[AT] First Federal Communications Court Decision on the Monitoring of Advertising in ORF Programmes

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In a decision dated 1 September 2008, the *Bundeskommunikationssenat* (Federal Communications Court – BKS) gave a ruling on an alleged offence reported by the *Kommunikationsbehörde Austria* (Austrian broadcasting regulator – KommAustria) concerning programmes broadcast by ORF.

The decision relates to a programme broadcast by ORF2 on 1 April 2005 in which, according to the Court, there was a breach of the ban on teleshopping contained in section 13(2) of the *Bundesgesetz über den Österreichischen Rundfunk* (Austrian Broadcasting Corporation Act – ORF-G). In the context of these proceedings, the BKS made an application to the European Court of Justice (ECJ) for a preliminary ruling under Article 234 of the EC Treaty.

The programme in issue was a call-in quiz broadcast in the late-night programme, during which there was a total of seven rounds in different categories with one question in each and a cash prize to be won for the correct answer. The presenter's main task was to urge viewers to call in on the permanently displayed premium rate number. Trailers on other ORF programmes were occasionally inserted on screen.

The main aspect of the dispute was whether the programme, which could be received across the national borders, constituted teleshopping within the meaning of section 13(2) of the Austrian Broadcasting Corporation Act, which transposes Article 1(f) of the Television without Frontiers Directive, and consequently constituted a service within the meaning of Article 50 of the EC Treaty. ORF wanted this to be categorised as "self-promotion". In response to the request for a decision, the ECJ ruled that whether the game show constituted teleshopping depended on whether this was an actual offer of a service and not just an interactive element within a simple entertainment programme. On the basis of the criteria submitted by the ECJ, the BKS decided that the programme concerned was an offer of a service against payment within the meaning of section 13(2) of the Austrian Broadcasting Corporation Act and was therefore teleshopping. Qualitatively and quantitatively, the key aspect of the programme was the organisation of a game show in which viewers were encouraged to participate by dialling a premium rate number. The call charges collected constituted the payment and were also economically substantial, while the incorporated editorial

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elements were merely of secondary importance. With regard to the time criterion too, the game was the dominant element of the programme. Furthermore, the questions were designed in such a way as to promote the provision of the “game show” service.

However, as ORF is prohibited from broadcasting teleshopping by section 13(2) of the Austrian Broadcasting Corporation Act, it has now been obliged to publish the BKS decision within four weeks by reading it out on one working day in ORF1’s late-night programme.

An appeal against this decision can be lodged within six weeks.

Entscheidung des BKS vom 1. September 2008 (GZ 611.009/0042-BKS/2007)

http://www.bundeskanzleramt.at/DocView.axd?CobId=31483

BKS decision of 1 September 2008 (Case 611.009/0042-BKS/2007)

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