OPINION OF ADVOCATE GENERAL LENZ

delivered on 6 February 1997 *

A — Introduction

1. This reference for a preliminary ruling concerns Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1] (hereinafter 'the Directive'). Essentially, the reference concerns questions which the Court has already dealt with in two judgments delivered on 10 September 1996. Those judgments were given in Treaty infringement proceedings which the Commission had brought against the United Kingdom [2] and against the Kingdom of Belgium. [3]

Relevant provisions of Community law

2. The key provisions of the Directive as far as this case is concerned are contained in Article 2. This provision reads as follows:

'1. Each Member State shall ensure that all television broadcasts transmitted

— by broadcasters under its jurisdiction, or

— by broadcasters who, while not being under the jurisdiction of any Member State, make use of a frequency or a satellite capacity granted by, or a satellite up-link situated in, that Member State,

comply with the law applicable to broadcasts intended for the public in that Member State.

2. Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive. Member States may provisionally suspend retransmissions of television broadcasts if the following conditions are fulfilled:

(a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22;

* Original language: German.

1 — OJ 1989 L 298, p. 23.

2 — Case C-222/94 *Commission* v *United Kingdom* [1996] ECR I-4025.

3 — Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115.

(b) during the previous 12 months, the broadcaster has infringed the same provision on at least two prior occasions;

(c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of its intention to restrict retransmission should any such infringement occur again;

(d) consultations with the transmitting State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in point (c), and the alleged infringement persists.

The Commission shall ensure that the suspension is compatible with Community law. It may ask the Member State concerned to put an end to a suspension which is contrary to Community law, as a matter of urgency. This provision is without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned.

3. This Directive shall not apply to broadcasts intended exclusively for reception in States other than Member States, and which are not received directly or indirectly in one or more Member States.'

3. Article 3(2) of the Directive provides that the 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'.

4. Chapter III ('Promotion of distribution and production of television programmes') contains, in Articles 4 to 9, provisions for ensuring that 'European productions [form] a majority proportion in television programmes of all Member States'. [4] Furthermore, 'new sources of television production' [5] in the Community are to be promoted, by reserving a proportion of broadcasting time or a proportion of the budgets of broadcasters for independent producers.

5. Article 4 of the Directive therefore requires the Member States to ensure 'where practicable and by appropriate means' that

4 — Twentieth recital of the preamble to the Directive.

5 — Twenty-fourth recital of the preamble to the Directive.

broadcasters reserve for European works [6] a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services (paragraph (1)). If that proportion cannot be attained, it must not be lower than the average for 1988 or 1990 in the Member State concerned (paragraph (2)).

Article 5 of the Directive requires the Member States to ensure 'where practicable and by appropriate means' that broadcasters reserve at least 10% of their transmission time or 10% of their programming budget for European works created by producers who are independent of broadcasters.

6. Article 22 of the Directive deals with the protection of minors. Member States have to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes 'which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence'.

6 — This term is defined in Article 6 of the Directive.

Facts of the case

7. The American Turner Group, a major concern on the United States television market, has a subsidiary in the United Kingdom, Turner Entertainment Network International Limited, which has its seat in London. This company owns all the shares in two other companies — The Cartoon Network Limited and Turner Network Television Limited. Both have their seats in the United Kingdom and broadcast television programmes. Those programmes are 'TNT' and 'Cartoon Network'. The marketing of these programmes is undertaken by yet another company belonging to the Turner Group, Turner International Network Sales Limited, which also has its seat in London. The United Kingdom authorities approved the broadcasting of those programmes and issued non-domestic satellite service licences [7] for them. The programmes are transmitted via satellite. For this purpose, the undertakings concerned use satellite transmission capacity assigned to the Grand Duchy of Luxembourg.

The Belgian Government takes the view that the programmes do not meet the requirements of Articles 4 and 5 of the Directive.

7 — As regards this term, see paragraph 10 of the judgment in Case C-222/94 *Commission* v *United Kingdom*, cited above in footnote 2.

8. On 17 September 1993 Turner International Network Sales Limited concluded an agreement with Coditel Brabant SA (hereinafter 'Coditel'), a Belgian cable television company. In the agreement Coditel undertook to distribute the aforementioned programmes via its cable network in the City of Brussels.

9. According to the court which has made the reference, there was no legislation at that time governing cable television in the City of Brussels area. This gap was filled by a Royal Decree of 16 September 1993, which, according to the national court, was designed to stop 'certain television channels' which intended to take advantage of the legal vacuum. On the basis of that decree, two (federal) Belgian ministers, by a Decree of 17 September 1993, prohibited Coditel from distributing the television programmes 'TNT' and 'Cartoon Network' over its cable network in the City of Brussels area.

10. Turner International Network Sales Limited thereupon applied to the Tribunal de Commerce, Brussels, for an interim order enjoining Coditel to perform the agreement concluded on 17 September 1993. That application was granted on 26 October 1993. Coditel complied with the order and resumed transmission of the programmes in question.

11. In June 1994 the Belgian State brought third-party proceedings against the interim order of 26 October 1993. The Tribunal de Commerce, Brussels, then issued a new order on 29 November 1994 referring three questions to the Court for a preliminary ruling (Case C-316/94). At the same time, it enjoined Coditel to cease transmission of the programmes in question until a preliminary ruling on those questions had been obtained.

12. That order of 29 November 1994 was set aside by judgment of 6 April 1995 of the Cour d'Appel, Brussels, but the third-party proceedings were declared admissible. Amending the challenged order, the Cour d'Appel found the proceedings brought by the Belgian State unfounded. By order of 1 December 1995, this Court then removed the reference for a preliminary ruling in Case C-316/94 from the register.

13. In the meantime, the competent Belgian authorities had brought criminal proceedings against Mr Denuit, the managing director of Coditel, before the Tribunal de Première Instance, Brussels. The charge laid against him was that, in spite of the prohibition imposed by the Ministerial Decree of 17 September 1993, the programmes 'TNT' and 'Cartoon Network' had been distributed by Coditel over its cable network in the City of Brussels area. A further charge laid against Coditel was that in the programmes which it distributed it had included commercial advertising without having the requisite authorization from the Belgian authorities.

14. The Tribunal de Première Instance, Brussels, came to the view that, in order to determine the proceedings before it, an interpretation of certain questions of Community law was necessary. It therefore submitted the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty:

(1) What conditions have to be met for a television broadcaster to be regarded as coming under the jurisdiction of a Member State within the meaning of Article 2(1) of Council Directive 89/552/EEC of 3 October 1989? To what extent is it relevant that a large, but variable, proportion of the material which it broadcasts is of non-European origin if the national court also finds that the body in question is based in the territory of the Member State in question and that the actual activities of programme management, composition and assembly are carried out there?

(2) Assuming that broadcasts emanating from a television broadcaster authorized by a Member State are not to be regarded as broadcasts transmitted by a broadcaster under the jurisdiction of a Member State within the meaning of Directive 89/552/EEC, is another Member State entitled — and, if so, on what conditions, regard being had in particular to Article 59 et seq. of the Treaty — to prohibit or restrict their retransmission in a particular area?

(3) Should Article 2 of that directive be interpreted as meaning that, if a television broadcaster comes under the jurisdiction of a Member State, another Member State is not entitled to oppose the retransmission in its territory of television broadcasts transmitted by that broadcaster even in the event that the rules laid down in Articles 4 and 5 of the directive are not complied with?

B — Assessment

The first preliminary question

15. By its first question the national court wishes to know first of all which conditions have to be met in order for a television broadcaster to come under the 'jurisdiction' of a Member State for the purposes of Article 2(1) of the Directive. So, more precisely, the question is concerned with the interpretation of the first indent of that provision.

16. The Court has already had to address this question in its judgment in Case C-222/94 *Commission* v *United Kingdom*. In that judgment it came to the conclusion that

the Member State under which a television broadcaster comes is the Member State in which the broadcaster is established. [8]

17. According to the case-law of the Court, the term 'establishment' within the meaning of the Treaty involves 'the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period'. [9]

18. In its judgment in Case C-222/94 *Commission* v *United Kingdom* the Court admitted that application of the criterion of establishment could lead to difficulties. These difficulties can arise from the fact that a television broadcaster may have more than one establishment in the Community. [10] However, these difficulties can be overcome. As the Court held in the aforementioned judgment, the Commission had explained in that case that the Member States could find a solution to these problems 'by interpreting the criterion of establishment as referring to the place in which a broadcaster has the centre of its activities, in particular the place where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together'. The Court went on to observe that the United Kingdom, as the defendant, had not contradicted that statement. [11]

19. The parties to these proceedings have, in so far as they have addressed this question, expressed the same view. According to Mr Denuit, the actual seat should be the criterion, that is to say the place at which the management and essential part of the activities are established. In this particular case, the actual seat is in the United Kingdom. The Belgian Government takes the same basic view but reaches a completely different conclusion. It considers that in the present case the actual seat is in the United States where control and responsibility for programmes is assumed. The seat in the United Kingdom is merely formal; no significant part of Turner's staff are employer there. The French Government has stated that determination of the Member State having jurisdiction must be done in each individual case on the basis of a number of factors in which it includes control of programming, the seat of the undertaking and the proportion of staff engaged in broadcasting activities in the relevant Member State. The Greek Government seems to want the criterion to be the main, actual seat of the television broadcaster.

20. However, in my view, those questions do not need to be examined more closely in the *present* case. [12] As I have already mentioned, those questions arise only in the event that a television broadcaster is established in more than one Member State. By all appearances, this is not the case here. Only then does the question arise whether a particular establishment, in the light of the aforementioned criteria, give a Member State

8 — Cited above in footnote 2, paragraphs 42, 51 and 61.

9 — Case C-221/89 *Factortame* [1991] ECR I-3905, paragraph 20; see also Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25.

10 — On this point, see my Opinion in Case C-222/94 [1996] ECR I-4025, paragraph 60 et seq.

11 — Case C-222/94, cited in footnote 2 above, paragraph 58.

12 — They do, however, form the focal point of Case C-56/96 (VT 4) in which I shall also give my Opinion today.

jurisdiction over the television broadcaster in question. The only question which matters here, therefore, is whether the broadcaster concerned has an establishment in the Community at all. This question is ultimately for the referring court. However, the answer to it can hardly be in doubt. The French Government points out that in this case we have an English company registered in the United Kingdom in which — according to the question referred — actual management activities are carried out. The Commission observes that the broadcaster concerned has its registered office in the United Kingdom and that programming decisions are also taken there. Furthermore, a significant number of staff engaged in broadcasting activity work there. The United Kingdom also takes the view that the broadcaster is established in that Member State.

21. At the hearing the Belgian Government observed that the Court of Justice had held to be contrary to Community law the legislation in force in the United Kingdom concerning jurisdiction over broadcasters on the ground that it was not based on the criterion of establishment. The Belgian Government concludes from this that licences granted on the basis of this legislation are also vitiated in law, so that there can be no question of the broadcasters in question in this case coming under the jurisdiction of the United Kingdom. Such an argument cannot be accepted. The judgment of the Court of Justice in the case cited confirms, on the contrary, that the Member State having jurisdiction over a broadcaster is the one in which that broadcaster is established. The question of the validity of licences granted by the United Kingdom is irrelevant in this regard.

22. However, it still remains to examine the other part of the question put in this context by the national court concerning the importance to be accorded to the origin of the programmes broadcast. In order to understand this question, it must be recalled that, according to the Belgian Government, the programmes in question are not in conformity with the requirements of Articles 4 and 5 of the Directive. The Belgian Government considers that the programmes do not come under the United Kingdom's jurisdiction because they do not comply with either the legislation of that Member State or with the provisions of the Directive.

23. That argument must be rejected. A Member State's jurisdiction, for the purposes of Article 2(1) of the Directive, does not depend on the nature of the programmes broadcast. The only decisive point is whether a *television broadcaster* comes under the jurisdiction of a Member State or whether, if this is not the case, it fulfils one of the

technical criteria set out in the second indent of that provision. The fact that the programmes broadcast by a television broadcaster may not be in conformity with Articles 4 and 5 of the Directive has no bearing on the allocation of jurisdiction under Article 2(1). This is the view taken by all the other parties to the proceedings.

24. The answer to the first question must therefore be that a television broadcaster comes under the jurisdiction of the Member State in which it is established. The origin of the programmes which it broadcasts is irrelevant in determining the Member State which has jurisdiction over it pursuant to the Directive.

The second question

25. The second question relates to the situation of a television broadcaster which has obtained authorization from a Member State without coming under the jurisdiction of a Member State 'within the meaning of this Directive'. Although the question refers to the 'jurisdiction' of a Member State, it would be more useful to interpret it as referring to a broadcaster not coming under the jurisdiction of a Member State either pursuant to the first indent or pursuant to the second indent of Article 2(1) of the Directive. As the German Government rightly observes, it is hard to see on the basis of which criteria of domestic law a broadcaster were to be authorized if it were not established in that Member State (so that it would not be covered by the first indent of Article 2(1)) and if it did not use a frequency or satellite capacity granted by that Member State or an up-link situated in that Member State (so that it would not be covered by the second indent of Article 2(1)). This therefore appears to be a situation which in practice never occurs.

26. Moreover, Mr Denuit has rightly pointed out that such a case could hardly entail a factual intra-Community situation requiring the application of Community law.

27. In any event, this is not the kind of situation existing in this case. As already mentioned, the broadcaster in question is, by all appearances, established in the United Kingdom. Even if it were not established in the United Kingdom (or in another Member State), the fact remains that the programmes in question are broadcast by means of a satellite capacity allocated to the Grand-Duchy of Luxembourg, a fact which even the Belgian Government has not contested. Thus, one of the jurisdiction criteria set out in the second indent of Article 2(1) would be fulfilled in any event. As Mr Denuit stated at the hearing, the situation would be the same if, in order to broadcast the programmes in question, an up-link situated in the United Kingdom were used.

28. For the reasons explained above, I agree with Mr Denuit, the Commission and the French and United Kingdom Governments that the Court does not need to reply to the second question.

The third question

29. By this third question, the national court seeks to ascertain whether a Member State must, under Article 2(2) of the Directive, ensure free reception of broadcasts from other Member States and not impede retransmission of such broadcasts even if they do not comply with the requirements laid down in Articles 4 and 5 of the Directive.

30. The Court has already replied to this question in the judgment which it gave in Case C-11/95. In that judgment it held, 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 Directive 89/552, and, second, that the receiving Member State is not authorized to exercise it own control in that regard'. [13] That also applies where compliance with Articles 4 and 5 of the Directive is concerned. [14] Contrary to what the Belgium Government contended at the hearing, the fact that the provisions of domestic law that were in point in that judgment are not the same as in this case is of no consequence. In the passage from that judgment cited above, it is not the provisions of domestic law which the Court interpreted but the Directive itself, which is also in question in the present case.

31. It is true that Article 2(2) of the Directive limits the scope of the obligations which it imposes only to reasons 'which fall within the fields coordinated by this Directive'. However, the matters dealt with in Articles 4 and 5 of the Directive are, precisely, fields coordinated by the Directive.

32. The possibility provided for in the second subparagraph of Article 2(2) of the Directive for provisionally suspending retransmission of broadcasts from other Member States can only apply if the conditions laid down in that provision are fulfilled. It is an exceptional measure. [15] It does not apply in the event of failure to comply with Articles 4 and 5 of the Directive. The Greek Government's argument that it may be generally deduced from that provision that secondary control by the receiving State is permissible cannot therefore be followed.

13 — Case C-11/95 *Commission* v *Belgium*, cited above in footnote 3, paragraph 34.

14 — Case C-11/95 *Commission* v *Belgium*, cited above in footnote 3, paragraph 42.

15 — Case C-11/95 *Commission* v *Belgium*, cited above in footnote 3, paragraphs 36 and 39.

33. As the Court has found, in such a situation a Member State is not allowed to take the law into its own hands. In such cases it cannot therefore take unilateral measures to counter any failure by other Member States to comply with the provisions of the Directive. However, it is entitled to bring an action against that Member State pursuant to Article 170 of the Treaty. It may also ask the Commission to take action itself against the Member State pursuant to Article 169 of the Treaty. [16]

34. In the judgment given in Case C-11/95 *Commission* v *Belgium* the Court did not determine the question whether 'in the light of Directive 89/552, a Member State is still entitled, on the basis of Article 59 of the Treaty to take measures to prevent a person providing services whose activity is entirely or principally directed towards its territory from exercising the freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established in that State'. [17] In effect, that question is whether the case-law of the Court, confirmed most recently in the *TV 10* case [18] in 1994, is still applicable after the entry into force of the Directive.

35. The French and United Kingdom Governments, like the Belgian Government, consider that this case-law remains applicable. I took the same position in my Opinion in Case C-11/95 *Commission* v *Belgium*. However, in that case, I clearly indicated that that case-law is, in my view, applicable only if the television broadcaster concerned acts *abusively* and that it calls for a restrictive interpretation. [19] In the present case, there is nothing to indicate such an abuse. The Belgian Government's argument that failure to comply with Articles 4 and 5 of the Directive constitutes in itself such an abuse must, in my view, be rejected. Following that argument would in fact allow secondary control by the State of reception, which is incompatible with the scheme of the Directive.

Therefore, there is no need to examine this question in any further detail in the *present* [20] case.

36. It must therefore be concluded that Article 2(2) of the Directive is to be interpreted as meaning that a Member State must ensure free reception of television broadcasts from other Member States and must not impede retransmission of those broadcasts even if they do not comply with Articles 4 and 5 of the Directive.

16 — Case C-11/95 *Commission* v *Belgium*, cited above in footnote 3, paragraphs 36 and 37.

17 — Cited above in footnote 3, paragraph 65.

18 — Case C-23/93 *TV 10* [1994] ECR I-4795, paragraph 20.

19 — See my Opinion in Case C-11/95 *Commission* v *Belgium*, cited above in footnote 3, paragraphs 73 et seq.

20 — I refer here again to my Opinion in Case C-56/96, in which this question was examined thoroughly.

C — Conclusion

37. I therefore propose that the Court should reply as follows to the questions submitted by the Tribunal de Première Instance, Brussels:

(1) Article 2(1) 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 is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established. The origin of the programmes which it broadcasts is irrelevant in determining the Member State which has jurisdiction over it under the Directive.

(2) Article 2(2) of the Directive is to be interpreted as meaning that a Member State must ensure free reception of television broadcasts from other Member States and must not impede retransmission of those broadcasts even if they do not comply with Articles 4 and 5 of the Directive.