JUDGMENT OF THE COURT
10 September 1996 *

In Case C-222/94,

Commission of the European Communities, represented by Christopher Docksey and Berend Jan Drijber, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

French Republic, represented by Edwige Belliard, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Jean-Louis Falconi, Secretary for Foreign Affairs in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

intervener,

v

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Stephen Richards and Rhodri Thompson, Barristers, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

defendant,

* Language of the case: English.

APPLICATION for a declaration that, by failing to implement correctly 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), the United Kingdom has failed to fulfil its obligations under Article 2(1) and (2) and Article 3(2) of that directive,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn (Rapporteur), C. Gulmann, J. L. Murray, P. Jann, H. Ragnemalm and L. Sevón, Judges,

Advocate General: C. O. Lenz,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the United Kingdom Government, represented by John E. Collins, Stephen Richards and Rhodri Thompson; the French Government, represented by Philippe Martinet, Secretary for Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by Christopher Docksey and Berend Jan Drijber, at the hearing on 27 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 30 April 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 28 July 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing to implement correctly 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, hereinafter 'the Directive'), the United Kingdom has failed to fulfil its obligations under Article 2(1) and (2) and Article 3(2) of the Directive.

2 The United Kingdom is charged with having failed to fulfil its obligations under the Directive by:

— adopting, with respect to satellite broadcasts, the criteria set forth in section 43 of the Broadcasting Act 1990 for determining which satellite broadcasters fall under the jurisdiction of the United Kingdom, and, in the exercise of that jurisdiction, applying to non-domestic satellite services a different regime from that applicable to domestic satellite services,

and

— exercising control over broadcasts transmitted by a broadcaster falling under the jurisdiction of another Member State when those broadcasts are transmitted by a non-domestic satellite service or conveyed to the public as a licensable programme service or by a local delivery service.

The Directive

3 Article 2 of the Directive provides that:

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

— by broadcasters under its jurisdiction, or

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

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

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

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

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

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

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

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

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

4 Article 3 of the Directive provides that:

'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.'

5 Article 25 of the Directive required Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive not later than 3 October 1991 and forthwith to inform the Commission thereof.

The Council of Europe Convention on Transfrontier Television

6 Articles 2, 3, 5 and 27 of the Council of Europe Convention on Transfrontier Television of 5 May 1989 (hereinafter 'the Convention') are worded as follows:

' *Article 2: Terms employed*

For the purposes of this Convention:

a. "Transmission" means the initial emission by terrestrial transmitter, by cable, or by satellite of whatever nature, in encoded or unencoded form, of television programme services for reception by the general public. It does not include communication services operating on individual demand;

b. ...

c. "Broadcaster" means the natural or legal person who composes television programme services for reception by the general public and transmits them or has them transmitted, complete and unchanged, by a third party;

d. "Programme service" means all the items within a single service provided by a given broadcaster within the meaning of the preceding paragraph;

...

Article 3: Field of application

This Convention shall apply to any programme service transmitted or retransmitted by entities or by technical means within the jurisdiction of a Party, whether by cable, terrestrial transmitter or satellite, and which can be received, directly or indirectly, in one or more other Parties.

...

Article 5: Duties of the transmitting Parties

1. Each transmitting Party shall ensure, by appropriate means and through its competent organs, that all programme services transmitted by entities or by technical means within its jurisdiction, within the meaning of Article 3, comply with the terms of this Convention.

2. For the purposes of this Convention, the transmitting Party shall be:

a. in the case of terrestrial transmissions, the Party in which the initial emission is effected;

b. in the case of satellite transmissions:

i. the Party in which the satellite up-link is situated;

ii. the Party which grants the use of the frequency or a satellite capacity when the up-link is situated in a State which is not a Party to this Convention;

iii. the Party in which the broadcaster has its seat when responsibility under sub-paragraphs (i) and (ii) is not established.

...

Article 27: Other international agreements or arrangements

1. In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

...'.

National law

7 The Broadcasting Act 1990 (hereinafter 'the Act') lays down the regulatory framework for, *inter alia*, the provision of television programme services by independent bodies in the United Kingdom.

8 Section 13 of the Act prohibits the provision of television programme services other than those of the BBC and the Welsh Authority unless authorized by or under a licence granted by the Independent Television Commission ('ITC').

9 Points (g) and (h) of section 16(2) of the Act implement the requirements laid down in Articles 4 and 5 of the Directive with regard to programming of works of European origin and works by independent producers.

10 Section 43 draws a distinction between two categories of 'satellite television services', namely domestic and non-domestic, both of which are considered to be 'television programme services' and for which a broadcasting licence is therefore required. Section 43 also sets out the criteria for determining which television broadcasts are covered by the two categories:

— according to section 43(1), a 'domestic satellite service' (hereinafter 'DSS') means a television broadcasting service where the television programmes included in the service are transmitted by satellite from a place in the United Kingdom on a frequency allocated to the United Kingdom and for general reception in the United Kingdom;

— according to section 43(2), a 'non-domestic satellite service' (hereinafter 'NDSS') means a service which consists in the transmission of television programmes by satellite

(a) from a place in the United Kingdom for general reception in the United Kingdom or in a Member State otherwise than on an allocated frequency, or

(b) from a place outside the United Kingdom or any Member State for general reception in the United Kingdom or in a Member State where the programme material is provided by a person in the United Kingdom who has editorial control over programming content.

11 Specific provisions are laid down in section 44 of the Act for the licensing of DSS and in section 45 for the licensing of NDSS. Section 44(3) of the Act applies points (g) and (h) of section 16(2), concerning the conditions relating to the programming of European works, to DSS. Section 45(2), on the other hand, does not do so with regard to NDSS.

12 Section 47(2) of the Act concerns the licensing of 'licensable programme services'. Section 79(2) deals with the licensing of 'local delivery services' consisting in, or including, relaying (complete and unchanged) any foreign satellite programmes.

Procedure

13 By letter of 3 November 1992, the Commission expressed its view that, by failing correctly and fully to transpose the Directive, the United Kingdom had failed to fulfil its obligations, and gave it formal notice to submit its observations.

14 By letter of 10 February 1993, the United Kingdom Government submitted its observations on the various points raised in the letter giving formal notice.

15 On 30 September 1993, the Commission issued a reasoned opinion requesting the United Kingdom to adopt, within two months of its notification, the measures necessary to comply with its obligations under the Directive.

16 The United Kingdom replied to the reasoned opinion by letter of 25 January 1994.

The subject-matter of the action

17 In its second head of claim, the Commission contends that, contrary to Article 2(2) of the Directive, section 79(2) of the Act provides for control over broadcasts which are transmitted by a broadcaster falling under the jurisdiction of another Member State when those broadcasts are transmitted by a non-domestic satellite service or conveyed to the public by a local service.

18 In its statement of defence, the United Kingdom points out that, although it is true that section 79(2) of the Act covers the transmission of foreign satellite programmes, it none the less follows from section 79(5) and from the rules of application contained in the Broadcasting (Foreign Satellite Programmes) (Specified Countries) Order 1991 (S.I. 1991 No 2124) that section 79(2) does not apply to programmes transmitted by satellite from other Member States.

19 Following those observations, the Commission abandoned this objection at the hearing.

Failure to comply with Article 2(1) of the Directive

20 In its application, the Commission's objection against the United Kingdom is that section 43 of the Act does not comply with Article 2(1) of the Directive in four respects, in that it

— applies criteria other than that of establishment for determining which broadcasters fall within the jurisdiction of the United Kingdom;

— also applies a criterion which is not relevant for the purposes of such jurisdiction, namely the criterion of reception;

— fails to make third-country broadcasts falling under the United Kingdom's jurisdiction subject to United Kingdom law; and

— applies different regimes to NDSS and DSS.

21 The French Government shares and supports the reasoning of the Commission on which those objections are based.

The criteria for determining which television broadcasters fall within the jurisdiction of the United Kingdom

The interpretation of Article 2(1) of the Directive

22 Article 2(1) of the Directive requires each Member State to ensure that television broadcasters under its jurisdiction, or in respect of which it is required, for the

purposes of broadcasts, to exercise jurisdiction under the second indent of Article 2(1), comply with the law applicable to broadcasts intended for the public in that Member State. Member States are also required, under Article 3(2) of the Directive, to ensure that television broadcasters under their jurisdiction comply with the provisions of the Directive.

23 The documents before the Court show that the Commission and the United Kingdom disagree about the interpretation to be given to the term 'jurisdiction' used in the phrase 'broadcasters under [the] jurisdiction [of a Member State]' appearing in the first indent of Article 2(1) of the Directive.

24 The Commission's position is that broadcasters under the jurisdiction of a Member State are, for the purposes of that provision, those established in the Member State concerned. It therefore considers that, in adopting other criteria, the scheme of section 43 of the Act is not in conformity with Articles 2(1) and 3(2) of the Directive.

25 According to the United Kingdom, the Member State having jurisdiction within the meaning of Article 2(1) of the Directive is that from whose territory the broadcast is transmitted.

26 The Directive contains no express definition of the phrase 'broadcasters under its jurisdiction'.

27 It is therefore necessary to consider first whether an interpretation in support of one or other of the parties' positions can be deduced from the text of Article 2(1).

28 The United Kingdom submits that its interpretation, to the effect that the Member State having jurisdiction within the meaning of Article 2(1) of the Directive is that from whose territory the broadcast is transmitted, is borne out by the second indent of that provision, under which the Member State competent for ensuring compliance with the law applicable to broadcasts is that which grants a frequency or a satellite capacity or in which a satellite up-link is situated.

29 However, as the Commission has rightly pointed out, if the only criterion for determining the Member State having jurisdiction within the meaning of Article 2(1) of the Directive were that of the place from which the broadcast is transmitted, the second indent of Article 2(1) would be without substance.

30 The United Kingdom also submits that the relationship between the two indents in Article 2(1) of the Directive is not one of hierarchy but rather dichotomy.

31 It is, however, plain from the wording of Article 2(1) that a broadcaster cannot both be under the jurisdiction of a Member State within the meaning of the first indent and be in the situation envisaged by the second indent, which relates only to broadcasters not falling under the jurisdiction of any Member State.

32 Finally, the United Kingdom argues that the second indent of Article 2(1) of the Directive refers to satellite broadcasting, so that the first indent of that provision refers to terrestrial broadcasting.

33 That argument presupposes that the word 'jurisdiction' has a different meaning in each of the two indents. As the Advocate General observes at point 41 of his

Opinion, that argument is untenable. Given that the second indent refers only to situations in which no other Member State has the jurisdiction envisaged in the first indent, it presupposes that Member States may, by virtue of the first indent, have jurisdiction in the cases covered by the second indent.

34 Since the interpretation supported by the United Kingdom Government does not withstand analysis of the wording of Article 2(1), it is necessary to examine whether the Commission's position can be upheld.

35 The purpose of Article 2(1) of the Directive is to make sure that a Member State ensures that all television broadcasts made by broadcasters in relation to which it can assert the jurisdiction thereby conferred comply with the law applicable to broadcasts intended for the public in that Member State, including, according to Article 3(2), the provisions of the Directive itself.

36 A Member State's power to enforce compliance with its laws is a function of its jurisdiction in relation to activities carried on in its territory and, subsidiarily, over persons or, as the case may be, physical objects such as spacecraft, linked to that State, even though located outside its territory.

37 The second indent of Article 2(1) refers to the situation in which a Member State may assert either its jurisdiction in relation to the use of a satellite or its territorial jurisdiction in relation to the use of an up-link, situated in that State, to a satellite which does not fall under its jurisdiction.

38 However, the second indent envisages the exercise of such jurisdiction only on condition that no other Member State has jurisdiction under the first indent of Article 2(1).

39 Member State B can have jurisdiction in the circumstances envisaged in the second indent only if, pursuant to the first indent, it can assert jurisdiction *ratione personae* over television broadcasters wishing to make use of (i) a frequency or the capacity of a satellite linked to Member State A or (ii) an up-link, situated within Member State A's territory, to a satellite not falling under the jurisdiction of Member State A.

40 It thus follows from an analysis of Article 2(1) that the concept of jurisdiction of a Member State, used in its first indent, must be understood as necessarily covering jurisdiction *ratione personae* over television broadcasters.

41 This interpretation is borne out by the wording of the first indent of Article 2(1) of the Directive in that it refers to broadcasters as being under the jurisdiction of a Member State without referring, in that context, to the place from which they transmit their broadcasts.

42 A Member State's jurisdiction *ratione personae* over a broadcaster can be based only on the broadcaster's connection to that State's legal system, which in substance overlaps with the concept of establishment as used in the first paragraph of Article 59 of the EC Treaty, the wording of which presupposes that the supplier and the recipient of a service are 'established' in two different Member States.

The Council of Europe Convention

43 The United Kingdom further contends that its interpretation of the phrase 'broadcasters under [a Member State's] jurisdiction' appearing in Articles 2(1) and 3(2) of the Directive is based essentially on Article 5(2) of the Convention, according to which the transmitting Party that must ensure that entities or technical means within its jurisdiction, within the meaning of Article 3, comply with the obligations imposed by the Convention shall be the State in which the satellite up-link is situated or the State which grants the use of the frequency or a satellite capacity when the up-link is situated in a State which is not a Party to the Convention.

44 The United Kingdom argues that, although the Community is not itself a Party to the Convention, it would be absurd if the Community, by way of the Directive, sought to regulate intra-Community broadcasting in a manner radically different from that adopted by the Member States within the framework of the Convention.

45 That argument, considered in the light of a comparative analysis of the wording, scheme and aims of the Directive, on the one hand, and of those of the Convention, on the other, cannot, however, be accepted.

46 First, Article 5 of the Convention provides that the competent State for ensuring compliance with the provisions dealing with programme services shall be the Party from which transmission is made. According to Article 2 of the Convention, 'transmission' means the initial emission by terrestrial transmitter, by cable or by satellite of whatever nature, in encoded or unencoded form, of television programme services for reception by the general public. In the case of terrestrial transmissions, Article 5(2)(a) provides that the transmitting Party shall be that in which the initial emission is effected. In the case of satellite transmissions, Article 5(2)(b) provides that the transmitting Party shall be that in which the satellite up-link is

situated (point (i)) or that which grants the use of the frequency or a satellite capacity when the up-link is situated in a State which is not a Party to the Convention (point (ii)).

47 It follows that, in order to determine which State is competent for ensuring compliance with the provisions relating to programme services, the Convention principally applies criteria based on transmission. It is only in the case of satellite transmissions, if responsibility cannot be established under Article 5(2)(b)(i) and (ii), that Article 5(2) refers to the State in which the broadcaster has its seat (point (iii) of Article 5(2)(b)). As the Advocate General observes at point 51 of his Opinion, point (iii) is subsidiary in relation to the cases covered by points (i) and (ii) of Article 5(2)(b) of the Convention.

48 Under the first indent of Article 2(1) of the Directive, however, the Member State competent for ensuring compliance with the provisions relating to programme services is that under whose jurisdiction the broadcaster comes. According to the second indent of Article 2(1), it is only where the broadcaster does not come under the jurisdiction of any other Member State that the Directive uses criteria based on transmission.

49 It follows that Article 2(1) of the Directive and Article 5(2) of the Convention use different criteria for determining the State that must ensure compliance with the provisions relating to television broadcasts. As the Commission has rightly observed, this substantive difference reflects a difference between the aims of the Directive and the aims of the Convention. Whereas, according to the second recital in the Directive's preamble, the Directive is designed to establish the internal market in television services, the Convention, according to Article 1 thereof, is designed to facilitate the transfrontier transmission and retransmission of television programme services.

50 Furthermore, there is no doubt that the Council was fully aware of the adoption of the Convention when it itself adopted the Directive, as is indeed clear from the

fourth recital of the preamble. However, as the Advocate General explains at point 54 of his Opinion, the proposal for the Directive, dating from 1986, was not amended with a view to bringing it into line with the Convention. It follows that, by adopting the Directive, the Community legislature chose to regulate television services in a way which differs from the path followed by the Convention.

51 Consequently, the Convention affords no argument to counter the view that the reference made in Article 2(1) of the Directive to the State having jurisdiction over a broadcaster must be understood as a reference to the State in which the broadcaster is established.

52 Finally, the United Kingdom points out the consequences of interpreting Article 2(1) of the Directive in a way which does not reflect Article 5(2) of the Convention. It argues that such an interpretation would clearly place Member States in an impossible situation by requiring them to infringe their legal obligations either at international or at Community level.

53 As to that point, it is sufficient to observe that Article 27(1) of the Convention expressly provides that Member States are to apply Community law and are therefore not to apply the rules arising from the Convention except in so far as there is no Community rule governing the particular subject concerned.

The efficacity of the criterion based on establishment

54 Next, it is necessary to examine various arguments put forward by the United Kingdom concerning the efficacity of interpreting Article 2(1) of the Directive as meaning that the State having jurisdiction over a broadcaster is the State in which the broadcaster is established.

55 Certainly, such an interpretation of Article 2(1) of the Directive is liable to produce difficulties, as indeed the Commission expressly acknowledged at the hearing.

56 However, when a Member State has difficulty in implementing a directive, it has an obligation to raise the matter with the Commission in order that the latter may, in close cooperation with the Member States concerned, find an appropriate solution. In any event, the mere fact that practical problems can be anticipated in the application of the criterion for determining the State having jurisdiction under Article 2(1) of the Directive does not entitle a Member State to replace it with its own different criterion.

57 The United Kingdom also argues, on the basis on the Court's judgments in Case 39/75 *Coenen and Others* v *Sociaal-Economische Raad* [1975] ECR 1547 and Case C-221/89 *Factortame and Others* [1991] ECR I-3905, that a broadcaster could be established in more than one Member State and that such a broadcaster could thus be entitled to have the benefit of the provisions of the Directive both as regards transmissions from the State in which it has its principal place of establishment and as regards transmissions from the State in which it has its secondary place of establishment. There would therefore be a risk that more than one Member State would have jurisdiction over the same broadcaster.

58 As to that point, the criterion contended for by the United Kingdom may produce problems in the delimitation of jurisdiction which, in its view, can be resolved only through the conclusion of international agreements between the Member States. Although the criterion of establishment may also give rise to difficulties, the Commission has stated, without being contradicted by the United Kingdom, that Member States may find a solution to the problem of double control, without the necessity of further legislation, by interpreting the criterion of establishment as referring to the place in which a broadcaster has the centre of its activities, in particular the place where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together.

59 The United Kingdom also contends that the criterion of establishment involves a risk of abuse in that a broadcaster could move its seat to another Member State in order to avoid application of the legislation of a Member State.

60 As to that, the interpretation of the criterion of establishment advocated by the Commission (see paragraph 58 above) would considerably reduce the risk of abuse pointed out by the United Kingdom. The criterion advocated by the United Kingdom would, in any event, involve a comparable, if not greater, risk of abuse.

61 It follows that, by using criteria other than that of establishment in order to determine the broadcasters falling under the jurisdiction of the United Kingdom, section 43 of the Act is not in conformity with Articles 2(1) and 3(2) of the Directive.

62 The Commission's objection is therefore well founded.

The criterion of programme reception

63 According to the Commission, section 43 of the Act is not in conformity with Article 2(1) of the Directive in so far as it refers to the criterion of programme reception. That criterion, the Commission argues, is irrelevant for the purpose of determining, within the context of the Directive, the Member State having jurisdiction over a broadcaster.

64 Suffice it to observe that the Court has already found, at paragraph 61 above, that the criteria set out in section 43 of the Act are not in conformity with Articles 2(1) and 3(2) of the Directive.

65 The Commission's objection is therefore well founded.

The failure to make broadcasts from non-member countries coming under United Kingdom jurisdiction subject to United Kingdom law

66 The Commission objects that the Act does not seek to ensure that broadcasts from non-member countries using a frequency allocated to the United Kingdom for general reception in another Member State comply with the law applicable to broadcasts intended for the public in the United Kingdom.

67 The United Kingdom Government submits that there would be a breach of the second indent of Article 2(1) of the Directive only in the highly unrealistic event that it were to grant a frequency to a broadcaster from a non-member country without exercising control over its service.

68 Suffice it to point out that, even though this may only be a hypothetical case, the United Kingdom does not deny that in this respect the Act is not in conformity with the Directive.

69 The Commission's objection is therefore well founded.

The application of a different regime to NDSS and DSS

70 The Commission claims that, besides being based on criteria other than that of the broadcaster's place of establishment, the distinction drawn in section 43 of the Act between DSS and NDSS is not in accordance with Article 2(1) of the Directive in so far as section 43 makes NDSS subject to a less stringent regime than DSS.

71 It explains that, by virtue of section 44(3) of the Act, points (g) and (h) of section 16(2) are applicable to DSS, whereas the latter provision is not applicable to NDSS. It is common ground that section 16(2) of the Act is intended to give effect to Articles 4 and 5 of the Directive.

72 However, both the Commission and the United Kingdom have stated that the question whether the United Kingdom has in fact satisfied its obligations under Articles 4 and 5 of the Directive with regard to NDSS is the subject of separate proceedings under Article 169 of the Treaty.

73 Since the United Kingdom does not deny that a less stringent regime is applied to NDSS than that laid down for DSS, the only question arising in these proceedings is whether Article 2(1) of the Directive precludes such different treatment.

74 While a Member State may, under Article 3(1) of the Directive, lay down stricter rules in the areas covered by the Directive, the fact remains that, under Article 2(1), all broadcasts transmitted by broadcasters under the jurisdiction of that Member State or over which it is required to exercise jurisdiction pursuant to the second indent of Article 2(1) must comply with the law applicable to broadcasts intended for the public in that Member State.

75 The Commission's objection is therefore well founded.

Failure to comply with Article 2(2) of the Directive

76 Finally, the Commission objects that sections 44 and 45 of the Act, dealing with the licensing of DSS and NDSS, are not in conformity with Article 2(2) of the

Directive in that the definition of DSS and NDSS in section 43 of the Act includes broadcasters falling under the jurisdiction of other Member States, thereby giving rise to the possibility of double control.

77 The United Kingdom does not deny that section 43 of the Act extends to all broadcasters transmitting from its territory.

78 It must therefore be held that, by using criteria other than that of establishment, provided for in Article 2(1) of the Directive, section 43 of the Act, contrary to Article 2(2) of the Directive, also applies to broadcasters falling under the jurisdiction of other Member States by reason of their establishment in those States.

79 The Commission's objection is therefore well founded.

80 It follows from all the foregoing that, by adopting, with respect to satellite broadcasts, the criteria set forth in section 43 of the Broadcasting Act 1990 for the purpose of determining which satellite broadcasters fall under the jurisdiction of the United Kingdom and, in the context of that jurisdiction, by applying different regimes to domestic satellite services and non-domestic satellite services, and by exercising control over broadcasts which are transmitted by broadcasters falling under the jurisdiction of other Member States when those broadcasts are transmitted by a non-domestic satellite service or conveyed to the public as a licensable programme service, the United Kingdom has failed to fulfil its obligations under Article 2(1) and (2) and Article 3(2) of the Directive.

Costs

81 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4), the French Republic, which has intervened in the proceedings, is ordered to pay its own costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by adopting, with respect to satellite broadcasts, the criteria set forth in section 43 of the Broadcasting Act 1990 for the purpose of determining which satellite broadcasters fall under the jurisdiction of the United Kingdom and, in the context of that jurisdiction, by applying different regimes to domestic satellite services and non-domestic satellite services, and by exercising control over broadcasts which are transmitted by broadcasters falling under the jurisdiction of other Member States when those broadcasts are transmitted by a non-domestic satellite service or conveyed to the public as a licensable programme service, the United Kingdom has failed to fulfil its obligations under Article 2(1) and (2) and Article 3(2) 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;

(2) Orders the United Kingdom to pay the costs;

(3) Orders the French Republic to pay its own costs.

Rodríguez Iglesias Kakouris Edward Puissochet

Hirsch Mancini Moitinho de Almeida Kapteyn

Gulmann Murray Jann Ragnemalm Sevón

Delivered in open court in Luxembourg on 10 September 1996.

R. Grass — G. C. Rodríguez Iglesias

Registrar — President