OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 10 March 2005 [1]

1. By order of 18 February 2004, the Raad van State (Council of State, Netherlands) referred three questions to the Court for a preliminary ruling, pursuant to Article 234 EC, on the interpretation 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] ('Directive 89/552') and Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, [3] as amended by Directive 98/48/EC [4] ('Directive 98/34').

2. The national court is essentially seeking to ascertain whether the supply, by a broadcaster of films which are transmitted in encoded form over a network at prearranged times and which can be viewed by customers by means of an individual decoding key sent to them once they have paid the requisite charge, constitutes 'television broadcasting' within the meaning of Directive 89/552 or an 'information society service' within the meaning of Directive 98/34.

I — Legal framework

The relevant Community legislation

3. The first provision that is relevant for present purposes is Article 1(a) of Directive 89/552, under which 'television broadcasting' means:

'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. ... It does not include communication services providing items of information or other

1 — Original language: Italian.

2 — OJ 1989 L 298, p. 23.

3 — OJ 1998 L 204, p. 37.

4 — Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 217, p. 18).

messages on individual demand such as telecopying, electronic data banks and other similar services'.

4. Also relevant is Article 4(1) of that directive, which requires Member States to ensure,'where practicable and by appropriate means, that broadcasters reserve for European works ... a majority proportion of their transmission time ...'.

5. For present purposes, attention is also drawn to Article 1 of Directive 98/34, as amended by Directive 98/48, which provides that:

'For the purposes of this Directive, the following meanings shall apply:

...

2. "service", any information society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

— "at a distance" means that the service is provided without the parties being simultaneously present,

— "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

— "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

This Directive shall not apply to:

— radio broadcasting services,

— television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC.'

6. The following services are listed in point 3 of Annex V to Directive 98/34:

'Services not supplied "at the individual request of a recipient of services"

Services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission):

(a) television broadcasting services (including near-video on-demand services) covered by point (a) of Article 1 of Directive 89/552/EEC;

(b) radio broadcasting services;

(c) (televised) teletext.'

The relevant national provisions

7. The provision of radio and television programmes in the Netherlands is governed by the Mediawet (Law on the Media). [5]

8. Under Article 71a(1) of the Mediawet, a commercial radio-television company may

5 — Netherlands law of 21 April 1987 governing the provision of radio and television programmes, radio and television standards, and aids to organs of the press (*Staatsblad* No 249 of 4 June 1987).

broadcast a television programme or have such a programme broadcast only if it has obtained authorisation to do so from the Commissariaat voor de Media (the Media Authority, which is the body responsible for monitoring the radio-television sector).

II — Facts and procedure

9. Since the end of 1999, Mediakabel has offered its subscribers the possibility of receiving a number of television broadcasts in addition to the programmes transmitted by other broadcasters (the 'Mr Zap' offer). As part of the offer, the subscriber can also order one or more films selected via the television screen or appropriate programme guides (the 'Filmtime' offer).

10. The films included in the Filmtime offer are transmitted to all subscribers simultaneously — but in encoded form — at the times determined by Mediakabel. The subscriber indicates at a distance, even by telephone, which films he wishes to view at the times available and once he has paid the requisite charge he receives an electronic key to decode the television images.

11. By decision of 15 March 2001, the Commissariaat voor de Media informed Mediakabel that the Filmtime service constituted a television programme for which appropriate authorisation must be obtained in accordance with Article 71a(1) of the Mediawet.

12. The complaint against that decision was dismissed and Mediakabel, which had nevertheless obtained the required authorisation in the meantime, therefore brought an action before the Rechtbank te Rotterdam (Rotterdam District Court) contesting the results of the Commissariaat's classification of its service.

13. That action, too, was dismissed. Mediakabel then brought an appeal before the Raad van State in which it maintained that Filmtime should be classified not as 'television broadcasting' subject to authorisation and to the requirement to comply with the programming quotas for European works but as an 'information society service' of the 'near-video on-demand' variety and, as such, not subject to those obligations.

14. The court of appeal, having doubts as to the correct classification of the service in

question, decided to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is the term "television broadcasting" within the meaning of Article 1(a) of Directive 89/552/EEC to be interpreted as not covering an "information society service" within the meaning of Article 1(2) of Directive 98/34/EC, as amended by Directive 98/48/EC, but as covering services such as those set out in the indicative list of services not covered by Article 1(2) of Directive 98/34/EC, including "near-video on-demand services", contained in Annex V to Directive 98/34/EC, in particular subparagraph (3), which therefore do not constitute "information society services"?

(b) If the answer to Question 1(a) is in the negative, how should a distinction be drawn between the term "television broadcasting" within the meaning of Article 1(a) of Directive 89/552/EEC and the term "communication services providing items of information ... on individual demand" also set out therein?

(2) (a) On the basis of which criteria must it be determined whether a service such as that at issue, which involves encoded signals, transmitted over a network, of a range of films selected by the provider, which subscribers can, in return for a separate payment per film and using a key sent by the provider on individual demand, decode and view at various times determined by the provider, and which contains elements of an (individual) information society service and also elements of a television broadcasting service, constitutes a television broadcasting service or an information society service?

(b) In this regard is priority to be given to the standpoint of the subscriber or rather to that of the service provider? Is the kind of services with which the service concerned is in competition relevant in this regard?

(3) In that connection is it relevant that,

— on the one hand, classification of a service such as that at issue as an "information society service" to which Directive 89/552/EEC does not apply might undermine the effectiveness of

that directive, in particular as regards the objectives underlying the requirement thereunder to reserve a specific percentage of transmission time for European works, and

— on the other, if Directive 89/552/EEC does apply, the requirement thereunder to reserve a specific percentage of transmission time for European works is not entirely apposite because the subscribers pay per film and can only view the film which has been paid for?'

15. In the proceedings thus instituted, written observations have been submitted by Mediakabel, the Commissariaat voor de Media, the Governments of the Netherlands, Belgium, France and the United Kingdom, and by the Commission.

16. The Court also heard oral argument from Mediakabel, the Commissariaat voor de Media, the Netherlands Government and the Commission at the hearing on 20 January 2005.

III — Legal analysis

Introduction

17. As we all know, the range of services available through television has multiplied in recent years as a result of rapid changes in technology.

18. In addition to the traditional television services, there are now pay-TV, pay-per-view, video on-demand, and near-video on-demand services, which guarantee viewers increasing flexibility in their enjoyment of the product as compared with traditional services.

19. In the case of pay-TV, the product is part of a package put together by the broadcaster, which the viewer can purchase en bloc; the same goes for pay-per-view, with the difference that the viewer can watch and pay for a specific product. Greater flexibility is afforded by the near-video on-demand service, where the specific product is broadcast repeatedly at very short intervals, and even more so by the video on-demand service, where the viewer makes his selection from an electronic catalogue and decides himself which programme to watch, and when.

20. These new services also include interactive online services available through television terminals (interactive television), such as home banking, home shopping, travel and holiday services, downloaded games, and online lessons.

21. That is the context in which the referring court put the question concerning a specific service (near-video on-demand) which was expressly taken into consideration in Directive 98/34, in which it occupies a very precise place. I shall therefore refer primarily to that directive in my analysis of the questions referred for a preliminary ruling, comparing it where necessary with the earlier Directive 89/552.

The classification of near-video on-demand services (Question 1(a))

22. By Question 1(a), the referring court is essentially seeking to ascertain whether near-video on-demand services are to be regarded as covered by the term 'television broadcasting' or by the term 'information society service'.

23. It seems to me, as it does to the intervening governments and to the Commission, that the answer to that question follows clearly and directly from a simple reading of Directive 98/34.

24. As we have seen, 'information society services' are defined in the first subparagraph of Article 1(2) of Directive 98/34 as services 'normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services' and the fourth subparagraph of that provision expressly states that the directive does not apply to 'television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC'.

25. Point 3(a) of Annex V to Directive 98/34 repeats that the definition of information society services does not embrace 'television broadcasting services ... covered by point (a) of Article 1 of Directive 89/552/EEC' and expressly indicates that such television broadcasting services are to be understood as 'including near-video on-demand services'.

26. In view of the unequivocal nature of the provisions cited, I can therefore conclude without further investigation that, under point 3(a) of Annex V to Directive 98/34, near-video on-demand services are covered by the term 'television broadcasting' referred to in Article 1(a) of Directive 89/552. On the other hand, 'television broadcasting' services do not fall within the definition of 'information society service' set out in Article 1(2) of Directive 98/34.

27. It seems to me that, as the United Kingdom Government has also pointed out, such a conclusion is sufficient in itself to determine the point at issue in the main proceedings, that is to say, to establish whether the Commissariaat voor de Media acted lawfully in insisting on an authorisation procedure in the case of the Filmtime service.

28. The referring court itself pointed out in its order for reference that that service falls into the category of near-video on-demand services, [6] that is to say, a category which — as I have just said — is covered under Directive 98/34 by the term 'television broadcasting'. And, according to the Netherlands Government, authorisation is indeed required for that type of broadcasting, as the Commissariaat voor de Media claims.

6 — See order for reference, paragraph 2.2.

29. However, at the hearing, Mediakabel raised what was in a sense a preliminary objection with regard to the classification of the Filmtime service. That is to say, it argued that that service cannot in fact be defined as a near-video on-demand service.

30. I should point out in this connection that the directives in question do not contain any definition of near-video on-demand services or, generally speaking, of any individual services entailing the transmission of televised material and that the classification of near-video on-demand services is also the subject of academic dispute. Consequently, in order to give a reply to Mediakabel's objection that is less vague and, at the same time, more useful for present purposes, it seems to me preferable to begin by identifying the criterion for distinguishing between 'television broadcasting' and 'information society services' and then to determine in the light of that criterion whether a service such as Filmtime falls within the first or the second category.

31. That approach also has the advantage of bringing us to the other questions raised in the order for reference, which should therefore be examined now.

The distinction between 'television broadcasting' services and 'information society services' (Question 2(a))

32. By Question 2(a), which essentially covers Question 1(b) and renders a specific answer to that question superfluous, the referring court asks the Court to indicate the criterion for determining whether a service for the transmission of televised material, such as the service at issue in the present case, constitutes 'television broadcasting' within the meaning of Directive 89/552 or an 'information society service' within the meaning of Directive 98/34.

33. According to Mediakabel, on the basis of Directive 98/34, the key question in this connection is whether the product is available to the viewer on 'individual demand'. In other words, the service is an 'information society service' if the viewer can ask the provider for a specific film but 'television broadcasting' if he cannot.

34. In addition to the question of availability on individual demand, Mediakabel also claims that other evidence indicative of an 'information society service' is the fact that the systems for decoding the images and the methods of payment are prearranged by the provider in such a way as to enable the viewer to watch, and pay for, only the film requested.

35. On those premisses, Mediakabel manages to classify Filmtime as an 'information society service'. In its view, although the specific films offered by that service are broadcast to all subscribers, they can be viewed only by those who have specifically requested them and who, on paying the requisite charge, have been sent the necessary decoding key.

36. However, I do not think that solution can be accepted. In my view, it involves attaching too much importance to factors that are completely irrelevant for the purposes of the classification in question (the form of encoding and the methods of payment) and it also relies on a misinterpretation of the term 'individual demand' (for the television service) as used in Directive 98/34.

37. In support of the foregoing assertion, I should like first of all to recall the various definitions at issue in the present case:

— pursuant to Article 1(a) of Directive 89/552, 'television broadcasting' means '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*';

— pursuant to the first subparagraph of Article 1(2) of Directive 98/34, on the contrary, 'information society service' means 'any service *normally* provided for remuneration, at a distance, by electronic means and *at the individual request* of a recipient of services'.[7]

38. The term 'individual request', in turn, is more clearly defined in the second subparagraph of Article 1(2) of Directive 98/34 and in point 3 of Annex V thereto.

39. According to the former of those provisions, the term means that 'the service is provided through the *transmission* of data *on individual request*'. According to the latter, however, the term does not apply to services such as television broadcasting services (including near-video on-demand services) 'provided by *transmitting data without individual demand* for *simultaneous reception* by an unlimited number of individual receivers (point to multipoint transmission)'.[8]

40. However, as the intervening governments have observed, an analysis of those provisions shows, first, that the distinction between 'television broadcasting' and 'information society services' cannot be based on whether the images are transmitted in *unencoded or encoded form* since, under Directive 89/552, the form in which images are transmitted is completely irrelevant for the purposes of the distinction. Nor can it be based on the method of payment for the services provided, since the provisions cited are silent on the subject and payment may therefore be made in a wide variety of ways and may even be waived in the case of information society services, though only in exceptional circumstances.

41. Those first two factors are therefore irrelevant for our purposes. On the other hand, it seems to me crucial to determine when the transmission of televised material

7 — My emphasis.

8 — My emphasis.

can be classed as being 'intended for reception by the public' or as being provided 'on individual request'.

42. As the Commission has noted, it follows from the provisions cited in point 37, taken together, that there is 'television broadcasting', not an 'information society service', when the televised material transmitted is 'intended for reception by the public', that is to say, when — to use the more precise words employed in Directive 98/34 — the data in question are not transmitted to individual viewers on request (point to point transmission) but are intended for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission).

43. On that criterion, a service such as the service at issue which, according to the information supplied by the referring court and accepted by Mediakabel itself, presupposes the simultaneous transmission of films, albeit in encoded form, to all subscribers must in principle be classified as 'television broadcasting'.

44. That said, it will be for the national court, which is better apprised of all the elements of fact, to make the classification in the present case.

45. Concluding my consideration of this question, I therefore propose that the answer should be that a service constitutes 'television broadcasting' within the meaning of Article 1(a) of Directive 89/552 and not an 'information society service' within the meaning of Article 1(2) of Directive 98/34 where the audiovisual data transmitted are 'intended for reception by the public', that is to say, where they are not transmitted to individual viewers on request (point to point transmission) but are intended for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission).

The factors to be considered in classifying a service consisting in the transmission of televised material (Questions 2(b) and 3)

46. By Questions 2(b) and 3, which should be taken together, the referring court asks the Court whether, in classifying a service consisting in the transmission of televised material, more attention should be paid to the standpoint of the user or to that of the provider of the service; whether the services with which it is in competition should be considered; and whether the requirement laid down in Directive 89/552 that a certain quota of European works be transmitted is in fact inapplicable in the case of a service where it is the viewer who selects and pays for the film to be shown.

47. Mediakabel observes that its service and video on-demand services, which are transmitted in accordance with the point to point method and are therefore clearly 'information society services', have similar characteristics and are in a way interchangeable. Both allow the consumer to select the film to be shown. Both should therefore be placed in the same category and be subject to the same requirements. In that connection, Mediakabel points out that it could certainly have organised the transmission of the films included in the Filmtime offer in accordance with the point to point method but it had abandoned the idea because that method is too costly.

48. Mediakabel adds that it does not make sense to classify its service as 'television broadcasting' and consequently require it to comply with the quotas for the transmission of European works, since in the case of the service in question it is the viewer who selects the programme and decides whether or not he wants to watch a European work.

49. In my view, that position cannot be accepted.

50. As we saw earlier (point 42), in order to determine whether a particular service is an 'information society service' or 'television broadcasting', it is necessary to ascertain whether the televised material transmitted is sent to an individual viewer on request (point to point transmission) or whether it is intended for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission).

51. To that end, as the Netherlands and United Kingdom Governments and the Commission have pointed out, what is needed is an objective examination based on an essentially technical criterion which has to do with the way in which the televised material is transmitted.

52. It follows that the classification of the service cannot vary according to whether the standpoint adopted is that of the provider or the user. Still less can the classification depend on any competitive disadvantages entailed by the method of point to multipoint transmission (albeit less costly and therefore more convenient in other respects).

53. In particular, I do not think the abovementioned objective examination can be

avoided by invoking the possible damage that may arise from the application of Article 4(1) of Directive 89/552, which requires Member States to ensure, 'where practicable and by appropriate means', that broadcasters reserve a majority proportion of their transmission time for European works.

54. Contrary to what the referring court and Mediakabel appear to suppose, that requirement also applies to services like Filmtime where the viewer selects and pays for the film to be shown.

55. As the French and United Kingdom Governments and the Commission have observed, Article 4(1) requires *television broadcasters* to *transmit* European works for a majority proportion of their transmission time; it does not require *television viewers* to select those works. Consequently, broadcasters like Mediakabel may well be obliged to programme and transmit European works, including works in encoded form, but its subscribers are of course still free to choose which ones to pay for and watch.

56. Furthermore, as I pointed out not long ago, the Member States are required to ensure that broadcasters fulfil that obligation only 'where practicable' and 'by appropriate means'.

57. That means, in my view, that the obligation is not always mandatory, come what may; certainly not when it would be so onerous as to render certain services economically *impossible*. Moreover, it must be adapted and modified according to the particular methods of providing and profiting from television broadcasting, and partial or temporary exceptions should be introduced where necessary. [9]

58. Lastly, as the United Kingdom Government has pointed out, that obligation is applicable to all television broadcasting services, including those where the viewer selects the film to be shown, but it is actually applied only if and in so far as it does not create insurmountable difficulties for the broadcaster.

59. For the reasons set out above, I think it possible to conclude on this point that the classification of a service as 'television

9 — The Commissariaat voor de Media reported at the hearing that the legislation provided for the possibility of modifying the application of the obligation laid down in Article 4 of Directive 89/552 by granting partial or temporary exemption in some cases.

broadcasting', within the meaning of Directive 89/552, or as an 'information society service', within the meaning of Directive 98/34, does not depend on the personal standpoint of the provider or of the user of that service, or on any competitive disadvantages associated with the method of transmitting the images.

60. The obligation, laid down in Article 4(1) of Directive 89/552, to reserve a majority proportion of transmission time for European works also applies, where practicable and by appropriate means, to television broadcasting services where the viewer selects and pays for the film to be viewed.

IV — Conclusion

61. In the light of the foregoing, I propose that the Court give the following answers to the questions referred by the Raad van State:

(1) Pursuant to point 3(a) of Annex V to Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, near-video on-demand services are covered by the term 'television broadcasting' in Article 1(a) 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.

'Television broadcasting' services, as referred to in Article 1(a) of Council Directive 89/552, do not fall within the definition of 'information society services' in Article 1(2) of Directive 98/34, as amended by Directive 98/48.

(2) (a) A service constitutes 'television broadcasting' within the meaning of Article 1(a) of Directive 89/552, and not an 'information society service' within the meaning of Article 1(2) of Directive 98/34, as amended by Directive 98/48, where the audiovisual data transmitted are intended for reception by the public, that is to say, where they are not transmitted to individual viewers on request (point to point transmission) but are intended for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission).

(b) The classification of a service as 'television broadcasting' within the meaning of Directive 89/552 or as an 'information society service' within the meaning of Directive 98/34, as amended by Directive 98/48, does not depend on the personal standpoint of the provider or of the user of that service; nor does it depend on any competitive disadvantages entailed by the method of transmitting the images.

(3) The obligation, laid down in Article 4(1) of Directive 89/552, to reserve a majority proportion of transmission time for European works also applies, where practicable and by appropriate means, to television broadcasting services where the viewer selects and pays for the film to be viewed.