COMMISSION OF THE EUROPEAN COMMUNITIES

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2nd Report from the Commission to the Council, the European Parliament and the Economic and Social Committee

on the application of Directive 89/552/EEC "Television without frontiers"

1. *INTRODUCTION*

Article 26 of Directive 89/552/EEC, "Television without frontiers", (the Directive)[1] provides that, no later than the end of the fifth year after the date of adoption of the Directive and every two years thereafter, the Commission must submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Directive and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting.

In accordance with Article 4(3) of the Directive, there is a specific report on Articles 4 and 5 of the Directive.[2]

In this communication, the Commission submits to the European Parliament, the Council and the Economic and Social Committee the second report on the application of the Directive.

The first report, which covered the period up to the end of 1994, concluded that it was necessary to revise the Directive, in order to adapt it to developments in the European audiovisual field. The Commission therefore made a proposal to this end.[3] The main features of the system set up by the Directive, as well as the reasons justifying the proposal for revision, are set out in detail in the preamble to the proposal. These points and the aspects of the Directive's application which were addressed in the first report are not dealt with in this document.

The proposal for amendment put forward by the Commission has been the subject of detailed discussions within the Community institutions over the last two years. The codecision procedure led to the adoption of European Parliament and Council Directive 97/36/EC amending Directive 89/552/EC on 19 June. The new Directive enters into force on the day of its publication in the Official Journal of the European Communities.[4]

Directive 97/36/EC amends Article 26 of Directive 89/552/EEC to provide that the next report on the application of the Directive should be submitted no later than the end of the third year after the date of adoption of the Directive (i.e. 31 December 2000).

In order to avoid any break in continuity, this report therefore covers the application of Directive 89/552/EEC for the period from January 1995 to the entry into force of the new Directive, a period of approximately 30 months.

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1 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 No L 298, 17.10.1989, p. 23).

2 For 1991 and 1992: COM(94) 57 final, 3 March 1994; for 1993 and 1994: COM(96) 302 final, 15 July 1996.

3 COM(95) 86 final, 31 May 1995.

4 Ref.

2. *SUBJECT OF THE REPORT*

Although the legislation in several Member States does not yet fully comply with Directive 89/552/EEC,[5] the practical application of the principles behind the Directive and consistent judgments by the Court of Justice have contributed a great deal to the gradual assertion of a genuine area of freedom for the changing European television industry.

The principle of free movement, in the Member States of the Union, of television programmes of all kinds and with all kinds of broadcasting is now established, according to clearly defined legal requirements.

This report describes and analyses the salient facts in the application of the Directive during the reference period. It also attempts to offer an overall view of the progress achieved in interpreting its standards, with special attention given to the decisions of the Court of Justice. In view of the fact that it covers what is basically a transition period and that a new Directive has just been adopted, this report does not attempt to analyse the impact of the application of the Directive in depth, but simply to present the main developments in the case law by putting them in context, i.e. a changing audiovisual industry.

3. *DEVELOPMENT OF THE TELEVISION MARKET IN EUROPE*

Apart from significant growth in the number of operators (Europe today has more than 250 television channels, of which two thirds are private channels, their number in the Community having practically doubled in six years[6]) and in resources generated in the television sector (total television revenue in the countries of the European Union in 1995 was estimated at $43.3 billion/ECU 38 billion - an increase of 14% on 1994[7]), 1995 and 1996 saw the preparation and launch of digital television in Europe.

At the beginning of 1997, there were about 330 digital services broadcast by satellite, as compared with about ten in January 1996.[8]

This acceleration in the development of digital services has stimulated discussion in the Member States on the need to adapt the national legal framework to the

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5 Infringement proceedings against several Member States were opened or pursued in 1995 and 1996.

6 IDATE, "Marché mondial de l'audiovisuel et du cinéma - Industries et Marchés", November 1996, p. 114.

7 *ibid.*, p. 111.

8 European Audiovisual Observatory, 1997 Statistical Yearbook, p. 162.

requirements of the new services, and in certain cases certain measures have been decided and implemented.[9]

The Commission assigns the greatest importance to the correct application of the principles of free movement and non-discrimination in this field. It would particularly stress the increased importance of a correct application of the so-called "*home country control*" principle (according to which broadcasters are subject only to the law of the country in which they have their principal place of business) in an audiovisual environment which - thanks to the proliferation of broadcasting capacities due to digital technology - favours the growth of transnational services.

The Commission also recognised the specific problems of broadcasting in its Communication on services of general interest in Europe (COM(96)443 final of 11 September 1996) and noted that the funding of public service broadcasting is the subject of a protocol in the draft Amsterdam Treaty that will be annexed to the EC Treaty.

4. *APPLICATION OF THE DIRECTIVE*

4.1 Coordination between national authorities and the Commission

Application of the rules of the Directive is the responsibility of each Member State's national authorities responsible for regulating the audiovisual industry. Systematic contact with the national bodies has been maintained, particularly through the ad hoc Group of representatives of the Member States, set up within the Commission on the latter's initiative.

The work of the Group, to which observers from the EFTA countries, the Central and Eastern European countries linked by association treaties to the Union, and the Council of Europe's secretariat were invited, led to information on the application of the Directive in the different countries being pooled and contributed to the interpretation of its provisions.

Amongst other things, the Group considered the application of Articles 4 and 5 (measures concerning the promotion of distribution and production of European television programmes), the rules applicable to new forms of advertising ("virtual advertising"), and work in progress in international bodies (Council of Europe, Organisation for Economic Cooperation and Development, World Trade Organisation, etc.) likely to have an impact on Community legislation in the audiovisual field.

The Commission is particularly pleased with the administrative cooperation initiated with national governments, which has meant that the problems

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9 This is the case in the United Kingdom, where the Independent Television Commission has just awarded licences for the first digital multiplexes on terrestrial frequencies, in application of the Broadcasting Act 1996.

connected with broadcasting activities in the Community could be addressed.

The work of the ad hoc Group has staked out a path for the future work of the "Contact Committee" which has just been set up by Directive 97/36/EC. Specifically, the Committee will have to (new Article 23a):

a) facilitate the effective implementation by the Directive by organising regular consultations on all the practical problems arising from its application, in particular the application of Article 2, and on other topics on which discussions seem useful;

b) give opinions - on its own initiative or at the request of the Commission - on the application by the Member States of the provisions of the Directive;

c) act as a forum for the exchange of views on topics to be addressed in the reports that the Member States must provide pursuant to Article 4(3), on their methods, on the mandate of the independent study referred to in Article 25a, on the assessment of offers relating to it and on this study itself;

d) discuss the results of the regular consultations that the Commission holds with representatives of associations of broadcasters, producers, consumers, manufacturers, service providers, trade unions and the artistic community;

e) facilitate the exchange of information between the Member States and the Commission on the situation and development of legislation in the field of television broadcasting, taking into account the audiovisual policy pursued by the Community and the relevant developments in the technical field;

f) examine any development in the sector for which consultation would appear useful.

4.2 Protection of minors: application of the special procedure laid down in Article 2(2) of the Directive

As an exception from the general rule of freedom of reception and non-restriction of retransmission,[10] Article 2(2) of the Directive allows the Member States - provided that they respect a special procedure and only in exceptional circumstances - to take measures against broadcasters under the jurisdiction of another Member State who "manifestly, seriously and gravely" infringe Article 22 of the Directive. This is designed to protect minors from programmes which could seriously impair their "physical, mental or moral development".

The Member State concerned must notify the television broadcaster and the Commission in writing of the alleged infringements and the measures it intends to take if any such infringement occurs again.

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10 For an interpretation of this term, see COM(95) 86 final, p. 19.

Consultations must be undertaken. If they do not produce an amicable settlement within 15 days of the notification, and the alleged infringement persists, the receiving Member State may take unilateral provisional measures against the channel concerned.

The Commission is to ensure that the measures taken should be compatible with Community law. If it decides that they are not, it may require the Member State to put an end to the measures in question as a matter of urgency.

During the period in question, only one Member State (the United Kingdom) felt it was necessary to have recourse - three times - to this procedure.

In the first two cases, the consultations did not produce a settlement and the British authorities considered it necessary to adopt a prohibition order against the channels under the jurisdiction of another Member State.

Following contacts with the Member States concerned and after considering the effects of the measures communicated by the United Kingdom, the Commission considered in both cases that these measures were compatible with Community law. This judgment was largely based on a test of proportionality and on an assessment of the possible discriminatory effects of the measures.[11]

The third case notified to the Commission under Article 2(2) is, at the time of writing, under examination, in view of the fact that the authorities of the Member State that the offending programmes were emanating from have taken stringent measures to stop them, but that it seems they are still being broadcast from another country.

The Commission considers the application of Article 2(2) in the reference period satisfactory. It has protected the general interest with a minimum of restriction on freedom to provide services.

However, the Commission would stress that its assessment of the measures taken under Article 2(2) is based on factual and legal considerations; the moral assessment of the content of the programmes depends on the judgment of each Member State, which has the principal responsibility of authorising or prohibiting the transmission of certain television programmes by broadcasters under its jurisdiction who may be caught by Article 22. The possibility of a difference in judgment between the authorities of the originating country and those of the receiving country is anticipated by the Directive.

Furthermore, the measures taken by the receiving Member State are without prejudice to those taken, if necessary, by the Member State which has

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11 See Commission opinions C(96) 3933 final in the "Rendez-Vous Télévision" case and C(95) 2678 final in the "XXXTV" case.

jurisdiction over the broadcaster in question. It is not, therefore, a question of transferring jurisdiction from one State to another, but of an exceptional possibility offered to the receiving Member State to take measures to protect its interest in situations of incontestable gravity, according to a precise procedure.

It is also important to highlight the fact that, in the system of Community rules created by the Directive (Article 2(1)), Member States are not permitted to apply discriminatory moral criteria to the broadcasters under their jurisdiction: an stricter attitude to programmes to be received in their territory and a more lenient attitude to programmes destined to be broadcast abroad (typically, satellite channel programmes) would not be acceptable. On the contrary, the Member States are bound to ensure that all the broadcasters under their jurisdiction comply with Article 22.

4.3 Application of rules on advertising

The Directive lays down rules concerning the amount of advertising permitted on screen (daily and hourly limits, Article 18), the number and form of advertising interruptions (Article 11), and rules applicable to the content and presentation of advertising messages (Articles 10, 12, 13, 14, 15 and 16). Specific rules (Article 17) are applied to sponsorship.

Several complaints concerning alleged failure to comply with the rules on advertising and sponsorship in certain Member States have been referred to the Commission.

Certain problems, connected with the interpretation of the rules of the Directive, have been solved in judgments of the Court of Justice (see below, point 5.5 - "RTI case") or in the amendments made to the text by Directive 97/36/EC. The first case addressed problems related to showing the name and/or logo of the sponsor in sponsored programmes and telepromotions. The second case dealt with the new rules for teleshopping and self-promotion.

In other cases, complaints - often coming from consumers' associations - report that the quantitative thresholds are systematically exceeded. The problems particularly concern the practices of certain broadcasters in Spain, Portugal and Greece. The Commission is in the process of gathering the information it needs to assess the extent to which these alleged excesses could constitute infringements by the Member States concerned, with a view to taking the relevant corrective measures.

The Commission would point out that each Member State has an obligation to ensure that all programmes transmitted by broadcasters under its jurisdiction respect the rules of the Directive and, more generally, the law applicable to programmes intended for an audience in that Member State.

The Commission considers it an absolute priority to create a level playing field between operators established in the different Member States, along

with a level of protection of the interests of television viewers in the Union which is at least that of the Directive. It expects to equip itself with the means to increase its capacity for monitoring of complaints and for checking the implementation of Community law in this field.

5. *COURT OF JUSTICE CASE LAW*

5.1. General remarks

The Court of Justice has given several judgments on the scope and interpretation of Directive 89/552.

Most of the Court's judgments, whether in proceedings for failure to fulfil an obligation under Community law, on the Commission's initiative (Article 169 EC), or in a preliminary ruling case (Article 177 EC), mainly apply to the various aspects of the system of the division of competences between Member States for broadcasters in Europe, and especially to the criteria for legal jurisdiction. The specific topics that the Court has examined in its judgments to date are: the extent of the originating country's jurisdiction and the criteria for bringing broadcasters under the its legal system, the possibility for the Member States to adopt more stringent or more detailed rules to apply to broadcasters under their jurisdiction, and the powers of the receiving Member State in terms of programmes transmitted from other Member States.

In general terms the interpretation given by the Court of Justice in the various cases coincides with the Commission's. It is also important to stress that the positions taken by the Court supplement and support the choices made by the community legislator in adopting the new Directive. Certain amendments made by the new Directive in fact aim to clarify the text in the light of the Court's rulings. Far from losing its importance after the amendments to the Television without frontiers Directive have been adopted, the case law of the Court shown here will therefore maintain its value as a reference for the national authorities, for the Commission and for the economic operators in the phases of transposal and application of the new Directive.

5.2 Case C-412/93 *Leclerc-Siplec*

The *Leclerc-Siplec* judgment of 9 February 1995 is the first case of judicial application of Directive 89/552/EEC.

It concerned a complaint lodged by Leclerc-Siplec against the refusal of TF1 and M6 to broadcast an advertisement concerning the distribution of fuel in Leclerc supermarkets, in accordance with French law. The matter was referred for a preliminary ruling to the Court, which ruled that Articles 30, 85, 86 and 3f of the EC Treaty, and the provisions of the Directive, did not preclude the Member States from prohibiting the broadcasting of

advertisements for the distribution sector by television broadcasters established on their territory.

This judgment clarifies the relationship between Articles 3, 19 and 20 of the Directive. According to the Court, Article 19 simply clarifies a general freedom conferred on the Member States by Article 3(1), to lay down more detailed or stricter rules as regards television broadcasters under their jurisdiction. Article 20, on the other hand, allows them to lay down less strict rules than those in Article 11(2-5) and Article 18, for programmes which are intended only for the national territory and which may not be received, directly or indirectly, in one or more other Member States.

The Court's interpretation gives the Member States, subject to compliance with the rules of the Treaty (which in this case were considered to have been complied with) and those of freedom of reception and retransmission of channels under the jurisdiction of other Member States, a broad margin for assessment of the interests which could justify stricter or more detailed measures than those in the Directive.[12]

It should be noted that Directive 97/36/EC abrogates Article 19 of the 1989 Directive.

5.3 Judgments given by the Court on 10 September 1996 in *Commission v United Kingdom* and *Commission v Belgium*

In **two judgments given on 10 September 1996** (C-222/94, *Commission v United Kingdom* and C-11/95, *Commission v Belgium*) the Court had the opportunity to pursue a general reflection on the Directive. If we consider the two judgments together, we will be better able to assess their scope and their implications for the implementation of the Directive.

They make a major contribution to the definition of the scope of the Directive, to the clarification of the concept of "jurisdiction", and to the application of the principle of the "place of establishment" of the intra-Community television broadcasters.

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12 The actual wording of the Court is as follows:

"Directive 89/552, whose purpose is to ensure freedom to provide television broadcasting services conforming to the minimum rules it lays down and which to that end requires Member States from which broadcasts are made to ensure compliance with its provisions and Member States receiving broadcasts to ensure freedom of reception and retransmission, provides in Article 3(1) that Member States are to remain free, as regards broadcasters under their jurisdiction, to lay down more detailed or stricter rules in the areas covered by the directive. That freedom, which is conferred by a general provision of the directive and the exercise of which is not such as to jeopardise the freedom to provide broadcasting services conforming to its minimum rules which the directive seeks to ensure, is not restricted, in relation to advertising, to the circumstances set out in Articles 19 and 20.

For that reason, on a proper construction the directive does not preclude Member States from prohibiting, by statute or by regulation, the broadcasting of advertisements for the distribution sector by television broadcasters established on their territory."

In Case C-222/94 (*Commission v United Kingdom*), the Court gave a detailed interpretation of Article 2. The principal point at issue was the definition of the reasons for which a Member State must assert its jurisdiction over a given broadcasting organization. The importance of this clarification is clear, as existing disparities on this point between national bodies of legislation may lead (as they have done in certain cases) to negative or positive conflicts of jurisdiction, which could compromise the effective functioning of the system. As there is no specific provision in the Directive, the Commission has always recommended applying the principle of the place of establishment.

The Court's interpretation of Article 2(1) leads to the conclusion that the concept of jurisdiction of a Member State, in the first subparagraph, must be understood as necessarily covering jurisdiction *ratione personae* over television broadcasters, which can be based only on the broadcaster's connection to that State's legal system. This last concept finds practical expression in the concept of establishment as used in the first paragraph of Article 59 of the EC Treaty.

According to the Court, the divergence on this point between the Directive and the European Convention on Transfrontier Television (essentially based on the criterion of the place of the initial transmission or, in the case of satellite broadcasting, the place where the up-link is situated) must be considered as resulting from a deliberate choice by the community legislator, justified by differences in the nature and legal framework of the two texts.

The adoption by a Member State of the EU of any criterion other than that of the place of establishment, and particularly that of the place of the initial transmission or the target audience, may lead that state to carry out a "double check" on broadcasters which already come under the jurisdiction of another Member State or, by contrast, to fail to ensure the application of its legislation to all the broadcasters which come under its jurisdiction. That is why certain parts of British law have been declared to be not in conformity with Articles 2 and 3(2) of the Directive.[13]

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13 The Court, in welcoming the arguments put forward by the Commission, considered that:

"A Member State fails to comply with its obligations under Articles 2(1) and (2) and 3(2) of Directive 89/552 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities if, in order to determine the satellite broadcasters falling under its jurisdiction, it adopts criteria other than that of establishment, such as transmission or reception of programmes, which lead it to exercise control, prohibited by the Directive, over broadcasts falling under the jurisdiction of another Member State and, with regard to broadcasters which it considers to fall within its jurisdiction, it applies to non-domestic satellite services a regime which is less stringent than that to which domestic satellite services are subject.

The concept of jurisdiction of a Member State, used in the first indent of Article 2(1) of the Directive, must be understood as necessarily covering jurisdiction rationae personae over television broadcasters. This can be based only on those broadcasters' connection to that State's legal system,

The second judgment (*Commission v Belgium*) poses the basic question of the compatibility with Community law of a general system of conditional prior authorisation for the retransmission of television programmes coming under the jurisdiction of another Member State.

The Commission considered that the need for prior authorisation granted by the authorities in the receiving country, on condition that the broadcasters met various conditions (such as, in the case of the French Community, the conclusion of agreements specifying cultural obligations with the Executive, which may in all cases be revoked), constituted a serious restriction on the retransmission of television broadcasts from other Member States, and that it contravened Article 2(2) of the Directive.

The Belgian Government invoked several arguments to justify putting such a system in place.

First, regarding the French Community's provisions regarding cable television, it alleged that cable retransmission did not come within the scope of the Directive. The Court, however, considered that the ninth and tenth recitals and Articles 1(a) and 2(2) led to the conclusion that the Directive did, effectively, concern cable retransmission of television programmes.[14]

This point of view is also confirmed by the third, fifth and twelfth recitals of Directive 93/88/EEC (on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission), and by the European Convention on Transfrontier Television (recalled in the fourth recital of the Television without frontiers Directive), the scope of which unequivocally extends to cable transmission.

The other arguments presented aimed to assert the right of the receiving Member States to exercise a certain form of control on televised programmes emanating from other Member States. Various reasons were given to justify this "secondary control". For example, the need to check whether a broadcaster has the right to enjoy the freedoms guaranteed by the Treaty and, if so, under the jurisdiction of which Member State; safeguarding pluralism in the media; protection of copyright; the need to ensure respect for public policy and morality.

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which in substance overlaps with the concept of establishment as used in the first paragraph of Article 59 of the EC Treaty, the wording of which presupposes that the supplier and the recipient of a service are established in two different Member States. While a Member State may, under Article 3(1) of the Directive, lay down stricter rules in the areas covered by the Directive, the fact remains that, under Article 2(1), all broadcasts transmitted by broadcasters under the jurisdiction of that Member State or over which it is required to exercise jurisdiction pursuant to the second indent of Article 2(1) must comply with the law applicable to broadcasts intended for the public in that Member State."

14 The Court could not have been clearer: *"Directive 89/552 ... must be interpreted as applying to the distribution of television programmes by cable."*

The Court clearly stated that, without prejudice to the special procedure laid down in Article 2(2) of the Directive in the case of infringements of Article 22, only the "Member State of establishment" (as defined in the United Kingdom case) is responsible for ensuring that its own laws are complied with by the broadcasters under its jurisdiction. If the receiving Member State considers that another Member State has not fulfilled its obligations under the Television without frontiers Directive, it can invoke the procedures provided for in Articles 169, 170 and 186 of the EC Treaty. The Court did not overlook the fact that, in certain cases (for example, in order to check whether transmissions emanate from another Member State, to safeguard pluralism, copyright or morality, public policy or public security), the receiving Member State could be justified in asserting its right to exercise a form of control, compatible with Community law, on the television programmes received on its territory.

But it considered in this case that the Belgian Government had not shown that the protection of such interests was such as to justify a general system of prior authorisation for programmes emanating from other Member States, which involves a de facto abolition of the freedom to provide services.[15]

5.4 Cases C-14/96 *Paul Denuit* and C-56/96 *VT4*

The Court confirmed this case law in two recent judgments in preliminary rulings (*Paul Denuit* C-14/96 of 29 May 1997 and *VT4* C-56/96 of 5 June 1997) and took it further.

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15 The most relevant extracts from the judgment are the following:

"Having regard to the system whereby Articles 2(1) and (2) and 3(2) of Directive 89/552 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities divide obligations between the Member States from which programmes emanate and the Member States receiving them, that directive must be interpreted as meaning, first, that it is solely for the Member State from which television broadcasts emanate to monitor the application of the law of the originating Member State applying to such broadcasts and to ensure compliance with the directive and, second, that, save in the circumstances provided for in the second sentence of Article 2(2), the receiving Member State is not authorised to exercise its own control in that regard.

Consequently, a Member State which

- maintains a system of prior authorisation for the retransmission by cable of television broadcasts emanating from other Member States

- maintains a system of express, conditional prior authorisation for the retransmission by cable of television broadcasts emanating from other Member States which contain commercial advertising or teleshopping programmes especially intended for viewers in that State

acts in breach of its obligations under Article 2 of the Directive.

Under no circumstances may a Member State unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of the rules laid down by the Treaty."

In Case C-14/96, the Belgian authorities (French Community) refused permission to the cable distributor Coditel Brabant to distribute programmes of a broadcaster under British jurisdiction (TNT/Cartoon) for the reason that it did not comply with the Directive, particularly those provisions relating to the promotion of European works (Articles 4 and 5). The Belgian courts overturned the Ministerial Decree of prohibition and a request for a preliminary ruling was introduced, on appeal, by the Tribunal de Commerce of Brussels.

The Court had already partially answered the questions raised by the Tribunal de Commerce in its judgments of 10 September 1996, ruling on the point of law regarding the extent of the receiving State's power of control of a broadcaster coming under the jurisdiction of another Member State. It also ruled on the criterion for determining jurisdiction by using the criterion of establishment.

In this case, the Belgian authorities also considered that TNT/Cartoon programmes did not come under the jurisdiction of a Member State within the meaning of Article 2(1) of the Television without frontiers Directive because they did not fulfil the requirements of Articles 4 and 5 (broadcasting quotas) and that, in fact, most of Turner's programming emanated from a country that was not a Member State of the European Community. The Court stated quite clearly that *"a television broadcaster comes under the jurisdiction of the Member State in which it is established. The origin of programmes broadcast by the television broadcaster or their conformity with Articles 4 and 5 of the Directive are irrelevant in determining the Member State having jurisdiction over such a broadcaster pursuant to Article 2(1)."*

Consequently, the fact that a broadcaster established in a Member State, and therefore under the real or supposed control of that State, broadcasts programmes of non-European origin in another Member State does not permit the State receiving those programmes to control their content, subject, of course, to the exception provided in the case of infringement of Article 22.

In Case C-56/96, the Belgian authorities (Flemish Community) refused to authorise the Flemish cable networks to distribute the programmes of VT4, a broadcaster established in the United Kingdom. Referring to the TV10 judgment of 5 October 1994 (Case C-23/93), the Flemish Minister of Culture considered that VT4, whose activities were totally or principally aimed at the Flemish Community, was trying to circumvent the Flemish law. VT4, however, referred to Article 2 of the Directive, according to which the receiving State does not have the right to refuse access to its national cable network if the foreign broadcasting organisation is licensed by another Member State. Furthermore, VT4 rejected the argument based on the TV10 judgment in so far as the "general interest" exception cannot be advanced to serve economic ends, such as protecting the national advertising market or protecting a national commercial television body from a monopoly.

The principal interest in this appeal lies primarily (as for the preceding preliminary ruling) in the fact that it is a concrete case of determination of jurisdiction (in this case the VT4 broadcasting organisation) which gives the Court an opportunity to clarify the concept of "establishment" (especially in the case of a broadcasting body being established in more than one Member State).

In its judgment, the Court considers, first, that the fact that all VT4's programmes and advertising are exclusively intended for the Flemish public does not in itself show that VT4 cannot be considered as being established in the United Kingdom. Secondly, it confirms and clarifies its ruling in the *Commission v United Kingdom* case cited above by deciding that when a television broadcaster is established in a Member State, jurisdiction over it is exercised by the Member State in whose territory the broadcaster has the centre of its activities.[16] Thus, even if all the programmes of a broadcaster from a Member State were conceived and intended exclusively for the public in another Member State, only the originating Member State may examine their compatibility with its national law (including the provisions transposing the Directive).

We should also note here that all this case law confirms the Community legislature in the basic choices it made in adopting the provisions of Directive 97/36/EC amending Article 2(1) of the 1989 Directive, particularly regarding the setting up of an exhaustive system of criteria of jurisdiction based on the concept of establishment (even if the specific criteria enumerated in Article 2(3) of the amended Directive do not correspond exactly to those cited by the Court in the VT4 case).

5.5 C-320/94 et al. *RTI*[17]

Giving judgment on 12 December 1996, the Court ruled on certain provisions of the Directive regarding advertising and sponsorship (Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 *Reti Televisive Italiane*).

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16 The Court ruled that *"Article 2(1) [of the Directive 89/552/EEC] is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established. If a television broadcaster is established in more than one Member State, the Member State having jurisdiction over it is the one in whose territory the broadcaster has the centre of its activities, in particular where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together."* It should be noted that these specific criteria do not correspond exactly with those now laid down by Community law in Article 2(3) of Directive 97/36/EC, viz. the place of effective registered office, the place where decisions on programming are made and, in certain cases, the place where a significant proportion of the staff employed in broadcasting activities are employed.

17 Judgment of the Court (Sixth Chamber) of 12 December 1996. Reti Televisive Italiane SpA (RTI) (C-320/94), Radio Torre (C-328/94), Rete A Srl (C-329/94), Vallau Italiana Promomarket Srl (C-337/94), Radio Italia Solo Musica Srl e.a. (C-338/94) and GETE Srl (C-339/94) v Ministero delle Poste e Telecommunicazioni. Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 [1996] ECR I-6471.

The Regional Administrative Court for Lazio (Italy) had made several requests to the Court of Justice, under Article 177 of the EC Treaty, for preliminary rulings interpreting the Directive, notably regarding sponsorship and "telepromotions".

Telepromotions are a common form of television advertising in Italy, based on the interruption of studio programmes (especially game shows) by slots devoted to the presentation of one or more products or services, where the programme presenters momentarily swap their role in the games in progress for one as "promoters" of the goods or services which are the object of the advertising presentation.

The questions put by the Lazio Regional Administrative Court essentially concerned:

1) the interpretation of Article 17(1)(b) of the Directive (may the indication of the name and/or logo of the sponsor be inserted at points other than the beginning and/or the end of the sponsored programme?)

2) is Article 18 of the Directive, and particularly the concept of "forms of advertisements such as direct offers to the public" purely illustrative - thus potentially inclusive of telepromotions - or does it refer only to direct offers in the strict sense of the term?

The Court gave its judgment on 12 December 1996, deciding that:

1) Article 17(1)(b) of the Directive must be interpreted as meaning that it does not prohibit references to the name and/or logo of the sponsor at moments other than the beginning and/or end of the sponsored programme;

2) Articles 1(b) and 18 of the Directive must be interpreted in the sense that the expression "forms of advertisements such as direct offers to the public", used in Article 18, is used by way of example. Consequently, other forms of advertising which share with teleshopping ("direct offers") the characteristic of lasting longer than spot advertisements (such as "telepromotions"), may be considered for the purposes of extending from 15% to 20% the daily limit of time devoted to television advertising.

The Court also pointed out that this increase was an option left to the Member States, which can choose not to avail themselves of it.[18]

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18 The Court's arguments can be summed up as follows:

Directive 89/552 on the pursuit of television broadcasting activities, and in particular, Articles 1(b) and 18 thereof, "must be interpreted as meaning that the expression 'forms of advertisements such as direct offers to the public' in Article 18 is used in the context of the Community rules, with regard to the possibility of increasing maximum advertising time to 20% of daily transmission time, by way of example. Consequently, it may also cover other forms of promotion, such as 'telepromotions' which,

Under the new Directive, incidentally, all forms of advertising are subject to a new daily maximum limit and the expression "forms of advertisements such as direct offers to the public" has been deleted. The daily limit of one hour of teleshopping (Article 18(3)) has also been deleted and replaced by new provisions tailored to both generalist channels and channels exclusively devoted to teleshopping.

5.6 Cases C-34, C-35, C-36/95 *De Agostini* and *TV-Shop*

In Joined Cases C-34, C-35 and C-36/95 (*Konsumentombudsmannen v, respectively, De Agostini Svenska Förlad AB and TV-Shop I Sverige AB*) advertising and teleshopping programmes received in Sweden were considered by the Konsumentombudsman (Consumer Ombudsman) to be unfair under the Trading Practices Act (Marknadsföringslagen 1975:1418), either because they directly targeted children (Case C-34/95, Swedish law prohibits advertising programmes aimed at children under 12 years of age) or because for other reasons (particularly those connected with the clarity, precision and exhaustiveness of the advertisements) they were potentially harmful to consumers' interests.

The court hearing the three cases (the Marknadsdomstol of Stockholm) decided to refer one question in each of them to the EFTA Court. Following

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like 'direct offers to the public', require more time than spot advertisements on account of their method of presentation."

The reason why the Community law allowed for an increase in the transmission ceilings for direct offers to the public was that this form of sales promotion requires more air time than simple spot advertisements and not because these offers are programmes presenting products which can be ordered direct by telephone, post or videotext and which are intended to be delivered to the home of the television spectator, since the spectator's ordering of the products is an operation that is totally distinct from the televised presentation that the Directive is intended to govern. It is therefore normal that other forms of advertising, which also need more time than spot advertisements typically do, should benefit from the increase provided explicitly, but not exclusively, for direct offers to the public. But it is for each Member State, assuming that it intends to make use of the facility allowed by Article 18 for the television broadcasters under its jurisdiction to raise the transmission ceiling to 20%, to decide, in accordance with the Treaty, whether this increase may benefit forms of advertising other than spot advertisements which, however, are not direct offers to the public.

Directive 89/552 on the pursuit of television broadcasting activities, and in particular Article 17(1)(b) thereof, must be interpreted as not prohibiting the insertion of the sponsor's name or logo at times other than the beginning and/or end of a sponsored programme.

However, regarding television broadcasters under their jurisdiction, the Member States may, pursuant to Article 3(1) of the Directive, lay down stricter rules on the subject, as long as they do not undermine the freedoms guaranteed by the Treaty, in particular the free provision of services and the free movement of goods. This interpretation does not affect the fact that the sponsored televised programmes must in no case incite to purchase or hire the products or services of the sponsors or any third party, in particular by making special promotional references to these products or services.

Sweden's accession to the EC Treaty, the proceedings were transferred to the Court of Justice in Luxembourg.[19]

The Swedish court asked the Court of Justice to rule on the following questions:

"Are Article 30 or Article 59 of the Treaty or Directive 89/552/EEC of 3 October 1989 to be interpreted as:

a) preventing a Member State from taking action against television advertisements which an advertiser has broadcast from another Member State (in the three cases);

b) precluding application of Article 11(1) of the Radiolag prohibiting advertisements directed at children (in Case C-34/95)."

The main subject of the case was therefore the application of the Swedish national law regarding misleading advertising and televised advertising aimed at children under 12 years of age in two cases where Swedish advertisers were transmitting their advertising messages to the Swedish public. In the three cases, the televised advertising in question was transmitted by a broadcaster under the jurisdiction of another Member State (TV3 - UK) and, at the same time, by broadcasters under Swedish jurisdiction (TV4 in Case C-34/95 and Homeshopping Channel in Cases C-35/95 and C-36/95).

The Court, in its judgment of 9 July 1997, first notes that fair trading and the protection of consumers in general are overriding requirements of general public importance which may justify - under certain conditions - obstacles to the free movement of goods and the free provision of services.[20]

In the case of television advertising, the Television without frontiers Directive guarantees "a set of provisions specifically devoted to the protection of minors".[21] Compliance with these provisions must be ensured by the broadcasting State alone.[22] Consequently, the receiving State may no

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19 The EFTA Court had already ruled on the Norwegian element of these cases on 16 June 1995 in the Joined Cases E-8/94 and E-9/94 concerning certain questions referred for a preliminary ruling to the EFTA Court by the Oslo "Markedsrådet". The EFTA Court decided that Articles 2(2) and 16 of the Directive, as incorporated into the Agreement on the European Economic Area (EEA), must be interpreted as opposing a prohibition on an advertiser that would prevent him from broadcasting an advertisement within the framework of programmes televised by a broadcaster established in another EEA State, if this obstacle results from a general prohibition provided for in national law and affecting advertisements which are specifically targeted at minors.

20 Paragraphs 46, p. 12, and 53, p. 13.

21 Paragraph 57, p. 14.

22 Paragraph 58, p. 14.

longer apply to programmes emanating from another Member State provisions specifically designed to control the content of television advertising with regard to minors.[23] However, Article 3 of the Directive allows Member States to apply stricter rules to the broadcasters under their jurisdiction.

The Directive is not, in principle, opposed to a Member State taking measures - in application of a general provision regarding the protection of consumers from misleading advertising - against an advertiser because of a televised advertisement broadcast from another Member State. These measures, however, may not extend to preventing the retransmission on its territory of broadcasts coming from that other Member State.[24]

More generally, the Court affirms that national measures prohibiting advertising aimed at children under 12 years of age and misleading advertising may have an impact on the freedom to provide services[25] and could even - if it were demonstrated that these measures affected the marketing of national products and those from other Member States - constitute a restriction on the free movement of goods.[26]

In order to assess the compatibility of Swedish law with Articles 30 and 59 of the EC Treaty in the case in question, the Court considered that it was for the national court to check whether the national provisions were actually necessary to meet overriding requirements of general public importance or one of the aims laid down in Articles 36 and 56 of the Treaty, whether they were proportionate for that purpose and whether the aims or overriding requirements could have been met by less restrictive means.[27]

The Court therefore highlighted several general principles, and in particular that national measures having a restrictive effect on trade in goods or services must have a specific justification and must not go beyond what is necessary to achieve the aim pursued.

In the case where the secondary Community law (in this case, the Television without frontiers Directive) provides for harmonisation measures in the field concerned and a distribution of powers between the Member States for the application of common rules, all the Member States must respect this division and must refrain from applying their rules to broadcasters under the competence of another Member State.

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23 Paragraphs 60 and 62, pp. 14 and 15.

24 Paragraph 38, p. 11.

25 Paragraph 50, p. 13.

26 Paragraph 44, p. 12.

27 Paragraphs 45, p. 12, and 52, p. 13.

With specific regard to the Directive, the Court thus ruled that it "*does not preclude a Member State from taking, pursuant to general legislation on protection of consumers against misleading advertising, measures against an advertiser in relation to television advertising broadcast from another Member State, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State.*" As for advertising directed at children, the Court decided that "*Directive 89/552 is to be interpreted as precluding the application to television broadcasts from other Member States of a provision of a domestic broadcasting law which provides that advertisements broadcast in commercial breaks on television must not be designed to attract the attention of children under 12 years of age*".

In other words, the Court makes a distinction between general legislation which is not covered by specific provisions in the Directive (i.e. protection of consumers against misleading advertising, which was already covered by Directive 84/450/EEC when Directive 89/552 was adopted) and a subject which has a "complete set" of measures in the Directive (viz. those specifically devoted to the protection of minors in respect of television programmes and advertising - see Articles 16 and 22). In the first case, the receiving State may take measures intended to protect consumers with regard to (national) advertisers but not introduce a second control on the television programmes broadcast with regard to (non-national) broadcasters, as these programmes must be controlled by the transmitting State. In the second case, the level of harmonisation attained is that considered sufficient by the Court for the Directive to prevent the receiving State from applying measures of protection of minors provided in a broadcasting law, whoever the operators concerned might be. In both cases, the Court once again confirms the principle of control of broadcasters by only the Member State under whose jurisdiction they come (the transmitting State, i.e. the State where the broadcaster is established).

6. *CONCLUSIONS*

During the reference period, the Court has provided a regular and abundant flow of case-law. The principles of the European audiovisual area[28] - freedom of movement on the basis of control by the country of origin, common rules for the protection of the general interest where necessary - have been confirmed and applied. This case law will keep all its relevance as a reference for the operators, the national authorities and the Commission in the phases of transposition and application of the new Directive. In the digital broadcasting era, Europe is moving towards greater freedom of

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[28] The setting up of this area was completed in the field of copyright and related rights by Directive 93/83/EEC, currently being transposed. The proposal for a Directive on the Legal Protection of Conditional Access Services, adopted by the Commission on 9 July 1997, has, in part, the same objective (COM(97) 356 final).

movement for televised programmes and advertising, and the Television without frontiers Directive is contributing to this by providing the necessary Community legal framework.