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GENERAL NOTICE

NOTICE 359 OF 2009



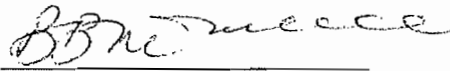
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA)

NOTICE OF INTENTION TO EXTEND THE TIME PERIOD FOR THE SUBMISSION OF WRITTEN COMMENTS ON THE REGULATIONS AND CODE OF ADVERTISING PRACTICE SETTING OUT THE STANDARDS, PRACTICE AND PROHIBITIONS IN ADVERTISING, SPONSORSHIPS AND OTHER FORMS OF COMMERCIAL PROMOTION BY RADIO AND TELEVISION BROADCASTING SERVICE LICENSEES

- (1) The Independent Communications Authority of South Africa (the Authority) published, for comments, draft Regulations that will repeal the 1999 Regulations and the Code that will be submitted to the Advertising Standard Authority of South Africa (Government Gazette No.31903, Notice No. 172).
- (2) In terms of the Notice (No 172), interested parties were invited to make written comments to the issues raised in the drafts by no later than 16H00 on the 27th of March 2009, later extended to the 3rd of April 2009 to accommodate the workshop in Gauteng.
- (3) Workshops were conducted in various provinces with the view of sensitizing stakeholders to the issues raised and to provide clarity before the submission of written comments. The last workshop was held on Monday the 30th of March 2009 at the ICASA offices for stakeholders in the Gauteng province. During the discussions, stakeholders raised concerns that the draft regulations were published with no explanatory memo, position paper or any other supporting document that indicates the Authority's rationale or thinking on some of the issues raised in the regulations. The Authority has since decided to release an explanatory memo.

(4) However, due to the fact that the deadline for comments is Friday the 3rd of April, the Authority deems it advisable to extend this deadline to allow industry to review the regulations with the benefit of an explanatory memo.

(5) It is for this reason therefore that the deadline for the submission of written comments on the above is extended from the 3rd to the 28th of April 2009.



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EXPLANATORY MEMORANDUM

ON

**THE REVIEW OF THE 1999 REGULATIONS RELATING TO THE
DEFINITION OF ADVERTISING AND THE REGULATION OF
INFOMERCIALS AND PROGRAMME SPONSORSHIPS IN RESPECT OF
BROADCASTING ACTIVITIES**

1. INTRODUCTION

- 1.1 This document forms the basis of the review of the Regulations Relating to the Definition of Advertising and the Regulation of Infomercials and Programme Sponsorship in Respect of Broadcasting Activities (published under Government Notice R426 in Government Gazette 19922 of 1 April 1999) (1999 regulations).
- 1.2 This review is undertaken on the backdrop of a changing global environment, rapid technological advancement as well as the coming into effect of a new regulatory framework for the communications industry in the form of the Electronic Communications Act No. 36, of 2005 (the ECA). The main focus of the review is on the identification and scheduling of advertisements, infomercials and programme sponsorships.
- 1.3 In regulating the scheduling of advertisements, infomercials and programme sponsorships, the Authority wishes to balance the interests of broadcasters and advertisers on the one hand with those of listeners and viewers on the other.
- 1.4 The explanatory memorandum provides the rationale for some of the changes introduced to the 1999 regulations while at the same time providing examples of good practice from across the globe. The structure of the document follows more or less that of the draft Regulations on Advertising, Infomercials and Programme Sponsorships for Broadcasting Service Licensees, 2009, as published in Government Gazette No 31903 of 13 February 2009.

2 APPLICATION

These regulations apply to all broadcasting service licensees, that is both television and sound broadcasting service licensees. The 1999 regulations apply conditionally to sound broadcasters due to the fact that when these regulations were promulgated the Authority wanted to give the newly licensed sound

broadcasters time to adjust in the market. The Authority feels that the time is perhaps opportune to apply the principle of non-discrimination especially when it comes to practices such as programme sponsorships. There is no justification, for instance, why a television news bulletin cannot be sponsored whilst a sound broadcasting news bulletin can.

3 ADVERTISING

3.1 The essential point of defining advertising in these regulations is for purposes of distinguishing it from programme material, infomercials, programme sponsorships, teleshopping and other forms of commercial promotion, so as to ensure consistency in applying the regulations. Having a standard definition that is applicable to all broadcasting service licensees also assists in achieving non-discrimination in the application of the regulations.¹

3.2 Furthermore, in these draft regulations the definition of advertising has been simplified by removing the substantive issues from the definition and placing those under section 4 which deals with advertising to ensure that there is clarity on what constitutes advertising.

4 PLACEMENT AND DURATION OF ADVERTISEMENT

4.1 The Authority intends including time limits on advertising in the regulations when these are also found in some operators' licence conditions. The inclusion of such in the regulations would mean that they are not only standardized across similar licensees but also easily accessible to interested parties.

¹ Position Paper on Advertising, Infomercials and Sponsorships, 1999. ICASA

Office of Communications (Ofcom)²

4.2 The United Kingdom's Office of Communications (Ofcom) applies stricter rules to public service channels when it comes to limits on advertising. The daily amount of advertising on these channels is limited to an hourly average of 7 minutes (with no additional amount allowed for teleshopping spots), subject to a cap of 12 minutes in any one hour. During peak viewing times, there are further restrictions on the amount of advertising. From 7am to 9am, and from 6pm to 11pm, broadcasters may only show an average of 8 minutes an hour of advertising. PSB channels also have stricter rules on advertising breaks, which means that they can only have one break in a half-hour programme.

The European Union³

4.3 The European Union rules are set out in a law called the Television without Frontiers Directive (TWF Directive). The TWF Directive limits the daily amount of advertising on television channels to an average of 9 minutes an hour (plus up to 3 minutes of teleshopping spots), but no more than 12 minutes in any one hour. This means that a channel broadcasting for 24 hours a day could show up to 216 minutes of advertising spots (9 minutes x 24 hours), and up to 72 minutes of teleshopping spots, a combined total of 288 minutes. In addition, there must be a break of 20 minutes between advertising within a programme. The effect of this rule is to allow two breaks within a half hour programme. This does not affect the advertising shown between programmes, however short the programme may be. Except in special cases, advertising must be taken during a 'natural break' in programming.

4.4 Similar to the European Union, advertising on Australian commercial television is restricted to a certain amount in a 24-hour period, but there are no restrictions on how much advertising may appear in any particular hour.

² <http://www.ofcom.org.uk/tv/ifi/codes/advertising/rules/rules.pdf>

³ Reding, Viviane. 2006. **Freedom of the media, effective co-regulation and media literacy: cornerstones for an efficient protection of minors in the European Union**. Speech delivered at the ICRA Roundtable Brussels "Mission Impossible", June 14, 2006. Brussels, European Union.

Canadian Radio-Television Commission (CRTC)⁴

4.5 The CRTC rules on limits on Advertising are as follows:

- TV stations: 15 minutes of advertising per hour: as of September 1, 2009, there will no longer be time limits
- Specialty services: 12 minutes per hour
- Pay services (pay television, pay-per-view and video-on-demand): don't carry advertising
- Commercial AM and FM radio stations: no limits
- CBC radio networks: prohibited from carrying advertising except for programs that are available to networks only on a sponsored basis.

These time limits don't include: the promotion of Canadian programs, public service announcements, political ads, product placements within a TV program and virtual ads.

4.6 In community-based media there are also limits on the amount of time as follows:

- Cable community channels: don't carry commercial advertising, but can air sponsorships and contra advertising
- Community-based, low power TV and digital services: 12 minutes of local advertising per hour
- Campus radio stations: 504 minutes per week; up to 4 minutes per hour
- Community radio stations: no limits

Finnish Communications Regulatory Authority (FCRA)⁵

4.7 Advertising and teleshopping in Finland is prohibited during the broadcast of a religious service, religious programme, news and current affairs, documentaries and children's programmes scheduled for less than thirty (30) minutes. In instances where children's programmes are scheduled for more than thirty (30) minutes,

⁴ http://www.crtc.gc.ca/eng/info_sht/b300.htm

⁵ <http://www.finlex.fi/en/laki/kaannokset/1998/en19980744.pdf>

normal scheduling rules apply. Advertising of tobacco and alcoholic beverages should comply with the relevant Finnish laws.

Advertisements are prohibited during:

- a religious service or other devotional programme; or
- school programmes within the Educational Television (ETV) time slot supplied by the Government as the BA may require to be included in the domestic free television programme service under the Broadcasting Ordinance.

Broadcasting Commission of Ireland (BCI)⁶

4.8 The general advertising principles and rules in Ireland are meant to protect the individual and society, not to offend, cause harm or prejudice human dignity. Of the many genres of advertising, surreptitious, subliminal and misleading advertising are banned. Also of importance is the fact that advertising is not allowed during broadcast of religious service, news and current affairs, documentaries and religious programmes. With regards to religious programmes, advertising is not allowed only when the said programme is less than thirty minutes.

Federal Communications Commission (FCC)⁷

4.9 In the United States of America, the FCC rules on advertising provide that commercial advertising may not occur during or immediately after a programme that is primarily intended for children under the age of 12. The prohibition is general and applies to all television commercials irrespective of which product is marketed. Commercials that are broadcasted before or after a children's programme with only a "greetings element" as a break in the programme are considered to be broadcasted in "immediate conjunction" to it. Parties shall ensure, where advertising or tele-shopping is inserted during programmes, that the integrity of the

⁶ http://www.bci.ie/codes/gen_advertising_code.html

⁷ <http://www.broadcastlawblog.com/archives/advertising-issues-fcc-begins-investigation-of-embedded-advertising-and-sponsorship-identification.html>

programmes, taking into account natural breaks in and the duration and the nature of the programme, and the rights of the right holders are not prejudiced.

4.10 The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by advertising and/or teleshopping once for each scheduled period of at least thirty minutes. The transmission of children's programmes may be interrupted by advertising and/or tele-shopping once for each scheduled period of at least thirty minutes, provided that the scheduled duration of the programme is greater than thirty minutes.

4.11 No advertising or tele-shopping shall be inserted during religious services. Isolated advertising and tele-shopping spots other than in transmissions of sport events, shall remain the exception.

Independent Communications Authority of South Africa (ICASA)

4.12 In South Africa, not all Broadcasting Service Licensees have limits on advertising in their licence conditions. Examples include the Community Broadcasting Service Licensees and Subscription Broadcasting Service Licensees. It is important to revisit this issue especially for subscription broadcasters where in terms of section 60(4) of the ECA advertising and sponsorship or a combination thereof may not form the largest source of revenue for such broadcasters.

4.13 The Authority's Position paper on Subscription Broadcasting, 2006, reflects that it is a challenge to set advertising limitations on multi-channel subscription broadcasting services. It is easier to stipulate advertising limits for an analogue television subscription service with a single channel, but difficult for multi-channel subscription broadcasting services in a digital environment. Regulating advertising on multi-channel subscription broadcasting services could mean stipulating advertising limits for individual channels on the bouquet. This would defeat the

intention of section 60(4) of the ECA since it would mean more advertising minutes per hour for subscription broadcasting services, when the individual channels are viewed collectively. Stipulating advertising limits would also restrict subscription broadcasting services' freedom of placing advertisements on channels of their choice.

4.14 Despite the afore-going, the Authority would like to get industry views on the introduction of advertising limits for subscription broadcasters, taking into account section 60(4) of the ECA.

4.15 For community broadcasters, during the temporary licensing period, there were concerns expressed with respect to the nature of advertising, the amount of advertising and the relationship between community broadcasters. At the time the Authority indicated that it might consider placing limitations on the amount and nature of advertising and sponsorships. This was to be informed by fair competition between all the three tiers of broadcasting and the viability of community broadcasters. Community sound broadcasters may derive funding from advertising, sponsorships and donations. Although currently there are no limitations on the amount of advertising that community sound broadcasters may flight, most of them struggle to source revenue from advertising and the proposed limit is way above current industry norms, so that community broadcasters would not be prejudiced by the change.⁸

4.16 In terms of Community Television Broadcasting Services the Authority has imposed an advertising limit of an average of ten (10) minutes per hour measured annually with a maximum of 12 hours in any hour. Licensees are required to make a

⁸ This was a common problem experienced by a number of community radio stations visited in Free State (Bloemfontein) and during the Community Radio review conducted between June-July 2004

clear distinction between sponsorship announcements and advertising and the Authority has made specific regulations on this regard.⁹

5 IDENTIFICATION OF ADVERTISEMENTS

5.1 The general principle when it comes to the identification of advertisements is that they should be clearly distinguishable as such and recognisably separate from the other items of a programme service. Such distinction usually occurs through optical and/or acoustic means. References to programmes in advertisements are generally not acceptable unless the reference is related in the subject matter to an adjacent programme e.g. advertisements for farm products and fertilizers in intervals around a farming programme. In principle advertisements should be transmitted in blocks and isolated advertising spots should remain the exception.

5.2 However, advertisements can be inserted between programmes or 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. Below are some examples of how various communications regulators treat the identification of advertisements.

Federal Communications Commission¹⁰

5.3 The Federal Communications Commission of the United States of America (the FCC) reviewed its Advertising rules due to concerns that the broadcasting and advertising industries, in adopting advertising techniques to respond to technological and marketplace changes, have been exposing the public to commercial messages without their knowledge. Advertising that is incorporated

⁹ Independent Broadcasting Authority. Position Paper on Community Sound Broadcasting Services: Four Year Licences para 7

¹⁰ <http://www.broadcastlawblog.com/archives/advertising-issues-fcc-begins-investigation-of-embedded-advertising-and-sponsorship-identification.html>

into broadcast programming rather than being placed into a stand-alone commercial is not acceptable. The FCC decided to amend its rules to deal with new advertising techniques so that it is clearly identifiable from programme sponsorship. No advertisement may include anything that states, suggests or implies, or could reasonably be taken to suggest or imply, that any part of any programme broadcast by a service has been supplied or suggested by an advertiser.

Office of Communication¹¹

5.4 The United Kingdom's Office of Communication (Ofcom) adopts a similar approach to that of the FCC when it comes to the identification of advertisement by providing that television advertising must be readily recognisable as such and kept quite separate from other parts of the programme service. Breaks containing advertising spots of any kind, including teleshopping spots, must be identified in vision and/or sound, for example station identifications going in and out of breaks. Breaks within programmes may be taken only at a point where some interruption in continuity would, in any case, occur (even if there was no advertising) and such natural breaks must not damage the integrity or value of the programme in which they occur.

5.5 The maximum duration of any break within a programme is three minutes fifty seconds, of which no more than three and a half minutes may be advertising. Ofcom may permit departures from the normal requirements if it is satisfied that these are justified for programming reasons.

5.6 Limited departures from the pattern above, for instance, are permissible in the case of coverage of certain sporting and similarly structured events where there are frequent natural breaks of brief duration. The distribution of advertising in such intervals must, however, have regard to the interests of good programme presentation.

¹¹ <http://www.ofcom.org.uk/tv/ifi/codes/advertising/rules/rules.pdf>

Italian Communications Authority (AGCOM)¹²

5.7 Similarly, the Italian Communications Authority requires that advertising and teleshopping must be kept completely separate from other parts of the programme and identifiable as such by the insertion on the screen, at the beginning and at the end of the message, of specific signs such as "advertising" or "teleshopping". Advertisements, including teleshopping and sponsorship, cannot be shown by the host of the programme within the context of the programme itself.

6 INFOMERCIALS

6.1 The 1999 Position Paper on Advertising, Infomercials and Sponsorships defined an infomercial as material of more than two minutes duration, broadcast in visual and/or audio form, for which the broadcaster receives a consideration. Infomercials are usually presented in a programme format and promote the interests of a person, product or service. Infomercials entail a direct offer of a product or service to the public in return for payment, and usually contain a demonstration of the use of the product. Infomercials include material known as tele-shopping, home shopping, direct marketing and direct sales. The Authority would like broadcasters to note that infomercials should not be regarded or calculated as programming.

6.2 For purposes of this review, the Authority is of the view that there is no need to change the rules on infomercials as contained in the current regulations as they are still relevant. Nonetheless, a brief discussion on the treatment of infomercials in other countries follows.

6.3 According to Ofcom up to 5 per cent of daily transmission time above the spot advertising maximum of 15 per cent of transmission time may be devoted to teleshopping spots including infomercials. This 5 per cent may be increased by any

¹² http://www2.agcom.it/eng/reports_docs/resp_reg.htm#20

balance of 15 per cent of transmission time not devoted to spot advertising. Teleshopping windows of whatever length may not be interrupted by any other material, whether advertising or teleshopping spots or by editorial. Advertising and teleshopping spots may, however, be inserted between adjacent teleshopping windows¹³.

6.4 Teleshopping windows may comprise a collection of separate teleshopping spots, provided that the window as a whole is presented as a single entity and identified as such in listings of any kind. Teleshopping windows must be identified both in vision and in sound at both the beginning and end of each window in a way which makes its commercial nature clear to viewers.¹⁴

6.5 An infomercial, according to the CRTC combines entertainment or information with the sale or promotion of goods or services in a program that's more than 12 minutes long. Broadcasters must clearly inform viewers that infomercials are paid commercial advertising. On commercial radio stations, an advertisement that's more than 3 minutes long must be identified as a paid commercial, by clear and prominent announcements, before and after the segments. The announcement must be repeated when the program breaks, and before returning to the program.¹⁵

7 PROGRAMME SPONSORSHIP

7.1 The overriding concern with programme sponsorship is the preservation of the editorial integrity of sponsored programmes. In order to secure this, the Authority will require broadcasters to ensure that no sponsor has any influence in the scheduling of sponsored programming.¹⁶ The threat to editorial integrity continues to grow, as advertisers/sponsors have assumed an even greater influential role in

¹³ <http://www.ofcom.org.uk/tv/ifi/codes/advertising/rules/rules.pdf>

¹⁴ <http://www.ofcom.org.uk/tv/ifi/codes/advertising/rules/rules.pdf>

¹⁵ http://www.crtc.gc.ca/eng/info_sht/b300.htm

¹⁶ Position Paper on a Definition of Advertising, The Regulation of Infomercials and The Regulation of Programme Sponsorship.

the media, where broadcasters, through the former's influence, have continued to change media output to suit their corporate interests.¹⁷ The broadcaster must ensure that the editorial integrity of their programming is not influenced by the sponsor.

7.2 Although the current programme sponsorship rules are still applicable and relevant to the South African context, the Authority has moved some of the sub-clauses of the regulations dealing with the subject matter to the Code of Advertising Practice to be enforced by ASA. However, should these provisions be unacceptable to ASA, the Authority reserves the right to include them in the final version of the regulations.

Office of Communication¹⁸

7.3 Ofcom defines programme sponsorships, which includes an advertiser-funded programme, as a programme that has had some or all of its costs met by a sponsor with a view to promoting its own or another's name, trademark, image, activities, services, products or any other direct or indirect interest. Costs include any part of the costs connected to the production or broadcast of the programme or channel.

7.4 A sponsor is any public or private undertaking (other than the broadcaster or programme producer), who is sponsoring the programme, programming or channel in question with a view to promoting their or another's name, trademark, image, activities, services, products or any other direct or indirect interest. This meaning extends to those who are otherwise supplying or funding the programme or channel. The following may not be sponsored:

- news bulletins and news desk presentations on radio; and
- news and current affairs programmes on television.

¹⁷ McChesney, R. 2000. *Rich Media, Poor Democracy. Communication Politics in Dubious Times*. New York: The New Press.

¹⁸ <http://www.ofcom.org.uk/tv/ifi/codes/advertising/rules/rules.pdf>

No channel or programme may be sponsored by a sponsor that is not allowed to advertise on the relevant medium.

7.5 Sponsorships on radio and television must comply with both the advertising content and scheduling rules that apply to that medium. A sponsor must not influence the content and/or scheduling of a channel or programme in such a way as to impair the responsibility and editorial independence of the broadcaster. There must be no promotional reference to the sponsor, its name, trademark, image, activities, services or products or to any of its other direct or indirect interests. There must be no promotional generic references. Non-promotional references are permitted only where they are editorially justified and incidental. Promotional reference includes, but is not limited to, references that encourage, or are intended to encourage, the purchase or rental of a product or service.

7.6 Sponsorships must be clearly identified as such by reference to the name and/or logo of the sponsor. For programmes, credits must be broadcast at the beginning and/or end of the programme. The relationship between the sponsor and the sponsored channel or programme must be transparent. Sponsorship must be clearly separated from advertising. Sponsor credits must not contain advertising messages or calls to action. In particular, credits must not encourage the purchase or rental of the products or services of the sponsor or a third party. Where a programme trail contains a reference to the sponsor of the programme, the sponsor reference must remain brief and secondary.

7.7 The principles of Ofcom's Broadcasting Code of 2008 above are similar to the existing 1999 Regulations by the Authority. As already stated, the Authority, in the draft regulations separated the content part of sponsorship from scheduling with the intention of submitting the content part to the Advertising Standards Authority of South Africa (ASA). This part might be inserted again in the current regulations if ASA does not include them in the code since it is vital especially in terms of news and current affairs, amongst other clauses.

8 CONCLUSION

8.1 The Authority used its practical experience, its enquiries and the above internal benchmarking exercise to review and update the 1999 regulations. In this regard, the Authority wishes to update its regulatory rules, taking into account global practice, whilst being mindful of the critical importance of advertising revenues for broadcasters and the unique local conditions, and at the same time creating a consumer-focused and sensitive regulatory regime.

8.2 The Authority requests comments on any changes that might be required to its approach. If stakeholders consider certain regulations to be inappropriate, they should provide details as to how these should be changed.

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