutes per clock hour laid down in Article 18(2) of Directive 89/552.

31 The Kingdom of Spain contends that Article 18 of Directive 89/552 does not define either the concept of ‘advertising spot’ or that of ‘other forms of advertising’. These, it argues, are generic and open concepts

which do not lend themselves to a *numerus clausus* system and which come within the more general concept of ‘television advertising’. In particular, ‘other forms of advertising’ include advertising productions of various kinds which, by reason of their duration and the particular characteristics of their production or broadcasting, or because of their objective or their association with specific programmes or activities of the television broadcaster, are not considered to fall within the scope of the traditional concept of ‘advertising spots’.

32 According to the Kingdom of Spain, the definition of television advertising given by Directive 89/552 is a very broad general concept covering a range of advertisements which brings together not only advertising spots or teleshopping spots, but also other types of advertising such as telepromotions, advertorials, overlays, sponsorship credits, micro-ads comparable to advertorials, self-promotional spots, virtual advertising and public service advertising, these being types of advertising the treatment of which may vary in respect of how frequently they are broadcast, whether programmes are interrupted and whether they are broadcast in isolation or together with others, all according to the objectives to be attained.

33 In fact, the interpretation to be given to the concepts of ‘advertising spots’ and ‘other forms of advertising’ must, according to the Kingdom of Spain, be determined by the objective pursued by Directive 89/552. That objective is to seek a balance between, on the one hand, the funding requirements of television broadcasters, their freedom to conduct a business and respect for their editorial independence, and, on the other hand, protection of the interest of consumers, as television viewers, against excessive advertising. That is why Law 25/1994 not only set an hourly limit of 12 minutes for advertising spots and teleshopping spots, but also laid down a supplementary limit of 17 minutes for the broadcasting of any form of quantifiable advertising, including self-promotional advertising for the broadcasters’ products, without the possibility of accumulating those two limits in the same period of an hour, that legislation consistently respecting the fixed limit of 12 minutes for advertising spots and teleshopping spots.

34 The Kingdom of Spain contends that the four types of advertising at issue do not fall within the scope of the concept of advertising spots, not only because of their standard duration, but also because their marketing is less aggressive, their suggestive capacity vis-à-vis the consumer is lower and, for television viewers, they involve less interference with the enjoyment of programmes.

35 The United Kingdom submits that the Commission’s action is based on an interpretation of the concept of advertising spots which does not respect the fundamental differences established by Directive 89/552 between, on the one hand, advertising spots and, on the other hand, other forms of advertising, which include sponsorship and announcements made by the television broadcaster in relation to its own programmes, referred to in Article 18(3) of the directive.

36 The United Kingdom is of the opinion that sponsorship, provided that it satisfies the conditions set out in Article 17 of Directive 89/552, is not subject to the restrictions specified in Article 18 thereof. The Commission's approach, to the effect that sponsorship credits constitute advertising spots, is therefore, it submits, misconceived. If a sponsorship credit meets the requirements set out in Article 17 of that directive, the fact that it may promote certain goods or services offered by a sponsor does not mean that it constitutes an advertising spot.

37 As regards announcements made by the broadcaster in connection with its own programmes, the United Kingdom states that the Commission does not respect the exception laid down in Article 18(3) of Directive 89/552 in relation to those announcements. The consequence of the Commission's approach would be to include the broadcaster's announcements within the scope of the concept of advertising spots on the mere ground that they promote the services provided by the broadcaster. According to the United Kingdom, that approach is misconceived inasmuch as it deprives the exclusion contained in Article 18(3) of all effect.

#### **Findings of the Court**

38 By its action, the Commission complains that the Kingdom of Spain has infringed Article 3(2) of Directive 89/552 by tolerating repeated infringements of the rules set out in Article 18(2) of that directive, which lay down an hourly limit on broadcasting time in relation to, inter alia, advertising spots. In particular, the Spanish authorities, it is argued, interpret incorrectly and too narrowly the concept of 'advertising spots' referred to in Article 18 of the directive, with the result that certain types of television advertising broadcast in Spain, namely advertorials, telepromotions, sponsorship credits and micro-ads, are excluded from that concept and are not subject to that hourly restriction.

39 Consequently, the essential matter to be resolved, in these proceedings, is to determine whether the four types of advertising at issue must be classified as 'advertising spots', as claimed by the Commission, or whether they constitute 'other forms of advertising', as the Kingdom of Spain argues.

40 In that regard, it is necessary to consider what is covered by the concept of 'advertising spots', as referred to in Article 18(1) and (2) of Directive 89/552.

41 It is clear that that concept is not defined by Directive 89/552, which, moreover, does not refer, on that point, to the law of the Member States.

42 In those circumstances, it must be borne in mind that it follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question ([see, to that effect, Case C-195/06 Österreichischer Rundfunk \[2007\] ECR I-8817, paragraph 24 and case-law cit-](#)

[ed](#), and Case C-396/09 Interedil [2011] ECR I-0000, paragraph 42).

43 Accordingly, the scope which the European Union legislature sought to give to the concept of 'advertising spots', within the meaning of Article 18(1) and (2) of Directive 89/552, must be examined in the light of the context of that provision and the objective pursued by the legislation in question ([see, by analogy, Österreichischer Rundfunk, paragraph 25](#)).

44 It follows from the 27th recital in the preamble to Directive 89/552, as well as from Article 18(1) and (2) thereof, that Article 18 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 (see, by analogy, [Case C-245/01 RTL Television \[2003\] ECR I-12489, paragraph 62](#)).

45 In this latter regard, the Court has already stated that the protection of consumers, as television viewers, from excessive advertising is an essential aspect of the objective of that directive ([Österreichischer Rundfunk, paragraph 27](#)).

46 With that objective specifically in mind, as is stated in the 27th recital itself, the European Union legislature chose to ensure that the interests of consumers as television viewers were fully and properly protected by making the different forms of promotion such as television advertising, teleshopping and sponsorship subject to a certain number of minimum rules and standards ([see, to that effect, Österreichischer Rundfunk, paragraph 26](#)).

47 In particular, Directive 89/552 not only established limits on the broadcasting time of television advertising, as defined in Article 1(c) thereof, but also created, as is clear from Article 18(2), a distinction between daily limits and hourly limits. That distinction takes account of the fact that hourly limits, unlike daily limits, have a direct impact on peak-time viewing, that is to say, the periods during which the need to protect television viewers is of heightened importance.

48 It is true that, as stated by the Kingdom of Spain, the Court ruled in Case C-6/98 ARD [1999] ECR I-7599, paragraphs 29 and 30, that the provisions of Directive 89/552 which impose a restriction on the freedom to provide television broadcasting services must, where they are not drafted in clear and unequivocal terms, be given a restrictive interpretation.

49 However, it remains the case that, as stated by the Advocate General in point 75 of his Opinion, the concept of 'advertising spots' stemming from Article 18 of Directive 89/552 must be interpreted taking into account that directive's objective, which is to reconcile the exercise of the freedom to broadcast television advertising announcements with the requirement that television viewers be protected from the broadcasting of excessive advertising.

50 In that regard, the Court has also stated, as correctly observed by the Commission, that advertising spots are 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 (RTI and Others, paragraph 31).

51 In RTI and Others, the Court, in the context of distinguishing the concept of spot advertisements from the concept of forms of advertisements such as ‘direct offers to the public’ provided for in Directive 89/552 in its original version, held that, in essence, the justification for increasing, exceptionally, the maximum transmission time in relation to those offers lay in the fact that their duration, because of the way in which they were presented, was greater and that the application of the limits on broadcasting time laid down in relation to spot advertisements amounted to disadvantaging those offers by comparison with spot advertisements. The Court stated, moreover, that those criteria could also be used in respect of other forms of promotion (see, to that effect, RTI and Others, paragraphs 32, 34 and 37).

52 It follows that any type of television advertising broadcast between programmes or during breaks constitutes, as a general rule, an ‘advertising spot’ within the meaning of Directive 89/552, unless the type of advertising concerned were to be covered by another form of advertising expressly governed by that directive, as applies to, inter alia, ‘teleshopping’, or unless it were to require, because of the way in which it is presented, a duration greater than that of advertising spots, on condition that an application of the restrictions prescribed in respect of advertising spots would, without valid justification, amount to disadvantaging the form of advertising concerned by comparison with advertising spots.

53 Consequently, even if a specific type of advertising has inherently, that is to say, because of the way in which it is presented, a duration which is slightly longer than the usual duration of advertising spots, that fact alone is not sufficient reason for it to be classified as an ‘other form of advertising’ within the meaning of Article 18(1) of Directive 89/552.

54 It is clear from the court-file, and in particular from the Audimetrie report mentioned in paragraph 16 of this judgment, the factual accuracy of which has not been validly challenged by the Kingdom of Spain, that each of the four types of advertising at issue in this case generally has a duration of no more than two minutes.

55 It follows that those types of advertising fall within the scope of the concept of advertising spots and are therefore subject to the restrictions on broadcasting time laid down in Article 18(2) of Directive 89/552.

56 In the light of all the foregoing, it must be held that, by tolerating a situation in which the broadcasting of certain types of advertising, such as advertorials, telepromotion spots, sponsorship credits and micro-ads, on Spanish television channels has a duration which exceeds the maximum limit of 20% of the transmission time within a clock hour, as laid down in Article 18(2) of Directive 89/552, the Kingdom of Spain has failed to fulfil its obligations under Article 3(2) of that directive.

## Costs

57 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

**On those grounds, the Court (First Chamber) hereby:**

1. Declares that, by tolerating a situation in which the broadcasting of certain types of advertising, such as advertorials, telepromotion spots, sponsorship credits and micro-ads, on Spanish television channels has a duration which exceeds the maximum limit of 20% of the transmission time within a clock hour, as laid down in Article 18(2) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997, the Kingdom of Spain has failed to fulfil its obligations under Article 3(2) of that directive;
2. Orders the Kingdom of Spain to pay the costs.

[Signatures]

\* Language of the case: Spanish.

## OPINION OF ADVOCATE GENERAL YVES BOT

delivered on 7 April 2011 (1)

Case C-281/09

European Commission

v

Kingdom of Spain

(Television broadcasting – Advertising spots – Transmission time)

1. The version of the ‘Television Without Frontiers’ Directive applicable in this case (2) sets different limits for the transmission time of advertising messages depending on whether those messages are advertising spots or other forms of advertising.

2. The Directive thus provides that the transmission time of advertising spots and teleshopping spots must not exceed twelve minutes per clock hour. With respect to other forms of advertising, however, it sets only a daily limit, providing that their transmission time, when added to that of advertising spots, is not to exceed 15% of daily transmission time.

3. In the present action for failure to fulfil obligations, the European Commission accuses the Kingdom of Spain of having misapplied those provisions. It complains that that Member State has allowed new forms of television advertising, referred to as advertorials, telepromotions, sponsorship credits and micro-ads, to be broadcast beyond the 12 minutes per clock hour limit, even though, in the Commission’s opinion, they constitute ‘advertising spots’ within the meaning of the Directive.

4. The Kingdom of Spain disputes that analysis and submits that the four forms of advertising at issue fall



within the concept not of ‘advertising spots’ but of ‘other forms of advertising’.

5. The Directive does not define those two terms.

6. In this Opinion, I shall ask the Court of Justice to find that the two concepts at issue must have a uniform and autonomous definition in the European Community and that, taking into account the scheme and objectives of the Directive, those definitions must make it possible to ensure that advertising at peak-viewing times is effectively restricted as intended by the hourly limit.

7. I shall also explain why, in my view, the concept ‘other forms of advertising’ must be interpreted not as meaning particular forms of advertising which require longer transmission time for technical reasons, as the Commission maintains, but on the basis of the forms of advertising referred to in the Directive, and that it should therefore refer only to sponsorship credits.

8. I shall submit that, in any event, the interpretation of that concept applied by the Kingdom of Spain to the four forms of advertising at issue deprives the hourly limit laid down in the Directive of its effectiveness.

9. I shall therefore propose that the Court declare this action for failure to fulfil obligations well founded.

## **I – Legal context**

### **A – The Directive**

10. The Directive seeks to coordinate the laws of the Member States in the field of television in order to ensure the free movement of television broadcasts in the Community. (3)

11. To that end it sets certain minimum rules and standards for television advertising in order to protect consumers. (4) Those rules seek in particular to reconcile the freedom to produce television advertising, which is an essential source of revenue for commercial television channels, with an adequate level of protection for audiovisual works and for viewers against excessive broadcasting of advertising. (5)

12. The Directive begins by defining a number of the terms used in its legislative provisions, such as ‘television advertising’, ‘sponsorship’ and ‘teleshopping’.

13. Thus, ‘television advertising’ is defined in Article 1(c) of the Directive as ‘any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment’.

14. Pursuant to Article 1(e) of the Directive, ‘sponsorship’ refers to ‘any contribution made by a public or private undertaking not engaged in television broadcasting activities or in the production of audio-visual works, to the financing of television programmes with a view to promoting its name, its trade mark, its image, its activities or its products’.

15. Pursuant to Article 1(f) of the Directive, ‘teleshopping’ means ‘direct offers broadcast to the public with a view to the supply of goods or services,

including immovable property, rights and obligations, in return for payment’.

16. Under Article 10 of the Directive, television advertising and teleshopping must be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means. They are not to use subliminal techniques. Isolated advertising and teleshopping spots are to remain the exception.

17. Article 17(1)(c) of the Directive provides that sponsored television programmes ‘must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services’.

18. Article 18 of the Directive, which is at the heart of the present case, lays down the maximum transmission times for advertising.

19. The wording of that article has changed with the different versions of the ‘Television without frontiers’ Directive.

20. In the initial version of Directive 89/552, Article 18 read as follows:

‘1. The amount of advertising shall not exceed 15% of the daily transmission time. However, this percentage may be increased to 20% to include forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services, provided the amount of spot advertising does not exceed 15%.

2. The amount of spot advertising within a given one-hour period shall not exceed 20%.

3. Without prejudice to the provisions of paragraph 1, forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services shall not exceed one hour per day’.

21. In the version applicable to the present case, which, it should be recalled, is the result of the amendments made by Directive 97/36, Article 18 is worded as follows:

‘1. The proportion of transmission time devoted to teleshopping spots, advertising spots and other forms of advertising, with the exception of teleshopping windows within the meaning of Article 18a, shall not exceed 20% of the daily transmission time. The transmission time for advertising spots shall not exceed 15% of the daily transmission time.

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

3. For the purposes of this Article, advertising does not include:

– announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes;

– public service announcements and charity appeals broadcast free of charge’.

22. Directive 97/36 also introduced Article 18a, which is worded as follows:

‘1. Windows devoted to teleshopping broadcast by a channel not exclusively devoted to teleshopping shall be of a minimum uninterrupted duration of 15 minutes.

2. The maximum number of windows per day shall be eight. Their overall duration shall not exceed three hours per day. They must be clearly identified as teleshopping windows by optical and acoustic means’.

23. Articles 18 and 18a of the Directive were amended by Directive 2007/65/EC of the European Parliament and the Council, (6) which is not applicable in this case. In their new version, those articles are now worded as follows:

‘Article 18

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

2. Paragraph 1 shall not apply to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes, sponsorship announcements and product placements.

Article 18a

Teleshopping windows shall be clearly identified as such by optical and acoustic means and shall be of a minimum uninterrupted duration of 15 minutes’.

24. Finally, reference should be made to Article 3(2) of the Directive, which provides that ‘Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction effectively comply with the provisions of this Directive’.

## **II – Facts, procedure and forms of order sought by the parties**

25. The Commission asked Audimetrie, an independent consultancy specialising in research and data analysis relating to the television advertising market, to undertake a study of the programme schedules of a number of major Spanish channels over a reference period running from 1 May to 30 June 2005.

26. In the light of the results of that study and following an exchange of letters with the Spanish authorities, the Commission sent those authorities a letter of formal notice dated 11 July 2007, and then a reasoned opinion on 8 May 2008.

27. It brought the present action by document of 17 July 2009 in which it claimed that the Court should:

- declare that, by tolerating flagrant, repeated and serious infringements of the rules laid down in Article 18(2) of the directive, the Kingdom of Spain has failed to fulfil its obligations under Article 3(2) of that directive, read in conjunction with Article 10 EC; and
- order the Kingdom of Spain to pay the costs.

28. The Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, which intervened in support of the defendant Member State, contend that this action should be dismissed.

29. The Kingdom of Spain also contends that the Commission should be ordered to pay the costs.

## **III – The arguments of the parties**

### **A – The arguments of the Commission**

30. In its action for failure to fulfil obligations, the Commission refers to four forms of advertising transmitted on Spanish television channels, that is to say

advertorials, telepromotions, sponsorship credits and micro-ads.

31. It submits that, in the light of the definitions of ‘spot advertising’ and ‘other forms of advertising’ given by the Court in the judgment in RTI and others, (7) which relates to Article 18 of Directive 89/552, each of those forms of advertising constitutes an advertising spot.

32. The Commission points out that ‘spot advertisements’ are defined as ‘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’. (8)

33. It also points out that the Court of Justice held that ‘the option introduced by the second sentence of Article 18(1) of raising the percentage of transmission time for advertising to 20% of the daily total may also be used for forms of publicity which, whilst not constituting “offers to the public”, nevertheless, like them and because of the way in which they are presented, require more time than spot advertisements’. (9)

34. The Commission argues that, in the light of those definitions, any form of advertising transmitted between programmes or during breaks which is not presented in such a way as to require a significantly longer transmission time must be considered to be an advertising spot and is therefore subject to the hourly limit laid down in Article 18(2) of the Directive. The Commission takes the view that a particular form of advertising can therefore be regarded as ‘[an]other form of advertising’ within the meaning of Article 18(1) of the Directive only if it is presented in such a way as to require more time owing to unavoidable technical constraints.

35. The Commission submits that, in the light of those considerations, the four forms of advertising at issue must be regarded as constituting advertising spots, for the following reasons.

36. Advertorials are defined as advertising messages which are longer than spots and generally have a story line, informative or descriptive. They are also stock products capable of being retransmitted, although they are not normally rebroadcast because of their special length and story line. (10)

37. The Commission points out that the examples given in the Audimetrie study show that such advertorials, like advertising spots, are transmitted between programmes or during breaks and their frequency of transmission is identical to that of spots.

38. With respect to telepromotion spots, the Commission concedes that, in the judgment in RTI and Others, telepromotions, that is to say ‘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', (11) were held not to constitute advertising spots.

39. The Commission makes it clear, however, that its action is concerned with telepromotion spots, that is to say messages transmitted between programmes, which are independent of those programmes, of short duration and capable of being retransmitted.

40. With respect to sponsorship credits, the Commission bases its action on their definition in the criteria for the interpretation of the Spanish legislation, according to which these are a particular type of spot, known as a 'euroclaqueta', in which a programme's sponsorship is announced at the same time as the sponsor's advertisement is shown.

41. The Commission points out that, under Article 17 of the Directive, classification as sponsorship is subject to the condition that the message must not contain any encouragement to purchase the products or services of the sponsor.

42. Finally, with respect to micro-ads, the Commission also relies on their definition in the criteria for the interpretation of the Spanish legislation, according to which 'micro-slots containing advertising messages are considered to be "another form of advertising" if they last for more than 60 seconds and they do not consist simply of a combination of spots with a vague common thread'.

43. The Commission argues that, unlike true telepromotions, micro-slots are not presented in such a way as to require more time than conventional spots.

44. Consequently, the Commission submits, the Kingdom of Spain has failed to fulfil its obligations since it is clear from the Audimetric report and the legislation of that Member State that those four forms of advertising are transmitted on Spanish television channels for as much as 17 minutes per hour, which is 50% more than the maximum 12 minutes per clock hour laid down in the Directive.

#### **B – The arguments of the Kingdom of Spain**

45. The Kingdom of Spain points out that the Directive does not define the terms 'advertising spots' and 'other forms of advertising'. In its contention, those two terms must be distinguished on the basis of the following criteria:

- The form or presentation of the advertising message: its aesthetic or visual appearance, the combination of audiovisual elements with other exclusively graphic elements (crawls, overlays) or sound elements (voice-off), the use of actors and scenography from particular programmes;
- Duration: advertorials or micro-ads are longer;
- Their place in the programme schedule: whether or not linked to other programmes; and
- The content of the message: depending on the extent of the encouragement to buy or sell, which may be very great (as with spots), or less so because the descriptive aspect is predominant (advertorials), or because the message is confined to the visual presentation of the product or service advertised (a mere mask for institutional sponsorship).

46. The Kingdom of Spain also states that the term 'advertising spots' must be defined in accordance with the principle established in the judgment in *ARD*, (12) according to which, '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'. (13)

47. According to that Member State, account must also be taken of the objective of the Directive, which is to strike a balance between the financing needs of television operators, their right of free enterprise and respect for their editorial independence, on the one hand, and the protection of the interests of consumers, as viewers, against excessive advertising, on the other hand.

48. That, it maintains, is the reason why its legislation lays down an hourly limit of 12 minutes for advertising spots and teleshopping spots and 17 minutes for other forms of advertising.

49. The Kingdom of Spain submits that the four forms of advertising at issue do not fall within the scope of the concept 'advertising spots' because of their standard length, the fact that they are less commercially aggressive, in the sense of the extent of their suggestiveness towards the consumer, and, finally, the extent to which they disturb the enjoyment of programmes.

50. It states that none of those forms of advertising is transmitted as frequently as conventional advertising spots because of the specific characteristics of each of them, be it their long duration (with the exception of sponsorship credits, it is inconceivable that the other forms of advertising would be transmitted more than once in the same block of advertising), their particular link with a given programme (as in the case of sponsorship credits and some telepromotion announcements) or their nature as informative programmes (micro-ads).

51. The Kingdom of Spain argues that the four forms of advertising at issue are characterised by the special or exceptional nature of their transmission, which, combined with a further factor, such as the fact that the programme format varies depending on the television operator in question, or even the fact that each television channel produces its own advertising in certain spots, means that they can be distinguished from advertising spots.

#### **C – The arguments of the United Kingdom**

52. The United Kingdom maintains that the interpretation proposed by the Commission is not consistent with the Directive because it fails to respect the fundamental differences established by the Directive between advertising spots and other forms of advertising, in particular sponsorship and messages transmitted by the broadcaster in connection with its own programmes, which are referred to in Article 18(3) of the Directive.

53. According to that Member State, the fact that a sponsorship credit promotes certain products or services of the sponsor does not mean that it is an advertising spot.

54. Likewise, the Commission's approach, according to which the broadcaster's announcements should fall within the meaning of advertising spots simply because they promote its services, would deprive the exclusion contained in Article 18(3) of the Directive of all effect.

#### IV – My assessment

55. I share the Commission's view that the four forms of advertising at issue must be classified as advertising spots within the meaning of the Directive. However, while I come to the same conclusion as the Commission, I do not subscribe to its definition of 'other forms of advertising'. My assessment is based on the following grounds.

56. This dispute revolves around whether the four forms of advertising at issue are to be classified as advertising spots, as the Commission submits, or whether they fall into the category of other forms of advertising, as the Kingdom of Spain claims. The resolution of this dispute will determine whether the transmission of the four forms of advertising in question is subject to the hourly limit of twelve minutes per clock hour or only to the limit of 15% of daily transmission time.

57. The nub of the dispute is therefore very clear. It is the right of television broadcasters to transmit these new forms of advertising at peak viewing hours for more than the twelve minutes laid down in Article 18(2) of the Directive with respect to the transmission of advertising spots and teleshopping spots.

58. Its resolution calls for an examination of the meaning of the concepts 'advertising spots' and 'other forms of advertising' contained in Article 18(1) and (2) of the Directive.

59. Those two concepts are not easy to define. As the parties have pointed out, they are not defined in the Directive, which also makes no reference in their regard to the laws of the Member States.

60. It is true, as the Commission has submitted, that the explanatory memorandum which accompanied its proposal for a directive (14) stated that 'the reference to "other forms of advertising" (than slots) was introduced ... so that it will cover new forms of advertising, such as telepromotion and "Dauerwerbesendungen", which are longer and actually constitute part of the programme itself, as and when they emerge'. (15)

61. However, that first proposal was modified by the Commission following the amendments made by the European Parliament, which wished to remove the possibility of allowing additional transmission time for other forms of advertising. (16)

62. In its amended proposal for a directive, (17) the Commission simply says that its new version of Article 18 incorporates changes deriving in part from the Parliament's amendments, but that it thought it neither desirable nor possible to exclude forms of advertising other than advertising spots. (18)

63. In the light of the foregoing considerations, I therefore find it difficult to accept that the preparatory work for the directive makes it possible to give a precise meaning to the concept 'other forms of advertising' and to say with certainty that this was the meaning

intended by the Community legislature in Article 18(1) of the Directive.

64. According to case-law, the meaning and scope of the concepts 'advertising spots' and 'other forms of advertising' must therefore be determined in the light of the context of the provisions in which they appear and the objectives pursued by those provisions, so as to ensure that those concepts are given an autonomous and uniform interpretation throughout the Community. (19)

65. The Kingdom of Spain submits that, in the absence of a precise definition in the Directive, the concepts in question should be understood in a manner favourable to the transmission of the advertising.

66. It is true, as that Member State points out, that, in *ARD*, the Court held that the provisions of the Directive which impose a restriction on the broadcasting of television advertising must, if not drafted in clear and unequivocal terms, be given a restrictive interpretation. (20)

67. Similarly, the Commission's argument that the concept 'other forms of advertising' as used in the Directive was defined in *RTI and Others*, may appear to be open to challenge.

68. After all, in that judgment, the Court's ruling related to the expression 'forms of advertisements such as direct offers to the public' as used in Article 18(1) of Directive 89/552. The wording of that expression, in particular the use of the word 'such', shows that the Community legislature was referring explicitly to forms of advertising with the same characteristics as teleshopping offers. However, the concept 'other forms of advertising' as used in the Directive is no longer linked to teleshopping offers, in respect of which Directive 97/36 laid down more precise rules intended to take into account the development and importance of that activity. (21)

69. Moreover, in the light of the objective underlying Article 18(2) of the Directive, of protecting consumers against the excessive broadcasting of advertising at peak viewing hours, to which I shall return, it seems difficult to accept that the criterion for derogating from that hourly limit is the duration of the advertising messages. Such an interpretation would effectively encourage economic operators to invent new forms of advertising requiring longer transmission times for technical reasons and thus render the hourly limit less effective.

70. In so far as the purpose of the Directive is to lay down, in all the Member States, limits on the transmission time for all forms of advertising satisfying the definition contained in Article 1(c) of the Directive, I am inclined to the view that the meaning of the term 'other forms of advertising' as used in Article 18(1) of the Directive must be sought in the provisions of that directive.

71. An examination of those provisions shows that the other forms of advertising which might be distinguished from advertising spots and which are mentioned in the Directive are sponsorship credits. Such announcements are indeed a form of advertising, since,

in the terms of Article 1(e) of the Directive, they have the aim of promoting the name, trade mark, image, activities or products of the sponsor.

72. In my opinion, Directive 2007/65 corroborates that analysis, since Article 18(2) of Directive 89/552, as amended by Directive 2007/65, excludes from the hourly limit not only announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes, but also sponsorship announcements and product placements.

73. I am therefore inclined to the view that the term ‘other forms of advertising’ as used in Article 18(1) of the Directive refers to sponsorship credits rather than to forms of advertising which, because of unavoidable technical constraints, require longer transmission times, as the Commission submits.

74. However, the choice between one or other of those definitions is not crucial to the examination of the present action. Whichever of the two definitions is chosen, the Commission’s line of argument is in my opinion well founded inasmuch as it submits that the interpretation given to the term ‘other forms of advertising’ as used in Article 18(1) of the Directive must not lead to a situation where the hourly limit laid down in Article 18(2) becomes ineffective.

75. After all, even though concepts which limit the freedom to transmit advertisements must be given a restrictive interpretation, as the Court held in *ARD*, account must also be taken of the objective pursued by the Directive of reconciling the exercise of that freedom with the need to protect viewers from the excessive broadcasting of advertising.

76. As the Commission quite rightly points out, the protection of consumers, as viewers, from excessive advertising is an essential aspect of the objectives of the Directive. (22)

77. The limit of twelve minutes per clock hour laid down in Article 18 of the Directive represents the balance sought by the Community legislature between the need of television broadcasters to secure financing from advertising and the protection of viewers from excessive advertising. In other words, the Community legislature took the view that the possibility of transmitting advertisements for a maximum period of 12 minutes per clock hour was sufficient to allow television broadcasters to cover their financing needs.

78. If that provision is to be effective, the forms of advertising that may be transmitted for more than those 12 minutes must therefore correspond exactly to those intended by the Community legislature. That requirement is also necessary in order to ensure equal treatment for all television broadcasters irrespective of the Member State in whose territory they are established.

79. That interpretation seems to me to be confirmed, should that be necessary, by the provisions of Directive 2007/65, in which the Community legislature decided to remove the daily limit and to maintain only the hourly limit, because only the latter is capable of limiting the transmission of advertising at peak viewing hours

and, therefore, of ensuring the balance mentioned above. (23)

80. However, as the Commission has very well demonstrated in this action, the Kingdom of Spain’s argument clearly runs counter to that objective. According to that Member State, the concept ‘advertising spots’ should be defined in the light of a set of criteria and discarded whenever the form of advertising in question differs slightly, by reference to one or other of those criteria, from the definition of ‘spot advertisements’ given in *RTI and Others*.

81. That argument effectively leaves to the competent authorities of each Member State the power to define the term ‘advertising spots’ on a case by case basis and, therefore, deprives the hourly limit laid down in Article 18(2) of the Directive of much of its effect.

82. That is why I take the view that the present action for failure to fulfil obligations is well founded, including with respect to sponsorship credits, known as ‘euroclaquetas’.

83. According to the definition of that form of advertising in the criteria for the interpretation of the Spanish legislation, ‘euroclaquetas’ are a particular type of spot in which a programme’s sponsorship is announced at the same time as the sponsor’s advertisement is shown.

84. To accept, as the Kingdom of Spain does, that such a form of advertising falls within the meaning of the term ‘other forms of advertising’ and can therefore be transmitted outside the hourly limit of 12 minutes is in effect to allow television broadcasters and economic operators seeking to promote their products or services to circumvent that limit.

85. After all, all they have to do in order to evade that limit is to add a sponsorship credit to the advertisement encouraging viewers to purchase their products or services. The Commission is therefore, in my opinion, entirely justified in maintaining that, pursuant to Article 17 of the Directive, the only sponsorship credits which may be transmitted outside the hourly limit are those which do not encourage viewers to purchase particular products or services of the sponsor.

86. If the Court shares my view, the Kingdom of Spain will have to pay the costs of these proceedings pursuant to Article 69(2) of the Rules of Procedure of the Court of Justice. The United Kingdom will have to bear its own costs pursuant to the first subparagraph of Article 69(4) of those Rules of Procedure.

## V – Conclusion

87. In the light of the foregoing considerations, I propose that the Court should:

– declare the present action for failure to fulfil obligations to be well founded in so far as the complaint made is that by tolerating flagrant, repeated and serious infringements of the rules laid down in Article 18(2) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation and administrative action in the Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June



1997, the Kingdom of Spain failed to fulfil its obligations under Article 3(2) of Directive 89/552, as amended, read in conjunction with Article 10 EC;

– order the Kingdom of Spain to pay the costs and the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

1 – Original language: French

2 – 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), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('the Directive').

3 – Recitals 5 to 11 of the preamble to the Directive.

4 – Recital 27 of the preamble to the Directive.

5 – Idem. See also point 3 of the Commission interpretative communication on certain aspects of the provisions on televised advertising in the 'Television without frontiers' Directive (OJ 2004 C 102, p. 2).

6 – Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 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 (OJ 2007 L 332, p. 27).

7 – Joined Cases C-320/94, C-328/94, C-329/94 and C-337/94 to C-339/94 [1996] ECR I-6471.

8 – Paragraph 31.

9 – Paragraphs 32 and 34.

10 – See p. 6 of the criteria for the interpretation the rules governing advertising transmissions as applied by the Sub-directorate General for Information Society Content as part of its inspection and monitoring services (criterios interpretativos de emisiones publicitarias aplicados por la subdirección general de contenidos de la S.I. en sus servicios de inspección y control) of 17 December 2001 ('the criteria for the interpretation of the Spanish legislation').

11 – Point 25 of the Commission's interpretative communication referred to in footnote 5.

12 – Case C-6/98 [1999] ECR I-7599.

13 – Paragraph 30.

14 – Proposal for a European Parliament and Council Directive amending Directive 89/552 [COM (95) 86 final].

15 – Paragraph 2.4.4.

16 – Legislative resolution embodying Parliament's opinion on the 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 (OJ 1996 C 65, p. 96). The Parliament proposed that Article 18 should be worded as follows:

'1. The amount of advertising shall not exceed 15% of the daily transmission time.

'The combined amount of advertising and teleshopping (excluding teleshopping windows with a minimum duration of 15 minutes) shall not exceed 20% of the daily transmission time. This shall not apply to services exclusively devoted to teleshopping.

'2. The combined amount of any form of advertising, including teleshopping spots, within a given clock hour shall not exceed 20%. The amount of advertising inserted during a feature film shall not exceed 15% of the film's scheduled duration'.

17 – Amended proposal for a European Parliament and Council directive amending Directive 89/552 [COM(96) 200 final].

18 – See the explanatory memorandum, point 2.2, p. 7.

19 – See, in relation to the concepts 'television advertising' and 'teleshopping' as used in Article 1 of the Directive, Case C-195/06 Österreichischer Rundfunk [2007] ECR I-8817, paragraph 24 and the case-law cited.

20 – Paragraphs 29 and 30. The point at issue was whether or not, in order to calculate the 45-minute period laid down in Article 11(3) of the Directive for the purpose of determining the number of advertising interruptions allowed in the broadcasting of feature films, the duration of the advertisements must be included in that period.

21 – See recitals 36 and 37 of the preamble to Directive 97/36.

22 – Österreichischer Rundfunk, (paragraph 27 and the case-law cited).

23 – Recital 59 in the preamble to Directive 2007/65.