Court of Justice of the EC: Interpretation of the "Television without Frontiers" Directive

IRIS 1996-10:1/6

Vincenzo Cardarelli
European Commission, Audiovisual policy Unit

As reported in IRIS 1996-9: 7, on 10 September 1996 the Court of Justice of the European Communities issued two important judgments concerning the `Television without Frontiers' Directive. This short analysis summarizes the main points of Community law that can be drawn from these judgments. It does not report in detail on the subject matter of each of the two proceedings.

In these two cases the Court was called upon to interpret the Directive's basic provisions (namely Articles 1, 2 and 3). The Court's decisions provide an important contribution to the definition of the scope of the Directive, to the clarification of the concept of "jurisdiction" and to the application of the `home country' principle to intra-Community broadcasts.

As a reminder, I will briefly recall that the `Television without Frontiers' Directive is the cornerstone of Community law in the audio-visual field. It ensures the effective application to television broadcasting of the general freedom to provide services within the Internal Market. In order to achieve this, it coordinates, where necessary, national rules on the content of television programmes and it affirms (in its Articles 2 and 3) a general principle of mutual trust based on two "pillars": 1) each and every Member State is responsible towards the Community for the effective application of its own law (inclusive of the substantive provisions of the Directive) to broadcasters falling under its jurisdiction, and 2) no Member State can restrict (for reasons falling within the fields coordinated by the Directive) reception and/or retransmission on its territory of broadcasts transmitted by broadcasters under the jurisdiction of another Member State.

It is self-evident, though, that the practical application of this rather straightforward principle relies in the first place on a common understanding among all Member States of some key issues: what are the television services covered by the Directive, which State has `jurisdiction' over a given broadcaster, what is the actual content of the freedom to provide television services within the Internal Market (as regards, in particular, the residual powers of the `receiving' Member States).

It is precisely a substantial lack of this `common understanding', revealed by inconsistencies with the Directive's principles of some provisions of the national

laws of the United Kingdom and Belgium, that led the Commission to bring the matter before the Court of Justice.

A better perception of the scope and implications of the Court's decisions can be attained by examining the two judgments jointly. The coincidence of the date of the decisions, and the complementarity of the subject matters decided, offered the Court an ideal opportunity for a general reflection on the Directive.

In the UK case, the Court was asked to give a thorough interpretation of Article 2. The main point under discussion was the definition of the grounds on which a Member State can/must assert its `jurisdiction' over a given broadcaster. It goes without saying that discrepancies between national laws on this point can lead (and they have actually led, in some cases) to positive or negative conflicts of jurisdiction, potentially jeopardizing the effective functioning of the system.

In the absence of a precise provision in the Directive, the Commission has always advocated the application of the principle of the place of establishment (a Member State has jurisdiction if the broadcaster is established in its territory).

The Court's reading of Article 2, paragraph 1, leads to the conclusion that the concept of jurisdiction of a Member ratione personae State, used in the first indent, must be understood as necessarily covering jurisdiction over television broadcasters, which can be based only on the broadcaster's connection to that State's legal system. This last concept, in fact, coincide with the concept of establishment, as used in the first paragraph of Article 59 of the EC Treaty. According to the Court, the disparity on this point between the Directive and the Council of Europe's Convention on Transfrontier Television (essentially based on the criterion of the place of "initial emission", or the place where the up-link is situated, in case of satellite broadcasts) must be considered as the result of a wilful choice of the EC legislator, justified by the fundamental differences of nature and legal context that exist between these two texts. The adoption by an EC Member State of any possible criterion other than that of the place establishment, and particularly the criterion of the place of first transmission or that of the targeted audience, can lead that State to exercise a "dual control" over broadcasters already under another Member State's jurisdiction or, on the contrary, not to ensure full application of its regulations to all broadcasters for which it is responsible before the Community. Whence the declared non-conformity with articles 2 and 3.2 of the Directive of the relevant parts of UK legislation. Having clearly stated the rules according to which jurisdiction must be attributed to one Member State, and having recalled that Member State's obligation to ensure effective application of its broadcasting laws to all broadcasters established in its territory, the Court turned its attention to the implications of article 2.2 for the receiving Member State.

In the Belgian case, in fact, the main issue was the compatibility with Community law of a general system of conditional prior authorization by the Executive, in both the French and the Flemish Communities, for retransmission of television broadcasts falling under the jurisdiction of another Member State.

The Commission considered that in both cases the need for a prior authorization (granted subject to respect by the broadcasters of various conditions (such as - in the French Community case - the conclusion of `agreements' of a cultural nature with the Executive, and - in any case - always subject to withdrawal) constituted a serious restriction on the retransmission of television broadcasts from other Member States, and that it infringed Article 2(2) of the Directive.

The Belgian Government defended both systems on various grounds.

In the first place, as regards French Community regulations concerning cable television, it submitted that cable retransmission fell outside the scope of the Directive. The Court held, on the contrary, that a joint reading of the ninth and tenth recitals of the Directive as well as its Articles 1(a) and 2(2) necessarily led to the conclusion that the Directive does indeed cover cable retransmission of television programmes. This is also confirmed by the third, fifth and twelfth recitals of Directive 93/88/EEC (on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission), and by reference to the Council of Europe's Convention on Transfrontier Television (recalled in the fourth recital of the `Television without Frontiers' Directive), whose scope clearly includes transmission by cable.

The substantial objections of the Belgian Government, however, aimed at asserting the receiving Member State's right to exercise some form of control over incoming broadcasts. Various reasons were adduced in order to justify this `secondary control'. For instance, the need to verify whether a broadcaster is entitled to benefit from the freedoms guaranteed by the Treaty, and, in the affirmative, under which Member State's jurisdiction; the need to verify whether the broadcaster effectively complies with the law of the originating Member State; the need to safeguard pluralism in the media; the need to prevent copyright infringements; the need to safeguard "public policy, morality or law and order" (in the Flemish Community case).

The Court clearly affirmed that, without prejudice to the special procedure provided for in Article 2.2 of the Directive for alleged infringements of the provisions on the protection of minors, it is only for the `home Member State' (as defined in the UK case) to ensure that its own laws are respected by broadcasters falling under its jurisdiction. If the receiving Member State considers that another Member State has failed to fulfil its obligations under Directive the `Television without Frontiers' Directive, it may always have recourse to the procedures provided for under Articles 169, 170 and 186 of the EC Treaty.

The Court did not rule out that - in some cases (for instance, to ascertain whether broadcasts emanate from another Member State, to protect pluralism, copyright or public policy, public morality or public security) - the receiving Member State might be well founded in claiming the right to exercise some form of control, compatible with Community law, over incoming broadcasts. But it considered that none of the reasons put forward by the Belgian Government on behalf of the French and Flemish Communities justified per se the existence of a general system of prior authorization of programmes coming from other Member States, which de facto entails the abolition of the freedom to provide services.

Judgements of the Court of Justice of the European Communities of 10 September 1996 in: Case C-11/95, Commission of the European Communities v. Kingdom of Belgium; and Case C-222/94, Commission of the European Communities supported by the French Republic v. United Kingdom of Great Britain and Northern Ireland.

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