JUDGMENT OF THE COURT (Second Chamber)

5 March 2009 *

In Case C-222/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Supremo (Spain), made by decision of 18 April 2007, received at the Court on 3 May 2007, in the proceedings

Unión de Televisiones Comerciales Asociadas (UTECA)

v

Administración General del Estado,

intervening parties:

Federación de Asociaciones de Productores Audiovisuales

* Language of the case: Spanish.

Radiotelevisión Española (RTVE),

Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda),

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, J.-C. Bonichot, J. Makarczyk, P. Kūris and L. Bay Larsen, Judges,

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 July 2008,

after considering the observations submitted on behalf of:

— Unión de Televisiones Comerciales Asociadas (UTECA), by S. Muñoz Machado, abogado, and M. Cornejo Barranco, procuradora,

— Federación de Asociaciones de Productores Audiovisuales, by A. Albaladejo and E. Klimt, abogados, and by A. Blanco Fernández, procurador,

— Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda), by J. Suárez Lozano and M. Benzal Medina, abogados,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the Belgian Government, by C. Pochet, acting as Agent, and by A. Berenboom and A. Joachimowicz, avocats,

— the Greek Government, by E.-M. Mamouna and O. Patsopoulou, acting as Agents,

— the French Government, by G. de Bergues and A.-L. During, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by F. Arena, avvocato dello Stato,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Polish Government, by P.T. Kozek, acting as Agent,

— the Commission of the European Communities, by E. Montaguti, and by R. Vidal Puig and T. Scharf, acting as Agents,

— the EFTA Surveillance Authority, by B. Alterskjær and L. Young, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 September 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC and 87 EC, and Article 3 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60; 'the Directive').

2 The reference has been made in an action brought by the Unión de Televisiones Comerciales Asociadas ('UTECA') against a Royal Decree requiring television operators to allocate, first, 5% of their operating revenue for the previous year to the

funding of full-length and short cinematographic films and European films made for television and, secondly, 60% of that funding to the production of films of which the original language is one of the official languages of the Kingdom of Spain.

Legal context

Community legislation

3 The 26th recital in the preamble to Directive 89/552 states:

'… in order to allow for an active policy in favour of a specific language, Member States remain free to lay down more detailed or stricter rules in particular on the basis of language criteria, as long as these rules are in conformity with Community law, and in particular are not applicable to the retransmission of broadcasts originating in other Member States'.

4 Recital 7 in the preamble to Directive 97/36 provides:

'… any legislative framework concerning new audiovisual services must be compatible with the primary objective of this Directive which is to create the legal framework for the free movement of services'.

5 Recital 44 in the preamble to Directive 97/36 states:

'… Member States remain free to apply to broadcasters under their jurisdiction more detailed or stricter rules in the fields coordinated by this Directive, including, inter alia, rules concerning the achievement of language policy goals …'.

6 Recital 45 in the preamble to Directive 97/36 states:

'… the objective of supporting audiovisual production in Europe can be pursued within the Member States in the framework of the organisation of their broadcasting services, inter alia, through the definition of a public interest mission for certain broadcasting organisations, including the obligation to contribute substantially to investment in European production'.

7 Article 3(1) of the Directive provides:

'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.'

8 Article 4(1) of the Directive provides:

> 'Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.'

9 Article 5 of the Directive states:

> 'Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to broadcasters' informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria; it must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five years of their production.'

National legislation

10 Royal Decree 1652/2004 approving the Regulation governing compulsory investment for the pre-funding of European and Spanish cinematographic feature-length and short films and films made for television (Real decreto 1652/2004 por el que se aprueba el Reglamento que regula la inversión obligatoria para la financiación anticipada de largometrajes y cortometrajes cinematográficos y películas para televisión, europeos y españoles) of 9 July 2004 (BOE No 174 of 20 July 2004, p. 26264), implements in part the Spanish legislation with regard to television and cinematography. That legislation comprises Law 25/1994 incorporating Directive 89/522/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities in the Spanish legal order (Ley 25/1994 por la que se incorpora al ordenamiento jurídico español la Directiva 89/552/CEE del Consejo, sobre la coordinación de disposiciones legales, reglamentarias y administrativas de los Estados miembros relativas al ejercicio de la actividad de radiodifusión televisiva) of 12 July 1994 (BOE No 166 of 13 July 1994, p. 22342), as amended by Law 22/1999 of 7 June 1999 (BOE No 136 of 8 June 1999), then by the Second Additional Provision of Law 15/2001 on the development and promotion of cinematography and the audiovisual sector (Ley 15/2001 de fomento y promoción de la cinematografía y el sector audiovisual) of 9 July 2001 (BOE No 164 of 10 July 2001, p. 24904).

11 Article 5(1) of Law 25/1994, as amended by Law 22/1999, provides:

'Television operators must reserve 51% of their annual transmission time for broadcasting European audiovisual works.

With a view to fulfilling that obligation, each year they must earmark at least 5% of the total amount of revenue which, according to their operating account, accrued in the previous financial year for the funding of European cinematographic feature films and films made for television.'

12 Subsequent to the amendment made by the Second Additional Provision of Law 15/2001, the second subparagraph of Article 5(1) of that law was replaced by the following provisions:

'Television operators with editorial responsibility for television channels whose programming schedules include recently-produced cinematographic feature films, in other words, films which are less than seven years old by reference to their date of production, must earmark each year at least 5% of the total amount of revenue which, according to their operating account, accrued in the previous financial year for the pre-funding of the production of European cinematographic feature films and short films and films made for television, including the cases provided for in Article 5(1) of the Law on the development and promotion of cinematography and the audiovisual sector. Sixty per cent of that funding must be used for productions whose original language is any of the official languages of Spain.

In that connection, films made for television shall mean audiovisual works which have characteristics similar to cinematographic feature films, in other words, unitary works with a duration of more than 60 minutes and a final outcome, but which are distinguished by the fact that their commercial exploitation does not entail cinema exhibition; and operating revenue shall mean revenue derived from the programming and running of the television channel or channels which give rise to the obligation concerned, as reflected in their audited operating accounts.

After consulting all interested sectors, the Government may enact regulations stipulating the duration which an audiovisual work is required to have in order to be regarded as a film made for television.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 UTECA has brought an action to challenge Royal Decree 1652/2004 before the Tribunal Supremo (Supreme Court). In its application, it seeks to have both that Royal Decree and the legislative provisions on which it is based declared inapplicable, submitting that the investment obligations imposed thereby infringe not only a number of provisions of the Spanish Constitution but also certain provisions of Community law.

14 UTECA's claims are opposed by the Administración General del Estado (General State Administration) and by the Federación de Asociaciones de Productores Audiovisuales Españoles (Federation of Spanish Audiovisual Producers' Associations) and the Entidad de Gestión de Derechos de los Productores Audiovisuales (Management body for the rights of audiovisual producers), the latter having intervened to seek to uphold the validity of the contested provisions.

15 Since the Tribunal Supremo had concerns, first, as to the extent of Member States' discretion in imposing stricter standards in fields coordinated by the Directive, having regard in particular to Article 3(1) thereof, and, secondly, as to the compatibility of Articles 12 EC and 87 EC with the requirement to reserve 60% of the obligatory funding for the production of films of which the original language is one of the official languages of the Kingdom of Spain, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 3 of [the] Directive … permit Member States to impose on television operators the obligation to earmark a percentage of their operating revenue for the pre-funding of European cinematographic films and films made for television?

(2) If the reply to the previous question is in the affirmative, is a national measure which, in addition to laying down the pre-funding obligation referred to above, reserves 60% of that compulsory funding for works having an original language which is one of the languages of Spain compatible with that directive and with Article 12 EC, taken in conjunction with the other special provisions to which that article refers?

(3) Does an obligation imposed by a national measure on television operators to the effect that the latter must earmark a percentage of their operating revenue for the pre-funding of cinematographic films, where 60% of that amount must be earmarked specifically for films having an original language which is one of the languages of Spain the majority of which are produced by the Spanish film industry, amount to State aid in favour of that industry within the meaning of Article 87 EC?'

The first and second questions

16 By its first and second questions, which may conveniently be considered together, the referring court asks essentially whether the Directive and, more particularly, Article 3 thereof and Article 12 EC are to be interpreted as meaning that they preclude a measure adopted by a Member State, such as that at issue in the main proceedings, requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State.

17 At the outset, it must be noted that the Directive does not contain any provision governing the extent to which a Member State may require television operators to earmark part of their operating revenue for the funding of European cinematographic films and films made for television or whose original language is one of the official languages of that Member State. In particular, Articles 4 and 5 of the Directive do not address such a situation.

18 Pursuant to Article 3(1) of the Directive, the Member States remain free to lay down more detailed or stricter rules with regard to television broadcasting bodies under their jurisdiction. Nevertheless, when exercising that right, they must respect the fundamental freedoms guaranteed by the EC Treaty (see, to that effect, Case C-6/98 *ARD* [1999] ECR I-7599, paragraph 49, and Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785, paragraph 31).

19 Finally, it should be recalled that the Directive does not completely harmonise the rules relating to the areas which it covers, but that it lays down minimum rules for broadcasts which emanate from the European Community and which are intended to be received within it (see, to that effect, Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraphs 29 and 44, and Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 3).

20 It follows that, irrespective of whether the measure adopted by a Member State such as the measure at issue in the main proceedings is in an area covered by the Directive, the Member States retain, in principle, jurisdiction to adopt such a measure, provided that they respect the fundamental freedoms guaranteed by the Treaty.

21 In those circumstances, it is appropriate to examine whether that measure respects those fundamental freedoms.

22 With regard to a measure adopted by a Member State such as the measure at issue in the main proceedings requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television, the documents before the Court do not contain any indication that such a measure constitutes, in practice, a restriction on one of the fundamental freedoms guaranteed by the Treaty.

23 Moreover, it should be noted that it is clear from a reading of recital 7 in conjunction with recital 45 in the preamble to Directive 97/36 that the main objective of that directive is to create a legal framework for the free movement of services, mention being made at the same time, inter alia, of 'supporting audiovisual production in Europe', which can be achieved through, inter alia, 'the obligation to contribute substantially to investment in European production'.

24 By contrast, with regard to a measure such as that at issue in the main proceedings, in so far as it relates to the obligation to reserve for the production of films of which the original language is one of the official languages of the Member State in question 60% of the 5% of operating revenue reserved for the pre-funding of European cinematographic films and films made for television, such a measure constitutes, as the Advocate General points out in points 78 to 87 of her Opinion, a restriction on several fundamental freedoms, that is to say on the freedom to provide services, freedom of establishment, the free movement of capital and freedom of movement for workers.

25 However, such a restriction on the fundamental freedoms guaranteed by the Treaty may be justified only where it serves overriding reasons relating to the general interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 39 and the case-law cited).

26 According to the Spanish Government, the measure at issue in the main proceedings has a cultural basis, namely the defence of Spanish multilingualism.

27 In that regard, the Court has already accepted that the objective, pursued by a Member State, of defending and promoting one or several of its official languages constitutes an overriding reason in the public interest (see, to that effect, Case C-379/87 *Groener* [1989] ECR 3967, paragraph 19, and *United Pan-Europe Communications Belgium and Others*, paragraph 43).

28 As the Advocate General points out in point 91 of her Opinion, such an aim has also been recognised as being legitimate by the Community legislature, as shown by the 26th recital in the preamble to Directive 89/552 and recital 44 in the preamble to Directive 97/36.

29 A measure taken by a Member State such as the measure at issue in the main proceedings, in so far as it introduces an obligation to invest in cinematographic films and films made for television the original language of which is one of the official languages of that Member State, appears appropriate to ensure that such an objective is achieved.

30 In addition, it does not appear, in the circumstances of the action in the main proceedings, that such a measure goes beyond what is necessary to achieve that objective.

31 By requiring television operators to reserve for works whose original language is one of the official languages of the Member State concerned 60% of the 5% of operating revenue reserved for the pre-funding of European cinematographic films and films made for television, a measure taken by a Member State such as the member at issue in the main proceedings affects, in the final analysis, 3% of the operating revenue of those operators. The documents submitted to the Court do not contain any material which might lead to the conclusion that such a percentage is disproportionate in relation to the objective pursued.

32 Furthermore, contrary to the submissions of the Commission of the European Communities, a measure taken by a Member State such as the measure at issue in the main proceedings does not go beyond what is necessary to achieve the objective pursued by reason of the mere fact that it does not lay down criteria which would allow the works concerned to be classified as 'cultural productions'.

33 Since language and culture are intrinsically linked, as pointed out by, inter alia, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the General Conference of UNESCO in Paris on 20 October 2005 and approved on behalf of the Community by Council Decision 2006/515/EC of 18 May 2006 (OJ 2006 L 201, p. 15), which states in paragraph 14 of its preamble that 'linguistic diversity is a fundamental element of cultural diversity', the view cannot be taken that the objective pursued by a Member State of defending and promoting one or several of its official languages must of necessity be accompanied by other cultural criteria in order for it to justify a restriction on one of the fundamental freedoms guaranteed by the Treaty. Indeed, in the present proceedings, the Commission has been unable to state precisely what those criteria should actually be.

34 Nor does a measure taken by a Member State such as the measure at issue in the main proceedings go beyond what is necessary to achieve the objective pursued by reason of the mere fact that the beneficiaries of the financing concerned are mostly cinema production undertakings in that Member State.

35 As the Advocate General pointed out in point 110 of her Opinion, the criterion used in respect of such a measure is linguistic.

36 The fact that such a criterion may constitute an advantage for cinema production undertakings which work in the language covered by that criterion and which, accordingly, may in practice mostly comprise undertakings established in the Member State of which the language constitutes an official language appears inherent to the objective pursued. Such a situation cannot, of itself, constitute proof of the disproportionate nature of the measure at issue in the main proceedings without rendering nugatory the recognition, as an overriding reason in the public interest, of the objective pursued by a Member State of defending and promoting one or several of its official languages.

37 With regard to Article 12 EC, of which an interpretation is also requested by the referring court and which enshrines the general principle of non-discrimination on grounds of nationality, it must be recalled that that provision applies independently only to situations governed by Community law for which the Treaty lays down no specific rules of non-discrimination (see Case C-40/05 *Lyyski* [2007] ECR I-99, paragraph 33 and the case-law cited).

38 However, in relation to the freedom of movement for workers, the right of establishment, the freedom to provide services and the free movement of capital, the principle of non-discrimination was implemented by Articles 39(2) EC, 43 EC, 49 EC and 56 EC respectively (see, with regard to Article 39(2) EC, *Lyyski*, paragraph 34; with regard to Article 49 EC, Case C-289/02 *AMOK* [2003] ECR I-15059, paragraph 26; and, with regard to Articles 43 EC and 56 EC, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 99).

39 Since it follows from the foregoing that a measure taken by a Member State such as that at issue in the main proceedings does not appear contrary to those provisions of the Treaty, it cannot be considered contrary to Article 12 EC either.

40 Consequently, the answer to the first and second questions is that the Directive and, more particularly, Article 3 thereof and Article 12 EC must be interpreted as meaning that they do not preclude a measure adopted by a Member State such as the measure at issue in the main proceedings which requires television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State.

The third question

41 By its third question, the referring court asks essentially whether Article 87 EC is to be interpreted as meaning that a measure adopted by a Member State, such as the measure at issue in the main proceedings, requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State constitutes State aid in favour of the cinematographic industry of that Member State.

42 It should be recalled that, in accordance with settled case-law, classification as aid requires all the conditions set out in Article 87 EC to be fulfilled, that is to say, first, there must be intervention by the State or through State resources, second, the intervention must be liable to affect trade between Member States, third, it must confer an advantage on the recipient and, fourth, it must distort or threaten to distort competition (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 74 and 75 and the case-law cited).

43 More particularly, it is clear from the case-law of the Court that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 87(1) EC. The distinction made in that provision between aid granted by a Member State and aid granted through State resources does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid, but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State (Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58 and the case-law cited).

44 It is not apparent that the advantage given by way of a measure adopted by a Member State, such as that at issue in the main proceedings, to the cinematographic industry of a

Member State constitutes an advantage granted directly by the State or by a public or private body designated or established by the State.

45 Such an advantage is the result of general legislation requiring television operators, whether public or private, to earmark a percentage of their operating revenue for the pre-funding of European cinematographic films and films made for television.

46 Furthermore, since a measure adopted by a Member State, such as the measure at issue in the main proceedings, applies to public television operators, it does not appear that the advantage in question is dependent on the control exercised by the public authorities over such operators (see, by analogy, Joined Cases 67/85, 68/85 and 70/85 *Kwekerij van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 37).

47 Consequently, the answer to the third question is that Article 87 EC must be interpreted as meaning that a measure adopted by a Member State, such as the measure at issue in the main proceedings, requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State does not constitute State aid in favour of the cinematographic industry of that Member State.

Costs

48 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 (Second Chamber) hereby rules:

1. **Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, and, more particularly, Article 3 thereof and Article 12 EC must be interpreted as meaning that they do not preclude a measure adopted by a Member State such as the measure at issue in the main proceedings which requires television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State.**

2. **Article 87 EC must be interpreted as meaning that a measure adopted by a Member State, such as the measure at issue in the main proceedings, requiring television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State does not constitute State aid in favour of the cinematographic industry of that Member State.**

[Signatures]