Court of Justice of the EC: Three Swedish TV Cases Interpreting the `Television without Frontiers' Directive

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These three joined cases are all concerned with television advertising broadcasts by TV3 (which is based in England) via satellite to Denmark, Sweden and Norway, but can also be received (in the first case) in Sweden on home channel TV 4.

The image is always the same, the acoustic signals are in the language of the country concerned. The first case concerns a commercial for a children's magazine about dinosaurs, which is printed in Italy and distributed in Sweden, by a Swedish subsidiary (De Agostini) of an Italian business group. The commercial has been broadcast without raising any problems in any country of the Union. The Independent Television Commission in the UK has reviewed the commercial's message, and it passed the test.

Article 11 of the Swedish Broadcasting Act states that TV commercials may not be directed to attract the attention of children under twelve years of age.

The other two cases deal with teleshopping programmes with `infomercials' coming from the Swedish subsidiary (TV shop i Sverige) of the international operating TV Shop group. These programmes include a number of statements which, according to Swedish law, can be considered as misleading.

The Swedish Marknadsdomstol (Market Court) would like the Court of Justice to indicate whether the prohibitions concerned are in accordance with the EC Treaty and the `Television without Frontiers' Directive. The Court of Justice states - not unjustified - that the Directive is insufficiently formulated; what the Directive really stipulates, that is the question. Adding to this: A distinction should be made between the subjects, regulated by the Directive and the associative way of supervision by the receiving Member State. This way of supervision can be differentiated into, on the one hand, preventive control measures on broadcasting and distribution of programmes and, on the other, incidental measures after broadcasting as a result of a real violation. The additional questions are: (including my answers) (i) Is a system of preventive total control by the receiving Member State generally forbidden? Yes, it generally is. (ii) As far as the subject is concerned, is it also forbidden to have a system of incidental control after broadcasting? The answer is yes. (iii) Is a system of incidental control after broadcasting by the receiving Member State also forbidden in relation to subjects

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not regulated by the Directive? The answer is no.

An affirmative answer to question (i) can be deduced from one of the recent `Television without Frontiers' cases against Belgium (Case C-11/95, CoJEC 10 September 1996, see IRIS 1997-7: 5). Belgium, as a receiving Member State wanted to verify if the TV broadcasting companies, who wished to broadcast their programmes in Belgium, were observing the regulations of the broadcasting State, including the Directive. Belgium did so with a license-system; a second control in addition to that of the broadcasting State. This was judged inadmissible in the opinion of the Court of Justice. The supervision of the observation of national law, including the regulations of the Directive, remains with the State on whose territory the broadcasting company is established. (The so called transmitting State principle, Article. 2 sub 2.) If Belgium wants to undertake swift and decisive action, a request for a preliminary ruling by the Court of Justice of the EC is the only possibility.

The prohibition of a second control also includes the regulations of the broadcasting State which are not regulated by the Directive. The Swedish TV cases confirm this answer. According to the Court of Justice, regulations which are designed to protect the consumers and under-aged, will be reinforced by the receiving Member State provided that this reinforcing of the regulations is not preventing actual broadcasting from another Member State. The consequence is a prohibition of a total control of domains, which are not specifically regulated by the Directive. In the case of a rule with the aim to control something which has been explicitly regulated by the Directive, the concerning provisions may not be applied at all. (My second question) The Directive regulates TV advertising especially in order to protect the under-aged. This rule does not include a prohibition of advertising which attract the attention of children under twelve years old. Sweden however, may not apply such a rule on transfrontier advertising. It may do so only with commercials which are being broadcast by a Swedish TV channel (TV 4).

The most important question is number three: Is the Directive an instrument too stealthily obtaining a total harmonisation of the rights concerning unfair competition and consumer protection? The conclusion of the Advocate-General did have a tendency to go in this direction. (Conclusion of Advocate-General Jacobs, 16 September 1996, Joined Cases C-34, 35 and 36/95, OJEC of 22 April 1995, C101: 2). He pleaded that misleading commercials are also within the definition of the "Television without Frontiers" Directive, arguing that 'The aim of the Television without Frontiers Directive' as well as the 'Directive on Misleading Advertising' is to prevent secondary obstruction on transfrontier advertising. Based on Article 2 Subsection 2 of the Television without Frontiers Directive, this would mean that Member States may not again control the advertising from broadcasters established in another Member State, conforming to the regulations

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related to misleading advertising from that Member State. Such an opinion opens the way to generalisation of the "Transmitting State principle" favoured by the European Commission but does not take into consideration common civil rights, including the international domestic rights of each of the Member States. Meaning that, for instance, concerning a matter between two Dutch advertisers about the broadcasting of a commercial on RTL-4 which can be viewed in The Netherlands, the Dutch law would not be valid. The Court of Justice rejects this opinion. National regulations to protect consumers can be applied to broadcastings of other Member States, if the former conditions have been met (no second control in the beginning, no regulations which have already been dealt with in the Directive).

Yet an answer to the questions mentioned above is not sufficient to settle the matter. It might occur that national limitations are opposed to freedom of movement in goods or services. Both kinds of freedom play an important role here, seeing it concerns a service (commercial) of a certain product. As far as the freedom of movement of goods is concerned, the Keck-Hobbel case should be considered first, since the Leclerc case (CoJEC 9 February 1995, C412/93 - see IRIS 1995-3: 5) has presented TV commercials to the Court of Justice as a way of promoting goods; national regulations for TV commercials can only be checked in connection with the prohibition of the EC Treaty - Article 30, if the regulation, factually and according to the law, has the same influence on dealings of national products and the products of other Member States. The Court of Justice leaves it to the investing judge to decide whether this is really the case, and if so, whether the regulations can be considered as a part of the exceptions regarding Article 30.

Keck is not mentioned in connection with the freedom of services. So, for the moment, the Keck doctrine cannot be applied to transfrontier services. The Court of Justice proceeds in the usual manner. In this case it concerns services of a broadcasting organisation for an advertiser in another Member State. The investigating judge should check whether the Swedish restrictions of the broadcasting of the commercial are in agreement with the general importance or the exceptions of the EC Treaty - Article 56. No doubt this test will have good results, seeing the Court of Justice itself already points out that the protection of consumers represents a valid exception. In the case of TV 4 an appeal to Article 59 is rejected, because TV 4 is a Swedish TV channel and offers services to the Swedish spectators and advertisers, even though they might be part of an international concern based in Italy. Thus Sweden should relax restrictive measures regarding advertising aimed at children, as far as commercials broadcast from abroad are concerned. Apart from this, the Swedish rule can no doubt be maintained.

Court of Justice of the EC, 9 July 1997, Joined Cases C-34/95 and C_36/95, Konsumentenombudsmannen v. Agostini (Svenska) Förlag AB et TV-Shop

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