OPINION OF ADVOCATE GENERAL LENZ

delivered on 30 April 1996 *

A — Introduction

1. The present case and Case C-222/94, in which I am also delivering my Opinion today, provide the Court with its first opportunity to address some of the central problems arising from 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 Television Directive').

Relevant provisions of Community law

2. The Court has consistently held that the transmission of television signals — including those in the nature of advertisements — must be regarded as a provision of services within the meaning of Articles 59 and 60 of the EC Treaty. [2] The scope of the freedom to provide services protected by those provisions is also applicable if a cable network operator established in one Member State distributes television programmes of broadcasters from other Member States. [3]

3. The principal objective pursued by the Television Directive is to remove barriers to the free provision of television broadcasting services. [4] The recitals in the preamble to the directive state as follows:

'[9] ... the laws, regulations and administrative measures in Member States concerning the pursuit of activities as television broadcasters and cable operators contain disparities, some of which may impede the free movement of broadcasts within the Community and may distort competition within the common market;

* Original language: German.

1 — OJ 1989 L 298, p. 23.

2 — The Court thus held as early as its judgment in Case 155/73 *Sacchi* [1974] ECR 409, at paragraph 6.

3 — Judgment in Case 352/85 *Bond van Adverteerders and Others* v *Netherlands State* [1988] ECR 2085, at paragraphs 14 to 17.

4 — See the judgment in Case C-412/93 *Leclerc-Siplec* v *TF1 Publicité and M6 Publicité* [1995] ECR I-179, at paragraph 28. See also the judgment of the EFTA Court of 16 June 1995 in Joined Cases E-8/94 and E-9/94 *Forbrukerombudet* v *Mattel Scandinavia A/S and Lego Norge A/S*, at paragraph 22.

[10] ... all such restrictions on freedom to provide broadcasting services within the Community must be abolished under the Treaty;

[11] ... such abolition must go hand in hand with coordination of the applicable laws; ... this coordination must be aimed at facilitating the pursuit of the professional activities concerned and, more generally, the free movement of information and ideas within the Community;

[12] ... it is consequently necessary and sufficient that all broadcasts comply with the law of [the] Member State from which they emanate'. [5]

According to the grounds given by the Council, the Television Directive lays down 'the minimum rules needed to guarantee freedom of transmission in broadcasting'. The organization, financing and content of programmes remain the responsibility of the Member States. [6] The subsequent recitals provide that:

'[14] ... it is necessary, in the common market, that all broadcasts emanating from and intended for reception in the Community, and in particular those intended for reception in another Member State, should respect the law of the originating Member State applicable to broadcasts intended for reception by the public in that Member State and the provisions of this directive;

[15] ... the requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this directive is sufficient under Community law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States; ... however, the receiving Member State may, exceptionally and under specific conditions, provisionally suspend the retransmission of televised broadcasts'. [7]

4. Article 1 of the Television Directive, which comprises Chapter I thereof, sets out a number of definitions. The term 'television broadcasting', *inter alia*, is there defined for

5 — Ninth to twelfth recitals in the preamble to the Television Directive. For the sake of clarity I have added the appropriate numbers in square brackets.

6 — Thirteenth recital in the preamble to the Television Directive.

7 — Fourteenth and fifteenth recitals in the preamble to the Television Directive.

the purposes of the directive. According to that definition, that term is there to be understood as meaning 'the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public'.

5. Chapter II of the directive ('General provisions') contains Articles 2 and 3. Those articles provide as follows:

'Article 2

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 retransmission 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;

(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 infringements in question in the Member State which has jurisdiction over the broadcaster concerned.

3. (...)

Article 3

1. Member States shall remain free to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by this directive.

2. 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.'

6. Chapter III ('Promotion of distribution and production of television programmes') contains, in Articles 4 to 9, provisions which are designed to ensure 'for European productions ... a majority proportion in television programmes of all Member States'. [8] Moreover, 'new sources of television production' [9] in the Community should be stimulated by reserving part of transmission time or the budgets of television producers for independent producers.

7. Article 4 of the directive accordingly prescribes that the Member States shall ensure 'where practicable and by appropriate means' that broadcasters reserve for European works [10] a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services (Article 4(1)). If this proportion cannot be attained, it must not be lower than the average for 1988 or 1990 in the Member State concerned (Article 4(2)).

8 — Twentieth recital in the preamble to the Television Directive.

9 — See the twenty-fourth recital in the preamble to the Television Directive.

10 — This expression is defined in Article 6 of the directive.

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

8. Chapter IV (Articles 10 to 21) of the directive contains provisions relating to television advertising and sponsorship. Article 14 prohibits television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls. Article 15 lays down various criteria with which television advertisements for alcoholic beverages must comply.

9. Chapter V (Article 22) of the directive deals with the protection of minors. This requires Member States 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 involving pornography or gratuitous violence'.

10. Chapter VI (Article 23) of the directive deals with the right of reply. Chapter VII (Articles 24 to 27) contains final provisions. Under Article 25(1) of the directive, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with that directive not later than 3 October 1991. Under Article 25(2) of the directive, the text of the main provisions of national law adopted by the Member States in the fields governed by the directive had to be communicated to the Commission.

Legal position in Belgium

11. In Belgium the regions are to a large extent responsible for television. I therefore set out below the legal position with regard to the French Community, the Flemish Community, the bilingual Metropolitan Brussels Region and the German-speaking Community in each case.

Legal position in the French Community

12. In the French Community the provisions which are relevant here are contained

in the Decree of the French Community of 17 July 1987 on the audio-visual sector [11] (hereinafter 'the Decree of 17 July 1987') — in the version resulting from the Decree of the French Community of 19 July 1991. [12]

13. Article 20 et seq. of the Decree of 17 July 1987 concern the broadcasting of radio and television programmes by cable networks.

14. Article 22(1) concerns the programmes of Belgian television channels. According to Article 22(2) of the decree, the 'distributor' — that is, the operator of such a cable network — may, with the prior written consent of the French Executive (that is, the Executive of the French Community — 'Exécutif de la Communauté française'), distribute programmes of other television channels which have been approved by the State in which they are established and which comply with the conditions laid down by the Executive in the instrument by which it gave its consent. That consent may be revoked.

Cable network operators therefore need the prior authorization of the Executive if they wish to distribute over their network the programmes of foreign channels, and hence also broadcasts from other Member States. Such authorization is given only if the broadcaster has previously concluded with the Executive an agreement governed by private law. A special outline for such agreements is given in the French Executive's Order of 22 December 1988. [13] In these agreements broadcasters must *inter alia* undertake to devote a portion of their budget to the purchase or production of European works.

15. Article 26 of the decree governs the question of the permissibility of television advertising. According to Article 26(2), television broadcasters who comply with the conditions laid down by the French Executive under Article 22(2) may broadcast commercial advertisements intended in particular for viewers in the French Community ('publicité commerciale plus particulièrement destinée aux téléspectateurs de la Communauté française'), subject to express prior authorization from the Executive. Under Article 26(3) the Executive lays down the conditions governing the inclusion of advertising in television programmes. These conditions prescribe in particular that the television broadcaster concerned must be involved in encouraging the production of audio-visual programmes of the French Community and the Member States of the European Union and in maintaining and promoting pluralism in the French Community press.

11 — *Moniteur Belge* of 22 August 1987, p. 12505.

12 — Décret modifiant la loi du 6 février 1987 relative aux réseaux de radiodistribution et de télédistribution et à la publicité commerciale à la radio et à la télévision, le décret du 12 décembre 1977 portant statut de la Radio-Télévision belge de la Communauté française (RTBF) et le décret du 17 juillet 1987 sur l'audiovisuel (*Moniteur Belge* of 2 October 1991, p. 21671).

13 — *Moniteur Belge* of 17 March 1989, p. 4896; amended by the Order of 18 December 1991 (*Moniteur Belge* of 26 February 1992, p. 6532).

Article 26b(1) of the decree provides that television broadcasters covered by Article 26(2) may broadcast so-called 'Télé-achat' programmes [14] subject to express prior authorization from the Executive. From the statements of the parties to these proceedings it is to be concluded that this provision concerns sales broadcasts intended particularly for viewers in the French Community.

16. According to Article 22(2a) of the decree, the operator of a cable network may distribute programmes of television broadcasters who have authorization under Article 26(2) and who comply with the conditions laid down by the Executive on the basis of Article 26(3). [15]

Legal position in the Flemish Community

17. Here the relevant legal field was initially governed — in so far as concerns this case — by the Decree of the Flemish Community of 28 January 1987 on transmission of radio and television programmes by radio and television cable networks and on the approval of private television companies [16] (hereinafter 'the Decree of 28 January 1987'). Under Article 3 of the decree, programmes of television broadcasters from other Member States could be distributed over Flemish cable networks only if they were transmitted in one of the languages of the country of origin and subject — in so far as private broadcasters from other Member States were concerned — to prior authorization from the Flemish Executive, to which conditions might be attached.

18. In its judgment in Case C-211/91 [17] (delivered on 16 December 1992) the Court of Justice declared that those rules were *inter alia* contrary to Articles 59 and 60 of the Treaty.

19. On 4 May 1994 the Flemish Community issued a decree concerning radio and television cable networks and the authorization necessary for the establishment and operation of such networks and on promoting the broadcasting and production of television programmes [18] (hereinafter 'the Decree of 4 May 1994'). That decree repealed parts of the Decree of 28 January 1987 (including Article 3) and re-regulated the matters concerned.

14 — These are broadcasts in which offers for the purpose of sale, purchase or hiring of objects or for the purpose of the provision of services in return for payment are made direct to viewers.

15 — The Commission has formed the view (by implication) that this provision applies also to the distribution of 'Télé-achat' broadcasts under Article 26b of the Decree. The defendant has not contested that interpretation of the relevant provisions.

16 — *Moniteur Belge* of 19 March 1987, p. 4196.

17 — *Commission v Belgium* [1992] ECR I-6757.

18 — *Moniteur Belge* of 4 June 1994, p. 15434.

20. Article 3 of the Decree of 4 May 1994 provides that no person shall establish or operate a cable network unless authorization has been granted by the Flemish Government in accordance with the conditions laid down in the decree. Such authorization mentions *inter alia* the programmes which may be distributed. Any modifications relating to the distribution of a new programme must be submitted for assent ('goedkeuring') to the Flemish Government, which determines whether the conditions laid down in the decree are satisfied. The decision concerning assent to the modification or its refusal, as the case may be, are to be notified to the network operator within four months. The operator is entitled to proceed with the planned modification as soon as the authorities have given their assent or as soon as the period of four months has elapsed (Article 5(2) of the decree).

21. According to Article 10(2) of the decree, programmes of a television broadcaster who has received authorization from another Member State of the European Union may be distributed over the network provided that the said broadcaster is subject in the Member State concerned to the control applicable there to television broadcasters whose work is intended for public distribution in the Member State concerned and that such control relates in fact also to compliance with the provisions of European law. It is further required that the television broadcaster and the programmes broadcast by him do not endanger public policy, good morals and public security in the Flemish Community.

Legal position in the bilingual Metropolitan Brussels Region

22. Under Article 127(2) of the Belgian Constitution the decrees issued by the French Community and the Flemish Community apply also to the operators of cable networks established in the bilingual Metropolitan Brussels Region in so far as by reason of their activity they must be classed with one community or the other. [19]

23. For other cable network operators in that region the Belgian Law on Radio and Television Networks and the Pursuit of the Activity of Distributing Television Programmes in the Bilingual Metropolitan Brussels Region, [20] promulgated on 30 March 1995, now applies.

Legal position in the German-speaking Community

24. At first the Royal Decree of 24 December 1966 on Networks for the Distribution

19 — Statement made by the defendant in the rejoinder and not challenged by the Commission in the oral procedure.

20 — The text of this Law is produced by the defendant in the annex to the defence.

of Radio Broadcasts [21] applied to the German-speaking Community. According to Article 21 of that decree advertisements *inter alia* could not be retransmitted. [22]

25. The legal basis for that decree was Article 13 of a Law of 26 January 1960, [23] which was repealed by Article 30 of the Law of 13 July 1987. [24] Accordingly, there is in the German-speaking Community at present no legal provision under which the re-transmission of television broadcasts could be prohibited. [25]

The course of the procedure

26. On 3 November 1992 the Commission sent the Kingdom of Belgium a letter giving it, in pursuance of Article 169 of the Treaty, the opportunity to submit its observations on the complaints made by the Commission. In the letter the Commission took the view that Article 2(2) of the Television Directive had not been duly transposed into national law either in the three language communities or in the Metropolitan Brussels Region. As far as the French Community was concerned, the Commission complained in addition of an infringement of Articles 13, 14, 15 and 23 of the directive. With regard to the Flemish Community it complained of an infringement of Articles 4, 5, 22 and 23 of the directive. Finally it claimed that Chapters III and IV of the directive had not been duly implemented in the German-speaking Community or in the Metropolitan Brussels Region.

27. The Commission thereafter received a letter of 5 April 1993 presenting the views of the Flemish Community. It also received a letter of 21 April 1993 containing the comments of the French Community.

28. On 10 January 1994 the Commission sent the Kingdom of Belgium a reasoned opinion in which it alleged that the Kingdom of Belgium had not informed the Commission sufficiently precisely of the measures it had adopted or proposed to adopt for the complete implementation of the directive. Moreover the Kingdom of Belgium had not duly implemented Article 2(2) of the directive as regards the three language communities or the Metropolitan Brussels Region. With regard to the French Community the Commission further complained of an infringement of Articles 14 and 15 of the directive. As regards the Flemish Community it complained of an infringement of Articles 4, 5 and 22 of the directive. Finally it claimed that the provisions of the directive had not been duly implemented in the Metropolitan Brussels Region as far as broadcasters who could not be classed with either the French or the Flemish Community were concerned. The Kingdom of Belgium had therefore, it was claimed, failed to fulfil its

21 — *Moniteur Belge* of 24 January 1967, p. 604.

22 — Statement made by the Commission in its reply and not contested by the defendant.

23 — *Moniteur Belge* of 6 February 1960, p. 726.

24 — *Moniteur Belge* of 12 August 1987, p. 12071.

25 — The defendant made these statements in the rejoinder. The Commission has not contested them.

obligations under the Television Directive and under Article 5 of the Treaty. The Commission therefore called upon the Kingdom of Belgium to bring these infringements to an end within two months.

29. The Commission thereupon received a letter of 4 February 1994 enclosing a draft of a new decree of the Flemish Community. By a letter of 9 June 1994 the Kingdom of Belgium sent the Commission a copy of the Decree of 4 May 1994 which had in the meantime been adopted.

The French Community's reply was contained in a letter of 11 April 1994. Finally the Commission received a letter from a Belgian Minister of 7 April 1994 going into the complaints relating to the Metropolitan Brussels Region.

30. On 16 January 1995 the Commission brought an action before the Court of Justice on the basis of Article 169 of the Treaty, which forms the subject-matter of these proceedings. In its application the Commission claimed a declaration that:

— by maintaining in respect of the French Community in the French-speaking region a system of prior authorization for retransmission by cable of television broadcasts from other Member States;

— by maintaining in respect of the French Community in the French-speaking region a system of express prior authorization, to which conditions are attached, for retransmission by cable of television broadcasts from other Member States containing commercial advertising or teleshopping programmes especially intended for viewers in the French Community;

— by maintaining in respect of the Flemish Community in the Dutch-speaking region a system of prior authorization for retransmission by cable of television broadcasts from other Member States;

— by failing to adopt in respect of the bilingual Metropolitan Region of Brussels the laws, regulations and administrative measures necessary to comply with Article 2(2) of Directive 89/552/EEC;

— by failing to adopt in respect of the German-speaking Community the laws, regulations and administrative measures necessary to comply with Article 2(2) of Directive 89/552/EEC;

— by failing to adopt in respect of the French Community the laws, regulations and administrative measures necessary to comply fully with Articles 14 and 15 of Directive 89/552/EEC;

the Kingdom of Belgium had failed to fulfil its obligations under the Television Directive and in particular under Articles 2, 14 and 15 thereof.

The Commission further claimed that the Kingdom of Belgium should be ordered to pay the costs.

31. The defendant contends that the application should be dismissed as unfounded in so far as the French Community, the German-speaking Community and the Metropolitan Brussels Region are concerned. In so far as the application concerns the Flemish Community, it contends that the application should be dismissed as inadmissible or in the alternative as unfounded.

B — Discussion

32. I shall now consider first of all whether the Commission's complaint that the Kingdom of Belgium has failed to fulfil its obligations under Article 2(2) of the Television Directive is well founded. It will be necessary to make a separate examination of each of the three language regions and the bilingual Metropolitan Brussels Region. Finally, I shall have to consider the complaint that the Kingdom of Belgium has infringed Articles 14 and 15 of the directive in relation to the French Community.

I. Infringement of Article 2(2) of the Television Directive

1. French Community

(a) Article 22(2) of the Decree of 17 July 1987

33. The Commission takes the view that, according to Article 2(1) of the Television Directive, it is in principle only for the Member State from which the broadcast emanates (the 'originating Member State') [26] to check whether the television broadcaster concerned has complied with the law of that Member State and the provisions of the Television Directive. Article 2(2) of the directive requires the Member States to ensure

26 — Hereinafter I shall use this expression which is also used, moreover, in the fourteenth recital in the preamble to the Television Directive. The question which Member State is competent in a specific case is discussed in greater detail in my Opinion in Case C-222/94.

freedom of reception of television broadcasts from other Member States and not to restrict their retransmission — with the exception contained in the second sentence of that paragraph — for reasons which fall within fields coordinated by the directive. It is therefore incompatible with that provision for a Member State (the 'receiving Member State') [27] to make the retransmission by a cable network of television broadcasts from other Member States dependent on a prior authorization, as Article 22(2) of the Decree of 17 July 1987 does.

34. The Kingdom of Belgium does not deny that the French Community provisions require such an authorization. It takes the view, however, that the provision in question is in conformity with Community law. To demonstrate that it refers to a whole series of considerations which I shall later have to examine.

35. The defendant contends that there can be no infringement of the provisions of the directive for the very reason that they are not applicable to the field of cable television. That is, in any case, the position where it is not a case of an initial transmission over a cable network. [28] In that connection the defendant relies in particular on the definition of the concept of 'television broadcasting' in Article 1(a) of the directive, according to which the meaning is *inter alia* 'the initial transmission ... of television programmes.' [29] The Commission's view, the defendant contends, cannot be supported by the concept of 'retransmission' used in Article 2(2), which is not defined in the directive. If the intention had really been to include retransmission by cable, a different expression would have been used. Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [30] also uses the expression 'cable retransmission'. Otherwise the Television Directive would diverge from international terminology. [31]

The defendant also points out that at the time when the Television Directive was adopted cable television was not yet very widespread. It cannot therefore be assumed that the European legislature wished to regulate that field.

36. These arguments do not convince me. In my view, there can be no doubt that the Television Directive also covers the field of retransmission of programmes from other

27 — Here too, for the sake of simplicity, I follow the terminology of the recitals in the preamble to the Television Directive (cf. the fifteenth recital).

28 — By that the defendant means the position of a television broadcaster who feeds his programme direct into a cable network.

29 — See point 4 above.

30 — OJ 1993 L 248, p. 15.

31 — The defendant contends that, accordingly, instead of the expression 'retransmission' in the French version of the directive the expression 'réémission' would have been expected.

Member States by cable networks. The contrary view cannot be based on the definition of the concept of 'television broadcasting' if only because Article 2(2) of the directive does not refer to that expression as such but to 'retransmission'. Nor can it be deduced from Directive 93/83 that the concept of 'retransmission' is not applicable to the activity of operators of cable networks. On the contrary, that directive supports the Commission's view. In it the concept of 'cable retransmission' is defined as 'retransmission' of programmes 'by a cable or microwave system'. [32] That confirms my view that the concept of 'retransmission' is quite broad enough, in the view of the European legislature, to cover also transmission by cable networks.

37. Moreover, it may be clearly seen from the Television Directive that the intention is that it should be applicable to cable retransmission of television broadcasts. In this connection the Commission rightly points to the ninth and tenth recitals in the preamble. [33] There reference is made *inter alia* to the impediments which may arise for freedom to provide services from the disparities between national measures concerning 'the pursuit of activities ... as cable operators'. '*All such* restrictions on freedom to broadcast within the Community must in the Council's view be abolished.' [34]

In this connection the Agreement on the European Economic Area, signed on 2 May 1992 and approved by the Community by decision of the Council and Commission of 13 December 1993, [35] seems to be of some interest. For the purposes of that agreement an addition to Article 15 of the Television Directive was made according to which the EFTA States were to remain free to 'compel the cable companies operating on their territories to scramble or otherwise obscure spot advertisements for alcoholic beverages', but that 'exception' was not to 'have the effect of restricting the retransmission' of other television programmes. [36] This, too, confirms the Commission's view that the Television Directive is applicable to cable television.

38. Moreover, the Commission rightly points out that in the European Convention on Trans-frontier Television [37] adopted by the Council of Europe on 5 May 1989 the concept of 'retransmission' is used. According to Article 3 thereof, the Convention is also applicable to programmes retransmitted by cable. The Convention was adopted only a few months before the Community's Television Directive. That shows that at the material time thought had clearly been devoted — contrary to the view expressed by the defendant — to regulating the field of cable television. The fact, mentioned by the

32 — Article 1(3) of that directive (op. cit., footnote 30).

33 — The wording of these passages is given above under point 3.

34 — See the tenth recital (my emphasis).

35 — OJ 1994 L 1, p. 1. The text of the agreement is given on p. 3 et seq.

36 — See Annex X to the agreement (op. cit., footnote 35), p. 417.

37 — The French and English versions of this Convention, together with a German translation, are printed in the *Bundesgesetzblatt* II 1994, p. 639.

defendant, that Belgium does not yet appear to have ratified that Convention is therefore irrelevant.

39. The defendant's assertion that the Television Directive does not cover the field of cable television must therefore be rejected, as must the defendant's objection that the French Community's provisions would apply only to domestic cable network operators so that there was no restriction of freedom to provide services. It must in fact be stated that, according to case-law, the distribution of television programmes from other Member States does indeed fall within the field of application of freedom to provide services. [38] From the ninth recital in the preamble to the Television Directive it may be seen that it was intended precisely to serve the purpose of harmonizing national measures restricting that freedom.

40. The defendant further contends that the requirement of authorization serves in practice chiefly to determine which Member State's law is applicable to a television broadcaster in accordance with Article 2(1) of the Television Directive. In this connection it claims that the application of Article 2(1) might lead to difficulties and possibly result in two Member States' taking the view that they had jurisdiction over one and the same television broadcaster.

41. That argument is unsound. Admittedly the application of Article 2(1) of the directive has given rise to difficulties [39] and a Member State has therefore a legitimate interest in ascertaining which Member State has jurisdiction over a given television broadcaster. However, it is quite obvious that a scheme which makes the retransmission of programmes from other Member States dependent upon authorization goes too far and is not therefore covered by that interest. The Commission has rightly pointed out that the defendant would have had to show that the requirement of authorization was essential to enable the Member State to obtain the necessary information and that there was no less restrictive way of achieving that. The defendant has not adduced any such proof.

42. There is another more fundamental consideration at the heart of the defendant's defence. The Kingdom of Belgium is of the opinion that Article 2(1) of the Television Directive takes precedence over Article 2(2). Accordingly, all television broadcasts must comply with the law of the originating Member State and — according to Article 3 of the directive — with the provisions of that directive. Such transmissions *alone* can benefit from the advantages of Article 2(2), that is to say, the other Member States are required to ensure freedom of reception and not to restrict retransmission only if that condition is satisfied. From that the defendant deduces that the receiving Member State is entitled to check whether the law of

38 — See point 2 above and the judgment in *Bond van Adverteerders* cited there.

39 — Cf. in this respect my Opinion in Case C-222/94.

the originating Member State and the provisions of the Television Directive have been observed.

In that respect the defendant claims that the French Community's procedure contributes in particular to the fulfilment of Articles 4 and 5 of the Television Directive. In the oral procedure before the Court the defendant further stated that Article 4 of the directive appeared to be addressed to all Member States and that it was therefore not the originating Member State alone which had to ensure compliance therewith.

43. I do not think this point of view can be accepted. It would result in precisely that secondary control of television broadcasts by the receiving Member State which the Television Directive was intended to exclude. If the defendant's view were to be followed, the liberalization in the sphere of television brought about by the directive would be largely nullified.

44. The defendant's view is not compatible with either the wording or the purpose of the directive. According to Article 2(1) thereof, the originating Member State must ensure that broadcasters under its jurisdiction or for whom it is responsible on other grounds comply with the law applicable to broadcasts intended for the public in that Member State. Under Article 3(2) of the directive the originating Member State must in addition ensure that television broadcasters under its jurisdiction comply with the provisions of the Television Directive. Both obligations are addressed to the *originating Member State. Receiving Member States* are addressed in Article 2(2). They must ensure freedom of reception and are obliged not to restrict retransmission of the relevant broadcasts — with one exception referred to therein — for reasons falling within the fields coordinated by the directive.

45. That fully corresponds to the idea underlying in particular the fifteenth recital in the preamble to the directive, according to which the obligation of the originating Member State to verify compliance with national law as coordinated by the directive is sufficient under Community law to ensure free movement of broadcasts 'without secondary control on the same grounds in the receiving Member States'. This clearly shows that the receiving Member State must not be allowed to effect such a secondary control. The following, last, sentence of the fifteenth recital emphasizes that point by stating that the receiving Member State may, however, 'exceptionally and under specific conditions' 'provisionally' suspend the retransmission of a programme.

46. Express authority for the receiving Member State to take action is to be found only in the second sentence of Article 2(2) of the Television Directive. That authority is,

however, severely restricted. First of all, it deals only with cases in which broadcasts from other Member States infringe Article 22, that is to say, cases in which the broadcasts in question might seriously impair the physical, mental or moral development of minors. The receiving Member State may, however, take action only if the infringements are manifest, serious and grave and if the broadcaster concerned has already infringed the same provision on several occasions and consultations with the transmitting State and the Commission have proved unavailing. From that detailed provision it can only be concluded that it is not intended that the receiving Member State shall be entitled to adopt unilateral measures against broadcasts from other Member States if the conditions set out therein are not met. Similarly, it may be concluded from that provision that the receiving Member State is not entitled to adopt unilateral measures against broadcasts from other Member States if there is, or is alleged to be, an infringement of other provisions of the Television Directive. That corresponds entirely to the statement already quoted from the fifteenth recital in the preamble to the directive. The defendant's view that the rule set out in the second sentence of Article 2(2) does not exclude the receiving Member State's right to check that *other* provisions of the directive have been observed is therefore not tenable.

47. This rule is therefore clearly based on the consideration that every Member State must rely on the competent Member State's performing its duties of control under Articles 2(1) and 3(2) of the directive as regards the broadcasters for which it is responsible. Moreover, that idea is also expressed in the provision already cited since the fifth sentence of Article 2(2) makes it quite clear that the possibility that the receiving Member State may under strictly defined conditions take action against broadcasts from other Member States with a view to the protection of minors is without prejudice to the right of the originating Member State to take action with regard to the infringements in question.

48. It therefore seems clear to me that the Television Directive is based on the idea that only the originating Member State is to monitor compliance with its national law and the Television Directive. As far as the field of application of the directive goes, the receiving Member State is authorized to take action against the retransmission of broadcasts from other Member States only in the cases strictly defined in the second sentence of Article 2(2) of the directive.

49. It appears clearly from the defendant's statements that the contested provision of the French Community is designed in particular to ensure that Articles 4 and 5 of the directive are observed. Contrary to the defendant's opinion, however, it is my view that precisely in this sphere the receiving Member State's right to subject broadcasts from other Member States to a secondary control cannot be accepted. Both Articles 4 and 5 clearly link the duties which they impose to conditions relating to the special characteristics of the Member State in question, which is also in the best position to judge 'where practicable and by appropriate means' what can and must be done to fulfil

such obligations. It would not be acceptable for another Member State to substitute its own assessment of what is practicable and appropriate for that of the originating Member State by subjecting its broadcasts to a (further) control.

50. That does not mean that it would be impossible to check whether the originating Member State had fulfilled its obligations. If a Member State considers that another Member State has failed to fulfil its obligations under the Television Directive it may bring an action for infringement of the Treaty under Article 170 of the Treaty or request the Commission itself to take action under Article 169 of the Treaty against the Member State concerned.

51. Nor can the defendant claim that those procedures offer no appropriate legal protection on the ground that television broadcasts by their nature are extremely ephemeral events and that any harm they cause cannot be remedied. As the Commission has rightly observed, in the course of such proceedings for infringement of the Treaty the Court may prescribe interim measures under Article 186 of the Treaty. But above all reference must be made once more to the conditions set out in the second sentence of Article 2(2) of the directive. If, even in such an important and sensitive sphere as that of protection of minors, a receiving Member State is entitled to take unilateral action only under special conditions and even then not immediately, it would be hard to understand why such a right should be considered to exist when the question is one of complying with the quota rules set out in Articles 4 and 5 for example.

52. Purely for the sake of completeness I would say that the requirement of authorization cannot be justified either by provisions such as Articles 3(1) and 19, according to which Member States may lay down stricter rules for television broadcasters under their jurisdiction, since we are dealing here with broadcasts from other Member States by broadcasters who are not subject to the jurisdiction of the receiving Member State.

53. As a result it may be stated that a secondary control of broadcasts from other Member States by the receiving Member State, as envisaged by the contested provision of the French Community, is in principle incompatible with the Television Directive. It should in any case be remembered that the Member States are only obliged not to restrict retransmission of such broadcasts for reasons which fall within the *fields coordinated by this directive*. The Television Directive does not provide for a complete harmonization of the field of television activity. In the seventeenth recital it is expressly stated that the directive is 'confined specifically to television broadcasting rules' and is without prejudice to existing or future Community acts of harmonization 'in particular to satisfy mandatory requirements concerning the protection of consumers and the

fairness of commercial transactions and competition'. If it were possible, therefore, for the contested requirement of authorization to be based on reasons falling within fields *not* coordinated by the Television Directive, there would be no infringement of Community law. In this connection the defendant has put forward several arguments which I must now examine.

54. This is perhaps the appropriate juncture for a first brief examination of the defendant's argument based on Article 10 of the Council of Europe Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms. [40] Under the second sentence of Article 10(1) of that Convention, the right of freedom to express opinions protected by that article does not prevent States from requiring the licensing of television enterprises. As the Commission rightly states, however, the fact that a system under which television broadcasters require authorization from the State concerned is compatible with the said Council of Europe Convention does not alter the fact that a corresponding requirement of authorization may be incompatible with Community law.

55. The Kingdom of Belgium pleads that the contested requirement of authorization is intended to make it possible to check whether the relevant broadcasts respect copyright and related rights. The defendant relies in this respect on Directive 93/83, previously cited, and in particular on Article 8(1) thereof, which reads as follows:

'Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.'

56. In the recitals in the preamble to the directive, the Council points out that in the field of copyright and related rights legal certainty is missing where programmes transmitted across frontiers through cable networks are concerned. Cable retransmission of such broadcasts is an act subject to copyright and rights related thereto. The cable operator therefore needs for the pursuit of his activity the authorization of every holder of rights. However, in the present state of the law he cannot be sure whether he has actually acquired all the rights covered by an agreement of that kind. [41] 'The legal framework for the creation of a single audio-visual area laid down in Directive 89/552/EEC must, therefore, be supplemented with reference to copyright'. [42]

40 — UNTS Vol. 213, p. 221.

41 — See the eighth, ninth and tenth and the twenty-seventh recitals in the preamble to the directive.

42 — Twelfth recital.

According to the directive the cable network operator must obtain the necessary authorizations by contractual agreements. In order to ensure that the smooth operation of contractual arrangements is not called in question by the intervention of outsiders holding rights in individual parts of a programme, [43] the directive provides in Article 9(1) that the Member States must ensure that the right of copyright owners and holders of related rights may be exercised 'only through a collecting society'.

57. It appears from the foregoing that the operator of a cable network must ensure that in the retransmission of broadcasts from other Member States no copyrights or related rights are infringed. For that purpose, the operators must make agreements with collecting societies which exercise these rights on behalf of their owners. The Member States must ensure that provision is made for the protection of such rights. It may be assumed that the Member States comply with this duty by imposing corresponding legal duties on cable network operators and ensuring that they are fulfilled. On the other hand, it is not clear why for that purpose it should be necessary to link retransmission to an authorization which is granted only if the foreign broadcasters concerned have concluded an agreement with the Executive of the French Community. The defendant has not made any observations from which it might be deduced that the requirement of a prior authorization was necessary for the protection of copyright and that there was no less restrictive means of attaining that objective.

58. To justify the provision at issue the Kingdom of Belgium also relies on Article 128 of the Treaty. Its view is that the Television Directive must now be interpreted in the light of that provision, which was inserted in the EC Treaty by the Treaty on European Union and forms the only article in Title IX ('Culture') of Part Three of the EC Treaty. Article 128(1) provides *inter alia* that the Community is to contribute to the flowering of the cultures of the Member States. Under Article 128(4) the Community is to 'take cultural aspects into account in its action under other provisions of the Treaty'.

59. The defendant appears to consider that this provision empowers the Member States to subject broadcasts from other Member States to a fresh control, though I am not clear how it arrives at this interpretation. The Television Directive itself also pursued cultural aims, particularly through the rules contained in Articles 4 and 5. In so far as the receiving Member State's right, posited by the defendant, to check whether the originating Member State has complied with its obligations under the Television Directive is linked to compliance with those articles, this is a field which has been coordinated by the directive. But according to the clear wording of Article 2(2) of the directive, quoted several times already, the receiving Member State may not restrict retransmission of

43 — Twenty-eighth recital.

television broadcasts from other Member States for reasons which fall within the fields coordinated by the directive. Moreover, it must be stated that the fact — uncontested — that the Member States have primary responsibility for questions of culture does not prevent the Community from adopting measures binding upon the Member States for the implementation of fundamental freedoms even when — as is the case in the field of television — cultural considerations must also be taken into account. It is true that Article 128(5) of the Treaty expressly states that in order to contribute to the achievement of the objectives referred to in that article, apart from recommendations only incentive measures 'excluding any harmonization of the laws and regulations of the Member States' may be adopted. Even the defendant, however, does not assert that as a result the legal basis for the Television Directive has become inapplicable. Article 128 thus provides no support for the defendant's view.

60. The defendant relies in addition on the principle of subsidiarity now laid down in the second paragraph of Article 3b of the Treaty, but without making it clear how that principle is appropriate to support its view. In my opinion it is sufficient to state in this respect that the objectives sought by the directive could be achieved only by the coordination of national laws. Community legislation was therefore required. The defendant's view according to which the Member States are empowered to subject broadcasts from other Member States to a secondary control would therefore militate against the creation of that 'single audio-visual area' which the Television Directive was intended to create. [44] This supports my view that the Member States cannot derive such authority from the subsidiarity principle either.

Moreover, according to the first paragraph of Article 3b of the Treaty, the subsidiarity principle becomes applicable only in those fields which do not fall within the Community's exclusive powers. Freedom to provide services, however, which is protected by Article 59 et seq. of the Treaty and which the Television Directive is intended to implement does come — like the other subjects mentioned in Article 7a of the Treaty — within the Community's exclusive powers.

61. Finally, it is necessary to consider the defendant's objection that the contested rules present no obstacle to freedom to provide services. The broadcasters concerned from other Member States would willingly conclude with the Executive the necessary agreements, which, moreover, were only for the purpose of implementing Articles 4 and 5 of the Television Directive.

However, there can hardly be a free decision on the part of the broadcasters concerned. In any event the conclusion of such agreements is the condition for the relevant programmes'

44 — See the Council's assessment in the twelfth recital in the preamble to Directive 93/83.

being fed into a cable network in the French Community. The question of what discretion the Executive has in the conclusion of such agreements is therefore in my view irrelevant. Moreover, in the defence the defendant has conceded that, at the time that document was lodged with the Court, at least one broadcaster from another Member State was not prepared to enter into such an agreement. [45]

62. On the other hand, the further objection raised by the defendant in this connection is more important, namely that the conclusion of such agreements is a particularly appropriate way of helping to promote the production of European television programmes. Articles 4 and 5 of the Television Directive are, it is claimed, fulfilled thereby. Certainly, it is correct that the conclusion of agreements in which the broadcasters undertake to devote a portion of their budget to the purchase or production of European works may serve the purpose pursued by the Television Directive of promoting the production of television programmes in the Community. That, however, by no means changes the fact that the defendant is thereby arrogating to itself tasks and powers which, according to the Television Directive, should be reserved to the originating Member State. The originating Member State's view of the scope of the obligations imposed on it by Articles 4 and 5 of the directive to ensure 'where practicable and by appropriate means' the promotion of European works may differ from that of the receiving Member State. It is not acceptable for the receiving Member State to impose *its* criteria on broadcasts from other Member States to the extent of subjecting them to a secondary control. If an originating Member State actually fails to fulfil its obligations under the Television Directive in that respect it may be called to account by the other Member States and if necessary an action may be brought against it before the Court. The directive provides for a right of self-help only in the previously cited second sentence of Article 2(2), the conditions for which are not present here. The French Community's contested rules do indeed therefore form an obstacle to freedom to provide services.

63. The defendant contends, however, that the rules in question are justified by considerations of cultural policy and that there is therefore no infringement of Article 59 et seq. of the Treaty. In particular, it seems to be of the opinion that the provisions of the French Community help to protect pluralism in the media. As the reference to pluralism in the press and the transmission of advertising broadcasts shows, this argument relates primarily to the rules contained in Articles 26 and 26b of the Decree of 17 July 1987, which I shall consider later. As the

45 — It is interesting that the defendant has also stated that programmes from that broadcaster were nevertheless retransmitted over the network. That may be seen as an indication that the French Community system at issue is not as significant as the defendant claims.

defendant is obviously of the opinion, however, that the rules contained in Article 22(2) of the decree may also be justified by this argument, I must discuss it here.

64. It may be concluded from the case-law that the maintenance and safeguarding of pluralism in the television sector or in the media in general is an objective of general interest which may justify restrictions on the freedom to provide services which is protected by Article 59 et seq. of the Treaty. [46] It is true that a Member State can rely on such considerations of the general interest only in so far as the relevant national provisions of law have not been harmonized at Community level. [47] The defendant takes the view, however, that this question has not been definitively settled in the Television Directive. The Commission relies for its contrary view on Article 10 et seq. of the rules contained in the directive. Those rules are, however, provisions of a rather technical nature which are only very indirectly related to diversity of opinion in the media.

65. The defendant has not therefore shown why the contested rules of the French Community are necessary and proportional for protecting pluralism in the field of television or in the media in general. Nor are there any more detailed explanations with regard to the question of proportionality. Instead the defendant has simply made general assertions without offering any specific evidence for them. That cannot be regarded as sufficient.

66. It must therefore be concluded that the rules set out in Article 22(2) of the Decree of 17 July 1987, subjecting the retransmission by cable of television broadcasts from other Member States to prior authorization, infringe Article 2(2) of the Television Directive.

(b) Articles 26(2) and 26b(1) of the Decree of 17 July 1987

67. The Commission is of the opinion that the provisions of Article 26(2) of the Decree of 17 July 1987, subjecting the retransmission by cable of television broadcasts from other Member States containing commercial advertisements particularly addressed to viewers in the French Community to prior authorization, infringes Article 2(2) of the Television Directive. It bases that opinion on the same considerations as it has already put forward in connection with Article 22(2) of that decree. The Commission's view is that the provision under consideration here is even more restrictive than that of Article 22(2) of the decree which required prior authorization, whereas Article 26(2) of the decree even requires an *express* prior authorization.

46 — See for example the judgment in Case C-23/93 *TV10* [1994] ECR I-4795, at paragraphs 18 and 19.

47 — See for example the judgment in Case 52/79 *Debauve* [1980] ECR 833, at paragraph 15.

The same is true correspondingly of the rules contained in Article 26b(1) of the decree as regards sales broadcasts.

68. The Kingdom of Belgium contends that the rules in question are justified as they serve to put an end to circumvention of the national rules. The requirement of prior authorization allows the competent authority to check whether a broadcaster is actually one to whom the Television Directive applies.

69. In the defendant's opinion, the broadcasters affected by the rules in question are either foreign broadcasters seeking to avoid the application of the provisions of the French Community or else foreign broadcasters who must be regarded under Article 2(1) of the Television Directive as broadcasters under the jurisdiction of the French Community.

70. In the first place as regards the defendant's assertion that the contested rules are essential in order to provide the receiving Member State with the necessary information about the various broadcasters I need only refer to what I said with regard to Article 22(2) of the Decree of 17 July 1987. [48] The defendant has not shown that to obtain the information it needed it was necessary to make retransmission of the broadcasts concerned subject to an express prior authorization.

71. As regards the subject-matter, both parties agree that the Television Directive has not deprived Member States of the right to resist, in certain circumstances, the circumvention of their legislation. I share that view. It is consistent with the present case-law of the Court on freedom to provide services. As long ago as 1974 the Court decided in the *Van Binsbergen* case that a Member State cannot be denied the right to take measures 'to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State'. [49] Some time ago the Court confirmed that case-law in its judgment in the *TV10* case. [50]

72. The last-mentioned judgment is of particular importance for this case. It concerned a broadcasting organization which had established itself in Luxembourg but broadcast programmes primarily for the Netherlands

48 — See point 41 above.

49 — Judgment in Case 33/74 *Van Binsbergen* [1974] ECR 1299, at paragraph 13.

50 — See footnote 46 (at paragraph 20).

market. In the view of the Netherlands court which had referred the matter to the Court of Justice, the broadcaster concerned had established itself in Luxembourg in order to enable it to evade the application of the Netherlands legislation. The freedom of establishment guaranteed by Article 59 of the Treaty was accordingly to be misused in order to circumvent the legislation of the receiving Member State.

73. However, the Commission rightly replies to the defendant that the rules at issue here cannot be justified on the ground that they were necessary in order to prevent circumvention of the legislation of the receiving Member State. That would presuppose that all broadcasters from other Member States broadcasting commercial advertisements or 'télé-achat' programmes addressed in particular to viewers in the French Community could be accused of attempting to circumvent the legislation of the receiving Member State. However, that is not the case. The charge of circumvention is justified only if the broadcaster in question is acting *wrongfully*. The *TV10* judgment confirmed that the receiving Member State was entitled to resist broadcasts from abroad if organizations which have established themselves in another Member State have been able, by exercising the freedoms guaranteed by the Treaty, 'wrongfully' to evade the application of the legislation of the receiving Member State. [51]

74. It cannot be accepted that every broadcaster from another Member State transmitting advertising or sales broadcasts addressed particularly to viewers in the French Community would on those grounds only be acting wrongfully. In the judgment previously cited in the action brought by the Commission against Belgium for infringement of the Treaty in respect of provisions of the Flemish Community in the field of television, the Court, with reference to the *Van Binsbergen* case, confirmed that the receiving Member State is entitled to adopt provisions in order to prevent the misuse of Article 59 of the Treaty by a broadcaster whose activity is 'entirely or principally directed towards its territory'. The Court added, however: '[i]t does not follow that it is permissible for a Member State to prohibit altogether the provision of certain services by operators established in other Member States, as that would be tantamount to abolishing the freedom to provide services'. [52]

In my view, that case-law can also be extrapolated to the field of the Television Directive. The fact that the directive applies also to such broadcasts is moreover confirmation of that. The fourteenth recital in the preamble to the directive (already quoted) states that all broadcasts emanating from and 'intended for reception within the Community and *in particular those intended for reception in another Member State*' [53] must respect the

51 — See footnote 50 (at paragraph 21).

52 — See footnote 17 (at paragraph 12).

53 — My emphasis.

law of the originating Member State. A Member State cannot therefore presume that all broadcasts of foreign broadcasters addressed in particular to the public in that Member State will on that ground only represent an abuse. But that is exactly what is done by the rules of the French Community at issue here.

75. Finally it should be noted that the entitlement of the receiving Member State to take action, recognized by the Court in the *Van Binsbergen* and *TV10* judgments, represents an exception from one of the fundamental freedoms of the internal market. The Member State concerned must therefore demonstrate in every individual instance — as the Commission has rightly claimed — that the case actually involves a wrongful act in the aforementioned sense. The rules at issue here do not meet that criterion since they subject the retransmission of advertising or sales broadcasts particularly addressed to viewers in the French Community quite generally to a duty of express prior authorization. They cannot therefore be justified as averting such abuses.

76. Nor can the rules at issue find support in Article 3 of the Television Directive. Certainly in the *TV10* case the Court decided that in the event of a wrongful act the receiving Member State may regard a television organization established in another Member State as a domestic broadcaster. [54] That presupposes, however, the existence of such an abuse, which can only be determined case by case.

77. For the reasons already mentioned the defendant cannot claim, either, that the rules at issue are compatible with Article 4 of the Television Directive. [55]

78. The defendant relies in the alternative on the considerations already put forward with regard to Article 22(2) of the Decree of 17 July 1987. I have already discussed these arguments and rejected them in dealing with that provision.

79. It must therefore be stated that the rules contained in Articles 26(2) and 26b(1) of the Decree of 17 July 1987, according to which the retransmission by cable of television broadcasts from other Member States containing commercial advertising or sales broadcasts addressed particularly to viewers in the French Community must be expressly authorized in advance, infringe Article 2(2) of the Television Directive.

54 — See footnote 50 (at paragraph 21).

55 — See above, point 65.

2. Flemish Community

(a) Admissibility of the application

80. The Kingdom of Belgium contends that the Commission's application is inadmissible in so far as it concerns the Flemish Community's provision. The defendant puts forward three arguments in support of that contention. First, the Commission, contrary to Article 169 of the Treaty, gave it no opportunity to submit its observations before bringing the action. Secondly, the Commission did not take into account the legal situation obtaining at the time at which it delivered its reasoned opinion. Finally the reasoned opinion and the application were not based on the same reasons and pleas in law.

81. With regard to the defendant's first objection it must be stated that in the letter of 3 November 1992 the Commission gave the defendant the opportunity to submit observations before it made its application to the Court. It is equally clear that that letter and the complaints contained therein did not relate to the Decree of 4 May 1994 for the natural reason that that decree had not yet been issued when the Commission sent its letter. In the last resort the defendant's objection amounts to stating that after the said decree was issued the Commission ought to have introduced fresh proceedings. As this is therefore a complaint that there was no proper pre-litigation procedure, it would be appropriate to deal with it together with the third objection.

82. In this respect the defendant relies on the consistent case-law of the Court according to which an action against a Member State for failure to fulfil obligations cannot be founded on complaints other than those formulated in the reasoned opinion. [56] In view of the case-law referred to, the application is inadmissible, it is contended, since it is founded on the legal situation resulting from the Decree of 4 May 1994, which was not the subject of the reasoned opinion.

83. The Commission points out, however, that where the contested national legislation is amended during the course of the proceedings the Court in certain circumstances permits exceptions from the principle mentioned. The judgment which it refers to states, with reference to the finding that the reasoned opinion and the application must be based on the same complaints:

'That requirement cannot, however, go so far as to make it necessary that in every event the national provisions mentioned in the reasoned opinion and in the application should be completely identical. Where a change in the legislation occurred between those two phases in the procedure, it is sufficient that the system established by the legislation contested in the pre-litigation procedure has as a whole been maintained by the new measures

56 — See more recently for example the judgment in Case C-296/92 *Commission* v *Italy* [1994] I-1, at paragraph 11.

which were adopted by the Member State after the issue of the reasoned opinion and have been challenged in the application'. [57]

In that case the Court pointed out that in the pre-litigation procedure the Commission had criticized the temporary application of different tax rates. According to the Court's findings that difference had been perpetuated, if not aggravated, by the national Law issued during the course of the proceedings. [58]

84. In this case, one of the complaints made by the Commission in the reasoned opinion was that the Decree of 28 January 1987 made the retransmission over Flemish cable networks of programmes by broadcasters from other Member States subject to a prior authorization to which conditions might be attached. In addition the Commission pointed out that that provision had been regarded by the Court as an infringement of Articles 59 and 60. In the application the Commission complains that the defendant has maintained rules under which the retransmission by cable of television broadcasts from other Member States must be authorized in advance.

85. It is correct that the Decree of 4 May 1994 introduced considerable changes as compared with the previous legal position. For this reason therefore the objection of inadmissibility raised by the defendant is entirely understandable. The Commission has taken these changes into account in so far as it has not repeated in the application some of the complaints made in the reasoned opinion. The defendant also points out, not entirely incorrectly, that a considerable time elapsed after the decree was issued before the Commission made its application.

86. Nevertheless I think there are stronger grounds for regarding the application as admissible in that respect also. Like the Commission, I feel that the Decree of 4 May 1994 made no basic or even essential amendment as far as the complaint made by the Commission in its application is concerned. The position remains, as before, that the retransmission by Flemish cable networks of television broadcasts from other Member States is dependent on prior authorization.

87. The defendant objects that the Decree of 4 May 1994 had replaced the requirement for authorization by a mere duty to provide information. That statement has not convinced me. It is quite clear from the decree that the operator of a cable network requires prior authorization from the Flemish authorities for the pursuit of his activities. As that authorization is granted under Article 3 of the decree on the conditions laid down in the decree, it also contains a decision as to whether the relevant programmes from other

57 — Judgment in Case C-105/91 *Commission* v *Greece* [1992] ECR I-5871, at paragraph 13.

58 — See footnote 57 (at paragraph 14).

Member States comply with the requirements laid down in Article 10 of the decree. [59] The same applies — although the national rules are less explicit in that respect — to programmes which a cable network operator intends to feed into his network at a later period. Any relevant alterations require the assent of the Flemish authorities. If the question were actually one of a duty to provide information only, it would be hard to understand why the cable network operator could not retransmit the new programme immediately. The fact that he may do so only with the prior assent of the authorities is evidence that the issue is in fact one of a constitutive authorization.

The fact that the operator may retransmit the programme when four months have elapsed since the notification of the change in question in no way alters this analysis. In the first place, it is significant that the operator may not retransmit the programmes before that period has elapsed. Then it is clear that this provision may be applied only if the authorities do not refuse their assent before the end of the period. That possibility is expressly mentioned in the decree. [60] The defendant's statement in the defence that such assent has been refused once already shows that this is not a purely theoretical possibility.

88. The view I have expressed is consistent also with the purpose of the case-law already mentioned with regard to the requirements to be met by the pre-litigation procedure under Article 169 of the Treaty. On this question the Court has declared as follows in a recent order:

'The purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission (...).

The proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter.' [61]

89. I think it is clear in this case that there can be no doubt with regard to the subject-matter of the proceedings. The Commission is complaining, as in the previous instance, that the Flemish Community makes the retransmission over its cable networks of the programmes of foreign broadcasters

59 — See point 20 above.

60 — See Article 5(2) of the Decree of 4 May 1994.

61 — Order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, at paragraphs 16 and 17.

dependent upon a prior authorization. The fact that the provisions in question are now contained in the Decree of 4 May 1994 is immaterial in this respect.

Nor are the defendant's rights infringed if the application is regarded as admissible, since the defendant could not have been in any doubt which complaint the Commission was making against it. Similarly, it could not have been unaware that the Decree of 4 May 1994 would not be sufficient to remedy the infringement of which the Commission complained. Moreover, the Commission had already pointed out in its reasoned opinion that the draft of a new decree submitted to it on 5 July 1991 could not be regarded as sufficient. Finally, it is not apparent either that the Commission's way of proceeding was in any way detrimental to the defendant's opportunities to defend itself against the complaints made by the Commission.

90. Moreover, if in a case like this the application were regarded as inadmissible the Commission's task would be made unnecessarily more difficult and as a result a Member State which had not fulfilled its obligations at the right time would be granted an additional period in which to fulfil them. In this connection it should be pointed out that the Decree of 4 May 1994 was undeniably issued only after the expiry of the period allowed the defendant by the Commission in the reasoned opinion.

91. Finally, as regards the defendant's objection that the Commission had failed to take account of the existing legal position when it delivered its reasoned opinion, it should be pointed out that the decree on which the defendant relies was issued only on 4 May 1994. Since the Commission had to be guided by the legal situation actually prevailing, it had no need to examine any drafts of a new decree. Furthermore, it is quite clear that the defendant sent the Commission a copy of the draft of the new decree only by letter of 4 February 1994 — that is, after it had received the reasoned opinion of 10 January 1994.

92. Having regard to these considerations I am of the opinion that the objection of inadmissibility raised by the defendant must be rejected.

(b) Merits of the application

93. The Commission complains that the contested provisions of the Flemish Community infringed Article 2(2) of the Television Directive because they made the retransmission through its cable networks of the programmes of broadcasters from other Member States dependent on a prior authorization. Article 10(2) of the decree makes the authorization conditional upon the broadcaster's having an authorization in the originating Member State, upon a guarantee from the originating Member State that the

broadcaster will observe the provisions of the Television Directive and upon public policy, good morals and public security in the Flemish Community not being endangered. None of those conditions is, however, permissible under the Television Directive.

94. The defendant first contends that the contested provisions do not make the retransmission of programmes from other Member States dependent on authorization from the Flemish authorities but impose only a duty to inform. I have already examined and rejected this objection in the context of considering the admissibility of the application. The contested provisions once again require retransmission to be previously authorized by the Flemish authorities.

95. As regards the conditions laid down by Article 10(2) of the Decree of 4 May 1994, the defendant's view is that they are lawful.

96. The defendant contends that the requirement for the broadcaster concerned to be in possession of an authorization from the originating Member State is reasonable and in no way conflicts with the Television Directive. In this respect the defendant relies on an analogy with the Second Banking Law Directive. [62]

97. That argument cannot be upheld. The Television Directive prescribes that the Member States must ensure that broadcasters under their jurisdiction comply with the law of the originating Member State and the provisions of the Television Directive. The Member States must comply with that obligation 'by appropriate means', as Article 3(2) of the directive states. The originating Member State is not therefore obliged (though entitled) to make the activity of the broadcaster concerned dependent on authorization. It may dispense with it if there is some other way of ensuring that the provisions of national law and of the Television Directive are observed. That may be seen from the thirteenth recital in the preamble to the directive according to which it is left to the Member States to settle the question of 'licensing [or] administrative authorization'. From the context it is clear that this refers in each case to the originating Member State but not to the receiving Member State. The requirement in Article 10(2) of the Decree of 4 May 1994 of an authorization from the originating Member State cannot therefore be reconciled with the Television Directive. Whatever provisions the Community legislature has made in the banking sector is therefore of no consequence for this sector.

62 — Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1989 L 386, p. 1).

The consideration put forward by the defendant, obviously in the alternative, to the effect that the concept of 'assent' is not to be interpreted strictly does not seem to me convincing in view of the wording of the provision. The defendant's argument that an infringement of the provisions of the directive may be ruled out on the ground that the directive was not clear in that respect is similarly irrelevant. Even were that the case, which I do not think it is, it would in no way change the fact of the infringement. In that respect, it is sufficient that the Member State has objectively failed to fulfil its obligations; it is not a question of negligence.

98. The defendant justifies the requirement laid down in Article 10(2) of the Decree of 4 May 1994 for the broadcaster to be subject to effective control in the originating Member State by the consideration that only broadcasts by broadcasters who comply with the provisions of the Television Directive are entitled to the benefit of the directive. The question, therefore, is whether the receiving Member State is entitled to subject broadcasts from other Member States to a secondary control in order to check whether the originating Member State has complied with its obligations under the Television Directive. That question has already been discussed in connection with the French Community rules. As I stated then, the answer must be in the negative. [63]

99. With regard to the condition that programmes of foreign broadcasters may be transmitted by cable networks in Flanders only if they do not endanger public policy, good morals and public security in the Flemish Community, the defendant argues that the Television Directive has by no means coordinated the provisions of the Member States within those fields. For that reason a control by the receiving Member State to check whether those requirements have been met does not conflict with Article 2(2) of the directive.

100. It must be conceded that the matters mentioned by the defendant are indeed not expressly, or at least not fully, dealt with in the Television Directive. Thus, for example, Article 12 of the directive lays down strict requirements with which television advertising must comply. For example, it must not prejudice respect for human dignity or be offensive to religious or political beliefs. For other broadcasts, however, there is no express provision apart from the second paragraph of Article 22, according to which television broadcasts must not contain any incitement to hatred on grounds of race, sex, religion or nationality. [64] It might therefore be thought that the Television Directive wished to leave the receiving Member States free to take action where necessary against broadcasts by foreign broadcasters if they regard that as necessary for the protection of public policy, good morals or public security. The fact that the Television Directive, as

63 — See above, point 42 et seq.

64 — The provision is in Chapter V, which is entitled 'Protection of minors'. Nevertheless, it may be assumed that it is a provision applicable to all broadcasts.

I have already said, does not regulate the television sector definitively and comprehensively might also be an indication to the same effect.

101. Such an interpretation would, however, largely nullify the liberalization at which the Television Directive aims. As the defendant itself has said in this connection in the defence, this directive relies on the 'fundamental principle of mutual trust' of the Member States. It may be seen also from the fifteenth recital, to which I have already referred several times, that the idea of the legislature was that control by the originating Member State should be sufficient, whereas the receiving Member State was to be entitled only on strictly circumscribed conditions to take action against the retransmission of broadcasts from other Member States.

The rule on protection of minors in Article 22 and the second sentence of Article 2(2) of the directive in particular shows that the directive also covers matters belonging to the field of public policy, good morals or public security. When in the regulated matter the Community legislature attached strict conditions to possible unilateral action by the receiving Member State and provided for no corresponding powers for the receiving Member State in other fields, the conclusion must be drawn that it was assumed that control by the originating Member State was sufficient for protecting such legal interests. It is a question of implementation of the principle of mutual trust, already mentioned, which seems to have proved entirely effective in this respect. [65]

102. The legitimate interests of receiving Member States are not unduly prejudiced as a result. Apart from the authority to take action provided for in the second sentence of Article 2(2) of the directive, they still have the possibility of bringing an originating Member State which neglects its duties of control before the Court of Justice. The possibility of interlocutory relief makes it possible to obtain rapid redress if that should be necessary.

103. It should also be borne in mind that in cases in which programmes from other Member States can be received directly in the receiving Member State the latter has scarcely any other recourse against infringements of the Television Directive by the originating Member State than to bring an action before the Court.

104. The question whether a Member State is in no case — however flagrant — entitled to take action for the protection of public policy, public security or good morals against the retransmission of broadcasts from other Member States does not in any case need to be decided by the Court. It is not

65 — The disputes and disagreements discussed in the course of these proceedings concern Articles 4 and 5 of the directive which can hardly be classified as belonging to the field of public policy and security or good morals.

possible on any view, to justify, on grounds of the protection of these legal interests, a system which makes the retransmission over cable networks of broadcasts from other Member States *in general* dependent on a prior authorization from the receiving Member State, as the contested Flemish Community rules do. Such a rule goes far beyond what is necessary for the protection of such legal interests.

105. I may mention purely for the sake of completeness that the defendant refers in connection with the provisions of the Flemish Community also to Directive 93/83. In this respect I may refer to the remarks I made with regard to the arguments based on that directive when dealing with the provisions of the French Community. [66]

106. It must therefore be stated that the rules contained in the Decree of 4 May 1994 under which the cable retransmission of television broadcasts from other Member States must be authorized in advance infringes Article 2(2) of the Television Directive.

66 — See point 55 et seq. above.

3. Metropolitan Brussels

107. The Commission also complains that the Kingdom of Belgium has infringed Article 2(2) of the Television Directive with regard to the bilingual Metropolitan Brussels Region as that provision has not been transposed into national law.

108. With regard to this complaint the defendant first stated in the defence only that a Law for the transposition of the directive had been promulgated on 30 March 1995.

109. In its reply the Commission claimed that that Law had been issued too late. Moreover the content of that Law was based very largely on the rules contained in the Flemish Community Decree of 4 May 1994 and was therefore open to the same objections as that decree. The Commission therefore reserved the right to bring an action on those grounds under Article 169 for failure to fulfil Treaty obligations.

110. The defendant thereupon stated in its rejoinder that there was no infringement of the Television Directive. It contended, first, that, under Article 127(2) of the Belgian Constitution, the decrees of the French Community and of the Flemish Community

were each applicable to the Metropolitan Brussels Region, which had therefore no need to implement the directive itself. Moreover at the time at which the Commission gave the defendant the opportunity to submit its observations there was no provision in the Metropolitan Brussels Region by which the right to retransmit broadcasts from abroad was restricted. Finally the Commission's application was also inadmissible in so far as it took exception to the new Law as there had been no pre-litigation procedure.

111. In view of the provisions of Article 42(2) of the Rules of Procedure of the Court of Justice I have serious doubts as to whether it was in any way permissible for the defendant to introduce that plea in law in the rejoinder. As, however, the defendant's argument seems to me to be unfounded in any case, that is a matter of no importance.

112. The defendant's objection of inadmissibility is pointless, since, although the Commission does indeed mention the new Law in its observations, it has not made it the subject of the proceedings. The argument based on Article 127(2) of the Belgian Constitution is similarly unsound. Under that provision the decrees formulated by the French Community and by the Flemish Community apply only to those persons who are to be classed as belonging to one or other of those communities. They accordingly do not apply to persons not in that position. The Law promulgated on 30 March 1995, which, according to Article 3 thereof, applies only to persons who cannot be classed as belonging to either the French or the Flemish Community, expressly demonstrates, moreover, that there was an omission in that respect.

113. As regards the defendant's final objection, it should be pointed out that its argument seems inconsistent in this respect. Whilst it asserts on the one hand that at the material time there were no relevant provisions in the Metropolitan Brussels Region and therefore no provisions which could have restricted the right conferred by the Television Directive to free retransmission of foreign broadcasts, it states on the other hand that the provisions of the French Community and of the Flemish Community were applicable. From all that it is possible to conclude only that either the transposition of the directive took place too late for the Metropolitan Brussels Region (namely through the Law of 30 March 1995) or else that — if there really had been no restrictive provisions — there was an objectively unclear and obscure legal situation requiring clarification by the legislature. [67]

114. On these grounds it seems to me that the complaint made by the Commission is well founded.

67 — Whether there were in fact no provisions at the material time for the Metropolitan Brussels Region seems to me to be open to question because the Law of 30 March 1995 states in Article 42 that Articles 2 and 3 of the Law of 6 February 1987 on radio and cable television networks and commercial advertising on radio and in television (see also footnote 12 above) are repealed.

4. The German-speaking Community

115. With regard to the German-speaking Community too the Commission claims that the defendant has infringed Article 2(2) of the Television Directive as it had not been transposed into national law.

116. The defendant contends in its defence that in the German-speaking Community there were no provisions which could have restricted the right of free retransmission of broadcasts from abroad. The Royal Decree of 24 December 1966 which originally covered that field had lapsed when Article 13 of the Law of 26 January 1960, on which it was based, was repealed by Article 30 of the Law of 13 July 1987. [68]

117. These particulars, which were provided by the defendant only during the course of the proceedings before the Court, were not contested by the Commission's Agent during the oral procedure. He did, however, express the view that in view of that legal situation, which was anything but clear, it would have been desirable for the legislature to take action to make it clear that the right of retransmission was actually guaranteed. I can only agree. In view of the circumstances depicted, it was essential to make the legal position clear in order to fulfil the obligations imposed by the Television Directive. The uncertainties arising from the obscure legal situation jeopardized the full effectiveness of the rights which that directive was intended to ensure.

118. In that respect also the Commission's complaint is therefore well founded.

II. Infringement of Articles 14 and 15 of the Television Directive

119. The Commission complains that the defendant has not fully transposed into national law Articles 14 and 15 of the Television Directive as far as the French Community is concerned. Whilst Article 14 of the directive prohibits television advertising for medicinal products and medical treatment available only on prescription in the originating Member State, the relevant provision of national law prohibits only advertising for medicinal products. The requirements contained in Article 15 as regards television advertising for alcoholic beverages were imposed in the French Community only on one broadcaster but not on others. Moreover the relevant provisions covered only alcoholic beverages containing more than 10% alcohol, whereas Article 15 of the directive applied to all alcoholic beverages.

68 — See above, point 24.

120. As the Commission has rightly stated, the defendant does not in principle dispute the complaints made against it. What is particularly noticeable is that the Kingdom of Belgium in this respect merely reproduces the statements of the French Community claiming that the implementation of Article 14 of the Television Directive was a matter for the federal authorities.

121. In that respect also therefore the Commission's complaint is well founded.

C — Conclusion

122. I therefore propose that the Court should allow the application in its entirety and order the Kingdom of Belgium to pay the costs.