JUDGMENT OF THE COURT (Sixth Chamber)
29 May 1997 *

In Case C-14/96,

REFERENCE to the Court under Article 177 of the EC Treaty by Tribunal de Première Instance, Brussels, for a preliminary ruling in the criminal proceedings before that court against

Paul Denuit,

on the interpretation of Article 2(1) and (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 (OJ 1989 L 298, p. 23),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, J. L. Murray, C. N. Kakouris, P. J. G. Kapteyn (Rapporteur) and H. Ragnemalm, Judges,

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

* Language of the case: French.

after considering the written observations submitted on behalf of:

— Paul Denuit, by A. Braun and F. de Visscher, of the Brussels Bar,

— the Belgian State, in the persons of the Deputy Prime Minister, the Minister for Communications and Public Enterprises and the Minister for Scientific Policy, by A. Berenboom, of the Brussels Bar,

— the Belgian Government, by J. Devadder, General Adviser to the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent, assisted by A. Berenboom, of the Brussels Bar,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, assisted by S. Maass, Regierungsrätin at the same Ministry, acting as Agents,

— the Hellenic Government, by A. Samoni-Rantou, Special Deputy Legal Adviser to the Special Department for Contentious Community Affairs of the Ministry of Foreign Affairs, and I. Kiki, Secretary at the Special Legal Department of that Ministry, acting as Agents,

— the French Government, by C. de Salins, Deputy Director at the Foreign Affairs Directorate of the Ministry of Foreign Affairs and P. Martinet, Foreign Affairs Secretary at the same Directorate, acting as Agents,

— the United Kingdom Government, by S. Ridley, of the Treasury Solicitor's Department, acting as Agent, and R. Thompson, Barrister,

— the Commission of the European Communities by B. J. Drijber and P. van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations presented at the hearing on 12 December 1996 on behalf of Paul Denuit, represented by A. Braun and F. de Visscher; the Belgian Government, represented by J. Devadder and A. Joachimowicz, of the Brussels Bar; the Hellenic Government, represented by A. Samoni-Rantou; the United Kingdom Government, represented by R. Thompson; and the Commission, represented by B. J. Drijber,

after hearing the Opinion of the Advocate General at the sitting on 6 February 1997,

gives the following

Judgment

1 By order of 16 January 1996, received at the Court on 19 January 1996, the Tribunal de Première Instance (Court of First Instance), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 2(1) and (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 (OJ 1989 L 298, p. 23, hereinafter 'the Directive').

2 These questions have been raised in criminal proceedings brought against Paul Denuit, Managing Director of Coditel Brabant SA (hereinafter 'Coditel') for infringing domestic Belgian broadcasting legislation.

The Directive

3 In Chapter II (General provisions), Article 2 of the Directive provides:

'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, which is in the same chapter of the Directive, provides:

'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 In Chapter III (Promotion of distribution and production of television programmes), Articles 4 and 5 implement the aim of promoting production and distribution of European works by laying down minimum conditions for the proportion of programmes which must be devoted to European works and European works created by producers who are independent of broadcasters, including recent works transmitted within five years of their production.

6 Article 4(1) of the Directive requires Member States to 'ensure where practicable and by appropriate means, that broadcasters reserve for European works ... a majority proportion of their transmission time ...'. Article 5 also requires the Member States to 'ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time ... 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 ...'.

United Kingdom law

7 The Broadcasting Act 1990 ('the Act') lays down the regulatory framework for, *inter alia*, the provision of independent television services 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 of the Act 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' within the meaning of section 13 and for which a broadcasting licence must therefore be obtained. It also sets out the criteria to be applied 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.

The proceedings before the Belgian courts

12 According to the documents made available to the Court, Turner International Sales Ltd (hereinafter 'Turner'), established in London, obtained from the United Kingdom authorities authorization to transmit a television programme called 'TNT&Cartoon Network' via the Astra satellite. The broadcasts have taken place since September 1993. The programme can be received directly with a parabolic

antenna or by cable in the United Kingdom and in several western European countries. Since the frequency used by the Astra satellite is not one allocated to the United Kingdom, Turner's authorization is a non-domestic satellite service licence within the meaning of Article 43(2) of the Act.

13 Following the signing of a contract between Turner and Coditel on the retransmission of the channel in question, the Belgian Minister for Communications and Public Enterprises prohibited, by Ministerial Decree of 17 September 1993, distribution on cable networks in the City of Brussels region of the programmeTNT&Cartoon Network.

14 The reasons stated for the prohibition were as follows:

'Whereas the programmes involved consist essentially of programmes produced outside the European Community and of commercial advertising;

Whereas those programmes conflict with the aims 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, the so-called "television without frontiers" directive;

Whereas, in particular, they do not meet the requirements of Articles 4 and 5 concerning the broadcasting of a majority proportion of European works and requiring a portion of a broadcaster's budget to be reserved for the production of European works;

Whereas the channels in question rely on a non-domestic satellite service licence dated 12 July 1993 issued to them by the United Kingdom;

Whereas, under United Kingdom law, those programmes would not be subject to the obligations provided for by the aforementioned directive ...'.

15 When Coditel acted pursuant to that ministerial decree, Turner applied to the President of the Tribunal de Commerce, Brussels, for an interim order requiring Coditel to distribute the programmes in question pursuant to the contract which they had concluded. The president of that court concluded that the Ministerial Decree of 17 September 1993 had no legal basis under domestic law and consequently ordered Coditel, by order of 26 October 1993, to distribute the programme on its network or else pay a periodic penalty. Coditel complied with the order.

16 The Belgian State brought third-party proceedings in relation to the order of 26 October 1993. After a hearing, the President of the Tribunal de Commerce, Brussels, reconsidered his decision and, by order of 30 November 1994, decided to submit to this Court a question on the interpretation of the Directive (Case C-316/94). Coditel then suspended distribution of the channel in question. However, that order was annulled by the Cour d'Appel, Brussels, in a judgment delivered on 6 April 1995 following which the case was removed from this Court's register by order of the President on 1 December 1995. Since then, the programme in question has again been distributed in the City of Brussels region.

17 In the main proceedings, Mr Denuit is accused of infringing domestic legislation, in particular the provisions of the Ministerial Decree of 17 September 1993. According to the actual charge, for a certain period Coditel 'transmitted programmes of commercial television stations the distribution of which was

prohibited by the minister, in this case ... on the cable television networks of the bi-lingual region of the City of Brussels, the programme of the broadcasting service "Turner Network Television Limited" and the programme of the broadcasting service "The Cartoon Limited Network", when this was prohibited by Ministerial Decree of 17 September 1993'.

18 In view of the history of the case, the Tribunal de Première Instance, Brussels, decided to refer the following questions to the Court for a preliminary ruling:

'1. What conditions have to be met for a television broadcaster to be regarded as coming under the jurisdiction of a Member State within the meaning of Article 2(1) of Council Directive 89/552/EEC of 3 October 1989? To what extent is it relevant that a large, but variable, proportion of the material which it broadcasts is of non-European origin if the national court also finds that the body in question is based in the territory of the Member State in question and that the actual activities of programme management, composition and assembly are carried out there?

2. Assuming that broadcasts emanating from a television broadcaster authorized by a Member State are not to be regarded as broadcasts transmitted by a broadcaster under the jurisdiction of a Member State within the meaning of Directive 89/552/EEC, is another Member State entitled — and, if so, on what conditions, regard being had in particular to Article 59 et seq. of the Treaty — to prohibit or restrict their retransmission in a particular area?

3. Should Article 2 of that directive be interpreted as meaning that, if a television broadcaster comes under the jurisdiction of a Member State, another Member State

is not entitled to oppose the retransmission in its territory of television broadcasts transmitted by that broadcaster even in the event that the rules laid down in Articles 4 and 5 of the directive are not complied with?'

The first question

19 By the first part of its first question, the national court is essentially asking the Court to explain the criteria to be applied for determining which broadcasters come under a Member State's jurisdiction within the meaning of Article 2(1) of the Directive.

20 In its judgment of 10 September 1996 in Case C-222/94 *Commission* v *United Kingdom* [1996] ECR I-4025 the Court has already examined the interpretation to be given to the term 'jurisdiction' used in the phrase 'broadcasters under [a Member State's] jurisdiction' appearing in the first indent of Article 2(1) of the Directive.

21 As the Court found in that judgment, the Directive contains no express definition of that phrase (paragraph 26).

22 After examining the wording of Article 2(1) of the Directive the Court found that the concept of jurisdiction of a Member State had to be understood as necessarily covering jurisdiction *ratione personae* over television broadcasters (paragraph 40).

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

24 By the second part of its first question, the national court seeks to ascertain to what extent application of Article 2(1) of the Directive depends on the non-Community origin of a lesser or greater proportion of the works broadcast.

25 According to the Belgian Government, theTNT&Cartoon Network programmes do not come under a Member State's jurisdiction, within the meaning of Article 2(1) of the Directive, because they do not meet the requirements of Articles 4 and 5 of the Directive and furthermore are not there subject to section 43 of the 1990 Act.

26 The Court finds in this regard that it is apparent from the actual wording of Article 2(1) of the Directive that the origin of programmes broadcast by a television broadcaster or their conformity with Articles 4 and 5 of the Directive have no bearing on the question of a Member State's jurisdiction within the meaning of that provision.

27 The reply to the first question must therefore be that Article 2(1) of the Directive is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established. The origin of programmes broadcast by the television broadcaster or their conformity with Articles 4 and 5 of the Directive are irrelevant in determining the Member State having jurisdiction over such a broadcaster pursuant to Article 2(1).

The second question

28 By its second question, the national court asks in substance whether and under what conditions a Member State may prohibit or restrict retransmission on its territory of a television broadcaster's broadcasts authorized by another Member State where that broadcaster does not come under the jurisdiction of a Member State within the meaning of Article 2(1) of the Directive.

29 It follows from the reply given to the first question that such a case, which supposes that no Member State has jurisdiction over the broadcaster, cannot arise in the situation described in the order for reference.

30 Consequently, it is not necessary to reply to the second question.

The third question

31 By its third question, the national court asks whether Article 2(2) of the Directive is to be interpreted as meaning that a Member State may oppose retransmission on its territory of broadcasts of a television broadcaster over which another Member State has jurisdiction if those broadcasts do not comply with the requirements of Articles 4 and 5 of the Directive.

32 In paragraph 34 of its judgment of 10 September 1996 in Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4155 the Court held that under the system established by the Directive for allocating obligations between the Member States from which broadcasts emanate and those which receive them, it is solely for the Member State from which television broadcasts emanate to monitor the application

of the law of the originating Member State applying to such broadcasts and to ensure compliance with the Directive and that the receiving Member State is not authorized to exercise its own control in that regard.

33 That interpretation is borne out by the preamble to the Directive. According to the 10th recital, all restrictions on freedom to provide broadcasting services to which the ninth recital refers, must be abolished under the Treaty. Furthermore, the 12th and 14th recitals provide that it is necessary and sufficient in this regard that all broadcasts comply with the law of the Member State from which they emanate and with the provisions of the Directive. Finally, according to the 15th recital, the requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by the Directive is sufficient under Community law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States (judgment in Case C-11/95 *Commission* v *Belgium*, cited above, paragraph 35).

34 Only in the circumstances provided for in the second sentence of Article 2(2), to which the second part of the 15th recital refers, may the receiving Member State exceptionally suspend retransmission of television broadcasts, on the conditions laid down by that provision. The Court went on to state that if a Member State considers that another Member State has failed to fulfil its obligations under the Directive, it may bring Treaty infringement proceedings under Article 170 of the EC Treaty or request the Commission itself to take action against that Member State under Article 169 of the EC Treaty (*Commission* v *Belgium*, cited above, paragraph 36).

35 In paragraph 37 of that same judgment, the Court also pointed out that it is settled case-law that a Member State cannot unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law (see also the judgments in Joined Cases 90/63 and 91/63 *Commission* v *Luxembourg and Belgium* [1964] ECR 625, Case 232/78

Commission v *France* [1979] ECR 2729, paragraph 9, and Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 20).

36 The answer to be given must therefore be that Article 2(2) of the Directive is to be interpreted as meaning that a Member State may not oppose the retransmission on its territory of broadcasts of a television broadcaster over which another Member State has jurisdiction when those broadcasts do not conform with the requirements of Articles 4 and 5 of the Directive.

Costs

37 The costs incurred by the Belgian, German, Hellenic, French and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunal de Première Instance, Brussels, by order of 16 January 1996, hereby rules:

1. Article 2(1) 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 State concerning the pursuit of television broadcasting activities is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established. The origin of programmes broadcast by the television broadcaster or their conformity with Articles 4 and 5 of the Directive are irrelevant in determining the Member State having jurisdiction over such a broadcaster pursuant to Article 2(1).

2. **Article 2(2) of Directive 89/552 is to be interpreted as meaning that a Member State may not oppose the retransmission on its territory of broadcasts of a television broadcaster over which another Member State has jurisdiction when those broadcasts do not conform with the requirements of Articles 4 and 5 of the Directive.**

Mancini Murray Kakouris

Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 29 May 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber