JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
13 December 2000 *

In Case T-69/99,

Danish Satellite TV (DSTV) A/S (Eurotica Rendez-Vous Television), established in Frederiksberg, Denmark, represented by J.-P. Hordies and A. Maqua, of the Brussels Bar, with an address for service in Luxembourg at the office of Myson SARL, 30 Rue de Cessange,

applicant,

v

Commission of the European Communities, represented by K. Banks and M. Wolfcarius, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

supported by

United Kingdom of Great Britain and Northern Ireland, represented by R. Plender QC and R.V. Magrill, of the Treasury Solicitor's Department, acting as Agents, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION for annulment of the act of the Commission of 22 December 1998, addressed to the United Kingdom and notified to the applicant on 28 December 1998,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. Pirrung, President, A. Potocki and A.W.H. Meij, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 28 September 2000,

gives the following

Judgment

Legal background to the dispute

1 Under Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC) and Article 66 of the EC Treaty (now Article 55 EC), Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) was adopted. That directive was amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60).

2 Article 2a(1) and (2) of Directive 89/552, as amended, states:

'1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this directive.

2. Member States may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled:

(a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22(1) or (2) and/or Article 22a;

(b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in (a) 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 the measures it intends to take should any such infringement occur again;

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

The Commission shall, within two months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Community law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.'

3 Under Article 22 of Directive 89/552, as amended:

'1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.

2. The measures provided for in paragraph 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.'

Background to the dispute

4 Danish Satellite TV ('DSTV') A/S is a television company established under Danish law. DSTV retransmits by satellite the television service 'Eurotica Rendez-Vous' to viewers in various Member States, including the United Kingdom.

5 By letters of 9 January 1998, the United Kingdom authorities informed the Commission and DSTV that they were of the view that that company's

broadcasts had manifestly, seriously and gravely infringed Article 22 of Directive 89/552, as amended, and had done so on a regular basis, including on at least two occasions in the previous 12 months.

6 Following several exchanges of observations with DSTV, on 30 July 1998, the United Kingdom Government made the Foreign Satellite Service Proscription Order 1998 ('the Order') under section 177 of the Broadcasting Act 1990.

7 The Order was due to enter into force on 20 August 1998, subject to negative resolution of the United Kingdom Parliament, before which it had been laid. On 17 August 1998, DSTV applied to the High Court of Justice, England and Wales, for leave to apply for judicial review of the Order. On 19 August 1998, the hearing was adjourned until 9 September 1998 and the coming into force of the Order was stayed. On 9 September 1998, DSTV was granted leave to challenge the Order. On 10 September 1998, the stay on the entry into force of the Order was lifted and the Order entered into force.

8 The effect of the Order is, essentially, to make it an offence, in particular, to supply equipment or goods in connection with the service 'Eurotica Rendez-Vous', to advertise that service or to publish the times of its programmes.

9 By letter of 15 September 1998, the United Kingdom informed the Commission that the Order had been made.

10 By an act referred to as a decision, which was adopted on 22 December 1998 ('the contested act'), the Commission took the view that the measures adopted by the Member State concerned were not discriminatory and that they were appropriate for the purpose of protecting minors and stated, in Article 1, that they were compatible with Community law.

11 Article 2 thereof states that the contested act is addressed to the United Kingdom.

12 On 28 December 1998, the contested act was notified to DSTV.

13 By judgment of 12 February 1999, the High Court dismissed DSTV's application and rejected its alternative request for a question to be referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC). The High Court refused DSTV leave to appeal to the Court of Appeal. DSTV's application to the Court of Appeal for leave to appeal was dismissed.

Procedure

14 By application lodged at the Registry of the Court of First Instance on 5 March 1999, DSTV brought the present action for annulment.

15 By order of 1 October 1999, the United Kingdom Government was given leave to intervene in the proceedings in support of the form of order sought by the Commission.

16 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. The parties presented oral argument and answered questions put to them by the Court at the hearing on 28 September 2000.

Forms of order sought by the parties

17 DSTV claims that the Court should:

— annul the contested act;

— order the Commission to pay all the costs.

18 The Commission contends that the Court should:

— declare the application inadmissible or, at the very least, unfounded;

— order DSTV to pay the costs.

19 The intervener submits that the Court should:

— declare the application inadmissible;

— in the alternative, dismiss the application;

— in any event, order the applicant to pay the costs.

Admissibility

Arguments of the parties

20 The applicant claims that it is directly concerned, for the purposes of the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC), by the contested act, since that act renders valid the Order which, without that validation, would have had to be revoked. Since the contested act did not require any further national implementing measure in order for it to apply to DSTV, no national measure of a discretionary nature intervened between DSTV and the contested act.

21 The Court of Justice has held on many occasions that an individual is directly concerned by a Commission decision addressed to a Member State and rendering valid measures adopted by that State (Joined Cases 106/63 and 107/63 *Toepfer and Getreide-Import* v *Commission* [1965] ECR 405, 411).

22 The Court of Justice has even held that an authorisation addressed to a Member State was of direct concern to an individual applicant, since the competent national authorities had informed the applicant that they would reject its application for an import licence as soon as the Commission had authorised them to do so under Article 115 of the EC Treaty (now Article 134 EC) (Case 62/70 *Bock* v *Commission* [1971] ECR 897, paragraphs 7 and 8).

23 The Commission and the intervener contend, essentially, that the contested act is not of direct concern to DSTV, since it merely confirms ex post facto that the United Kingdom authorities exercised their discretionary power in accordance with Directive 89/552, as amended. The contested act does not, as in *Toepfer and Getreide-Import* v *Commission*, render valid a national measure nor can it be placed on the same footing as a decision giving prior authorisation to domestic measures, such as those at issue in *Bock* v *Commission*.

Findings of the Court

24 For an individual applicant to be directly concerned, for the purposes of the fourth paragraph of Article 173 of the Treaty, by a Community measure, that measure must directly affect the legal situation of the person concerned and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules (see, to that effect, Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43).

25 As is clear from the account of the facts of the dispute, the Order exists in law independently from the contested act. The Order entered into force and produced legal effects as from 10 September 1998, whereas the contested act was adopted only on 22 December 1998.

26 According to the very words in which the second subparagraph of Article 2a(2) of Directive 89/552, as amended, is couched, the Commission is, within two months following notification of 'the measures taken by the Member State', to take a decision on whether the measures are compatible with Community law. Furthermore, if the Commission decides that they are not, the Member State is to be required 'to put an end to the measures in question as a matter of urgency'.

27 Since the contested act is thus limited merely to pronouncing ex post facto on the compatibility with Community law of the Order, which was adopted, independently, by the United Kingdom in the exercise of its discretionary power, DSTV cannot invoke *Toepfer and Getreide-Import* v *Commission* and *Bock* v *Commission* in support of the argument that its legal position is directly affected by that act.

28 Contrary to what had been the case in *Toepfer and Getreide-Import* v *Commission*, the Commission did not, in the present case, retrospectively authorise the Member State concerned to retain a national measure. Consequently, the contested act did not replace that measure and therefore did not retrospectively render it valid.

29 Nor did the Commission, in the present case, in contrast to the situation in *Bock* v *Commission*, give the Member State concerned prior authorisation to adopt national measures and those measures were therefore not taken for the purpose of implementing the contested act.

30 In those circumstances, DSTV cannot be directly concerned, for the purposes of the fourth paragraph of Article 173 of the Treaty, by the contested act and is therefore not entitled to seek its annulment.

31 It should be noted that the applicant is not thereby deprived of judicial protection. As is clear from the facts of the case, DSTV could properly refer the Order to the High Court.

32 It follows from all the foregoing considerations that the application must be dismissed as inadmissible.

Costs

33 Under the first paragraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

34 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs. It follows that the United Kingdom must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber),

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to bear its own costs and to pay those of the Commission;**

3. **Orders the United Kingdom to bear its own costs.**

Pirrung Potocki Meij

Delivered in open court in Luxembourg on 13 December 2000.

H. Jung
Registrar

A.W.H. Meij
President