

# Jurisdiction over Broadcasters in Europe

## Report on a Round-table Discussion & Selection of Background Materials

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Whilst the Observatory can already look back at a series of workshops co-organised with our partner institution, the Institute for Information Law (IViR), it was for the first time that the European Platform of Regulatory Authorities (EPRA) joined our combined efforts in providing a forum for the exploration of an important legal issue. Eighteen experts from ten different European countries, whose names are listed in Annex A, participated in this brainstorming on jurisdictional problems. Without their contributions this IRIS Special would not have been possible. Neither would it exist without the efforts and strong commitment of Greger Lindberg, co-organiser for EPRA and Chairperson of the round-table, Ad van Loon, co-organiser for IViR and co-author of the report, and, last but certainly not least, Tarlach McGonagle (IViR), round-table rapporteur, co-author of the report and helping hand in assembling the Annex.

The round-table topic “Jurisdiction over Broadcasters in Europe” is important firstly because it is about the distribution of power among states to regulate broadcasting services. Broadcasting is not only a centrepiece of the weighty audiovisual industry; as a major outlet for information it is also a pillar of democracy. Jurisdiction over broadcasters entails the mandate to issue national legislation applicable to broadcasters, to assure its implementation and to provide related (administrative and judicial) control mechanisms. Secondly, two European legal instruments currently under scrutiny address “Jurisdiction over Broadcasters in Europe” and even though their pertinent jurisdiction clauses have already been amended, case law indicates that a number of jurisdiction problems remain unsolved. Apparently further clarifications, if not changes, to the text are needed.

What are the remaining difficulties in determining jurisdiction? What disputes were brought before the courts and how have they been solved? What clarifications should be made to European legislation? The workshop aimed to penetrate the many facets of these questions and to fuel the discussion with background information, problem analysis and expert knowledge. The results of this enterprise are reflected in the following “Report on a Round-table Discussion” published as an IRIS Special mirroring the title of the round-table discussion: “Jurisdiction over Broadcasters in Europe”.

The Report is supplemented by a compilation of background material, partly source references (with Internet links), and partly (edited) texts. These documents are meant to facilitate the efforts of all those who wish to work with primary sources when following, or contributing to, the general discussion. Most of the material was also used by the round-table participants and therefore underlies the report. All reprinted texts are copied from the original authenticated versions. Editing was limited to omitting parts that we judged to be of no or only minor relevance to the issue of jurisdiction. Those omissions are indicated by square brackets.

Our sincere thanks go to EPRA and IViR for their work and support and to the Observatory staff members, Michelle Ganter and Francisco Javier Cabrera Blázquez, who assisted in finalising this IRIS Special.

**Wolfgang Closs**  
*Executive Director*

**Susanne Nikoltchev**  
*Legal Expert*

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**Director of the Publication:**

Wolfgang Closs, Executive Director of the European Audiovisual Observatory  
E-mail: w.closs@obs.coe.int

**Editor and Coordinator:**

Dr. Susanne Nikoltchev (LL.M. EUI and U of M)  
Legal Expert of the European Audiovisual Observatory  
E-mail: S.Nikoltchev@obs.coe.int

**IRIS Special: Jurisdiction over Broadcasters In Europe**

results from a round-table discussion organised in co-operation with our partner organisation,  
**Institute for Information Law (IViR)** and the **European Platform of Regulatory Authorities (EPRA)**

**IViR – Institute for Information Law**

Rokin 84  
NL-1012 KX Amsterdam  
Tel.: +31 (0) 20 525 34 06  
Fax: +31 (0) 20 525 30 33  
E-Mail: website@ivir.nl

**EPRA - European Platform of Regulatory Authorities**

c/o European Institute for the Media  
Zollhof 2a  
D-40221 Düsseldorf  
Tel.: +49 (0)211 9010444  
E-Mail: info@epra.org

**Proofreaders:**

Florence Pastori, Natali Helberger

**Translators:**

France Courrèges, Stefan Pooth

**Editorial Assistants:**

Michelle Ganter, Francisco Javier Cabrera Blázquez

**Marketing:**

Markus Booms  
E-mail: M.Booms@obs.coe.int

**Publisher:**

European Audiovisual Observatory  
76 Allée de la Robertsau  
F-67000 Strasbourg  
Tel.: +33 (0)3 88 14 44 00 - Fax: +33 (0)3 88 14 44 19  
E-Mail: obs@obs.coe.int - [html://www.obs.coe.int](http://www.obs.coe.int)

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# Jurisdiction over Broadcasters in Europe

## Report on a Round-table Discussion<sup>1</sup>

*by Tarlach McGonagle & Ad van Loon\**

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\* Tarlach McGonagle is a researcher/editor at the Institute for Information Law (IViR) of the University of Amsterdam; Ad van Loon is Co-ordinator of International Research at the Institute for Information Law (IViR) of the University of Amsterdam, Manager Legal & Regulatory Affairs at VECAI (the industry association of cable operators in the Netherlands) and Visiting Professor of Law at New York Law School.

1) The authors would like to express their gratitude to Egbert Dommering, Greger Lindberg, Emmanuelle Machet and Susanne Nikoltchev for their very instructive comments on earlier drafts of this report.

This is a report based on the discussion which took place at an informal invitational round-table meeting at the Institute for Information Law (IViR) in Amsterdam on 24 November 2001 on the subject of jurisdiction over broadcasters in Europe.

The participants comprised academics, policy-makers, regulators and industry professionals.<sup>2</sup> However, they were all invited on the basis of their personal expertise and they did not represent the organisations to which they are affiliated. It was agreed at the very outset that the discussions would have an open character and that opinions expressed would not be attributed to individual participants in any publications that would result from the meeting.

The round-table meeting was co-organised by three organisations: the European Platform of Regulatory Authorities (EPRA),<sup>3</sup> the European Audiovisual Observatory and the Institute for Information Law (IViR) of the University of Amsterdam. The chairperson was Greger Lindberg, who also chairs EPRA.

The meeting followed an earlier round table on the topics, "How to Distinguish between Broadcasting and New Media Services" and "Broadcasters' Access to New Media Markets", which took place on 16 June 2001 under the auspices of IViR and the European Audiovisual Observatory.<sup>4</sup>

The subject of the latest round table, "Jurisdiction over Broadcasters in Europe", was chosen because the rules of two European legal instruments, the European Convention on Transfrontier Television<sup>5</sup> and the EC "Television without Frontiers" Directive<sup>6</sup> link the application of national broadcasting laws to the question of jurisdiction over broadcasters. Notwithstanding the existence of these two European-level instruments, debates on various aspects of jurisdiction remain perennial. A veritable panoply of issues feed into these debates and many of them are explored in this publication: the notions of broadcaster; editorial responsibility/control; significant part of the workforce; single service and so on.

The topicality of the subject-matter of the round table was ensured not only by these discussions, but also by ongoing developments at the European level. The European Commission is currently drafting a consultation document on the possible revision of the "Television without Frontiers" Directive, while the Standing Committee on Transfrontier Television<sup>7</sup> of the Council of Europe is simultaneously considering whether it should make adaptations to the European Convention on Transfrontier Television in order to accommodate new interactive media services or "on-demand" services.

The objective of the round table was to contribute to the ongoing discussions on jurisdiction over broadcasters in Europe and to provide options for possible future solutions.

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2) See list of participants in Annex A.

3) The EPRA is a cooperation scheme between 42 broadcasting regulators.

4) Two papers were published in connection with the round table on "broadcasting": one preparatory article, T. McGonagle, "Does the Existing Regulatory Framework for Television Apply to the New Media" (see *IRIS plus* as a supplement to *IRIS newsletter* Issue 2001-6) and one follow-up article, T. McGonagle, "Changing Aspects of Broadcasting: New Territory and New Challenges" (see *IRIS plus* as a supplement to *IRIS newsletter* Issue 2001-10).

5) Adopted on 5 May 1989, ETS No. 132. The Convention has been amended by the Protocol adopted on 1 October 1998, ETS No. 171, in force since 1 March 2002.

6) EC Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, adopted on 3 October 1989, OJ L 298, 17 October 1989, p.23 and amended by Directive 97/36/EC of the European Parliament and of the Council, adopted on 30 June 1997, OJ L 202, 30 July 1997, p. 60.

7) A body established pursuant to Articles 20-22 of the European Convention on Transfrontier Television.

## Introduction

This publication will begin with a brief overview of the matrix of recognised freedoms in European law into which the European Convention on Transfrontier Television and the “Television without Frontiers” Directive were born. It will concisely explain the policies and jurisprudence that acted as midwives for the birth of these two instruments. The circumvention of national legislation and related matters will then be scrutinised, before consideration is given to how to identify a broadcaster. This will be followed by an analysis of the main features of the various criteria which have roles to play in the determination of jurisdiction over broadcasters: editorial responsibility/control; significant part of the workforce and single service.

The advent of new technologies is leading inescapably to new challenges to existing definitions. Jurisdiction is not exempt from this general trend. Some technological innovations which are becoming increasingly prevalent in television broadcasting have consequences for the determination of jurisdiction over broadcasters. A number of these are explored and as these often border on other types of communications services, a comparative overview of the jurisdiction clauses in neighbouring legal instruments is also offered. A probing of mechanisms for dispute resolution – both extant and hypothetical – ensues before the publication draws to a close with a number of apt conclusions arising out of the foregoing.

## Relevant Freedom Rights

The freedom rights of broadcasters under the EC Treaty<sup>8</sup> (notably the free movement of services and the freedom of establishment) are to be balanced against the entitlement of European States to structure their broadcasting systems by means of a licensing system. Although couched in negative terms and set out in the broader context of the right to freedom of expression, this entitlement is nevertheless clearly countenanced by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>9</sup> It was also given express recognition by the European Court of Human Rights in the *Groppera Radio* case<sup>10</sup> and in an elaborated manner in the *Informationsverein Lentia* case.<sup>11</sup>

In the first case, the Court concluded that “the purpose of that provision [the third sentence of Article 10 § 1 of the ECHR] is to make it clear that States are permitted to regulate by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects”;<sup>12</sup> in the latter case, the Court added that “Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.”

This would appear to imply a legitimate interest on the part of States in preventing broadcasters from establishing themselves in another State for the sole purpose of circumventing the rules which apply to broadcasters in the State whose audience they primarily target.

8) The Treaty Establishing the European Community.

9) Article 10 – Freedom of Expression:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

10) *Groppera Radio AG & Others v. Switzerland*, Judgment of the European Court of Human Rights of 28 March 1990, Series A, no. 173, para. 61.

11) *Informationsverein Lentia & Others v. Austria*, Judgment of the European Court of Human Rights of 24 November 1993, Series A, no. 276, para. 32.

12) *Ibid.* See also: *Autronic AG v. Switzerland*, Judgment of the European Court of Human Rights of 22 May 1990, Series A, no. 178, para. 52.

As consistently held by the Court of Justice of the European Communities<sup>13</sup> and as laid down explicitly in the Amsterdam Treaty,<sup>14</sup> the EC is bound by the fundamental rights regime of the ECHR.

It is a shared aim of the Directive and of the Convention to avoid scenarios involving (i) the assertion of “double control” over a broadcaster and (ii) negative conflicts of jurisdiction, where no State asserts jurisdictional competence over a broadcaster.<sup>15</sup> Jurisdiction is a matter of fact, and not of agreement between States. It is thus both possible and necessary, through interpretation of the Directive or the Convention, to identify one, and only one, State as holding jurisdiction. In addition to the obvious difficulties of interpretation, there is also the difficulty of finding ways of bringing conflicts of jurisdiction to a speedy resolution with a high degree of legal certainty, as will be highlighted below.

The impact of European law on broadcasting activities has continued to be the subject of much debate and of numerous judgments of the Court of Justice of the European Communities.<sup>16</sup> The question of jurisdiction over broadcasters, in particular, has been raised on a number of occasions as Member States have, at times, felt that broadcasters licensed by other Member States were circumventing their national rules on broadcasting or even undermining their national broadcasting systems.

The Court of Justice of the European Communities has ruled that “a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.”<sup>17</sup> However, in order to deny persons the benefit of the provisions of EC law on which they seek to rely, their conduct must be assessed in the light of the objectives pursued by the provisions of EC law in question.<sup>18</sup> Again, in the words of the Court of Justice of the European Communities: “national measures liable to hinder, or make less attractive, the exercise of fundamental freedoms guaranteed by the [EC] Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.”<sup>19</sup>

Article 49 (ex Article 59) of the EC Treaty stipulates that “restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.” The Court of Justice of the European Communities has repeatedly held that the pursuit of broadcasting activities constitutes a service.<sup>20</sup> Nevertheless, broadcasting should be distinguished from other services, for its additional dimension of social and cultural goals cannot be overlooked.<sup>21</sup>

13) See, for example, Case 4/73, *Nold v. Commission* [1974], Judgment of 14 May 1974, ECR 491, para. 13; Case C-260/89, *Elliniki Radiophonia Tileorasi* [1991], Judgment of 18 June 1991, ECR I-2925, para. 41; Case C-353/89 *Commission v. The Netherlands* [1991], Judgment of 25 July 1991, ECR I-4069, para. 30.

14) Article 6.2 (ex Article F.2) of the EU Treaty: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

15) This aim is alluded to in Recital 13 of Directive 97/36/EC, which reads: “[W]hereas the fixing of a series of practical criteria is designed to determine by an exhaustive procedure that one Member State and one only has jurisdiction over a broadcaster in connection with the provision of the services which this Directive addresses; nevertheless, taking into account the case law of the Court of Justice and so as to avoid cases where there is a vacuum of jurisdiction it is appropriate to refer to the criterion of establishment within the meaning of Articles 52 and following of the Treaty establishing the European Community as the final criterion determining the jurisdiction of a Member State;”

16) For example:

Case C-148/91, *Veronica Omroep Organisatie v. Commissariaat voor de Media* [1993], Judgment of 3 February 1993, ECR I-487; Case C-23/93, *TV 10 SA v. Commissariaat voor de Media* [1994], Judgment of 5 October 1994, ECR I-4795; For more detail, see the excerpts in Annex F below.

Case C-56/96, *VT4 Ltd. v. Vlaamse Gemeenschap* [1997], Judgment of 5 June 1997, ECR I-3143. For more detail, see the excerpts in Annex F below.

17) Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* [1999], Judgment of 9 March 1999, ECR I-1459, para. 24.

18) Case C-206/94, *Brennet v. Paletta II* [1996], Judgment of 2 May 1996, ECR I-2357, para. 25.

19) Case C-212/97, *Centros*, *op. cit.*, para. 34. See also:

Case C-19/92, *Kraus v. Land Baden-Württemberg* [1993], Judgment of 13 March 1993, ECR I-1663, para. 32;

Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995], Judgment of 30 November 1995, ECR I-4165, para. 37.

20) Case 155-73, *Sacchi* [1974], Judgment of 30 April 1974, ECR 409;

Case 352-85, *Bond van Adverteerders and Others v. The Netherlands* [1988], Judgment of 26 April 1988, ECR 2085, para. 15. This was later reaffirmed in Recitals 6-8 of Council Directive 89/552/EEC.

21) Recital 3 of Directive 89/552/EEC, for instance, contains a reference to the public interest role to be discharged by television broadcasting services (this would, presumably, embrace cultural objectives), whereas Recital 4 of Directive 97/36/EC adverts to the cultural and sociological impact of audiovisual programmes. The cultural objectives of broadcasting are underlined in broader terms in Para. 6 of the Preamble to the European Convention on Transfrontier Television. This conceptual underpinning of the Convention is explained further in paras. 24 and 25 of the Explanatory Report thereto.

Under EC law, the right to freedom of establishment is granted to nationals<sup>22</sup> of a Member State who want to establish themselves in the territory of another Member State as well as to nationals who are already established in the territory of another Member State, but who want to set up agencies, branches or subsidiaries in one of the other Member States.<sup>23</sup>

It is important to ascertain whether a broadcaster who moves to another Member State in order to pursue an economic activity there is governed by the chapter of the Treaty on services or the chapter on the right of establishment, since the Court of Justice regards these chapters as being mutually exclusive;<sup>24</sup> with the provisions of the former being subordinate to those of the latter. The first reason for this is that the freedom to provide services has been given to nationals of Member States who are *established* in a State of the Community other than that of the person for whom the services are intended.<sup>25</sup> Secondly, the first paragraph of Article 50 (ex Article 60) of the EC Treaty specifies that the provisions relating to services apply only if those relating to the right of establishment do not apply. It is therefore necessary to consider the scope of the concept of “establishment”.<sup>26</sup> This freedom includes “the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms [...] under the conditions laid down for its own nationals by the law of the country where such establishment is effected [...]”<sup>27</sup>

## Emergence of Legislative Framework for Broadcasting<sup>28</sup>

The activities of a company or firm do not necessarily have to take place in the country where the company or firm has its seat, main office, or executive board. It is possible to establish an agency, branch or subsidiary in another Member State, where all activities would be concentrated,<sup>29</sup> even if the presence of the newly-established company or firm in that other EU Member State would not take the form of an agency, branch or subsidiary. It is sufficient if there is simply an office controlled either by the company or firm’s own staff or by one or more individuals authorised to represent the company or firm on a permanent basis. There should also be some kind of economic activity for an indefinite period of time, from a permanent base in a Member State other than the State where the company or firm is established.<sup>30</sup>

In consequence, a person may be established in more than one Member State, which would make it difficult to use the establishment criteria as the sole basis for determining jurisdiction over broadcasters if a primary objective is, as stated above, to ensure that only one State should exercise such jurisdiction.

This is why the Court of Justice of the European Communities decided that where a television broadcaster has more than one establishment, the competent Member State for jurisdictional purposes is the State in which the broadcaster has “the centre of its activities”.<sup>31</sup> In its decision, the Court ruled that the national authorities must take into account, “in particular the place where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together.”<sup>32</sup> These criteria were later incorporated – to a certain extent – into the “Television without Frontiers” Directive<sup>33</sup> and indirectly into the European Convention on Transfrontier Television as well.<sup>34</sup>

22) According to Article 48 (ex Article 58) of the EC Treaty, “nationals” of an EU State are either natural persons or companies established in accordance with the law of a Member State, *and* have their registered office, central administration or principal place of business within the Community. The notions of “companies or firms” include all types of legal persons “save for those which are non-profit-making”.

23) Article 43 (ex Article 52) of the EC Treaty. 24) Case C-55/94, Gebhard, *op. cit.*, para. 20.

25) Article 49 (ex Article 59).

26) Case C-55/94, Gebhard, *op. cit.*, para. 22.

27) Article 43 (ex Article 52).

28) For a comprehensive overview of this topic in respect of the “Television without Frontiers” Directive, see generally, E. Machet, “A Decade of EU Broadcasting Regulation” (The European Institute for the Media, Düsseldorf, 1999).

29) Case 79/85, D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen [1986], Judgment of 10 July 1986, ECR 2375, paras. 13, 14.

30) Case 221/89, R. v. Secretary of State for Transport, *ex parte* Factortame (No. 2), [1991], Judgment of 25 July 1991, ECR I-3905, para. 20.

31) Case C-222/94, Commission v. United Kingdom of Great Britain and Northern Ireland [1996], Judgment of 10 September 1996, ECR I-4025, para. 58.

32) *Ibid.*; Case C-56/96, VT4, *op. cit.*, para. 19.

33) Mainly in the Recitals to Directive 97/36/EC.

34) See footnote no. 41, *infra*.

The "Television without Frontiers" Directive assigns jurisdiction over broadcasters to EC Member States in which they are established. As Directive 89/552/EEC did not contain any clear criteria on jurisdiction, the Court of Justice of the European Communities opted to rely on the criterion of establishment, as per the EC Treaty.<sup>35</sup> A hierarchical set of establishment fictions was then developed by the Court of Justice (and subsequently endorsed by Directive 97/36/EC) with a view to finding a solution whenever:

- a service provider is established in two or more different Member States; and,
- it is desirable to identify only one place of establishment in order to determine which country has jurisdiction over a particular service provider; and,
- to avoid double "control" or a vacuum of control over these service providers.

At present, it is only in the event of the Directive's fictional establishment criteria failing to resolve any dispute that recourse will be had to the usual criteria for establishment, as set out in the EC Treaty. This inverted approach means that the basic rule of the EC Treaty on freedom of establishment, as interpreted by the Court of Justice, has now been set aside by means of a legal instrument of a lower order: a Directive.

There exists under the "Television without Frontiers" Directive and the Transfrontier Television Convention a constellation of central concepts. They include "broadcaster" (Article 1(b)), "television broadcasting" (Article 1(a)), "editorial responsibility for the composition of schedules of television programmes" (referred to in Article 1(b)) and "television programme" (undefined, see *infra*) in the case of the Directive and "broadcaster" (Article 2(c)), "transmission" (Article 2(a)), "editorial responsibility for the composition of television programme services" (referred to in Article 2(c), as amended by the Protocol) and "programme service" (Article 2(d)) in the case of the Convention. These concepts are defined with varying degrees of precision and, on occasion, they even manage to wriggle through the meshes of the definitional nets and escape into the high seas of speculative interpretation.

Many of these concepts have a significant bearing on the determination of jurisdiction over broadcasters, either directly or indirectly. For the purposes of the Directive, the operative provision is Article 2.3, which reads:

"For the purposes of this Directive, a broadcaster shall be deemed to be established in a Member State in the following cases:

- (a) the broadcaster has its head office in that Member State and the editorial decisions about programme schedules are taken in that Member State;
- (b) if a broadcaster has its head office in one Member State but editorial decisions on programme schedules are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those Member States, the broadcaster shall be deemed to be established in the Member State where it has its head office; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in neither of those Member States, the broadcaster shall be deemed to be established in the Member State where it first began broadcasting in accordance with the system of law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;
- (c) if a broadcaster has its head office in a Member State but decisions on programme schedules are taken in a third country, or vice-versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in that Member State."

<sup>35</sup> Article 2(1) of 1989 Directive refers simply to "broadcasters under its jurisdiction". This phrase was interpreted by the Court of Justice in Case C-222/94, *Commission v. U.K.*, *op. cit.*, para. 42, which stipulates that, "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 subsequent paragraphs of Article 2 focus on technical criteria which can be used for the determination of jurisdiction. These are also of relevance:

"4. Broadcasters to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:

- (a) they use a frequency granted by that Member State;
- (b) although they do not use a frequency granted by a Member State they do use a satellite capacity appertaining to that Member State;
- (c) although they use neither a frequency granted by a Member State nor a satellite capacity appertaining to a Member State they do use a satellite up-link situated in that Member State.

5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the broadcaster is established within the meaning of Articles 52 and following of the Treaty establishing the European Community."

By virtue of Article 7 of the Protocol Amending the European Convention on Transfrontier Television (which is due to enter into force imminently), the provisions governing jurisdiction over broadcasters have largely been synchronised with those of the Directive. They are set out in the new Article 5.3 *et seq.*:

"3. For the purposes of this Convention, a broadcaster shall be deemed to be established in a Party, hereinafter referred to as the "transmitting Party", in the following cases:

- (a) the broadcaster has its head office in that Party and the decisions on programme schedules are taken in that Party;
- (b) if a broadcaster has its head office in one Party but decisions on programme schedules are taken in another Party, it shall be deemed to be established in the Party where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those Parties, the broadcaster shall be deemed to be established in the Party where it has its head office; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in neither of those Parties, the broadcaster shall be deemed to be established in the Party where it first began broadcasting in accordance with the system of law of that Party, provided that it maintain a stable and effective link with the economy of that Party;
- (c) if a broadcaster has its head office in a Party but decisions on programme schedules are taken in a State which is not Party to this Convention, or vice-versa, it shall be deemed to be established in the Party concerned, provided that a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in that Party;
- (d) if, when applying the criteria of paragraph 3 of Article 2 of Directive 97/36/EC of the European Parliament and of the Council of 19 June 1997 amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in member States concerning the pursuit of television broadcasting activities, a broadcaster is deemed to be established in a member State of the European Community, that broadcaster shall also be deemed to be established in that State for the purposes of this Convention."

As in the case of the Directive, subsequent provisions list the technical criteria which are of relevance for the determination of jurisdiction:

"4. A broadcaster to whom the provisions of paragraph 3 is not applicable is deemed to be within the jurisdiction of a Party, so-called transmitting Party, in the following cases:

- (a) it uses a frequency granted by that Party;
- (b) although it does not use a frequency granted by a Party it does use a satellite capacity appertaining to that Party;
- (c) although it uses neither a frequency granted by a Party nor a satellite capacity appertaining to a Party it does use a satellite up-link situated in that Party.

5. If the transmitting Party cannot be determined according to paragraph 4, the Standing Committee shall consider this issue according to Article 21, paragraph 1, indent a, of this Convention, in order to determine this Party.”

In the original Directive, considerable reliance was placed on transmission criteria, but this level of reliance was not retained after the adoption of Directive 97/36/EC. Similarly, the technical criterion of (satellite) up-linking was used in the original Convention on Transfrontier Television for the purpose of determining the relevant transmitting Party,<sup>36</sup> but following the example of the Directive, it is of diminished importance in the Convention, since the entry into force of the Amending Protocol thereto. When assessing the usefulness of the uplink criterion, the rationale behind the establishment principle must be considered. Would something more tangible than the up-link be desirable? It could be argued that while the attractiveness of the up-link criterion is its simplicity (although a divergence of interpretation concerning the up-link provision led to a case heard by the Court of Justice of the European Communities involving Commission and the United Kingdom<sup>37</sup>), its main shortcoming is, perhaps, its oversimplicity. Up-links can be completely devoid of any connection with the economy of the State in which they are to be found; there is no necessary link between the operator of the service and the economy. The problems associated with the up-link criterion had already been exposed by the *Red Hot Television* (formerly known as *Red Hot Dutch*) case,<sup>38</sup> where numerous uplinks existed.

Given the pivotal position of the concept of “television programme” in the “Television without Frontiers” Directive, it seems surprising that the term is not defined therein (although closely-related terms, such as “television broadcasting”, are set out in Article 1). For its part, the definition of the corresponding term – “programme service” – offered by the Transfrontier Television Convention could also benefit from a more detailed explanation. It is defined as “all the items within a single service provided by a given broadcaster...”,<sup>39</sup> a formula which gives rise to certain interpretative problems which are explored below.

## Circumvention and Related Matters

The provisions of the Directive allow for different interpretations and broadcasters tend to establish themselves in the State where the authorities are most likely to interpret those provisions in their favour or where the national rules of company law appear to them to be the least restrictive. The Court of Justice of the European Communities has ruled that to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment.<sup>40</sup>

Despite the concerted drafting of the Convention and the Directive and the amendment of the former in order to align it more closely with the latter,<sup>41</sup> their provisions are not identical. This means that some interpretational divergence between them is inevitable. Furthermore, both instruments are open to varying interpretations and applications at the national level. To date, the extent of interpretational and regulatory harmonisation throughout Europe has been very limited. Significant legislative differences at the national level represent a considerable impediment to the easy and expeditious resolution of disputes over jurisdictional matters. Such differences are liable to lead to or to fuel disagreement or even distrust between national regulatory authorities (eg. the debate over the gross/net principle underlying the RTL<sup>42</sup> case).<sup>43</sup> If regulators were to apply rules in the same way, it would be of little or no consequence which country would have jurisdiction over a broadcaster.

36) See Article 5.2.b.i of the Convention.

37) Case C-222/94, *Commission v. U.K.*, discussed *supra*.

38) Case C-327/93, Removed from the register on 29/03/1996, *Continental Television*.

39) Article 2(d) of the Convention.

40) Case C-212/97, *Centros*, *op.cit.*, para. 27.

41) When drafting the Protocol to amend the European Convention on Transfrontier Television, the Council of Europe decided that it would be in the interest of clarity and legal certainty throughout Europe if the Convention and notably also the jurisdiction clauses would be aligned with the Directive. See, in particular, Paragraphs 5 and 6 of the Preamble to the Protocol amending the European Convention on Transfrontier Television.

42) A case centring on the question of whether Luxembourg or the Netherlands has jurisdiction over the television channels RTL4 and RTL5. The case has led to two separate rulings: (i) the Ruling of the *Afdeling Bestuursrechtspraak* (Administrative Law Division) of the *Raad van State* (Council of State) of the Netherlands on the case of RTL/Veronica de Holland Media Groep S.A. and CLT-UFA S.A. v. the *Commissariaat voor de Media* (Dutch Media Authority) of 10 April 2001, Doc. CC TVSF (2001) 20, and (ii) the Opinion of the Independent Broadcasting Commission of the Grand Duchy of Luxembourg as to which State has jurisdiction over Channels RTL4 and RTL5, Doc. CC TVSF (2001) 24. For more detail, see the excerpts in Annex H below.

43) The issue of disputes and dispute resolution is revisited in greater detail *infra*.

Cultural differences between European States may, however, make it impossible or even undesirable to harmonise certain definitions. What is considered to be pornographic content in the Netherlands differs, for example, from what is considered to be pornographic content in the United Kingdom. Although a greater harmonisation of national laws throughout Europe may provide a solution for differences of interpretation by Member States, it is important to take account of the subsidiarity principle of the EC Treaty<sup>44</sup> and the national margin of appreciation based on the case law of the European Court of Human Rights.<sup>45</sup>

The aforementioned gross/net principle debate provides a good illustration of the practical significance of the determination of jurisdiction for broadcasters. The debate arises from the accepted ambiguity<sup>46</sup> of Article 11(3) of the "Television without Frontiers" Directive:

"The transmission of audiovisual works such as feature films and films made for television [...], provided their scheduled duration is more than 45 minutes, may be interrupted once for each period of 45 minutes [...]."<sup>47</sup>

The kernel of the gross/net principle debate is as follows: "[A]ccording to the gross principle, [...] the duration of advertisements must be included in the period of time in relation to which the permissible number of interruptions is calculated."<sup>48</sup> On the other hand, "[A]ccording to the net principle, [...] only the duration of the films themselves is to be included."<sup>49</sup> The upshot of this distinction is that when broadcasters licensed by States adhering to these alternate interpretations compete with each other for the same viewers, they will have significantly different opportunities for earning advertising revenue. It is clearly more viable in financial terms for broadcasters to be established in Member States which endorse the gross principle.

The Court of Justice of the European Communities pronounced on the matter when it delivered its ruling in *ARD v. PRO Sieben*.<sup>50</sup> The Court held that as Article 11(3) of the Directive imposes a restriction on broadcasting and on the distribution of television broadcasting services, it has to be narrowly interpreted.<sup>51</sup> Thus, the Court held, the proper construction of the operative provision is that it prescribes the gross principle.<sup>52</sup> The Court went on to state that Article 11(3), *juncto* Article 3(1) of the Directive (as amended),<sup>53</sup> does not preclude Member States from applying the net principle for advertisements to television broadcasters within their jurisdiction,<sup>54</sup> subject to the proviso that such rules are "compatible with other relevant provisions of Community law."<sup>55</sup>

Disputes over jurisdiction are by no means limited to the debate on the gross/net principle debate. For instance, Sweden has strict rules on advertising directed at children and on advertising for alcoholic beverages. In the past, the Swedish authorities have tried to apply Swedish rules to

44) Article 5 (ex Article 3b) of the EC Treaty reads:

"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

45) See, for example, *Autronic AG v. Switzerland*, Judgment of the European Court of Human Rights of 22 May 1990, Series A, no. 178, para. 61, which reads: "The Court has consistently held that the Contracting States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case. Where, as in the instant case, there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10 (art. 10-1), the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established (see the *Barthold* judgment of 25 March 1985, Series A no. 90, p. 26, § 58)."

46) Case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media AG* [1999], Judgment of 28 October 1999, ECR I-7599, paras. 23-26.

47) See further, Article 18(2) of the Directive.

48) Case C-6/98, *ARD v. PRO Sieben Media AG*, *op. cit.*, para. 15.

49) *Ibid.*

50) See further, A. Scheuer & R. Mastroianni, "Court of Justice of the European Communities Sees the Grossed-Up Principle as Settled in TV Directive", *IRIS* 1999-10: 5.

51) *Op. cit.*, paras. 30, 31.

52) *Ibid.*, paras. 30-33.

53) Article 3(1) reads: "Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive." It may be noted in passing that Recital 26 of Directive 97/36/EC also focuses on this issue.

54) *Op. cit.*, paras. 42-43.

55) *Ibid.*, para. 43.

retransmissions on Swedish territory of programmes from another EU Member State targeting mainly the Swedish audience (*i.e.*, advertising messages broadcast by TV3, a Swedish-language broadcaster established in the UK).<sup>56</sup> The Court of Justice of the European Communities expressed its opinion that under the Directive, Member States must ensure freedom of reception and must not impede retransmission on their territory of television broadcasts coming from other Member States for reasons which fall within the fields coordinated by the Directive.<sup>57</sup> The Court, however, continued by stating that this “does not have the effect of excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes”<sup>58</sup> (such as rules on consumer protection against misleading advertising). The Court decided that other such national rules are permitted, “provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State.”<sup>59</sup>

In the case of TV10,<sup>60</sup> a company involved in commercial broadcasting and established in Luxembourg, was transmitting programmes via cable networks to the Netherlands. The *Commissariaat voor de Media* (the Dutch Media Authority) contended that TV10 had established itself in Luxembourg in order to avoid the Dutch legislation governing domestic broadcasters. This analysis was confirmed by the *Raad van State* (the Council of State of the Netherlands). The response of the Court of Justice of the European Communities was to apply the same reasoning as in the earlier *Van Binsbergen* case.<sup>61</sup> In other words, a Member State retains the right to take measures against a television broadcasting organisation that is established in another Member State, when all or most of that organisation’s activity is directed at the first Member State and the choice of establishment has been made in order to evade the legislation that would have applied to the organisation, had it been established in the first Member State.<sup>62</sup> This oft-quoted pronouncement is confirmed once more in Recital 14 of Directive 97/36/EC. It is noteworthy that at the time when the facts in the TV10 case arose, the Netherlands did not allow any private commercial broadcasting outside the framework of its public broadcasting system.

In the case of VT4,<sup>63</sup> the Flemish broadcaster which established itself in the United Kingdom and whose services mainly targeted the audience in the Flemish community of Belgium, the Court of Justice decided that this could be allowed. The difference with the TV10 case is that the Flemish legislator, unlike the Dutch legislator, did allow private commercial broadcasting in the Flemish community. It had, however, created a statutory monopoly for only one private commercial broadcaster in the Flemish community. Thus, it had become impossible for VT4 to obtain a broadcasting licence in Belgium.

It may be argued that it is relatively easy to circumvent general Treaty criteria on establishment and that doubt remains in the case law as to precisely what might be involved in certain practical circumstances. The relativity of freedom of establishment and the circumvention clause ought to be underscored, as well as their apparent incompatibility. Circumvention rules are specific to broadcasting and would appear to go against the grain of general EC law, which accords pride of place to the freedom of establishment and the principle of the Single Market. The circumvention principle still applies, notwithstanding sizeable difficulties concerning the burden of proof. The express intention to avoid jurisdiction must be proven.

As demonstrated above, circumvention issues have been given extensive treatment in the case law of the Court of Justice of the European Communities. The Court has also deemed it possible for a Member State to prohibit domestic broadcasters from supporting the establishment abroad of private commercial broadcasting undertakings with the aim of providing services from there which are directed in particular at the Member State issuing the prohibition order and where the same prohibition is necessary to safeguard, for example, “the pluralistic and non-commercial character of the audio-visual system introduced by that legislation”.<sup>64</sup>

56) Joined cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95)* [1997], Judgment of 9 July 1997, ECR I-3843.

57) *Ibid.*, para. 33.

58) *Ibid.*, para. 33.

59) *Ibid.*, para. 38.

60) Case C-23/93, *TV10 SA*, *op. cit.*

61) Case 33-74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974], Judgment of 3 December 1974, ECR 1299. For more detail, see the excerpts in Annex F below.

62) *Ibid.*, para. 13; *TV 10 SA*, *op. cit.*, para. 26.

63) Case C-56/96, *VT4 Ltd.*, *op. cit.*

64) Case C-148/91, *Veronica*, *op. cit.*, para. 15.

## Definitions of Broadcaster

A “broadcaster” is defined in Article 1(b) of the “Television without Frontiers” Directive as “the natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of [Article 1](a) and who transmits them or has them transmitted by third parties”. As indicated, Article 1(a) plays a qualifying role here. It sets out a definition of “television broadcasting” as: “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 [...]”.

The present wording of the European Convention on Transfrontier Television defines “broadcaster” as “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”.<sup>65</sup> The wording of the Protocol Amending the European Convention on Transfrontier Television, however, marks a discernible shift of emphasis from the actual composition of television programme services to editorial responsibility for the same. Article 2(c) will instead define a “broadcaster” as “the natural or legal person who has editorial responsibility for the composition of television programme services for reception by the general public and transmits them or has them transmitted, complete and unchanged, by a third party”. This modification will, as intended, render the Convention’s definition strikingly similar to that of the Directive.

Regulators have the duty to examine and determine who is a broadcaster as the company applying for the licence may not necessarily be the broadcaster. This decision ought to be made independently of the determination of jurisdiction. A two-pronged test can be extrapolated from the definition of “broadcaster” contained in the “Television without Frontiers” Directive (quoted *supra*). The first element of this test or analysis is to establish – in very precise terms – which natural or legal person exercises actual editorial responsibility for the composition of schedules of television programmes. In establishing this fact, reliance can be had on a number of criteria. By way of example, the Independent Broadcasting Commission of the Grand Duchy of Luxembourg, for instance, has in the past relied upon notions such as “decisive influence on such composition” and mere “advisory” roles in that connection.<sup>66</sup> The second element is technical in character and concerns ultimate responsibility for the transmission of programmes. The appropriate weighting to be attached to each element is not pre-ordained or even very clear. Much will depend on the facts of the case at hand.

A further consideration, which is perhaps beyond the scope of this report,<sup>67</sup> is that the changing nature of broadcasting (in particular, its inroads into the online world), as is being hastened by technological advances, could soon lead to a potentially radical reappraisal of the levels of liability which would attach to broadcasters, depending on the precise nature of their activities. An analogous illustration of this could be the liability criteria of the Directive on electronic commerce,<sup>68</sup> which differ depending on whether an intermediary service provider is acting as a “mere conduit” for, is “caching” or is “hosting”, information.<sup>69</sup>

Once the broadcaster has been identified, a decision on jurisdiction over this broadcaster must be taken. This would involve recourse to the criteria alluded to above, with the main ones explored in detail below.

65) Article 2(c) of the Convention.

66) See the Opinion of the Independent Broadcasting Commission [of the Grand Duchy of Luxembourg] as to which State has jurisdiction over Channels RTL4 and RTL5, Doc. CC TVSF (2001) 24.

67) See further, T. McGonagle, “Changing Aspects of Broadcasting: New Territory and New Challenges”, *op. cit.*, p. 5.

68) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), Official Journal L 178 , 17/07/2000 p. 0001 - 0016.

69) See Articles 12-15, *ibid.*

## Editorial Responsibility/Control

The notion of editorial responsibility, which plays lead and supporting roles in different sections of both instruments, could benefit from a clearer definitional focus. For instance, is an editorial decision a strategic decision that is taken once a year or is it the determination of the daily schedule, the day-to-day running of a broadcasting organisation? Perhaps it lies somewhere in-between these two poles.

The Transfrontier Television Convention and the “Television without Frontiers” Directive differ slightly in their respective approaches to the notion of editorial responsibility, although Recital 12 of the latter does offer some clarification at least in respect of the Directive. While the recital mentions the place “where decisions on programming policy are usually taken”, there is no further allusion to this phrase in the Directive. It reads:

“Whereas the establishment of a television broadcasting organization may be determined by a series of practical criteria such as the location of the head office of the provider of services, the place where decisions on programming policy are usually taken, the place where the programme to be broadcast to the public is finally mixed and processed, and the place where a significant proportion of the workforce required for the pursuit of the television broadcasting activity is located”.

The Directive refers to “editorial responsibility for the composition of schedules of television programmes”,<sup>70</sup> yet a slightly modified phrase, “editorial decisions on programme schedules”<sup>71</sup> also crops up. Although differences between these two formulations of the same concept appear negligible, it must be pointed out that both are, in any event, more focused than the potentially very wide-embracing notion of editorial responsibility *tout court*. In the Convention, reference is made to the concept in the corresponding terms, “editorial responsibility for the composition of television programme services”<sup>72</sup> and “decisions on programme schedules”.<sup>73</sup> Once again, any variance between the both terms is probably only semantic.

The extent of the importance of editorial responsibility/control for the determination of the criterion of establishment could usefully be elucidated. Consideration could be given to possible alternatives to head office and editorial control as the operative criteria for jurisdiction, particularly in light of increased moves towards content regulation. Essentially, the concern is about who is responsible for questions of programming, production quotas, youth protection, advertising and so on. The determination of editorial responsibility is important as it points towards the broadcaster who is responsible or can be made responsible for undesirable content. While technical qualifications could be useful, the ability to change programming (content) is the best indicator of editorial control. The formal concept of broadcaster is one who collects and transmits content to the public under its own name. Traditionally, this used to be a centralised activity, but this is no longer necessarily the case.

Furthermore in this connection, the composite, complex organisational structures of some broadcasting entities can envelop the question of the locus of their editorial responsibilities/control in an additional layer of uncertainty. At the time of the initial drafting of the Convention and of the Directive, internal structural distinctions in broadcasting entities were so uncommon that the problems which would later flow therefrom were barely contemplated by the drafters, if at all. Even the very notion of editorial responsibility itself can be splintered into very detailed fragments. The programme manager, for instance, has responsibility for deciding which films/programmes are shown, how much advertising time there ought to be and how the schedule should be structured. Editorial decisions should, perhaps, be considered in light of the general provisions of the EC Treaty.

Are the contiguous issues of ownership and control relevant factors for consideration when determining editorial responsibility/control? It could be submitted that ownership is at the very apex of, say, an international broadcasting organisation and that editorial responsibility/control is situated somewhere below that. On the other hand, the determination of *de facto* ownership could reveal that only a very small group of broadcasters actually exists in Europe and such a finding could, in effect, detract from the usefulness of considering ownership in this connection.

70) Article 1(b) of the “Television without Frontiers” Directive.

71) Article 2.3(a) & (b), *ibid*.

72) Article 2(c) of the Convention, as amended by the Protocol.

73) Article 5(a), (b) & (c) of the Convention, as amended by the Protocol.

## Significant Part of the Workforce

The term, “a significant part of the workforce involved in the pursuit of the television broadcasting activity”, is identical in both the “Television without Frontiers” Directive and the European Convention on Transfrontier Television. The question must nevertheless be asked whether there are both highly pertinent qualitative and quantitative factors to be considered in this regard.

It is likely that “significant part” does not mean “majority”, as if this were the intended meaning, it would surely have been stated explicitly. Moreover, the use of the indefinite article before the words “significant part” could suggest that it is possible for more than one significant part to exist. The term “significant part”<sup>74</sup> is relative to the size of the entire workforce and implies a significant part of something whole. Arguably, it should not, therefore, be construed as having qualitative connotations. It would, in any event, involve a number that is not abusive.

It is probable that the emphasis in the term “significant part” is on the numerical dimension and not on internal weighting or importance; the focus of Article 2.3(a) of the Directive. The intended meaning is most likely “not insignificant”, *i.e.*, if virtually no staff are based in a given State, that State would be precluded from consideration whenever the appropriate jurisdiction would have to be determined. The wording was designed to prevent blatant abuse and blatant attempts to circumvent jurisdiction. It could therefore be considered as merely an attempt at a more precise definition of head office. If the criterion of head office is not as stable as was once thought, it is difficult to envision a suitable, problem-free alternative.

Conversely, however, it could also be contended that the notion does have both qualitative and quantitative connotations. Should the criterion be to the exclusion of technicians and salespersons? Should greater weight attach to decision-makers? It could be argued that in order to decide which members of the workforce are relevant, one should look to the definition of “television broadcasting” in Article 1(a) of the Directive: “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 [...]” Consequently, only staff involved in those activities would have to be taken into account when deciding whether or not a significant part of the workforce is involved in the pursuit of television broadcasting activities.

The term “in the pursuit of the television broadcasting activity” was also designed to prevent abuse. For instance, when a media group also runs newspapers, personnel involved in the activities of the latter ought to be excluded from the reckoning. Those responsible for the sale of advertising times and those involved in marketing would arguably be best excluded as well. *A fortiori*, it should be asked whether it might also be helpful to exclude everything related to the establishment of the head office and everything connected with editorial decision-making?

## Single Service

The notion of “single service” is introduced by the definition of “programme service” provided by the European Convention on Transfrontier Television: “all the items within a single service provided by a given broadcaster [...]”.<sup>75</sup> As mentioned earlier, the corresponding term used in the “Television without Frontiers” Directive, “television programme”, is not defined therein.

The concept of “single service” gives rise to a number of questions. Does the linguistic adaptation of a broadcasting service in order to render it more suitable for transmission in different linguistic communities or countries alter the character of the service sufficiently for it to be considered a new service? To what extent would such adaptations entail a shift in editorial control? Can these questions be answered *in vacuo* or merely on a case-by-case basis?

The existence of several different language versions of one service should not be considered as several different services, as the different languages employed do not alter jurisdiction over the service. This argument rests on the assumption that different language versions do not imply different centres of editorial control. The focus should be on editorial responsibility for/control of the content of the basic service. On the other hand, it could be contended that each language version is different, at least insofar as mistakes or other problems could arise in one version and

74) The corresponding term in the French-language version is *partie importante*. In German, it is *wesentlicher Teil*.

75) Article 2(d) of the Convention.<sup>75</sup> Article 2(d) of the Convention.

not in others. Theoretical and practical difficulties arise in instances of the equation of translation services with editorial control. As regards the practical application of such an approach, a huge number of licences would be required for each language version produced, thus leading to huge costs and regulatory attention.

Tailoring a broadcasting service or television programme to better suit the needs or preferences of specific communities need not be limited to linguistic doctoring. Regional focuses for news and entertainment are surely not without consequences and, more topically, regional focuses for advertising can prove to be a bone of contention whenever there is a transfrontier dimension to the adaptation. Again, the same questions may be asked about editorial responsibility/control.

According to Opinion No. 7 (1996) of the Standing Committee,<sup>76</sup> teletext services *are* broadcasting and *are* within the purview of the European Convention on Transfrontier Television. It therefore stated that broadcasters must assume responsibility for their content. There is no indication that the Standing Committee would hold otherwise whenever, for example, broadcasters rely on contractual arrangements for the provision of teletext services instead of ensuring their production themselves.

This assessment is, however, not always replicated at the national level. In the United Kingdom, for instance, teletext providers are licensed separately. The underlying rationale is that such text services are made available to the public and the broadcaster has no chance of influencing the content contained therein. Although licensed on all other media, text services and electronic programme guides are not licensable when transmitted by cable, owing to an anomaly in the broadcasting law. This anomaly, which is likely to be addressed by future legislation, can perhaps be explained by the desire to avoid the risk of overlap, *i.e.*, in order to prevent the scope of the law from widening to include Internet text. Text services are thus described by the new term, “ancillary services”.<sup>77</sup>

## Control over Retransmissions

The notion of retransmission is not defined in the “Television without Frontiers” Directive, but it is set out at Article 2(b) of the European Convention on Transfrontier Television as signifying: “the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public”. Greater definitional decortication of the expression “complete and unchanged” would be desirable, owing to new technology-driven possibilities for retransmission.

The question of control over retransmissions came to the fore when Sweden introduced a licensing system for digital terrestrial transmission, which presupposed that the licences would contain content-related provisions. When acting on a complaint concerning programme content, the *Granskningsnämnden för radio och TV* (Swedish Broadcasting Commission) ruled that the broadcast was under UK jurisdiction, thereby disregarding a licence issued to Swedish subsidiary TV3 AB by the Swedish Government. In the Swedish Broadcasting Commission’s opinion, the broadcaster was a UK company, licensed in the UK, and already broadcasting the same content via satellite. The Broadcasting Commission held that it was impossible under the Directive to subject broadcasters established in other EU Member States to a licensing system in Sweden that would include content-regulation.<sup>78</sup> It found that the distribution of TV3 in a digital terrestrial multiplex constituted a retransmission of TV3’s programme service similar to cable retransmission. The Swedish licence that had been issued to TV3 AB thereby became *de facto* obsolete.

76) Opinion No. 7 (1996) on the application of the Convention to Advertising transmitted via teletext services (adopted by the Standing Committee on Transfrontier Television at its 9<sup>th</sup> meeting (13-14 June 1996). The Committee concluded: “[that] teletext services are broadcasting and as such within the scope of the European Convention on Transfrontier Television. The broadcaster has editorial responsibility for their content having regard in particular to Article 7 of the Convention. However, given the specific nature of teletext services, the Convention’s rules on advertising and sponsorship (chapters III and IV of the Convention) do not apply as such [...]”. For more detail, see Annex G below.

77) See Section 87 of the Broadcasting Act 1996.

78) The Swedish Broadcasting Commission’s decisions SB202 and 203/00 are available in Swedish only at <http://www.grn.se/PDF-filer/Namndbes/2000/sb202-00.pdf> and <http://www.grn.se/PDF-filer/Namndbes/2000/sb203-00.pdf> respectively. Both decisions were made on 15 June 2000 and the facts of the cases were virtually the same, but the former involved the broadcaster Kanal 5 and the latter, TV3. See further, G. Lindberg, “DTT Licensees Found to Be British”, IRIS 2000-9: 11.

In stressing the parallel to cable retransmission, it is perhaps appropriate to refer to a decision of the Court of Justice of the European Communities that appears to sustain the view of the Swedish Broadcasting Commission. In [the European] *Commission v. Belgium*, it was stipulated, "first, that 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 Directive 89/552, and, second, that the receiving Member State is not authorised to exercise its own control in that regard."<sup>79</sup> The TV3 decision is based on the understanding that the Directive defines jurisdiction with regard to the specific facts of each case and not according to the geographical reaches of existing licensing systems. In fact, the Directive does not require States to establish a licensing system in order to exercise jurisdiction over broadcasters. As a result of that understanding, a licensing system may even be void to the extent that a country lacks jurisdiction over broadcasters that are considered to be established abroad. In other words, it could be that most or even all broadcasters on the territory of one Member State, even those broadcasting terrestrially, would fall under the jurisdiction of other Member States. This result did already apply to analogue terrestrial transmission but as national borders then confined broadcasting and licensing was limited by frequency scarcity, broadcasters established abroad would rarely obtain licences. Consequently, the situation of double licensing would hardly arise. Yet that picture has changed with the greater number of broadcasting opportunities in the digital environment. In this new environment, the situation can be expected to become far more frequent. It is even conceivable that public service broadcasters could relocate abroad and come under foreign jurisdiction, should owners from another Member State acquire the company.

Whereas much credence appears to attach to this interpretation, the following tentative counter-argument could be invoked: on the basis of telecommunications law, a country may require a licence for the redistribution in digital terrestrial multiplex of content already broadcast via other means. Such a licence could also include content-related rules, as this may be possible under the radio spectrum decision,<sup>80</sup> which was proposed by the European Commission in the framework of its communications review package.<sup>81</sup> While the possibility of imposing an additional licence under telecommunications law for the assignment of radio spectrum is widely accepted, an alternative line of thinking holds that these licences could not impose content requirements.

Following this latter position, it might appear urgent to examine whether existing national laws that impose licensing requirements on broadcasters broadcasting principally or exclusively in one Member State, although established in another, are actually in conformity with European law. Member States' Governments might not even be aware of this important question.

## Technological Innovations

Even within broadcasting, the advent of new technological features are challenging the elasticity of the existing legal framework. The multifunctional practice of split-screening is a prime example of such new technological features. It can, for instance, serve the interests of specific communities and can also be used to relay alternative information during programmes. News programmes with a strip/stream of running headlines at the bottom of the screen are a classic example of this practice. The streaming of football results during a match is another. Such uses for split-screening are, by and large, unremarkable and uncontroversial. When used for advertising and teleshopping ends, however, alarm bells are sounded in many quarters. Although

79) Case C-11/95, *Commission v. Belgium* [1996], Judgment of 10 September 1996, ECR I-4115, para. 34. For more detail, see the excerpts in Annex F below

80) The unofficial consolidated text based on second reading amendments voted by European Parliament on 12 December 2001 and the Common Position adopted by the Council on 16 October 2001 with a view to the adoption of a Decision of the European Parliament and of the Council on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision):  
[http://europa.eu.int/information\\_society/topics/telecoms/radiospec/doc/pdf/decision.pdf](http://europa.eu.int/information_society/topics/telecoms/radiospec/doc/pdf/decision.pdf)  
 The reference of the amended proposal of 18 September is COM (2001) 524 final.

81) Further information on this package is available at:  
<http://europa.eu.int/ISPO/infosoc/telecompolicy/review99/review99.htm>.

such a practice has evolved in some countries, its legitimacy under the existing regulatory framework has been contested for its tendency to reduce the separation of programming and advertising; a key principle enshrined in both the Directive<sup>82</sup> and the Convention.<sup>83</sup>

The insertion of local windows in a programme transmitted by a broadcaster in one Member State in another Member State has obvious jurisdictional implications.<sup>84</sup> When one jurisdiction regards such (up-linked) windows as part of the same service and another jurisdiction regards them as separate services, how should this difference of interpretation be resolved? Is it reasonable to use the criterion of “editorial control” as the appropriate point of departure? In a previous opinion of the Standing Committee on Transfrontier Television, the notions of editorial and technical control were used in reaching a decision.<sup>85</sup> It found that the editorial and technical control would be exercised by a broadcaster up-linking to a satellite and that the said broadcaster would fall under the jurisdiction of the State Party in which the up-link was located.<sup>86</sup>

Virtual or electronic image advertising is another technological innovation that is being served to television viewers throughout Europe and again, it is not certain whether this fare should be classed as fish, flesh or fowl. A number of countries have introduced interesting measures to deal with the issue of virtual advertising.<sup>87</sup> However, it is not immediately obvious at which precise point editorial responsibility for virtual advertising would lie. According to the Standing Committee, “the use of virtual images in news and current affairs programmes falls under the editorial responsibility of the broadcaster.”<sup>88</sup> More specifically, for present purposes, this was confirmed by the Standing Committee in relation to virtual advertising: “the broadcaster, who is exclusively responsible for the content of the signal produced and/or broadcast, should retain ultimate control over this content.”<sup>89</sup> Again, the compatibility of virtual advertising with the existing European-level legal framework is questionable on account of the strict principle of separation concerning television advertising.

The practice of advertisement insertion by cable operators also merits closer scrutiny. This practice involves possible agreements between cable operators and certain programme providers which entitle cable operators to use the advertising breaks contained in a programme provider's programme schedule for broadcasting their own advertising messages. This begs the question whether the advertisements are inserted by the cable operator or specifically for the cable net by the broadcaster. Is the notion of a programme service the key element or should emphasis be placed instead on the manner in which such advertisements are presented rather than the technique employed?

82) Article 10 of the Directive reads:

1. Television advertising and teleshopping shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.
2. Isolated advertising and teleshopping spots shall remain the exception.
3. Advertising and teleshopping shall not use subliminal techniques.
4. Surreptitious advertising and teleshopping shall be prohibited.”

83) Upon the entry into force of the Protocol Amending the Convention, Article 13, entitled “Form and presentation”, will read:

1. Advertising and tele-shopping shall be clearly distinguishable as such and recognisably separate from the other items of the programme service by optical and/or acoustic means. In principle, advertising and tele-shopping spots shall be transmitted in blocks.
2. Advertising and tele-shopping shall not use subliminal techniques.
3. Surreptitious advertising and tele-shopping shall not be allowed, in particular the presentation of products or services in programmes when it serves advertising purposes.
4. Advertising and tele-shopping shall not feature, visually or orally, persons regularly presenting news and current affairs.”

84) See, for example, the recent discussions between the Federal Office of Communications (OFCOM) in Switzerland and the *Conseil supérieur de l'audiovisuel* (CSA) in France concerning the former's objections to the use of a Swiss advertising window by the French television channel M6. See *Pour l'OFCOM les fenêtres publicitaires étrangères ne sont pas souhaitables*, OFCOM Press Release of 11 September 2001, available at: <http://www.ofcom.ch>.

85) Opinion No. 2 (1994) on the notion of “Retransmission” (Article 2(B)) (adopted by the Standing Committee on Transfrontier Television at its 3<sup>rd</sup> meeting (15 February 1994)). For more detail, see Annex G below.

86) The Standing Committee stressed, however, that this decision was specific to the facts of the instant case and that subsequent similar cases would have to be considered on their own merits.

87) See, for example, the approach of the Independent Television Commission (ITC) in the United Kingdom.

88) Recommendation (96) 1 concerning the use of virtual images in news and current affairs programmes (adopted by the Standing Committee on Transfrontier Television at its 11<sup>th</sup> meeting (5-6 December 1996)). For more detail, see Annex G below.

89) Recommendation (97) 1 concerning the use of virtual advertising notably during the broadcast of sports events (adopted by the Standing Committee on Transfrontier Television at its 12<sup>th</sup> meeting (20-21 March 1997)). For more detail, see Annex G below.

The rather nebulous notion of semi-interactive (broadcasting) services ought also to be broached. Push technologies with limited capabilities might be a shorthand way of describing these services. Semi-interactivity generally offers limited possibilities for accessing further information and services, thus shifting it into the definitionally-penumbrous zone that separates broadcasting (as covered by the existing regulations) from the adjacent domain of information society services (which are beyond the regulatory pale of broadcasting). These would be services (e.g. enhanced teletext and teleshopping services) which are enhanced, but not to the point of being fully interactive or fully individualised in terms of the service that they would provide. The key questions, for the purposes of determining jurisdiction over broadcasting, are first, where the cut-off point for the broadcaster's editorial responsibility/control would be and second, how that cut-off point would be determined.

## Other Communications Services: A Comparative Overview

The criteria for determining jurisdiction over broadcasters have already been examined in detail. The existing regulatory regime for broadcasting in Europe has evolved so as to incorporate, *inter alia*, new criteria in order to facilitate the task of determining jurisdiction. With the prospect of further revisions of both of the main pillars of this regulatory regime, the key question as regards jurisdiction is whether more additional criteria are needed for broadcasting. A brief overview of analogous provisions in European-level instruments governing other communications services could prove instructive in this connection.

Different jurisdictional criteria apply to different categories of communications services, at least according to the relevant instruments elaborated at the EU level. More precisely, different criteria are used for the determination of jurisdiction for broadcasting, information society services<sup>90</sup> and electronic communications services.<sup>91</sup> This is a reflection not only of the different nature of the branches in question, but also the division of the relevant (administrative and regulatory) competences between different directorates general within the EU. Responsibility for broadcasting services lies with the Directorate General for Education and Culture; Information Society Services come within the remit of the Internal Market Directorate General and Electronic Communications Services are catered for by the Information Society Directorate General. In the present era of ever-increasing convergence, there is likely to be greater interplay between regulatory and administrative approaches to these different types of communications services. Many conceptual and practical challenges are in the offing, as pertinent existing distinctions are likely to lose the relative clarity which they now enjoy.

The notion of editorial control is absent from electronic communications services and the Framework Directive<sup>92</sup> does not contain any jurisdictional criteria either. The jurisdictional criteria governing information society services are the formal criteria of establishment, as per the EC Treaty. This provides a formal point of fixation for the regulator.

For the purposes of determining which Member State is responsible for implementing the provisions of the Satellite and Cable ("SatCab") Directive,<sup>93</sup> the European legislator has chosen an

90) An "Information Society Service" is defined as "[A]ny service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services" (and "[F]or 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")

By Article 1(2) 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 L 217 , 5 August 1998 p. 18-26. This definition is endorsed by Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178 , 17 July 2000 p. 0001 – 0016.91).

- 91) "Electronic communications service": services provided for remuneration which consist wholly or mainly in the transmission and routing of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excluding services providing, or exercising editorial control over, content transmitted using electronic communications networks and services (the Framework Directive).
- 92) Amended proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, COM(2001) 380 final, OJ 2001 C 270 E/199.
- 93) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6 October 1993 p. 15-21.

approach which, once again, differs from that of the “Television without Frontiers” Directive (although it does bear strong similarities to the up-link criterion, discussed *supra*). The “SatCab” Directive, like the “Television without Frontiers” Directive, aims at avoiding double “control”. Therefore, it too departs from the country-of-origin principle. Recital 14 of the “SatCab” Directive advocates the formulation of a European Union-level definition of “communication to the public by satellite”; a definition which would “specify where the act of communication takes place” in order to “avoid the cumulative application of several national laws to one single act of broadcasting”.

Such a definition is furnished by Article 1, para. 2 (b) of the “SatCab” Directive, which states that, “[T]he act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.” In addition, Article 1, para. 2 (d) states that when the act of communication to the public takes place in a non-Member State, if an uplink is located in a Member State or, failing that, if a broadcasting organisation “established in a Member State has commissioned the act of communication to the public by satellite”, “that act shall be deemed to have occurred [sic] in the Member State in which the broadcasting organization has its principal establishment in the Community[...].”

The foregoing overview of relevant criteria for the determination of jurisdiction in instruments governing other communications services is necessarily brief. An exhaustive examination of their suitability for *mutatis mutandis* application to broadcasting is beyond the scope of this report. One concluding observation that may be drawn from the overview is, however, that technical considerations have primacy in other branches of European communications law. Broadcasting is alone in attaching great importance to other criteria, such as editorial responsibility/control. This provides further evidence of the unique character of broadcasting, alluded to above.

## Dispute Resolution

The regulation of broadcasting services has, at least to some extent, been harmonised by the European Convention on Transfrontier Television and the “Television without Frontiers” Directive. The Court of Justice of the European Communities has indicated that “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.”<sup>94</sup> A Contact Committee of representatives of the competent authorities of the Member States has been established under the aegis of the European Commission pursuant to Article 23a of the revised Directive. It was established largely to facilitate the effective implementation of the Directive, *inter alia*, by engaging in consultative exercises, issuing opinions and coordinating the exchange of pertinent information between Member States and the Commission.<sup>95</sup> As such, there are no clear provisions for the expeditious resolution of such disputes or problems by the Contact Committee.

Indeed, it could be argued that any prospective further revision of the Directive could usefully address its lack of procedural measures for obtaining expeditious decisions from the Court of Justice of the European Communities on matters such as jurisdiction over broadcasters. There is no rule in the Directive dealing with changes of jurisdiction (burden of proof, standards/criteria to be applied, etc.). Jurisdiction is a fact and is not determined merely by the award of a licence, as such an award can be made erroneously. Provisions catering for changes of jurisdiction could thus also prove a useful innovation in any revision of the Directive.

94) Case C-222/94, *Commission v. U.K.*, *op. cit.*, para. 56;

Case C-11/95, *Commission v. Belgium*, *op. cit.*, para. 37.

95) The full list of tasks of the Contact Committee are enumerated at Article 23a(2) of the revised Directive.

In a similar vein, the question of dispute resolution between jurisdictions could benefit from further consideration, as well as the suggestion that national courts and tribunals make greater use of the procedure for asking preliminary questions of the Court of Justice of the European Communities concerning the correct interpretation and application of matters of European law. Article 234 (ex Article 177) of the EC Treaty sets out the nature of this procedure.<sup>96</sup>

An important feature of the European Convention on Transfrontier Television is its preference for the friendly settlement of disputes arising from its interpretation or application. This notion reverberates throughout the Convention. Its provisions on co-operation between the Parties<sup>97</sup> are designed, *inter alia*, as a pre-emptive dispute resolution mechanism. The underlying logic is that close cooperation between Parties obviates disputes.<sup>98</sup> The information-sharing provisions of Article 6.2 of the Convention have an important role to play in the furtherance of this logic.<sup>99</sup> The Convention also contains provisions for the resolution of disputes by conciliation<sup>100</sup> and arbitration.<sup>101</sup> It is, however, also within the remit of the Standing Committee to deal with dispute resolution. Article 21 sets out the functions of the Standing Committee and for present purposes, the most relevant sections state that the Committee may “examine, at the request of one or more Parties, questions concerning the interpretation of the Convention”<sup>102</sup> and “use its best endeavours to secure a friendly settlement of any difficulty referred to it [...]”<sup>103</sup>

However, for a variety of practical and largely political reasons, the Standing Committee is not necessarily the best forum for such matters. Members are reluctant to take positions owing to the many sensitivities that are invariably involved and owing to the fact that the Committee is not a court. It should, perhaps, also be borne in mind that the Standing Committee, by virtue of the express linkage of the Convention to the Directive in the interest of maintaining coherence between the two,<sup>104</sup> must always be attuned to relevant developments in the European Union. The pace and nature of these developments is therefore always likely to affect the agenda of the Standing Committee in one way or another. In consequence to all of the above, the Standing Committee rarely addresses jurisdictional cases in depth: indeed, it has yet to formally pronounce on any jurisdictional issue. Other forms of bilateral discussions could constitute alternative *modi operandi* for dispute resolution, with the possibility of eventual recourse to the Standing Committee.

The importance of developing strong contacts and working relationships between national regulatory authorities (NRAs) can hardly be overstated, nor can the usefulness of organisations such as EPRA as a forum for these discussions. Indeed, some might even advocate putting NRAs under the obligation to adopt structures that would facilitate the reconciliation of parties to pertinent disputes. It is necessary to be cognisant of the fact that these NRAs are bound to operate within the (often constraining) parameters of their national laws. A possible expanded remit for

96) Article 234 (ex Article 177) of the EC Treaty reads:

“The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

97) Article 19 of the Convention. For more detail, see Annex E below.

98) See further paras. 233-238 of the Explanatory Report to the Convention.

99) Article 6.2 of the Convention:

“Information about the broadcaster shall be made available, upon request, by the competent authority of the transmitting Party. Such information shall include, as a minimum, the name or denomination, seat and status of the broadcaster, the name of the legal representative, the composition of the capital, the nature, purpose and mode of financing of the programme service the broadcaster is providing or intends providing.”

100) Article 25, *ibid.*

101) Article 26, *ibid.*

102) Article 21(c), *ibid.*

103) Article 21(d), *ibid.*

104) See further footnote 41, *supra*.

EPRA could embrace, for example, dispute-resolution responsibilities. Such a role would appear to be in keeping with the organisation's primary function, which is to be:

- a forum for informal discussion and exchange of views between regulatory authorities in the field of the media ;
- a forum for exchange of information about common issues of national and European media regulation ;
- a forum for discussion of practical solutions to legal problems regarding the interpretation and application of media regulation.<sup>105</sup>

The possibility of arbitration as a temporary solution could also be advanced. Under such an arrangement, an arbitrator would make a provisional ruling on jurisdiction, under which the parties would agree to operate in advance, pending a full hearing on the matter by the Court of Justice of the European Communities. Mediation is equally deserving of mention as another possible course of conciliatory action.<sup>106</sup> Structures for supervisory and indeed investigatory cooperation should be developed. Joint supervision could also prove attractive to regulators in specific circumstances. Another option would be the creation of simple procedures (akin to consumer complaints mechanisms) for lodging complaints against programmes. The emphasis ought to be on practicality rather than conceptual beauty.

It is plausible that the broadcasting sector could benefit from an examination of experiences in other branches of communications, where a variety of structures and procedures exist. One concrete example of a feature of some other systems is a process of notification. It involves a harmonised process of notification by NRAs to a central body of draft laws or future authorisations and licences. Provision is made for a so-called standstill period during which any other Member State may object to the communicated proposals, if it so wishes. Such a process could develop into a useful mechanism for obviating contentious jurisdictional wrangling.

On a more speculative note, a European authority with a mandate for dispute resolution in broadcasting (and in particular as regards jurisdictional disputes) could be another possibility, albeit one that would have to surmount considerable practical obstacles in order to come into being. Not least of these would be the question of its appropriate place within the existing European institutional framework. The putative authority could be empowered to make administrative decisions which would be subject to appeal to the Court of Justice of the European Communities. This would have the advantage of offering interim solutions, pending a definitive judgment from the Court.

## Conclusion

This report has shown how the European Convention on Transfrontier Television and the "Television without Frontiers" Directive have grown from a series of interconnected freedom rights guaranteed under European law. In the regulatory edifice created by these two instruments, the concepts of broadcaster and of establishment can be described as veritable cornerstones. Once a broadcaster has been identified, the question of jurisdiction over that broadcaster can be addressed. This necessarily involves the examination and application of the detailed provisions in both instruments on establishment criteria (primarily) and on other relevant technical criteria.

Both sets of criteria demand intense scrutiny. Theoretical uncertainties as to their precise scope are matched by corresponding uncertainties in practice. The issues raised in the foregoing discussion are not just examples of semantic quibbling: the cases examined, both real and

<sup>105</sup> Article 1.1 of the Statutes of the European Platform of Regulatory Authorities, as amended during the Syros meeting (21-22 October 1999).

<sup>106</sup> This is the favoured form of dispute resolution of the "SatCab" Directive, Article 11 of which reads:

- "1. Where no agreement is concluded regarding authorization of the cable retransmission of a broadcast. Member States shall ensure that either party may call upon the assistance of one or more mediators.
2. The task of the mediators shall be to provide assistance with negotiation. They may also submit proposals to the parties.
3. It shall be assumed that all the parties accept a proposal as referred to in paragraph 2 if none of them expresses its opposition within a period of three months. Notice of the proposal and of any opposition thereto shall be served on the parties concerned in accordance with the applicable rules concerning the service of legal documents.
4. The mediators shall be so selected that their independence and impartiality are beyond reasonable doubt."

anticipated alike, are of clear practical significance. The discussion highlights a selection of issues that would benefit from formal elucidation by the appropriate competent bodies or, ultimately, in case law or in the context of a future revision of the Directive or Convention.

Foremost amongst these is the notion of broadcaster. Without a crystal-clear understanding of the full definitional ramifications of the term, the crucial first step in the process of determining jurisdiction will always be liable to prove problematic. The traditional character of broadcasting is being altered immeasurably and at a precipitous rate, principally on account of ongoing evolutionary trends in commercial and technological practices. These changes have led, in many cases, to more complex organisational structures and new internal divisions of labour. At the very least, it can be said that these changes have given rise to much greater variety in the atomic structures of broadcasters than ever before. The existing definitions of the term "broadcaster" do not always reflect the increased operational sophistication that is to be found at the confluence of all of these changes.

The notion of editorial responsibility/control, which is of major importance in the determination of jurisdiction over broadcasters, has also been affected by the aforementioned changes. Organisational divisions and changes within broadcasting undertakings often lead to uncertainty concerning the exact locus of editorial responsibility. New technologies have facilitated new working methods, resulting in further lack of certitude as to what editorial responsibility entails in different cases. The existence of a plurality of possible interpretations of the term "significant part of the workforce" is evidence in itself of a need for definitional clarification. The notion of "single service", which is prominent in the European Convention on Transfrontier Television, is also germane to the discussion of jurisdictional matters in the broadcasting sector, as the existence of several services instead of a single one can imply that there are also several centres of editorial responsibility/control instead of one.

Technological innovations are also capable of influencing the determination of jurisdiction over broadcasters. There is an obvious jurisdictional dimension to retransmissions, for example. Split-screening, virtual advertising and the practice of advertisement insertion by cable operators can all impact on the determination of jurisdiction insofar as they invite the question of the point at which editorial responsibility arises.

In an era of ever-increasing convergence, it is only logical to examine the jurisdictional clauses which apply to other types of communications services. For this reason, the report briefly documents some of the relevant clauses governing information society services, electronic communications services and satellite broadcasting and cable retransmission.

The issue of jurisdiction over broadcasters is by no means limited to substantive matters: the procedures for resolving disputes over jurisdiction are also of cardinal importance. This report underlines some of the shortcomings of existing European-level mechanisms for the resolution of such disputes. Simultaneously, it explores a miscellany of other possibilities, many of which have been gleaned from legal instruments governing adjacent branches of communications services. It emerges from the arguments advanced above that the encouragement of structured, systematic, bi- and multi-lateral discussions between national regulatory authorities with a view to pre-empting conflicting assertions (or indeed non-assertions) of jurisdiction over broadcasters should be accorded increased priority.

The scope of this report is wide. Its usefulness is that it braids together a number of thematic threads that are all-too-often considered in isolation. It measures relevant definitional shortcomings through a focus on actual problems (past and present), as well as plausible sources of interpretational divergence from which future problems are likely to stem. All of this is complemented by a panorama of the relevant sections of instruments dealing with neighbouring communications services and some probative suggestions for strengthening structures and systems for the resolution of disputes concerning jurisdiction over broadcasters. It is to be hoped, therefore, that this braiding exercise will prove synergic; that the report will prove to be more than the sum of its parts and that it will feed directly into future discussions on the matter.



# Selection of Background Material



## ANNEX A

### Participants in the Round Table on Jurisdiction over Broadcasters in Europe

<b>Greger Lindberg</b> (Chair)	The European Platform of Regulatory Authorities (EPRA) - SE
<b>Frithjof Berger</b>	Federal Ministry of the Interior - DE
<b>Maja Cappello</b>	Autorità per le Garanzie nelle Comunicazioni - IT
<b>Wolfgang Closs</b>	European Audiovisual Observatory - DE
<b>Egbert Dommering</b>	Institute for Information Law (IViR) - NL
<b>Andreas Grünwald</b>	Institute of Telecommunications and Media Law - DE
<b>Helena Mandić</b>	Communication Regulatory Agency – BA
<b>Alberto Pérez Gómez</b>	Dirección de Internacional Comisión del Mercado de las Telecomunicaciones - ES
<b>Ramon Prieto Suarez</b>	Media Division DG Human Rights / Standing Committee on Transfrontier Television, Council of Europe - ES
<b>Tony Prosser</b>	University of Glasgow - GB
<b>Eve Salomon</b>	The Radio Authority - GB
<b>Alexander Scheuer</b>	Institute of European Media Law (EMR) - DE
<b>Boleslaw Sulik</b>	The National Broadcasting Council (KRRiT) – PL
<b>Dirk Voorhoof</b>	University of Ghent - BE
<b>Emmanuelle Machet</b>	The European Platform of Regulatory Authorities (EPRA) - FR
<b>Malgorzata Pek</b>	The National Broadcasting Council (KRRiT) - PL
<b>Ad van Loon</b>	Institute for Information Law (IViR) - NL
<b>Tarlach McGonagle</b> (Rapporteur)	Institute for Information Law (IViR) – IE

## ANNEX B

### Selection of Relevant Laws and Internet Links

#### The European Union

##### The EC Treaty:

The Treaty Establishing the European Community, Official Journal C 340, 10 November 1997, pp. 173-308, (consolidated version) available at:  
[http://europa.eu.int/eur-lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf)

##### The Treaty on European Union:

The Treaty on European Union (consolidated version), available at:  
[http://europa.eu.int/eur-lex/en/treaties/dat/eu\\_cons\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/eu_cons_treaty_en.pdf)

##### The “Television without Frontiers” Directive:

EC Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, adopted on 3 October 1989, OJ L 298, 17 October 1989, p.23, available at:  
[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31989L0552&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31989L0552&model=guichett)

Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/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, adopted on 30 June 1997, OJ L 202, 30 July 1997, p. 60, available at:  
[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31997L0036&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31997L0036&model=guichett)

##### The Directive on Electronic Commerce:

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal L 178, 17/07/2000 p. 0001 – 0016, available at:  
[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32000L0031&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32000L0031&model=guichett)

##### The Directive on Electronic Communications Services (Amended Proposal)

Amended proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, COM(2001) 380 final, OJ 2001 C 270 E/199, available at:  
[http://europa.eu.int/eur-lex/en/com/dat/2001/en\\_501PC0380.html](http://europa.eu.int/eur-lex/en/com/dat/2001/en_501PC0380.html)

##### The “SatCab” Directive:

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJEC* L 248, 06/10/1993 p. 15-21, available at:  
[http://europa.eu.int/eur-lex/en/lif/dat/1993/en\\_393L0083.html](http://europa.eu.int/eur-lex/en/lif/dat/1993/en_393L0083.html)

#### The Council of Europe

European Convention on Transfrontier Television, adopted on 5 May 1989, ETS No. 132, available at:  
<http://conventions.coe.int/Treaty/EN/WhatYouWant.asp?NT=132&CM=8&DF=22/01/02>

Protocol amending the European Convention on Transfrontier Television, adopted on 1 October 1998, ETS No. 171, in force since 1 March 2002, available at:  
<http://conventions.coe.int/Treaty/EN/WhatYouWant.asp?NT=171&CM=8&DF=22/01/02>

Explanatory Report to the European Convention on Transfrontier Television, available at: <http://conventions.coe.int/Treaty/en/Reports/Html/132.htm>

Explanatory Report to the Protocol, available at:  
<http://conventions.coe.int/Treaty/en/Reports/Html/171.htm>

## ANNEX C

### Selection of Relevant Case Law, Opinions and Recommendations (European Level)

#### The Court of Justice of the European Communities

Case 33-74, Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1974], Judgment of 3 December 1974, ECR 1299, available at: [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0033](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0033)

Case C-148/91, Veronica Omroep Organisatie v. Commissariaat voor de Media [1993], Judgment of 3 February 1993, ECR I-487, available at: [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61991J0148](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61991J0148)

Case C-23/93, TV 10 SA v. Commissariaat voor de Media [1994], Judgment of 5 October 1994, ECR I-4795, available at: [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61993J0023](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61993J0023)

Case C-327/93, The Red Hot Television (formerly Red Hot Dutch) Case, removed from the register on 29/03/1996, Continental Television. [Not available on the website of the Court of Justice of the European Communities]

Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995], Judgment of 30 November 1995, ECR I-4165, available at: [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0055](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0055)

Case C-222/94, Commission v. United Kingdom of Great Britain and Northern Ireland [1996], Judgment of 10 September 1996, ECR I-4025, available at: [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0222](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0222)

Case C-11/95, Commission v. Belgium [1996], Judgment of 10 September 1996, ECR I-4115, available at: [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0011](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0011)

Joined cases C-34/95, C-35/95 and C-36/95, Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95) [1997], Judgment of 9 July 1997, ECR I-3843, available at: [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0034](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0034)

Case C-56/96, VT4 Ltd. v. Vlaamse Gemeenschap [1997], Judgment of 5 June 1997, ECR I-3143, available at: [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996J0056](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61996J0056)

Case C-212/97, Centros Ltd. v. Erhvervs- og Selskabsstyrelsen [1999], Judgment of 9 March 1999, ECR I-1459, available at: [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61997J0212](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61997J0212)

Case C-6/98, Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media AG [1999], Judgment of 28 October 1999, ECR I-7599, available at: [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61998J0006](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61998J0006)

*Alternatively to the specific references mentioned, all cases are accessible through the section of the Court of Justice's website offering "numerical access to the case-law", at:*

*<http://curia.eu.int/en/recdoc/indexaz/index.htm>*

*Cases 33-74, C-23/93, C-222/94, C-11/95, and C-56/96 were intensely discussed at the Round Table and are therefore reproduced in condensed form in Annex F below.*

### **The European Court of Human Rights**

Groppera Radio AG & Others v. Switzerland, Judgment of the European Court of Human Rights of 28 March 1990, Series A, no. 173, available at: <http://www.echr.coe.int>

Autronic AG v. Switzerland, Judgment of the European Court of Human Rights of 22 May 1990, Series A, no. 178, available at: <http://www.echr.coe.int>

Informationsverein Lentia & Others v. Austria, Judgment of the European Court of Human Rights of 24 November 1993, Series A, no. 276, available at: <http://www.echr.coe.int>

### **The Standing Committee on Transfrontier Television (Council of Europe)**

Opinion No. 2 (1994) on the notion of "Retransmission" (Article 2(B)) (adopted by the Standing Committee on Transfrontier Television at its 3<sup>rd</sup> meeting (15 February 1994)).

Opinion No. 3 (1995) on the notion of "broadcaster" (Article 2 (c)) (adopted by the Standing Committee on Transfrontier Television at its 6<sup>th</sup> meeting (24-25 April 1995)).

Opinion No. 5 (1995) on freedom of reception and retransmission (Article 4) (adopted by the Standing Committee on Transfrontier Television at its 6<sup>th</sup> meeting (24-25 April 1995)).

Opinion No. 7 (1996) on the application of the Convention to Advertising transmitted via teletext services (adopted by the Standing Committee on Transfrontier Television at its 9<sup>th</sup> meeting (13-14 June 1996)).

Recommendation (96)1 concerning the use of virtual images in news and current affairs programmes (adopted by the Standing Committee on Transfrontier Television at its 11<sup>th</sup> meeting (5-6 December 1996)).

Recommendation (97)1 concerning the use of virtual advertising notably during the broadcast of sports events (adopted by the Standing Committee on Transfrontier Television at its 12<sup>th</sup> meeting (20-21 March 1997)).

*These Opinions and Recommendations are reproduced in Annex G below.*

## ANNEX D

### Selection of National Cases Discussed at the Round Table

The Ruling of the *Afdeling Bestuursrechtspraak* (Administrative Law Division) of the *Raad van State* (Council of State) of the Netherlands on the case of RTL/Veronica de Holland Media Groep S.A. and CLT-UFA S.A. v. the *Commissariaat voor de Media* (Dutch Media Authority) of 10 April 2001, Doc. CC TVSF (2001) 20.

The Opinion of the Independent Broadcasting Commission of the Grand Duchy of Luxembourg as to which State has jurisdiction over Channels RTL4 and RTL5, Doc. CC TVSF (2001) 24.

The Swedish Broadcasting Commission's decision SB202 of 15 June 2000 ("Galna sanningar", Kanal 5), available in Swedish at:  
<http://www.grn.se/PDF-filer/Namndbes/2000/sb202-00.pdf>

The Swedish Broadcasting Commission's decision SB 203/00 of 15 June 2000 ("TV3 Direkt"), available in Swedish at :  
<http://www.grn.se/PDF-filer/Namndbes/2000/sb203-00.pdf>

*The Ruling of the Council of State and the Opinion of the Independent Broadcasting Commission were intensely discussed at the Round Table and are therefore reproduced in condensed form in Annex H below.*

## ANNEX E

### Excerpts from Selected Laws (Provisions NOT Quoted in the Text)

#### European Union

##### The "Television without Frontiers" Directive

#### CHAPTER VIa

##### Contact committee

##### Article 23a

1. A contact committee shall be set up under the aegis of the Commission.  
It shall be composed of representatives of the competent authorities of the Member States.  
It shall be chaired by a representative of the Commission and meet either on his initiative or at the request of the delegation of a Member State.
2. The tasks of this committee shall be:
  - (a) to facilitate effective implementation of this Directive through regular consultation on any practical problems arising from its application, and particularly from the application of Article 2, as well as on any other matters on which exchanges of views are deemed useful;
  - (b) to deliver own-initiative opinions or opinions requested by the Commission on the application by the Member States of the provisions of this Directive;
  - (c) to be the forum for an exchange of views on what matters should be dealt with in the reports which Member States must submit pursuant to Article 4 (3), on the methodology of these, on the terms of reference for the independent study referred to in Article 25a, on the evaluation of tenders for this and on the study itself;
  - (d) to discuss the outcome of regular consultations which the Commission holds with representatives of broadcasting organizations, producers, consumers, manufacturers, service providers and trade unions and the creative community;
  - (e) to facilitate the exchange of information between the Member States and the Commission on the situation and the development of regulatory activities regarding television broadcasting services, taking account of the Community's audiovisual policy, as well as relevant developments in the technical field;
  - (f) to examine any development arising in the sector on which an exchange of views appears useful.

## Council of Europe

### The European Convention on Transfrontier Television (unofficial consolidated version)

#### CHAPTER V – Mutual assistance

##### Article 19 – Co-operation between the Parties

1. The Parties undertake to render each other mutual assistance in order to implement this Convention.
2. For that purpose:
  - a. each Contracting State shall designate one or more authorities, the name and address of each of which it shall communicate to the Secretary General of the Council of Europe at the time of deposit of its instrument of ratification, acceptance, approval or accession;
  - b. each Contracting State which has designated more than one authority shall specify in its communication under sub-paragraph a the competence of each authority.

An authority designated by a Party shall:

- a. furnish the information foreseen under Article 6, paragraph 2, of this Convention;
- b. furnish information at the request of an authority designated by another Party on the domestic law and practices in the fields covered by this Convention;
- c. co-operate with the authorities designated by the other Parties whenever useful, and notably where this would enhance the effectiveness of measures taken in implementation of this Convention;
- d. consider any difficulty arising from the application of this Convention which is brought to its attention by an authority designated by another Party.

#### CHAPTER VI – Standing Committee

##### Article 20 – Standing Committee

1. For the purposes of this Convention, a Standing Committee shall be set up.
2. Each Party may be represented on the Standing Committee by one or more delegates. Each delegation shall have one vote. Within the areas of its competence, the European Economic Community shall exercise its right to vote with a number of votes equal to the number of its member States which are Parties to this Convention; the European Economic Community shall not exercise its right to vote in cases where the member States concerned exercise theirs, and conversely.
3. Any State referred to in Article 29, paragraph 1, which is not a Party to this Convention may be represented on the Standing Committee by an observer.
4. The Standing Committee may seek the advice of experts in order to discharge its functions. It may, on its own initiative or at the request of the body concerned, invite any international or national, governmental or non-governmental body technically qualified in the fields covered by this Convention to be represented by an observer at one or part of one of its meetings. ~~The decision to invite such experts or bodies shall be taken by a majority of three quarters of the members of the Standing Committee.~~  
[stricken by Article 27 of the Protocol]
5. The Standing Committee shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within six months of the date of entry into force of the Convention. It shall subsequently meet whenever one-third of the Parties or the Committee of Ministers of the Council of Europe so requests, or on the initiative of the Secretary General of the Council of Europe in accordance with the provisions of Article 23, paragraph 2, or at the request of one or more Parties in accordance with the provisions of Articles 21, sub-paragraph c, and 25, paragraph 2.
6. A majority of the Parties shall constitute a quorum for holding a meeting of the Standing Committee.
7. (Subject to the provisions of paragraph 4 and Article 23, paragraph 3, the decisions of the Standing Committee shall be taken by a majority of three-quarters of the members present.)  
To read: "Subject to the provisions of Article 9bis, paragraph 3b, and Article 23, paragraph 3, the decisions of the Standing Committee shall be taken by a majority of three-quarters of the members present."  
[wording changed by Article 27 of the Protocol]
8. Subject to the provisions of this Convention, the Standing Committee shall draw up its own Rules of Procedure.

#### Article 21 – Functions of the Standing Committee

1. The Standing Committee shall be responsible for following the application of this Convention. It may:
  - a. make recommendations to the Parties concerning the application of the Convention;
  - b. suggest any necessary modifications of the Convention and examine those proposed in accordance with the provisions of Article 23;
  - c. examine, at the request of one or more Parties, questions concerning the interpretation of the Convention;
  - d. use its best endeavours to secure a friendly settlement of any difficulty referred to it in accordance with the provisions of Article 25;
  - e. make recommendations to the Committee of Ministers concerning States other than those referred to in Article 29, paragraph 1, to be invited to accede to this Convention.
  - f. give opinions on abuse of rights under Article 24bis, paragraph 2c.

2. In addition, the Standing Committee shall:

- a. draw up the guidelines referred to in Article 9bis, paragraph 3b, in order to avoid differences between the implementation of the provisions of this Convention concerning access of the public to events of major importance for society and that of corresponding European Community provisions;
- b. give an opinion on the measures taken by Parties which have drawn up a list of national or non-national events which are considered by those Parties as being of major importance for society in accordance with Article 9bis, paragraph 2;
- c. publish once a year a consolidated list of the enlisted events and corresponding measures notified by Parties in accordance with Article 9bis, paragraph 2e. [added by Article 28 of the Protocol]

#### Article 22 – Reports of the Standing Committee

After each meeting, the Standing Committee shall forward to the Parties and the Committee of Ministers of the Council of Europe a report on its discussions and any decisions taken.

### CHAPTER VII – Amendments

#### Article 23 – Amendments

1. Any Party may propose amendments to this Convention.
2. Any proposal for amendment shall be notified to the Secretary General of the Council of Europe who shall communicate it to the member States of the Council of Europe, to the other States party to the European Cultural Convention, to the European Economic Community and to any non-member State which has acceded to, or has been invited to accede to this Convention in accordance with the provisions of Article 30. The Secretary General of the Council of Europe shall convene a meeting of the Standing Committee at the earliest two months following the communication of the proposal.
3. The Standing Committee shall examine any amendment proposed and shall submit the text adopted by a majority of three-quarters of the members of the Standing Committee to the Committee of Ministers for approval. After its approval, the text shall be forwarded to the Parties for acceptance.
4. Any amendment shall enter into force on the thirtieth day after all the Parties have informed the Secretary General of their acceptance thereof.
5. However, the Committee of Ministers may, after consulting the Standing Committee, decide that a particular amendment shall enter into force following the expiry of a period of two years after the date on which it has been opened to acceptance, unless a Party has notified the Secretary General of the Council of Europe of an objection to its entry into force. Should such an objection be notified, the amendment shall enter into force on the first day of the month following the date on which the Party to the Convention which has notified the objection has deposited its instrument of acceptance with the Secretary General of the Council of Europe.
6. If an amendment has been approved by the Committee of Ministers, but has not yet entered into force in accordance with paragraphs 4 or 5, a State or the European Community may not express their consent to be bound by the Convention without accepting at the same time the amendment.  
*[added by Article 29 of the Protocol]*

**CHAPTER VIII – Alleged violations of this Convention**

## Article 24 – Alleged violations of this Convention

1. When a Party finds a violation of this Convention, it shall communicate to the transmitting Party the alleged violation and the two Parties shall endeavour to overcome the difficulty on the basis of the provisions of Articles 19, 25 and 26.
2. If the alleged violation is of a manifest, serious and grave nature which raises important public issues and concerns Articles 7, paragraphs 1 or 2, 12, 13, paragraph 1, first sentence, 14 or 15, paragraphs 1 or 3, and if it persists within two weeks following the communication, the receiving Party may suspend provisionally the retransmission of the incriminated programme service.
3. In all other cases of alleged violation, with the exception of those provided for in paragraph 4, the receiving Party may suspend provisionally the retransmission of the incriminated programme service eight months following the communication, if the alleged violation persists.

The provisional suspension of retransmission shall not be allowed in the case of alleged violations of Articles 7, paragraph 3, 8, 9 or 10.

Article 24bis: Alleged abuses of rights conferred by this Convention

1. When the programme service of a broadcaster is wholly or principally directed at the territory of a Party other than that which has jurisdiction over the broadcaster (the “receiving Party”), and the broadcaster has established itself with a view to evading the laws in the areas covered by the Convention which would have applied to it had it fallen within the jurisdiction of that other Party, this shall constitute an abuse of rights.
2. Where such an abuse is alleged by a Party, the following procedure shall apply:
  - a. the Parties concerned shall endeavour to achieve a friendly settlement;
  - b. if they fail to do so within three months, the receiving Party shall refer the matter to the Standing Committee;
  - c. having heard the views of the Parties concerned, the Standing Committee shall, within six months of the date on which the matter was referred to it, give an opinion on whether an abuse of rights has been committed and shall inform the Parties concerned accordingly.
3. If the Standing Committee has concluded that an abuse of rights has occurred, the Party whose jurisdiction the broadcaster is deemed to be within shall take appropriate measures to remedy the abuse of rights and shall inform the Standing Committee of those measures.
4. If the Party whose jurisdiction the broadcaster is deemed to be within has failed to take the measures specified in paragraph 3 within six months, the arbitration procedure set out in Article 26, paragraph 2, and the appendix of the Convention shall be pursued by the Parties concerned.
5. A receiving Party shall not take any measures against the programme service concerned until the arbitration procedure has been completed.
6. Any measures proposed or taken under this article shall comply with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.  
[added by Article 30 of the Protocol]

**CHAPTER IX – Settlement of disputes**

## Article 25 – Conciliation

1. In case of difficulty arising from the application of this Convention, the Parties concerned shall endeavour to achieve a friendly settlement.
2. Unless one of the Parties concerned objects, the Standing Committee may examine the question, by placing itself at the disposal of the Parties concerned in order to reach a satisfactory solution as rapidly as possible and, where appropriate, to formulate an advisory opinion on the subject.
3. Each Party concerned undertakes to accord the Standing Committee, without delay, all information and facilities necessary for the discharge of its functions under the preceding paragraph.

## Article 26 – Arbitration

1. If the Parties concerned cannot settle the dispute in accordance with the provisions of Article 5, they may, by common agreement, submit it to arbitration, the procedure of which is provided for in the appendix to this Convention. In the absence of such an agreement within six months following the first request to open the procedure of conciliation, the dispute may be submitted to arbitration at the request of one of the Parties.
2. Any Party may, at any time, declare that it recognises as compulsory *ipso facto* and without special agreement in respect of any other Party accepting the same obligation the application of the arbitration procedure provided for in the appendix to this Convention.

## **ANNEX F**

### **Excerpts from Selected Case Law of the Court of Justice of the European Communities**

*The publisher wishes to thank the European Commission who for the benefit of the public, makes the electronic version of the texts of the Court of Justice available free of charge on Internet for information purposes. Please note that this version is subject to amendment and that the definitive version of these texts will be published in the "Reports of Cases before the Court of Justice and the Court of First Instance" which alone are authentic and, in the event of their differing from the electronic version, are alone to be regarded as authoritative.*

**Judgment of the Court of 3 December 1974. Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid. Case 33-74.**

(European Court Reports 1974 Page 1299)

[...]

1. By order of 18 April 1974, lodged at the Registry of the Court on 15 May, the Centrale Raad van Beroep put to the Court, under Article 177 of the EEC Treaty, questions relating to the interpretation of Articles 59 and 60 of the Treaty establishing the European Economic Community concerning freedom to provide services within the Community.

2. These questions arose incidentally, during the course of an action before the said Court, and are concerned with the admission before that Court of the person whom the appellant in the main action chose to act as his legal representative.

3. It appears from the file that the appellant had entrusted the defence of his interests to a legal representative of Netherlands nationality entitled to act for parties before courts and tribunals where representation by an advocaat is not obligatory.

4. Since this legal representative had, during the course of the proceedings, transferred his residence from the Netherlands to Belgium, his capacity to represent the party in question before the Centrale Raad van Beroep was contested on the basis of a provision of Netherlands law under which only persons established in the Netherlands may act as legal representatives before that Court.

5. In support of his claim the person concerned invoked the provisions of the Treaty relating to freedom to provide services within the Community, and the Centrale Raad van Beroep referred to the Court two questions relating to the interpretation of Articles 59 and 60 of the Treaty.  
The actual scope of Articles 59 and 60.

6. The Court is requested to interpret Articles 59 and 60 in relation to a provision of national law whereby only persons established in the territory of the state concerned are entitled to act as legal representatives before certain courts or tribunals.

7. Article 59, the first paragraph of which is the only provision in question in this connexion, provides that : "within the framework of the provisions set out below, restrictions on freedom to provide services within the community shall be progressively abolished during the transitional period in respect of nationals of member states who are established in a state of the community other than that of the person for whom the services are intended".

8. Having defined the concept "services" within the meaning of the Treaty in its first and second paragraphs, Article 60 lays down in the third paragraph that, without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to provide that service, temporarily pursue his activity in the state where the service is provided, under the same conditions as are imposed by that state on its own nationals.

9. The question put by the national court therefore seeks to determine whether the requirement that legal representatives be permanently established within the territory of the state where the service is to be provided can be reconciled with the prohibition, under Articles 59 and 60, on all restrictions on freedom to provide services within the community.

10. The restrictions to be abolished pursuant to Articles 59 and 60 include all requirements imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the state where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service.

11. In particular, a requirement that the person providing the service must be habitually resident within the territory of the state where the service is to be provided may, according to the circumstances, have the result of depriving Article 59 of all useful effect, in view of the fact that the precise object of that article is to abolish restrictions on freedom to provide services imposed on persons who are not established in the state where the service is to be provided.

12. However, taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good - in particular rules relating to organization, qualifications, professional ethics, supervision and liability - which are binding upon any person established in the state in which the service is provided, where the person providing the service would escape from the ambit of those rules being established in another Member State.

13. Likewise, a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.

14. In accordance with these principles, the requirement that persons whose functions are to assist the administration of justice must be permanently established for professional purposes within the jurisdiction of certain courts or

tribunals cannot be considered incompatible with the provisions of Articles 59 and 60, where such requirement is objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics.

15. That cannot, however, be the case when the provision of certain services in a Member State is not subject to any sort of qualification or professional regulation and when the requirement of habitual residence is fixed by reference to the territory of the state in question.

16. In relation to a professional activity the exercise of which is similarly unrestricted within the territory of a particular Member State, the requirement of residence within that state constitutes a restriction which is incompatible with Articles 59 and 60 of the Treaty if the administration of justice can satisfactorily be ensured by measures which are less restrictive, such as the choosing of an address for service.

17. It must therefore be stated in reply to the question put to the Court that the first paragraph of Article 59 and the third paragraph of Article 60 of the EEC Treaty must be interpreted as meaning that the national law of a Member State cannot, by imposing a requirement as to habitual residence within that state, deny persons established in another member state the right to provide services, where the provision of services is not subject to any special condition under the national law applicable.

The question of the direct applicability of Articles 59 and 60

[...]

26. Therefore, as regards at least the specific requirement of nationality or of residence, Articles 59 and 60 impose a well-defined obligation, the fulfilment of which by the Member States cannot be delayed or jeopardized by the absence of provisions which were to be adopted in pursuance of powers conferred under Articles 63 and 66.

27. Accordingly, the reply should be that the first paragraph of Article 59 and the third paragraph of Article 60 have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a member state other than that in which the service is to be provided.

[...]

on those grounds,

THE COURT[...] hereby rules :

1. The first paragraph of Article 59 and the third paragraph of Article 60 of the EEC Treaty must be interpreted as meaning that the national law of a member state cannot, by imposing a requirement as to habitual residence within that state, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable;

2. The first paragraph of Article 59 and the third paragraph of Article 60 have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided.

**Judgment of the Court (Fifth Chamber) of 5 October 1994. TV10 SA v. Commissariaat voor de Media. Case C-23/93.**

(European Court Reports 1994 Page I-4795 )

[...]

THE COURT

[...]

gives the following

Judgment

1. By order of 11 May 1992, [...], the Afdeling Rechtspraak (Administrative Appeals Section) of the Netherlands Raad van State (Council of State) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the Treaty provisions on the freedom to provide services, in order to assess the compatibility with Community law of rules of a Member State restricting the activities of broadcasters established in other Member States.

2. Those questions were raised in proceedings between TV10, a public limited company governed by Luxembourg law which is a commercial broadcasting undertaking established in Luxembourg, and the Commissariaat voor de Media, the supervisory body for broadcasting in the Netherlands, on the application of provisions of the Netherlands Law of 21 April 1987 governing the supply of radio and television programmes, radio and television licence fees and press subsidies (Staatsblad No 249 of 4 June 1987, hereinafter "the Mediawet").

3. The Mediawet lays down two different sets of rules for broadcasting of Netherlands origin and for transmission of programmes broadcast from abroad.

4. With respect to Netherlands broadcasting, Article 31 of the Mediawet prescribes that air time for radio and television programmes on the national network is to be allocated to broadcasting associations by the Commissariaat voor de Media. Under Article 14 of the Mediawet, broadcasting associations are associations of listeners or viewers having legal personality, established to represent a particular social, cultural, religious or philosophical persuasion set out in their statutes. They must provide a varied programme. Articles 99 to 102 of the Mediawet further provide for a method of financing intended to maintain the pluralist and non-commercial character of domestic broadcasting associations.

[...]

6. According to the case file, TV10 was in fact established in Luxembourg and took steps to broadcast in accordance with Luxembourg law. It therefore obtained authorization from the Luxembourg authorities to transmit its programmes via the Astra satellite, which directs them to Netherlands territory. The Commissariaat voor de Media has noted, however, that day-to-day management of TV10 is largely in the hands of Netherlands nationals and that its programmes are intended to be transmitted by cable networks primarily in Luxembourg and the Netherlands. It has further noted that TV10 has concluded contracts with cable network operators in Luxembourg and the Netherlands only and not in other States of the European Community. The Commissariaat voor de Media has also stated that although the broadcasting of programmes, purchase and sub-titling of foreign programmes, directing and final editing are carried out in Luxembourg, the target audience is the Dutch public, most of those employed for TV10's various programmes are from the Netherlands and the advertisements are made in the Netherlands.

7. On that basis the Commissariaat voor de Media, in a decision of 28 September 1989, held that TV10 had established itself in Luxembourg in order to escape the Netherlands legislation applying to domestic associations. It concluded that it could not be regarded as a foreign broadcaster within the meaning of Article 66(1) of the Mediawet, and that its programmes could therefore not be transmitted by cable in the Netherlands.

8. Following that decision TV10 decided not to broadcast any programmes. However, it appealed against the decision, under the Wet Administratieve Rechtspraak Overheidsbeschikkingen (Law on administrative jurisdiction over decisions of authorities), to the Administrative Appeals Section of the Raad van State.

9. In its judgment of 11 May 1992 the Raad van State first confirmed the analysis by the Commissariaat voor de Media and shared its view that TV10 had established itself in Luxembourg with the evident intention of avoiding the Mediawet and could not be regarded as a foreign broadcaster within the meaning of Article 66 of that Law. It further held that the Commissariaat's decision infringed neither the principle of equality, nor Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention on Human Rights"), which guarantees the right to freedom of expression, nor Article 14 of that Convention, which prohibits discrimination with reference to the rights and freedoms it guarantees.

10. The Raad van State referred to the judgments in Case 33/74 Van Binsbergen v Bedrijfsvereniging voor de Metallnijverheid [1974] ECR 1299 and Case 52/79 Procureur du Roi v Debauve [1980] ECR 833 and stated inter alia that a Member State has the right to take measures to prevent the exercise by a person providing services whose activities are entirely or principally directed toward its territory of the Treaty provisions on the freedom to provide services for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that Member State. However, in view of the judgment in Case 79/85 Segers v Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen [1986] ECR 2375, the Raad van State was uncertain how to assess "activities directed from another Member State by a broadcaster whose undertaking has been constituted under the laws of that other Member State and is formally established there".

11. It therefore considered it necessary to request a preliminary ruling on the following two questions:  
 "1. Where a broadcaster not eligible for access to the cable network in Member State A transmits programmes from Member State B with the manifest purpose, as shown by objective circumstances, of thereby avoiding the legislation of the Member State to which the programmes are primarily but not exclusively transmitted, is that a case of provision of services with a relevant cross-border element for the purposes of Community law?  
 2. Are restrictions imposed by the receiving Member State on the provision of the services described in Question 1, whereby a broadcaster is regarded as a domestic organization despite the fact that it has chosen to establish itself in another Member State and is therefore denied access for its programmes to the national cable network if they do not comply with the access conditions applicable to domestic broadcasters relying on the fact that the broadcaster established in another Member State is seeking to evade the legislation of the receiving Member State designed to maintain the pluralist and non-commercial character of national broadcasting compatible with Community law, having regard inter alia to Articles 10 and 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms?"

#### Applicability of the rules on freedom to provide services

12. By Question 1 the national court essentially asks whether the concept of "provision of services" referred to in Articles 59 and 60 of the Treaty covers the transmission, via cable network operators established in one Member State, of television programmes supplied by a broadcasting body established in another Member State, even if that body established itself there in order to avoid the legislation applicable in the receiving State to domestic broadcasters.

13. Before considering that question, the Court notes that it has already held in Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6, that the transmission of television signals comes, as such, within the rules of the Treaty relating to the provision of services. In *Debauve*, cited above, paragraph 8, the Court stated that there was no reason to treat the transmission of such signals by cable television any differently.

14. Also in *Debauve* the Court observed, however, that the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State. Whether that is so in a particular case depends on findings of fact which are for the national court to establish. In the present case, the Raad van State has established that TV10 was constituted in accordance with Luxembourg law, that the seat of the company is in the Grand Duchy of Luxembourg and that its intention was to broadcast to the Netherlands.

15. The circumstance that, according to the Raad van State, TV10 established itself in the Grand Duchy of Luxembourg in order to escape the Netherlands legislation does not preclude its broadcasts being regarded as services within the meaning of the Treaty. That is distinct from the question of what measures a Member State may take to prevent a provider of services established in another Member State from evading its domestic legislation. The latter point is the subject of the Raad van State's second question.

16. The answer to Question 1 must therefore be that the concept of "provision of services" referred to in Articles 59 and 60 of the Treaty covers the transmission, via cable network operators established in one Member State, of television programmes supplied by a broadcasting body established in another Member State, even if that body established itself there in order to avoid the legislation applicable in the receiving State to domestic broadcasters.

#### The lawfulness of certain restrictions on freedom to provide services

17. By Question 2 the national court essentially asks whether the provisions of the Treaty on freedom to provide services are to be interpreted as precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State.

18. The Court has held in Case C-288/89 *Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, paragraphs 22 and 23, Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, paragraphs 3, 29 and 30, and Case C-148/91 *Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487, paragraph 9, that the *Mediawet* is intended to establish a pluralist and non-commercial radio and television broadcasting system and thus forms part of a cultural policy whose aim is to safeguard the freedom of expression in the audiovisual sector of the various components, in particular social, cultural, religious and philosophical ones, of the Netherlands.

19. It also follows from those three judgments that such cultural policy objectives are objectives of general interest which a Member State may lawfully pursue by formulating the statutes of its own broadcasting bodies in an appropriate manner.

20. Moreover, the Court has already held in connection with Article 59 of the Treaty on the freedom to provide services that a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State (see *van Binsbergen*, cited above).

21. It follows that a Member State may regard as a domestic broadcaster a radio and television organization which establishes itself in another Member State in order to provide services there which are intended for the first State's territory, since the aim of that measure is to prevent organizations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law, in this case those designed to ensure the pluralist and non-commercial content of programmes.

22. In those circumstances it cannot be regarded as incompatible with the provisions of Articles 59 and 60 of the Treaty to treat such organizations as domestic organizations.

23. The national court, however, considered the question whether that treatment jeopardized the right to freedom of expression guaranteed by Article 10 and Article 14 of the European Convention on Human Rights.

24. It is settled law that fundamental rights, including those guaranteed by the European Convention on Human Rights, form an integral part of the general principles of law, the observance of which the Court ensures (see in particular Case C-260/89 *Elliniki Radiophonia Tileorasi* [1991] ECR I-2925, paragraph 41, and *Commission v Netherlands*, cited above).

25. In *Commission v Netherlands*, cited above, paragraph 30, the Court held that the maintenance of the pluralism which the Netherlands broadcasting policy seeks to safeguard is intended to preserve the diversity of opinions, and hence freedom of expression, which is precisely what the European Convention on Human Rights is designed to protect.

26. In those circumstances, the answer to Question 2 must be that the Treaty provisions on freedom to provide services are to be interpreted as not precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State.

[...]

On those grounds,  
THE COURT  
[...] hereby rules:

1. The concept of "provision of services" referred to in Articles 59 and 60 of the EEC Treaty covers the transmission, via cable network operators established in one Member State, of television programmes supplied by a broadcasting body established in another Member State, even if that body established itself there in order to avoid the legislation applicable in the receiving State to domestic broadcasters.

2. The provisions of the EEC Treaty on freedom to provide services are to be interpreted as not precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State.

**Judgment of the Court of 10 September 1996. Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland. Case C-222/94.**

(European Court Reports 1996 page I-4025)

[...]

THE COURT

[...]

gives the following  
Judgment

1. [...] 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 ([...] 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.

[...]

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").

[...]

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.

[...]

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.

[...]

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.

[...]

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

[...]

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, [...], 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.

[...]

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.

[...]

47. [...] 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. [...], 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.

[...]

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 of 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.

[...]

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.

[...]

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.

[...]

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.

[...]

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;

[...]

### **Judgment of the Court of 10 September 1996. Commission of the European Communities v. Kingdom of Belgium. Case C-11/95.**

(European Court Reports 1996 page I-4115 )

[...]

THE COURT

[...]

gives the following

Judgment

1. [...], the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that the Kingdom of Belgium had failed to fulfil its obligations under Council Directive 89/552/EEC of 3 October 1989 [...], in particular Articles 2, 14 and 15 thereof.

2. The following objections are made against the Kingdom of Belgium:

- as regards the French Community, it has maintained, within the French-speaking region, a system of prior authorization for retransmission by cable of television broadcasts from other Member States;
- as regards the French Community, it has maintained, within the French-speaking region, a system of express prior authorization, to which conditions are attached, for retransmission by cable of television broadcasts from other Member States containing commercial advertising or teleshopping programmes especially intended for viewers in the French Community;
- as regards the Flemish Community, it has maintained, within the Dutch-speaking region, a system of prior authorization for retransmission by cable of television broadcasts from other Member States;

[...]

Compliance with Article 2(2) of Directive 89/552 in the French Community

The objection to Article 22 of the Decree of 17 July 1987

13. Article 22 of the Decree of the Council of the French Community of 17 July 1987 on audiovisual communications (Moniteur belge of 22 August 1987, p. 12505, hereinafter "the 1987 decree"), as amended by the Decree of 19 July 1991 (Moniteur belge of 2 October 1991, p. 21671), provides as follows:

"...

2. Subject to prior written authorization by the Executive, the distributor may transmit, simultaneously and in their entirety, the television programmes of any other broadcasting station authorized by the State in which it has its seat which comply with the conditions laid down by the Executive in the authorization. Such authorization shall be revocable.

2a. Subject to express prior authorization by the Executive, the distributor may transmit, simultaneously and in their entirety, the television programmes of broadcasters authorized in accordance with Article 26(2) of this Decree which comply with the conditions laid down by the Executive pursuant to Article 26(3) of this Decree. ..."

14. According to the Commission, the system introduced by Article 22 of the 1987 decree constitutes a serious restriction on the retransmission in the French-speaking region of Belgium of television broadcasts from other Member States. Consequently, that system infringes Article 2(2) of Directive 89/552.

[...]

15. According to the Belgian Government, Directive 89/552 concerns only primary television broadcasting, and does not cover transmission by cable, which is a secondary form of broadcasting, that is to say, the communication of programmes broadcast by an organization other than the originating organization ("retransmission").

[...]

20. As the Commission has rightly observed, the ninth recital in the preamble to Directive 89/552 expressly refers to the disparities between the laws, regulations and administrative measures in Member States concerning the pursuit of activities as television broadcasters and cable operators, without drawing any distinction between primary and secondary television broadcasting. According to the tenth recital, all restrictions on freedom to provide broadcasting services within the Community which result from such disparities must be abolished.

21. As regards the concept of "television broadcasting", the definition given in Article 1(a) of Directive 89/552 cannot be interpreted as a restriction of its scope. Article 2(2), which forms part of Chapter II of Directive 89/552, entitled "General provisions", provides that Member States are to ensure freedom of reception and are not to restrict retransmission on their territory of television broadcasts from other Member States; cable retransmission is not excluded.

22. As regards Directive 93/83, it should be observed, first, that the third recital in the preamble to that directive provides that broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the most important ways of pursuing the objectives of the Community. After recalling, in the fourth recital, the objectives of Directive 89/552, the fifth recital states that the achievement of those objectives in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States was still obstructed by a series of disparities between national rules on copyright. Lastly, according to the twelfth recital, the

legal framework for a single audiovisual area laid down in Directive 89/552 must be supplemented with reference to copyright.

23. It follows that Directive 93/83 confirms that Directive 89/552 covers the cable retransmission of television programmes.

24. Lastly, as regards the genesis of Directive 89/552, the fourth recital in the preamble to that directive expressly refers to the adoption by the Council of Europe of the Convention on Transfrontier Television. As is apparent from Article 3 thereof, that convention also applies to television programmes retransmitted by cable.

25. Consequently, the fact that cable distribution was not very widespread at the time when Directive 89/552 was adopted cannot be relied on in support of an argument that this activity is excluded from the scope of that directive.

[...]

26. The Belgian Government contends that Article 22(2) of the 1987 decree covers only the provision of services by cable operators established in the territory of the French Community. Consequently, the decree does not give rise to any restriction on the free movement of foreign broadcasts.

27. According to the case-law of the Court of Justice, cable retransmission of foreign programmes constitutes a transfrontier service [...]. As is apparent from the sixth, seventh and ninth recitals in the preamble to Directive 89/552, that directive is precisely aimed at eliminating restrictions on freedom to provide television broadcasting services arising from disparities between the laws of the Member States.

28. Consequently, that argument cannot be accepted.

#### The compatibility of Article 22 of the 1987 decree with Directive 89/552

29. The Belgian Government states, first, that Belgian distributors must obtain the authorization of the Executive in order to be able to retransmit foreign television programmes. On the basis of that provision, both Belgian and foreign television channels negotiate agreements of a cultural nature with the Executive by which they undertake to devote part of their budget to the purchase, production and co-production of European audiovisual programmes.

30. As regards the compatibility of Article 22 of the 1987 decree with Directive 89/552, the Belgian Government maintains that it is apparent from the recitals in the preamble to that directive, and from Article 2(1) thereof, that a television programme may circulate freely throughout the Community only if it complies with the applicable law of the originating State, including the provisions of the directive. It necessarily follows from that principle that the receiving Member State must be able to verify whether foreign television broadcasters applying for authorization to retransmit their programmes in the territory of the French Community of Belgium comply with the law of the originating State and are justified in calling for the application of Article 2(2) of the directive.

31. Having regard to the system whereby Directive 89/552 divides obligations between the Member States from which programmes emanate and the Member States receiving them, those arguments cannot be accepted.

32. According to the wording of Article 2(1) of Directive 89/552, each Member State is to ensure that broadcasters under its jurisdiction, or broadcasters over whom it is called upon to exercise its jurisdiction under the second indent of that provision, comply with the law applicable to broadcasts intended for the public in that Member State. Article 3(2) requires Member States also to ensure that television broadcasters under their jurisdiction comply with the provisions of the directive.

33. According to Article 2(2) of Directive 89/552, Member States are to ensure freedom of reception and must not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by the directive.

34. It follows, first, that 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 Directive 89/552, and, second, that the receiving Member State is not authorized to exercise its own control in that regard.

35. That interpretation is borne out by the preamble to Directive 89/552. According to the tenth recital, all restrictions on freedom to provide broadcasting services must be abolished under the Treaty. The twelfth and fourteenth recitals provide that it is necessary and sufficient in that regard that all broadcasts comply with the law of the Member State from which they emanate and with the provisions of the directive. According to the fifteenth recital, the requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by Directive 89/552 is sufficient under Community law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States.

36. Only in the circumstances provided for in the second sentence of Article 2(2), to which the second part of the fifteenth recital refers, may the receiving Member State exceptionally suspend retransmission of televised broadcasts, on the conditions laid down by that provision. Moreover, 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 Treaty.

37. 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 [...].

38. The Belgian Government further maintains that, in the present case, those procedures are not appropriate to ensure compliance with Directive 89/552 and with the national law applicable to broadcasts intended for the public in the originating Member State, since televised broadcasts are, by their nature, ephemeral events and any harm which they may cause cannot be made good.

39. With regard to that point, it need only be observed that, as is stated in paragraph 34 above, the second sentence of Article 2(2) of Directive 89/552 authorizes the receiving Member State provisionally to suspend retransmissions of television broadcasts only in the circumstances set out in that provision. Furthermore, the receiving Member State may request the Court under Article 186 of the EC Treaty to prescribe interim measures in any proceedings brought before it under Article 170 of the Treaty.

40. The Belgian Government observes, in the alternative, that the 1987 decree does not restrict the free circulation of broadcasts from other Member States, since the agreements with the Executive are freely negotiated by both Belgian and foreign television channels and thus constitute an appropriate means of promoting the development of European audiovisual production as referred to in Articles 4 and 5 of Directive 89/552. The Executive does not have any discretion in fixing the terms and conditions of those agreements, since they are laid down by order of 22 December 1988 [...] and must be submitted to the Conseil Supérieur de l' Audiovisuel (Supreme Audiovisual Council) for a preliminary opinion.

41. In that regard, it should be noted, first, that it is apparent from the abovementioned order that those agreements cannot be described as "freely negotiated", since authorization for the distribution of foreign programmes is subject to compliance with the conditions set out in those agreements, which are to be laid down in detail therein.

[...]

45. As the Commission has rightly observed, the fact that a compulsory authorization system applying to the television sector is not contrary to Article 10 of the [European] Convention [for the Protection of Human Rights] does not prevent such a system from being contrary to Community law.

[...]

49. It is true that, under Article 128(1) of the Treaty, the Community is to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore, and that, under Article 128(4), it is to take cultural aspects into account in its action under other provisions of the Treaty.

50. However, that article does not in any way authorize the receiving State, by way of derogation from the system established by Directive 89/552, to make programmes emanating from another Member State subject to further controls.

[...]

54. The Belgian Government further maintains that the system introduced by Article 22(2) of the 1987 decree is justified, in so far as cultural policy does not fall within the field coordinated by Directive 89/552, by public interest considerations, inasmuch as it allows the Executive, in particular, to safeguard pluralism in the media by means of agreements concluded with Belgian and foreign television channels. In its judgments [...], the Court expressly acknowledged that a cultural policy aimed at safeguarding the freedom of expression of the various components of a State, [...], with a view to the exercise of that freedom in the press, on the radio or on television, may constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services guaranteed by Article 59 of the EC Treaty.

55. [...] the Belgian Government has not shown adequately in detail that the system of prior authorization was necessary and proportional for protecting pluralism in the audiovisual field or in the media generally.

[...]

58. It follows that the Commission's first objection must be upheld.

The second objection, concerning Articles 26 and 26b of the 1987 decree

[...]

61. According to the Commission, the system introduced by Articles 26 and 26b of the 1987 decree concerning the grant of authorization for the broadcasting by broadcasters from other Member States of commercial advertisements and teleshopping programmes intended in particular for viewers in the French Community, which is conditional, in particular, on the involvement of those broadcasters in supporting the French Community's television channels and press, is even more restrictive than the general system provided for in Article 22 of the decree. Consequently, that system is, a fortiori, contrary to Article 2(2) of Directive 89/552.

62. The Belgian Government observes that all channels which broadcast from another Member State commercial advertisements intended in particular for viewers in the French Community either fall within its jurisdiction or

effectively circumvent the rules applying in the French Community. It maintains that Articles 26 and 26b are specifically concerned with the circumvention of the national rules of the receiving State. Foreign television channels broadcasting in particular to viewers in the French Community cannot rely on the application of Article 2(2) of Directive 89/552. It was held in the judgments in Case 33/74 Van Binsbergen [1974] ECR 1299 and Case C-23/93 TV10 [1994] ECR I-4795 that a Member State is entitled to take steps against organizations which circumvent national rules.

63. With regard to that point, it should be observed, first, that Articles 26 and 26b of the 1987 decree are generally concerned with the circumvention of the legislation of the receiving Member State by broadcasters from other Member States. As the Belgian Government itself maintains, those provisions are based on the assumption that the emission by such broadcasters of commercial advertisements or teleshopping programmes intended for viewers in the French Community constitutes in itself a circumvention of the legislation of the receiving Member State.

64. That argument cannot be accepted.

[...]

#### Compliance with Article 2(2) of Directive 89/552 in the Flemish Community The third objection, concerning Articles 3, 5 and 10 of the Decree of 4 May 1994

67. In its judgment in Case C-211/91 *Commission v Belgium*, cited above, relating to Treaty infringement proceedings in respect of Articles 3 and 4 of the Decree of the Flemish Community of 28 January 1987 concerning the transmission of radio and television programmes on radio and cable television networks and the approval of non-public television broadcasting companies (Belgisch Staatsblad of 19 March 1987, p. 4196, hereinafter "the decree of 28 January 1987"), the Court ruled that, by making the transmission on a broadcasting network of television programmes of non-public broadcasting services from other Member States subject to prior authorization, to which conditions may be attached, the Kingdom of Belgium had failed to fulfil its obligations under Articles 59 and 60 of the Treaty.

68. On 4 May 1994 the Flemish Community adopted the Decree on radio and television networks and the authorization necessary for the establishment and operation of such networks and on promoting the broadcasting and production of television programmes (Belgisch Staatsblad of 4 June 1994, p. 15434/15440, hereinafter "the decree of 4 May 1994").

[...]

70 Article 3 of the decree of 28 January 1987 was repealed by Article 25(1) of the decree of 4 May 1994.

[...]

79. According to the Commission, the decree of 4 May 1994 maintains the system of prior authorization, since Article 10(2)(4) makes the retransmission of programmes from other Member States subject to three conditions. First, those programmes must be authorized by the government of another Member State; second, the broadcaster, as the original producer of the programmes, must be subject to control by that Member State and, third, the programmes must not compromise public policy, morality or law and order. Under Article 5(2) of the decree of 4 May 1994, it is for the Flemish Government to monitor compliance with those conditions and to authorize or refuse retransmission.

80. In the Commission's view, that system of authorization is incompatible with Article 2(2) of Directive 89/552, since that provision does not authorize the carrying out of controls by Member States on whose territory retransmission takes place if the originating Member State properly performs its obligations under the directive.

81. The Belgian Government, on the other hand, considers, first, that the decree of 4 May 1994 merely provides for a notification procedure aimed at identifying whether the broadcasting service is a Community or a non-Community broadcasting service, in order to verify whether that service is covered by the freedom to provide services guaranteed by Directive 89/552.

82. In this regard, it should be observed that Articles 3 and 5 of the decree of 4 May 1994 expressly state that the establishment or operation of a broadcasting or cable distribution network is conditional on the grant of authorization. Under Article 3 of that decree, such authorization is to be granted on the conditions provided for in the decree, including the requirements laid down in Article 10(2)(4) concerning programmes from other Member States, whilst Article 5(2) provides that that authorization is to state, in particular, the programmes which may be retransmitted.

83. Second, the Belgian Government maintains that Directive 89/552 merely coordinates certain areas of the legislation of the Member States relating to television, so that those Member States still have the power to verify whether the programmes have a real connection with the originating Member State and whether they are in fact subjected to controls there, thus making it possible to prevent broadcasters who have no real link with a Member State from being able to rely improperly on freedom to provide services.

84. The Belgian Government further states that the authorization referred to in Article 10(2)(4) of the decree of 4 May 1994 does not necessitate any specific control. Whenever a cable broadcaster notifies the retransmission of a new foreign programme, the authorities must in any case identify the Member State where transmission has taken place and to verify whether that State is the country under whose "jurisdiction" the broadcaster falls. Only those broadcasters enjoy the cross-border freedom of movement guaranteed by Directive 89/552.

85. That argument cannot be accepted.

86. As has already been stated in paragraph 34 of this judgment, it is solely for the Member States from which programmes emanate to monitor compliance with the provisions of the directive by the broadcasters under their jurisdiction. Even if the provisions of the decree of 4 May 1994 at issue were intended merely to introduce a system of verification, the requirement of prior authorization, which constitutes a serious obstacle to the free movement of programmes in the Community provided for by the directive, goes beyond what is necessary for ascertaining that the programmes in question emanate from another Member State.

87. The Belgian Government maintains, third, that, since the purpose of Directive 89/552 is to put in place the coordination necessary to create between Member States the reciprocal trust which will enable television programmes to freely cross borders, it is for the receiving Member State to verify, within certain limits, whether the originating State is actually supervising compliance with the directive.

88. In this regard the Court reiterates that the Member States must have mutual trust in each other as far as controls carried out on their respective territories are concerned [...]

89. As the Court has already observed in paragraph 36 of this judgment, if a Member State considers that another Member State has failed to fulfil its obligations under Directive 89/552, it may bring Treaty infringement proceedings under Article 170 of the Treaty or request the Commission itself to take action against that Member State under Article 169 of the Treaty.

[...]

91. Lastly, the Belgian Government considers that, since the Treaty authorizes restrictions on freedom to provide services where they are justified on grounds of public policy, public morality or public security and since Directive 89/552 does not coordinate the laws of the Member States in that respect, the receiving Member State may verify whether programmes from other Member States constitute a threat to those legitimate objectives.

92. As the Advocate General observes in points 100 and 101 of his Opinion, Directive 89/552 concerns matters covered by public policy, public morality or public security, and, inasmuch as the rules which it lays down are not exhaustive, the protection of those interests cannot in any event justify a general system of prior authorization of programmes coming from other Member States, which would entail abolition of the freedom to provide services (Case C-211/91 *Commission v Belgium*, paragraph 12).

[...]

On those grounds,  
THE COURT  
hereby:

1. Declares that the Kingdom of Belgium has failed to fulfil its obligations under 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, in particular Articles 2, 14 and 15 thereof,  
- as regards the French Community, by maintaining, in the French-speaking region, a system of prior authorization for the retransmission by cable of television broadcasts emanating from other Member States;  
- as regards the French Community, by maintaining, in the French-speaking region, a system of express, conditional prior authorization for the retransmission by cable of television broadcasts emanating from other Member States which contain commercial advertising or teleshopping programmes especially intended for viewers in the French Community;  
- as regards the Flemish community, by maintaining, in the Dutch-speaking region, a system of prior authorization for the retransmission by cable of television broadcasts emanating from other Member States;

[...]

### Judgment of the Court (Sixth Chamber) of 5 June 1997. VT4 Ltd v. Vlaamse Gemeenschap. Case C-56/96.

(European Court Reports 1997 Page I-3143)

[...]

THE COURT

[...]

gives the following

Judgment

1. By judgment of 14 February 1996, [...], the Raad van State (Council of State), Belgium, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 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 ([...], hereinafter 'the Directive').

2. The question has been raised in an action for annulment brought by VT4 Ltd (hereinafter 'VT4') against a decision adopted on 16 January 1995 by the Flemish Minister for Culture and Brussels Affairs (hereinafter 'the Decision') refusing VT4 access for its television programme to the cable distribution network.

3. Article 2 of the Directive, which is contained in Chapter II entitled 'General provisions', provides:

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

- by broadcasters under its jurisdiction, or

- ...

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.

...".

4. According to the documents provided by the national court, under two decrees of the Flemish Executive of 28 January 1987 on, in particular, licensing of private television broadcasters (Belgisch Staatsblad of 19 March 1987) and of 12 June 1991 regulating radio and television advertising and sponsoring (Belgisch Staatsblad of 14 August 1991, hereinafter 'the Flemish Executive Decrees'), Vlaamse Televisie Maatschappij NV (hereinafter 'VTM') holds a monopoly in commercial television and television advertising in the Flemish Community.

5. According to Article 10(1), No 2, of the Flemish Executive Decree of 4 May 1994 on television and radio cable networks, on licences for installing and operating such networks and on the promotion of the dissemination and production of television programmes (Belgisch Staatsblad of 4 June 1994, hereafter 'the Cable Decree'), cable distributors must transmit simultaneously and in their entirety the programmes of VTM, the only private company licensed by the Flemish Executive.

6. Article 10(2) of the Cable Decree provides:

"Without prejudice to the provisions of paragraph (1), a cable distributor may retransmit the following programmes on his radio or television cable network:

...

4. Television and radio programmes of broadcasters licensed by the government of a Member State of the European Union other than Belgium, provided that the broadcaster concerned is subject, in that Member State, to proper supervision of broadcasters broadcasting to the public of that Member State and the supervision exercised covers compliance with European law, in particular copyright and associated rights and international obligations of the European Union and provided that the broadcaster concerned and the programmes which it broadcasts do not undermine public order, morality or public safety in the Flemish Community.

...".

7. VT4, which is established in London, is a company incorporated under English law whose main activity is the broadcasting of radio and television programmes. The Luxembourg company Scandinavian Broadcasting Systems SA is the sole shareholder of VT4. The United Kingdom authorities have granted it a non-domestic satellite licence.

8. VT4's programmes are aimed at the Flemish public. They are either recorded or subtitled in Dutch. The television signals are transmitted via satellite from the territory of the United Kingdom. At Nossegem (a Flemish locality in Belgium), VT4 has what it calls a 'subsidiary' which is in contact with advertisers and production companies. It is also in this locality that information for the news programmes is collected.

9. By the Decision, the Flemish Minister for Culture and Brussels Affairs refused to allow the VT4 television programme to have access to the cable distribution network. The Decision was based mainly on two arguments. First, VT4 did not come within the scope of Article 10(1), No 2, of the Cable Decree because it was not licensed as a private television broadcaster broadcasting to the entire Flemish Community. VT4 is in fact the only licensed broadcaster. Secondly, VT4 could not be regarded as a television broadcaster licensed by another Member State since it was a Flemish body which had been established in another Member State in order to circumvent application of the Flemish Community legislation. Even if VT4 were a British broadcaster, this still would not be sufficient to fulfil the conditions laid down in Article 10(2), No 4, of the Cable Decree and, in particular, the requirement that proper supervision must be exercised with regard to compliance with Community law.

10. On 24 January 1995, the Raad van State suspended the Decision on VT4's application. [...] As a result, as from 1 February 1995 VT4 was able to distribute its programme on the cable television network in Flanders and Brussels. By judgment of 2 March 1995 the Raad van State then confirmed the suspension it had previously ordered, so that the VT4 programme could continue to be broadcast on the network for as long as the Raad van State had not given a ruling in the main proceedings.

[...]

13. [...] the Raad van State in effect seeks to ascertain the criteria for determining which broadcasters come within a Member State's jurisdiction for the purposes of Article 2(1) of the Directive.

14. In Case C-222/94 *Commission v United Kingdom* the Court examined the interpretation to be given to the term 'jurisdiction' in the phrase 'broadcasters under [a Member State's] jurisdiction' contained in the first indent of Article 2(1) of the Directive.

15. As the Court held in paragraph 26 of that judgment, the Directive contains no express definition of the phrase 'broadcasters under its jurisdiction'.

16. In paragraph 40, after analysing the wording of Article 2(1) of the Directive, the Court concluded that the concept of jurisdiction of a Member State, used in the first indent of that provision, had to be understood as necessarily covering jurisdiction *ratione personae* over television broadcasters.

17. In paragraph 42 the Court went on to state that 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.

18. It follows therefore 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.

19. Where a television broadcaster has more than one establishment, the competent Member State is the State in which the broadcaster has the centre of its activities. It is therefore for the national court to determine, applying that criteria, which Member State has jurisdiction over VT4's activities, taking into account in particular the place where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together (Case C-222/94 *Commission v United Kingdom*, paragraph 58).

20. According to *Vlaamse Gemeenschap*, in order for the provisions concerning free provision of services to apply, it is not sufficient for the provider of a service to be established in another Member State; it is also necessary, as is clear from the judgment in Case C-55/94 *Gebhard* [1995] ECR I-4165, that the person providing the service must not also be established in the host Member State.

21. That argument disregards the fact the activity of a television broadcaster which consists in providing, on a permanent basis, services from the Member State in which it is established for the purposes of Article 2(1) of the Directive does not imply, as such, the pursuit in the host Member State of an activity in regard to which it must be determined whether it is temporary or not, as was the case in Case C-222/94 *Commission v United Kingdom*.

22. It must also be emphasized that the mere fact that all the broadcasts and advertisements are aimed exclusively at the Flemish public does not, as VTM claims, demonstrate that VT4 cannot be regarded as being established in the United Kingdom. The Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established.

23. It follows from the foregoing 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. If a television broadcaster is established in more than one Member State, the Member State having jurisdiction over it is the one in whose territory the broadcaster has the centre of its activities, in particular where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together.

[...]

On those grounds,  
THE COURT  
[...], hereby rules:

Article 2(1) of Council Directive 89/552/EEC [...] is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established. If a television broadcaster is established in more than one Member State, the Member State having jurisdiction over it is the one in whose territory the broadcaster has the centre of its activities, in particular where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together.

## **ANNEX G**

### **Opinions and Recommendations of the Standing Committee on Transfrontier Television (of the Council of Europe) (Edited)**

*The publisher wishes to thank the Media Division of the Council of Europe for having supplied the original texts of the Opinions and Recommendations of the Standing Committee on Transfrontier Television of the Council of Europe.*

**Opinion No. 2 (1994) on the Notion of "Retransmission" (Article 2 (b))**

(adopted by the Standing Committee on Transfrontier Television at its 3rd meeting (15 February 1994))

[...]

The essential facts presented by the Delegate were as follows:

"The broadcaster RTL intends to establish a Swiss programming window on the RTL Television channel. To do so, RTL Switzerland, which is mainly in Swiss hands, has lodged an application for a licence for a regional language television programme. The Swiss Federal Council is the competent decision-making authority.

RTL Plus Germany has a shareholding in the capital of RTL Switzerland amounting to 30%. The two companies collaborate on a contractual basis.

The programme service for Switzerland will be produced in Switzerland. The programme includes two slots of thirty minutes each (6.45 p.m. to 7.15 p.m. and 7.45 p.m. to 8.15 p.m.). The first slot is devoted to information and culture, while the second concentrates on entertainment (situation comedies).

The Swiss window will be broadcast from Zürich. The up-link will be carried out from an earth station on Swiss territory, the up-link going to the Eutelsat satellite. The signal will transit through a relay station in Hamburg so as to continue up to the Kopernikus II satellite. Using a repeater in the Kopernikus II satellite, RTL already broadcasts a parallel programme containing three advertising slots specifically intended for the Swiss public between 7.15 p.m. and 11.15 p.m.

The Swiss cable networks which are equipped with equipment for receiving remote instructions provided by RTL receive the RTL parallel programme from the Kopernikus satellite. In the future, they will switch from Astra to Kopernikus II from 6.45 p.m. to 11.15 p.m. The remote switching action will be carried out from the Swiss RTL studios in Zürich. The Swiss cable networks, which are not equipped with an adequate switching device, will continue to receive the German RTL Plus programme from the Astra satellite.

The Swiss programming window is financed by advertising as well as a contribution provided in return for services carried out for the benefit of RTL Plus Germany."

[...], the Standing Committee concluded that "*the original programme service up-linked from Germany will constitute a retransmission within the meaning of Article 2, sub-paragraph b of the Convention*".

As regards the one-hour local programming window, the Standing Committee concluded that "*the editorial and technical control will be exercised by a broadcaster up-linking to the satellite from Switzerland. The latter broadcaster will be clearly distinct from the German broadcaster. For these reasons, the said broadcaster will fall within the jurisdiction of the Swiss authorities, and will be subject to Swiss legislation*".

In coming to these conclusions, the Standing Committee wished to stress that "*its opinion is based solely on the specific facts of the particular case. Other situations presenting similar but not identical features would need to be considered on their merits*."

**Opinion No. 3 (1995) on the Notion of "Broadcaster" (Article 2 (c))**

(adopted by the Standing Committee on Transfrontier Television at its 6th meeting (24-25 April 1995))

[...], a Delegate requested, [...], the opinion of the Standing Committee on the interpretation to be given to Article 2 (c) of the Convention and to paragraph 55 of the Explanatory Report, relating to the notion of "broadcaster".

According to Article 2 (c) of the Convention, " *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".

The Delegate believed that these definition should be interpreted in a way which exclude from the benefits of the Convention broadcasting organisations which have not been duly licensed or otherwise authorised by the competent authority of a Contracting Party or any other country. He considered that this interpretation was borne out by the provisions of Article 6 (1) of the Convention.

[...], the Standing Committee concluded that *"the guarantees offered by Article 4 of the Convention only apply to broadcasting organisations which have a lawful status under the domestic law of a transmitting Party. This conclusion follows on from the provisions of Article 5 and Article 6 (1) of the Convention, as well as from the instrument's overall objectives. In case of doubt over the lawful status of a broadcaster, the authorities of the receiving Party should contact the authorities of the transmitting Party referred to in Article 19 of the Convention. Should the authorities of the transmitting Party provide a declaration to the effect that the broadcaster enjoys a lawful status on the territory of the transmitting Party, this shall be conclusive of the broadcaster's status. Should the authorities of the transmitting Party refuse to provide the declaration, or fail to provide it after the lapse of a reasonable period of time, or declare that the broadcaster has no lawful status in its domestic law, the authorities of the receiving Party are not obliged to allow the retransmission of the programme services of the broadcaster. Without prejudice to the application of other relevant international rules, the authorities of the receiving Party could invoke the procedures contained in Articles 25 and 26 of the Convention"*.

**Opinion No. 5 (1995) on Freedom of Reception and Retransmission (Article 4)**  
(adopted by the Standing Committee on Transfrontier Television at its 6th meeting (24-25 April) 1995))

[...], a Delegate requested, [...], the opinion of the Standing Committee on the interpretation to be given to Article 4 of the Convention, according to which "the Parties shall ensure freedom of expression and information in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention".

In particular, he sought to ascertain whether:

- (i) a Contracting Party to the Convention may introduce legal requirements concerning quotas of European works, domestic production and programme items produced by independent producers for a programme service directed at viewers in that Party, but broadcast (especially by satellite) from the territory of another Contracting Party;
- (ii) should such requirements be permissible under the Convention, whether the Contracting Party may restrict retransmission of programme services in cable networks (without prejudice to direct reception by means of satellite dishes) which do not meet these requirements.

[...], the Standing Committee concluded that "*freedom of retransmission of transfrontier programme services on the territory of a Contracting Party is a fundamental rule of the Convention. It should be stressed that under Article 5 of the Convention, it is for the transmitting Party (as defined by this article) to ensure that programme services transmitted by entities or by technical means within its jurisdiction comply with the terms of the Convention.*

*As a general principle of interpretation, exceptions to fundamental human rights provisions (Article 4 in casu) must be narrowly construed. Thus, Article 24 ("alleged violations of the Convention"), in addition to setting out the procedure for overcoming difficulties between Contracting Parties, enumerates exhaustively and restrictively the circumstances which justify provisional suspension of the retransmission of a transfrontier programme service.*

*In accordance with Article 24 (4) "the provisional suspension of retransmission shall not be allowed in the case of alleged violations of Articles 7, paragraph 3, 8, 9 or 10."*

*Thus, a Contracting Party may not suspend provisionally retransmission of programme services broadcast from the territory of another Contracting Party which do not comply with the requirements of Article 10 paragraph 1 (cultural objectives)".*

**Opinion No. 7 (1996) on the Application of the Convention to Advertising Transmitted Via Teletext Services**

(adopted by the Standing Committee on Transfrontier Television at its 9th meeting (13-14 June 1996))

[...], a Delegate requested, [...], the opinion of the Standing Committee on whether information transmitted on the television screen via teletext in return for payment by third parties should be considered to be advertising, and if so whether the Convention's rules on advertising should apply.

[...], the Standing Committee concluded that "*teletext services are broadcasting and as such within the scope of the European Convention on Transfrontier Television. The broadcaster has editorial responsibility for their content having regard in particular to Article 7 of the Convention. However, given the specific nature of teletext services, the Convention's rules on advertising and sponsorship (chapters III and IV of the Convention) do not apply as such.*

*In the framework of a possible revision of the Convention, the Standing Committee proposes to consider the desirability of drafting a specific provision on advertising and sponsorship on teletext in the context of a possible revision of the Convention".*

**Recommendation (96) 1 concerning the Use of Virtual Images in News and Current Affairs Programmes**

(adopted by the Standing Committee on Transfrontier Television at its 11th meeting (5-6 December 1996))

Today, it is technically possible to produce "virtual" images (the quality of which, as well as the context in which they are shown, are such that the unsuspecting viewer might believe they are real). The issues raised by the use of such images in news and current affairs programmes were considered with attention by the Standing Committee.

[...]

*"The Standing Committee believes that the use of virtual images in news and current affairs programmes falls under the editorial responsibility of the broadcaster. In certain cases, virtual images may be an effective means of presenting and explaining facts or events to the public. The Standing Committee considers that, within the framework of Article 7 (3) of the Convention (responsibilities of the broadcaster), the use of virtual images in news and current affairs programmes needs to comply in particular with the following principles:*

- firstly, the use of virtual images must be necessary or helpful to illustrate information or a hypothetical version of the event being discussed;*
- secondly, the broadcaster should not use virtual images to manipulate or distort the content of an information;*
- thirdly, the viewer must be clearly informed, by appropriate means, when virtual images are being used."*

**Recommendation (97) 1 concerning the Use of Virtual Advertising Notably during the Broadcast of Sports Events**

(adopted by the Standing Committee on Transfrontier Television at its 12th meeting (20-21 March 1997))

Virtual techniques are sometimes used to insert advertising messages, notably during the broadcast of sports events, either by the virtual replacement of advertising messages on hoardings around the ground, or by inserting new, sometimes three-dimensional images in other parts of the picture.

In the transfrontier context, virtual image technology may, in certain cases, permit the masking of messages banned by law in the receiving country without affecting the broadcast of the sporting event. Sometimes, however, these techniques help to increase the presence of advertising on the screen under conditions which are detrimental to the perception and the understanding of the event.

[...]

*"The Standing Committee believes that the broadcaster, who is exclusively responsible for the content of the signal produced and/or broadcast, should retain ultimate control over this content. Given his/her responsibility towards the viewers, the broadcaster must ensure that virtual advertising messages comply with the rules of the Convention, and in particular that virtual advertising, in its presentation and content, meets the requirements stemming from Articles 7, 11 and 13 of the Convention.*

*In this respect, the Standing Committee notes the appropriateness of self-regulation and welcomes the code of conduct on virtual advertising adopted in 1996 by the European Broadcasting Union and the Association of Commercial Television in Europe.*

*Furthermore, without prejudice to any other indications which might be necessary in the future, it should be stressed at this stage that:*

- the presence of virtual advertising messages during the broadcast of sports events should be indicated to the viewers, by appropriate means, at the beginning and the end of the programme concerned;*
- in no case should virtual advertising messages transform the perception or the understanding of the event, or be detrimental to its visibility".*

## **ANNEX H**

**Excerpts from the Ruling and the Opinion of RTL/Veronica de Holland Media Groep S.A. and CLT-UFA S.A. v. the Commissariaat voor de Media**

**Ruling of the Afdeling Bestuursrechtspraak (Administrative Law Division) of the Raad van State (Council of State) of 10 April 2001. RTL/Veronica de Holland Media Groep S.A. and CLT-UFA S.A. v. the Commissariaat voor de Media (Dutch Media Authority), Doc CC TVSF (2001) 20**

Ruling on the appeal instituted by:

1. The partnership under Luxembourg law "RTL/Veronica de Holland Media Groep S.A." and
  2. The partnership under Luxembourg law "CLT-UFA S.A.",
- both registered in Luxembourg,  
the appellants

against the ruling by the Amsterdam District Court (*Arrondissementsrechtbank*) of 7 September 2000 in the case between:

the appellants and the Dutch Media Authority [...]

1. Course of the proceedings

[...]

2. Findings

Essentially, the dispute concerns the question of whether the Dutch Media Authority – in view of the Media Act and Directive no. 89/552/EEC [...] (the Directive: 'Television without frontiers'; OJEC L 298), as amended by Directive 97/36/EC [...], rightly took the position that HMG, as the party responsible for broadcasts of RTL4 and RLT5 in the Netherlands, falls under its jurisdiction. In the opinion of the Appellants, that question should be answered in the negative. To that end, they submitted that CLT-UFA S.A., and not HMG is the broadcaster responsible for the broadcasts of RTL4 and RTL5. CLT-UFA performs its activities in Luxembourg, works under a Luxembourg concession and falls under the supervision of the Luxembourg authorities, namely the Commission Indépendante de la Radiodiffusion (CIR). In the opinion of the appellants, the temporary exemption decision of 20 November 1997, as upheld by the decision of 31 March 1998, is therefore unwarranted. For those reasons they used legal means which lead to the proceedings at hand.

[...]

The appellants also argued that the Court wrongly passed over the fact that the Dutch Media Authority acted at variance with the principle of legal certainty because until 1997, it lay in the fact that channels RTL4 and RLT5 fell under Luxembourg jurisdiction and an administrative body can only change policy when specific changes in the actual or legal situation justify the same. This argument fails. It is justified that after some time, the Dutch Media Authority considered whether the facts and circumstances had changed to the extent that, in part in light of new legislation and case law at European and national levels, there was cause for a different opinion concerning the supervisory task.

Subsequently discussed was whether the Dutch Media Authority could have come to that different decision and whether the contested decision can also be upheld at law. In that connection the appellants, just as they did in Court, [...], that the applicable criteria do not lead to the conclusion that supervision should be performed by the Authority, and that the contested decision leads to double supervision.

[...]

In any event, the term 'broadcaster' must include commercial broadcasting organisations as referred to in Section 4 of the Media Act, as it read at the time of the current decision making. Therefore, the decision of which Member State should exercise the supervision must be based on the criteria in Article 2 just mentioned.

Based on the data it collected, the Dutch Media Authority concluded that the jobs of final editor, editor-in-chief, programme director and general programme director would be performed at HMG in Hilversum. It is true that HMG has its registered office in Luxembourg, but the editorial responsibility is exercised in the Netherlands, while programme decisions are also taken in the Netherlands and the majority of the personnel work in the Netherlands. All this was decisive for the Dutch Media Authority to conclude that HMG is the responsible broadcaster for the programmes of the channels RTL4 and RTL5, that HMG must be deemed to have its registered office in the Netherlands and that it falls under the jurisdiction of the Netherlands. In the case of the contested decision the Court ruled, on the basis of the findings used therein, that the Dutch Media Authority reached the conclusion on the proper grounds.

The appellants submitted that the Dutch Media Authority and the Court thus failed to acknowledge that the centre of gravity as regards the ultimate responsibility, as well as regards the strategic and commercial decisions, lies in Luxembourg, specifically and primarily with CLT-UFA. The Luxembourg headquarters of the organisation is the central location where strategic and commercial decisions are

taken all for the various channels, both jointly and individually. That is where the majority of the rights are purchased, negotiations are conducted there with intellectual property organisations and moreover, decisions regarding programming policy are taken there, according to the appellants. In that, they distinguish between the, in their opinion, ultimate responsibility lying with CLT-UFA in Luxembourg for establishing the profile, the positioning and the identity of the channels and for the formats, schedules and programme concepts to be used on the one hand, and the daily fleshing out in the Netherlands by HMG of the programmes on the basis of the outlined policy, on the other.

On this the Administrative Law Division finds that the documents insufficiently show that CLT-UFA is so involved with the broadcasting activities of the broadcaster for the programmes of RTL4 and RTL5 that it must be deemed to have its registered office in Luxembourg. In any event, they give no reason to assume that the involvement of CLT-UFA in this case should extend beyond what is customary for a (major) shareholder. Also at the session, when asked the appellants were unable to provide any further data and clarity about the exact influence of CLT-UFA on the nature, content, duration and time of programmes aired. In view of the facts and circumstances as these emerged during the proceedings, one can assume that the determination and changing of the profile, the positioning and the identity of the programmes in question are at least in part under the jurisdiction of HMG and that not only the further working out and fleshing out are performed in the Netherlands. The jobs of final editor, editor-in-chief, programme director and general programme director are performed at HMG in the Netherlands, that is the location of the editorial accountability and that is where the majority of the personnel work. Together with the Court, the Administrative Law Division finds that in the contested decision the Dutch Media Authority was permitted to take the position that, in view of Article 2, third paragraph under a, at least under b, first full sentence, of the directive, HMG as the party responsible for transmissions of RTL4 and RTL5 in the Netherlands, would fall under its jurisdiction.

A consequence of the decision making on the part of the Dutch Media Authority however, is that, when the decision in question is executed, there will be double supervision, as submitted by the appellants.

After all, the programmes of RTL4 and RTL5 are already under the supervision of the Luxembourg authorities, specifically of the CIR, who deem themselves to have authority to do so.

The preamble to the amendment directive explicitly contains the following premise for the application of the delineation provision of Article 2:

"(13) Whereas the fixing of a series of practical criteria is designed to determine by an exhaustive procedure that one Member State and one only has jurisdiction over a broadcaster in connection with the provision of the services which this Directive addresses; nevertheless, taking into account the case law of the Court of Justice and so as to avoid cases where there is a vacuum of jurisdiction it is appropriate to refer to the criterion of establishment within the meaning of Articles 52 and following of the Treaty establishing the European Community as the final criterion determining the jurisdiction of a Member State."

The directive contains criteria to prevent a legal vacuum and to stand up against the manner in which supervision is performed, but in itself does not include a procedure to stop double supervision. Chapter V bis Article 23 bis, inserted in the amendment directive, does provide for a contact committee. Insofar as relevant, the Article reads as follows:

[...][see text Art. 23 a Directive as amended]

With regard to the action taken by the Netherlands in this matter, the documents reveal the following, as explained at the session. The report of the hearing of the objection of 13 February 1998 states that the chairman of the contact committee was informed by the Netherlands in the Spring of 1997 about the developments and that this committee apparently saw no reason to discuss the situation bilaterally with the Luxembourg government. At the session, the Dutch Media Authority indicated that this matter was brought up during a meeting at the end of 1997, but no response was received. According to the minutes of the meeting of the contact committee held on 15 January 1998, in any event this matter did not lead to comments or criticism, not even on behalf of Luxembourg. The report also states that then State Secretary of Culture, A. Nuis, in late 1997 during the informal Culture Council\*\*, gave a copy of the letter with the decision to his Luxembourg colleague. In the contested decision of 31 March 1998, the Dutch Media Authority also points out that, on behalf of the European Commission in this respect, it was noted in the contact committee that if a Member State is having a problem, the said Member State can always place that on the agenda of the committee, which Luxembourg did not do. Finally, according to the documents, between the end of January and the end of March 1998, letters were exchanged between then State Secretary Nuis and the Luxembourg Prime Minister Juncker, which did not lead to a resolution. The position of the Dutch Media Authority can lead to problems in relation to the supervision now exercised by Luxembourg. After all, [...], the Luxembourg government does not hold the same opinion as the Dutch Media Authority. The principle of the careful preparation of a decision to be taken, in connection with the object and purport of the directive, and in light of Article 10 of the EC Treaty, entails in this case that the Dutch Media Authority cannot suffice with taking the position that the problem of the double supervision is only evident after the conclusion of the current proceedings, and that this problem does not concern the Dutch Media Authority. The assertion that the Luxembourg authorities create the double supervision and that the appellants can request the said authorities to cease the double supervision, refusal of which could result in the use of the necessary legal measures,

fails to recognise that in any event, the Dutch Media Authority has its own responsibility, taking into account the preamble of the amendment directive (in particular the words “that one Member State and one only has jurisdiction over a broadcaster” to prevent double supervision. It is true that it has been asserted and not refuted that this topic was discussed by the contact committee, but the Dutch Media Authority was unable to indicate and moreover it has not become evident that the issue was brought to the attention of the members of the committee explicitly and with reference to the possible consequences as an agenda item, including a written explanation. The least one can expect from the Dutch Media Authority is that the Dutch representatives bring up this issue in that manner explicitly in the contact committee created especially for that purpose. The Administrative Law Division consequently decides that the decision in the given circumstances was not taken with the prerequisite care. In view of that considered above [...], the appeal is founded to that extent. [...]The Dutch Media Authority will have to take a new decision with due observance of this ruling. As the result of the ruling by the Court, the period for the broadcast of the programmes in their current form via the cable terminated on 28 October 2000. In order to satisfy the interests of HMG, the Dutch Media Authority additionally decided on 2 November 2000 that, as far as the transmission of the programmes via the cable is concerned, the exemption situation will terminate on 1 December 2000, unless authorisation is requested prior to that date and that as far as the contents of the programmes go, the exemption will terminate on 1 February 2001. This additional temporary exemption decision, [...], shares in the quashing of the decision of 31 March 1998 and requires no further comment. The Administrative Law Division does note however, that it is logical that, pending the further decision making, the Dutch Media Authority shall take no further execution measures. [...]

### 3. Decision

The Administrative Law Division of the Council of State

[...]

quashes the contested ruling

declares the appeal to be founded

quashes the decision of the Dutch Media Authority of 31 March 1998

quashes the decision of the Dutch Media Authority of 2 November 2000

instructs the Dutch Media Authority, with due observance of this ruling, to take a new decision on the objection

[...]

**Grand Duchy of Luxembourg: Opinion of the Independent Broadcasting Commission of 6 July 2001 as to which State Has Jurisdiction over Channels RTL4 And RTL5. Doc CC TVSF (2001) 24**

By letter of 30 May 2001, the Prime Minister and Minister of State sought the opinion of the Independent Broadcasting Commission on determining which State has jurisdiction over channels RTL4 and RTL5 transmitted by the public limited company CLT-UFA on the basis of licences granted on 26 April 1995. The reasons for this request are, firstly, the entry into force of [...] and Council Directive 97/36/EC of 30 June 1997, and, secondly, the placing of this question of jurisdiction to monitor these channels on the agenda of the Contact Committee set up by the above Directive (the Television Without Frontiers Directive).

[...] the question currently sets the Luxembourg authorities against the Dutch authorities, both considering that they can exercise their own control over these two channels. [...]

By way of introduction, the Independent Broadcasting Commission wishes to stress the fundamental importance accorded by the Directive to the principle of single control of television channels by a single State. [...] the Directive sets up control over television broadcasting organizations responsible for broadcasting programmes by attributing jurisdiction to the State in which they are located. In this context, the rules in question and their practical application must also take account of the economic imperatives influencing European integration, i.e. the right of establishment and the freedom to provide services.

[...]

First of all, it is necessary to determine which entity fulfils the role of broadcaster in order then to apply to the same the criteria of geographical location, enabling the State which has jurisdiction, and which may exercise control, to be determined.

**I) Definition and determination of the television broadcasting organization [...]**

Article 1 (b) of the Directive defines the television broadcasting organization (or "broadcaster") in the following terms: the natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of (a) and who transmits them or has them transmitted by third parties.

This definition contains two elements.

**A) Editorial responsibility for the composition of schedules of television programmes**

It becomes evident upon reading Article 1 (b) of the Directive that with regard to the definition and determination of the broadcaster subject to control, any criterion of geographical location is removed. On the other hand, the Directive refers to the economic and legal reality in that the task is to determine the entity, whether natural or legal, which determines the content of television programmes by way of the general remit which it applies to such content.

This means that, in order to conclude the first stage of the analysis, the following must be disregarded:

- The geographical location of the natural person or corporate body having power to define such content ;
- The identity of the entity, whether natural or legal, which effects practical daily implementation of the decisions taken in terms of general remit ;
- The geographical location of the human and technical resources implemented in order to implement the decisions taken at the level of editorial responsibility.

In the case under discussion, the matter relates to the question of whether editorial responsibility for the composition of programme schedules is borne by RTL De Holland Media Groep (HMG), a public limited company under Luxembourg law, or by CLT-UFA, also a public limited company under Luxembourg law.

The factual elements of the case lead one to conclude that CLT-UFA is the broadcaster responsible for the editorial remit of the programme schedules for RTL4 and RTL5. In this regard, the following should be noted:

- CLT-UFA, a public limited company under Luxembourg law, is currently holder of a licence issued by the State of Luxembourg to operate the channels RTL4 and RTL5, which imposes upon the company the obligation to retain control over these two channels and assume responsibility for the composition of the programme schedules ;
- Whereas the decisions regarding the programme schedules are prepared by a committee of executives from CLT-UFA and RTL De Holland Media Groep (HMG), the relevant final decisions are taken only by and

on the responsibility of CLT-UFA. These decisions are taken by the executives responsible for the day-to-day management of CLT-UFA, and the programme schedules are approved regularly by the Board of Directors of CLT-UFA ;

- CLT-UFA and RTL De Holland Media Groep (HMG) are linked by a contract which defines their respective roles and expressly attributes to CLT-UFA responsibility for the programmes of RTL4 and RTL5 ;
- RTL De Holland Media Groep (HMG) is a wholly owned subsidiary of CLT-UFA, which enables the latter to have a decisive influence in fact and in law over the decisions of RTL De Holland Media Groep (HMG) and over the appointment of the persons entrusted with management thereof.

In the opinion of the Independent Broadcasting Commission, no element can be found which would enable responsibility for the programme schedules of RTL4 and RTL5 to be attributed to RTL De Holland Media Groep (HMG). The points set out above tend, on the contrary, to remove from the latter all decisive influence on such composition and attribute to the same a mere advisory role in the context of the programming committee via its constituent bodies, which are subject to the control and influence of CLT-UFA.

## **B) Transmission of schedules of television programmes**

In the present case, CLT-UFA transmits the television programmes of RTL4 and RTL5 to the public. This transmission involves the final assembly of programmes, which takes place in the final control room on the premises of CLT-UFA in Luxembourg, using personnel either of CLT-UFA or of other subsidiaries of the group whose capital it holds. It also involves broadcasting programmes, which is also undertaken from Luxembourg under the responsibility of CLT-UFA, using both terrestrial and satellite broadcasting facilities.

Conversely, the content of the case file does not indicate that RTL De Holland Media Groep (HMG) has any responsibility for transmitting the programmes of RTL4 and RTL5. While it does assume an important function within the framework of these programmes, its involvement is limited to the technical and practical production of programmes where the editorial line, general remit and responsibility are assumed upstream by CLT-UFA, and the transmission of which is effected downstream also by CLT-UFA.

In the opinion of the Independent Broadcasting Commission, in this case it is therefore CLT-UFA, [...], which must be qualified as a television broadcasting organization (or "broadcaster") [...].

## **II) Geographical location of the television broadcasting organization [...]**

Only once the [...] "broadcaster" within the meaning of Article 1 (b) of the Directive has been determined is it appropriate to refer to the geographical location thereof to determine to which State the Directive attributes jurisdiction for the purpose of monitoring programmes.

In the second stage of the analysis, Directive 97/36/EC sets out as the principal criterion of application the head office (Article 2(3)), while referring on a subsidiary basis to the transmission facilities (Article 2(4)) and providing a subsidiary criterion (Article 2(5)) in the event that the principal criterion should lead to a legal vacuum (Preamble No. 13 of Directive 97/36/EC).

Article 2(3) of the Directive provides a number of cases with a view to determining clearly which State has jurisdiction with regard to monitoring a television broadcasting organization. [...]

[...]

Within the framework of the present opinion, it is therefore necessary to examine successively the questions as to the State in which CLT-UFA, [...], has a head office (A), and in which State it takes decisions on programme schedules (B), in order, in the event of differing responses to these two questions, then to consider in which State(s) a significant part of the workforce involved in the pursuit of television broadcasting activity operates (C).

### **A) The head office of CLT-UFA [...]**

CLT-UFA is a public limited company under Luxembourg law, constituted in Luxembourg (under a different name) in 1931, entered in the Commercial Register and Register of Companies of Luxembourg under number B 6139, and having a head office in Luxembourg on a continual basis, currently at 45, boulevard Pierre Frieden, Luxembourg. From the outset, it has undertaken there both management and administration activities, and technical operations concerning various television and radio channels. This activity is demonstrated by a significant presence of human and technical resources in Luxembourg. Therefore, there can be no doubt that it maintains a head office there.

The first criterion of Article 2(3) (a) therefore designates the State of Luxembourg.

**B) Editorial decisions on programme schedules of RTL4 and RTL5 taken by CLT-UFA [...]**

First of all, it would appear useful to clarify the nature of the decisions which must be taken into consideration in this context. In the opinion of the Independent Broadcasting Commission, this can only mean the basic decisions intended to define the general content and general remit of the schedule of the programmes broadcast, to the exclusion of decisions on the day-to-day management of the daily or journalistic content of daily programmes. The latter must always be based on the general editorial guidelines to which they are subject. Therefore, it would be inappropriate and ineffective to apply as a criterion of geographical location a criterion of which the content is not autonomous in nature, but which depends on decisions taken elsewhere. It is only by exercising control over the general remit that such control can be revealed as effective.

According to the elements of this case, and as set out above, decisions on the general remit and definition of the schedules of programmes are taken by the management organs of CLT-UFA, [...]. These decisions are regularly endorsed by the Board of Directors of CLT-UFA. These two corporate levels of the company are brought together and perform their functions at the head office of CLT-UFA in Luxembourg.

Therefore, it must be stated that the second condition to which Article 2(3) (a) refers also designates the State of Luxembourg.

**C) The place where a significant part of the workforce involved in the pursuit of the television broadcasting activity is located**

Insofar as the two paramount criteria of Article 2(3) (a) both point to Luxembourg, this sole provision suffices to affirm the jurisdiction of the State of Luxembourg for the purposes of exercising the single control provided by the Television Without Frontiers Directive over the television channels RTL4 and RTL5. It is therefore not necessary to reflect on the subsidiary case provided in Article 2(3) (b) in the event that these two reference criteria should lead to differing conclusions.

Nevertheless, the Independent Broadcasting Commission wishes to express its opinion on the question as to the meaning, in the context of Article 2(3) (b), of the phrase "a significant part of the workforce involved in the pursuit of the television broadcasting activity". In the Independent Broadcasting Commission's opinion, this notion cannot be the subject of a strict numerical appraisal consisting of the assertion that the presence of a given percentage of persons on the territory of a given State might enable one to consider this condition as being fulfilled. On the contrary, account must be taken of the use made of the persons present on the territory of each of the States concerned in the process of production, broadcasting and transmission of programmes, each of these components being necessary and indispensable to the provision to the public of the service that a television programme constitutes. Therefore, while it is possible that a proportionately higher number of people are based in a State due to the fact that some programmes which are more demanding in terms of human resources (e.g. entertainment programmes, television news) are produced there, this does not necessarily mean that a more substantial part in terms of time and interest to the public originates from that State. Account must also be taken of the use of other elements of the programme schedule, such as programmes bought from third parties (e.g. television and cinema productions, sporting and cultural events) which, although less demanding in terms of human resources, comprise no less significant an interest for the programmes' target audience. Finally, account must be taken of the location of those entrusted with final assembly of the programmes and those responsible for broadcasting these programmes, whether by terrestrial or satellite technology, since in the absence of such persons, production upstream of the content of the programmes is scarcely of any use.

[...]

**CONCLUSION**

In conclusion, the Independent Broadcasting Commission is of the opinion that, in application of Directive 89/552/EEC as amended by Directive 97/36/EC, jurisdiction in respect of monitoring and control of the programmes of RTL4 and RTL5 is devolved upon the State of the Grand Duchy of Luxembourg.