JUDGMENT OF THE COURT (Sixth Chamber)

22 December 2010 *

In Case C-517/09,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Collège d'autorisation et de contrôle du Conseil supérieur de l'audiovisuel (Belgium), made by decision of 3 December 2009, received at the Court on 11 December 2009, in the proceedings

RTL Belgium SA, formerly TVi SA,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev, President of Chamber, A. Rosas and P. Lindh (Rapporteur), Judges,

* Language of the case: French.

Advocate General: J. Kokott,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 9 November 2010,

after considering the observations submitted on behalf of:

— RTL Belgium SA, formerly TVi SA, by F. Tulkens and S. Seys, avocats,

— CLT-UFA, by G. de Foestraets, avocat,

— the Belgian Government, by M. Jacobs, acting as Agent, assisted by A. Feyt, avocat,

— the Luxembourg Government, by C. Schiltz, acting as Agent, assisted by P. Kinsch, avocat,

— the European Commission, by C. Vrignon and E. Montaguti, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of point (c) of Article 1 of Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 1989 L 298, p. 23), as amended by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 332, p. 27) ('Directive 89/552').

2 The reference has been brought by the Collège d'autorisation et de contrôle du Conseil supérieur de l'audiovisuel ('the Licensing and Control Authority of the Broadcasting Authority') of the French Community of Belgium in proceedings concerning RTL Belgium SA, a company suspected of infringing national laws on teleshopping.

Legal context

European Union ('EU') law

3 Points (c) and (d) of Article 1 of Directive 89/552 set out the following definitions:

'(c) "editorial responsibility" means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

(d) "media service provider" means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised'.

4 Under Article 2(1), (2)(a), and (3)(a) and (b) of that directive:

'1. Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.

2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are those:

(a) established in that Member State in accordance with paragraph 3, …

…

3. For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:

(a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;

(b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State'.

National law

5 The Décret coordonné sur les services de médias audiovisuels (the coordinated decree on audiovisual media services; 'the decree') was published in the *Moniteur belge* of 24 July 2009.

6 Points (16), (46) and (57) of Article 1 of the decree set out the following definitions:

'(16) The "broadcaster of the services" is the natural or legal person who has editorial responsibility for the choice of the content of the audiovisual media service and determines the manner in which it is organised.

…

(46) "Editorial responsibility" is the exercise of effective control both over the selection of the programmes and over their organisation, either in a chronological schedule, in the case of linear services, or in a catalogue, in the case of non-linear services.

…

(57) "Teleshopping" means direct offers broadcast to the public, in the form of programmes or spots, with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment.'

7 Paragraph 2(3) of the decree provides:

'The French Community shall have jurisdiction over any broadcaster of services:

(1) who is established in the French-speaking region;

(2) who is established in the bilingual region of Bruxelles-Capitale and whose activities must be exclusively directed towards the French Community.'

8 Article 31(6) of the decree states:

'… the time allowed for teleshopping broadcasting is set by the Government, with a maximum of three hours per day, including repeats.'

9 Article 133 of the decree provides:

'The Broadcasting Authority for the French Community of Belgium is hereby created. It shall be an independent administrative authority with legal personality and shall be responsible for regulation of the audiovisual sector within the French Community...'

10 Article 134 of the decree provides that the Broadcasting Authority is to be composed of two authorities — the Advisory Committee and the Licensing and Control Authority — as well as a Bureau and an Investigatory Office.

11 Under Article 136(1) of the decree, the Licensing and Control Authority of the Broadcasting Authority is to have the following remit:

'(1) to register the statements made by broadcasters of services and to authorise certain broadcasters of services, with the exception of local television and [Radio-Télévision belge de la Communauté française de Belgique];

(2) to authorise the use of radio frequencies;

…

(12) to identify any infringement of the laws, decrees and regulations relating to audiovisual matters and any failure to fulfil obligations arising from an agreement concluded between the French Community and a broadcaster of services or a distributor of services, from a [Radio-Télévision belge de la Communauté française de Belgique] management contract, from an agreement between the Government and each of the local television broadcasters or from undertakings entered into in the context of a response to calls for tenders envisaged by this decree'.

12 Article 139(1) of the decree specifies the composition of the Licensing and Control Authority of the Broadcasting Authority and reads as follows:

'In addition to the [four] members of the Bureau referred to in Article 142(1), the Licensing and Control Authority shall be composed of six members. They shall have a four-year renewable mandate. …

Without prejudice to Article 142(1), the ten members shall be appointed in accordance with Article 9 of the Law of 16 July 1973 guaranteeing the protection of ideological and philosophical allegiances. Of the six members referred to in the first subparagraph, three shall be appointed by the Parliament of the French Community. The Government shall appoint the other members of the Authority after the Parliament of the French Community has appointed the first three members.

The members of the Licensing and Control Authority shall be selected from amongst those persons demonstrating expertise in the fields of law, broadcasting or communication.

…'

13 Pursuant to Article 140(1) of the decree, the Bureau of the Broadcasting Authority, which is composed of the president and the first, second and third vice-presidents of that authority, is to represent the Broadcasting Authority before the courts and with respect to third parties. Under Article 140(3) of the decree, the Bureau is to recruit the staff of the Broadcasting Authority. In particular, it is to recruit the counsellors and attachés of the Investigatory Office, following consultation with the Investigatory Officer.

14 Under Article 142(1) of the decree, the four members of the Bureau are to be appointed by the Government.

15 Under Article 143 of the decree, the Investigatory Office is to receive the complaints submitted to the Broadcasting Authority and to manage the complaint files. It may also commence investigations on its own initiative. That article states, further, that the Investigatory Office is to be managed by the Investigatory Officer under the authority of the Bureau.

16 Article 161 of the decree lays down the procedural rules that the Investigatory Office and the Licensing and Control Authority of the Broadcasting Authority must apply in the event of a complaint or a fact capable of constituting, in particular, an infringement of the laws, decrees and regulations relating to audiovisual matters. Article 161(1) provides, in particular, as follows:

'… the Investigatory Office shall initiate an investigation and decide on the admissibility of the case.

If the case is admissible, the Investigatory Office shall be responsible for the investigation. The Investigatory Office may decide to take no further action on the complaint.

…

The Licensing and Control Authority may deal with any decision adopted by the Investigatory Office to the effect that a complaint is inadmissible or that no further action is to be taken in connection with a complaint.

The investigation report shall be submitted to the Licensing and Control Authority. …'

17 Pursuant to Article 161(2) to (4), the Licensing and Control Authority is to notify its objections, together with the investigation report, to the person suspected of infringement, who is to have one month within which to consult the file and to submit written observations. That person is to be invited to enter an appearance. The Licensing and Control Authority is to have the power to hear any person who can provide it with relevant information. It is to give a reasoned decision within 60 days of the conclusion of the oral arguments.

The facts in the main proceedings and the question referred for a preliminary ruling

18 On 8 October 2009, the Investigatory Office received a complaint from a viewer informing it that, a few days earlier, RTL Belgium (the service) had broadcast a teleshopping programme for seven hours over the course of a single day, whereas the legal limit is three hours.

19 After checking that the legal limit had been exceeded, the Investigatory Office sent a letter to RTL Belgium SA, established in Belgium, asking it for its observations.

20 That company replied that, in its opinion, the Investigatory Office was not competent to carry out an investigation into it, since it is not RTL Belgium SA which broadcasts RTL Belgium's programmes, but its parent company CLT-UFA, established in Luxembourg.

21 The Licensing and Control Authority of the Broadcasting Authority asks whether it is the Belgian authorities or the Luxembourg authorities who are competent to monitor RTL Belgium's service. If, as the Investigatory Office maintains, RTL Belgium SA is the provider of the RTL Belgium service, the Authority considers itself competent,

since RTL Belgium SA has its seat in Belgium and, according to the Investigatory Office, editorial decisions are taken in Belgium.

22 The order for reference contains, inter alia, the following information about RTL Belgium SA and its parent company CLT-UFA.

23 Since 1987, RTL Belgium SA has obtained successive authorisations from the Belgian authorities to broadcast television services, in particular the RTL Belgium service. The last authorisation granted for that service expired on 31 December 2005. RTL Belgium SA did not seek its renewal because the service in question was from then on going to be operated from Luxembourg by CLT-UFA.

24 CLT-UFA, which now controls 66 % of RTL Belgium SA, obtained a licence for that service from the Luxembourg authorities in 1995.

25 By decision of 29 November 2006, the Licensing and Control Authority of the Broadcasting Authority found that RTL Belgium SA transmitted, without authorisation, services of which it was the 'broadcaster', in particular the RTL Belgium service, in breach of the Belgian legislation on broadcasting, and ordered it to pay a fine of EUR 500 000. RTL Belgium SA brought an action for the annulment of that decision before the Conseil d'État (Council of State) (Belgium), which held the action to be well founded and annulled the decision by judgment of 15 January 2009.

26 The Licensing and Control Authority of the Broadcasting Authority submits that, in that judgment, the Conseil d'État held that the dual authorisation system which lasted

until 2005 infringed the rule that only one Member State has jurisdiction with respect to a broadcaster and was liable to hinder the free movement of services within the European Union. The Conseil d'État found, in those circumstances, that it was irrelevant whether CLT-UFA or RTL Belgium SA was the 'broadcaster of the services' in accordance with the terminology of the decree, or the 'service provider' in accordance with the terminology of Directive 89/552.

27 The Licensing and Control Authority of the Broadcasting Authority maintains, however, that that question is relevant in the context of the dispute in the main proceedings, in light of the new legal framework applicable in Belgium since 2009, which includes, on the one hand, the decree, and, on the other hand, a protocol for cooperation between the Kingdom of Belgium and the Grand Duchy of Luxembourg.

28 The decree entered into force on 28 March 2009. It provides, in particular, a new definition of 'editorial responsibility'.

29 The Licensing and Control Authority of the Broadcasting Authority considers itself to be a court or tribunal for the purposes of Article 267 TFEU and therefore capable of making a reference to the Court of Justice for a preliminary ruling. In addition to having the legal status of an independent administrative authority, it satisfies the criteria laid down by the Court to identify a court or tribunal for the purposes of Article 267 TFEU.

30 It is in those circumstances that the Licensing and Control Authority of the Broadcasting Authority decided to refer the following question to the Court of Justice for a preliminary ruling:

'Can the notion of "effective control both over the selection of the programmes and over their organisation", as referred to in point (c) of Article 1 of [Directive 89/552] be interpreted as meaning that a company established in a Member State and licensed by

the government of that Member State to provide an audiovisual media service does in fact exercise such control, even though it delegates, with an option to subdelegate, to a third company established in another Member State, against payment of an indeterminate sum equal to the total advertising revenue generated by the broadcasting of that service, the actual production of all the programmes specific to that service, the communication to the public of programme scheduling information and the provision of financial and legal services, human resources, the management of infrastructure and other personnel-related services, and even though it is apparent that it is at the head offices of that third company that decisions are taken and implemented concerning the putting together of programmes and any deletions from or changes to the programming schedule in response to current events?

The jurisdiction of the Court

31 As a preliminary issue, it is necessary to determine whether the Licensing and Control Authority of the Broadcasting Authority is a court or tribunal for the purposes of Article 267 TFEU and, accordingly, whether the Court has jurisdiction to give a ruling on the question referred.

Observations submitted to the Court

32 The Kingdom of Belgium and the European Commission submit that the Licensing and Control Authority of the Broadcasting Authority fulfils all the criteria laid down by the case-law of the Court of Justice for the identification of a court or tribunal.

33 RTL Belgium SA, CLT-UFA and the Luxembourg Government consider, for their part, that the criterion of independence is not satisfied.

34 RTL Belgium SA and CLT-UFA submit, first, that the Licensing and Control Authority of the Broadcasting Authority is not sufficiently independent of the executive in that, in particular, the Belgian Government plays a dominant role in the appointment of its members. Furthermore, in the appointment of the members, account is taken of ideological and philosophical allegiances, which means that those members are not entirely independent. In addition, there is no separation of functions as between investigation and the taking of decisions. Lastly, the Licensing and Control Authority of the Broadcasting Authority does not act as a third party in relation to a complainant, whom it is not obliged to hear, or in relation to the Investigatory Office, which is under the authority of the Bureau.

35 The Luxembourg Government argues that the Licensing and Control Authority of the Broadcasting Authority is a party to the dispute and, as a consequence, does not have the necessary independence, as demonstrated by the fact that it is represented in actions brought against its decisions before the Conseil d'État.

Findings of the Court

36 According to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules

of law and whether it is independent (see, inter alia, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Case C-53/03 Syfait and Others [2005] ECR I-4609, paragraph 29; Case C-246/05 *Häupl* [2007] ECR I-4673, paragraph 16; and order in Case C-109/07 *Pilato* [2008] ECR I-3503, paragraph 22).

37 It is appropriate first of all to determine whether the Licensing and Control Authority of the Broadcasting Authority satisfies the criterion of independence.

38 According to the case-law of the Court, the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision (Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15, and Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 49).

39 There are two aspects to that concept. The first aspect, which is external, entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them (*Wilson*, paragraphs 50 and 51).

40 The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings (*Wilson*, paragraph 52).

41 It must be held that the criterion of independence is not satisfied by the Licensing and Control Authority of the Broadcasting Authority.

42 The reason for this is that neither the structural organisation of the Broadcasting Authority and the bodies of which it is made up, nor the tasks assigned to them, support a finding that the Authority acts as an impartial third party between the alleged offender, on the one hand, and the administrative authority responsible for monitoring the audiovisual sector, on the other.

43 As regards the structural organisation of the Broadcasting Authority, it should be pointed out, first, that the Authority's Bureau is composed of four members, namely its president and the first, second and third vice-presidents. Secondly, those members of the Bureau are also members of the Licensing and Control Authority of the Broadcasting Authority of which, as four of its ten members, they make up a significant part.

44 As regards the tasks assigned to the various bodies of the Licensing and Control Authority, the decree states that, within that administrative authority, the Licensing and Control Authority of the Broadcasting Authority is responsible for ensuring compliance by the media broadcasters in question with the broadcasting rules and for punishing any infringements. In order to carry out that task, it relies on the work of the Investigatory Office, which is overseen by the Investigatory Officer under the authority of the Bureau.

45 It should be noted that, through the Bureau, the Licensing and Control Authority of the Broadcasting Authority, which is a decision-making body, is linked, in terms of functions, with the Broadcasting Authority as a whole and with the Investigatory Office, upon whose proposals it decides. Consequently, when it adopts a decision, the Licensing and Control Authority of the Broadcasting Authority is not distinct from the administrative monitoring body, which can act as a party to proceedings relating to broadcasting matters (see, by analogy, *Syfait and Others*, paragraph 33).

46 That finding is corroborated, furthermore, by the fact that the Bureau represents the Licensing and Control Authority before the courts and with respect to third parties.

47 Accordingly, when it takes a decision, the Licensing and Control Authority of the Broadcasting Authority is not acting as a third party in relation to the interests at stake and, in consequence, does not possess the necessary impartiality with respect to alleged offenders — in the present case, RTL Belgium SA — to constitute a court or tribunal for the purposes of Article 267 TFEU.

48 There is no need, therefore, to determine whether the other criteria for assessing whether a referring body is a 'court or tribunal' for the purposes of Article 267 TFEU are satisfied by the Licensing and Control Authority of the Broadcasting Authority.

49 In those circumstances, the Court does not have jurisdiction to answer the question referred.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

The Court of Justice does not have jurisdiction to answer the question referred by the Collège d'autorisation et de contrôle du Conseil supérieur de l'audiovisuel in its decision of 3 December 2009.

[Signatures]