



TRANSFRONTIER TELEVISION IN THE EUROPEAN UNION: MARKET IMPACT AND SELECTED LEGAL ASPECTS

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“The Impact of
Transfrontier Broadcasting
Services on Television Markets
in Individual Member States”



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F O R E W O R D

The European Audiovisual Observatory is honoured to have been asked to contribute this paper to the Informal Ministerial Conference hosted by the Irish Minister for Communications, Marine and Natural Resources, Mr. Dermot Ahern, TD.

Established just over 11 years ago as an enlarged partial agreement of the Council of Europe, the Observatory today comprises 35 Member States, as well as the European Union represented by the European Commission. As a public service body the Observatory strives to improve the transparency of information flows in the film and audiovisual sector. To accomplish this it draws upon a Europe-wide network of correspondents and partners from throughout the industry. It is thus in a unique position to serve the needs of policy-makers and professionals alike by providing the overviews essential to good practice.

The document that follows provides just such an overview of current market conditions and legal aspects in relation to transfrontier television. Its contents were prepared by Dr. Susanne Nikoltchev and Prof. Dr. André Lange, respectively responsible for the Legal Information and for the Markets and Financing Departments at the European Audiovisual Observatory. We hope you will find it a useful starting point for an open exchange of views.

In the recent past the Observatory has been honoured to contribute to conferences in the audiovisual policy area organised under the French, Finnish, Spanish, Greek and Italian Presidencies of the European Union. My colleagues and I extend our sincere thanks to the Irish Presidency of the European Union for allowing us the opportunity to contribute once more. We have no doubt that the occasion will prove fruitful and stimulating for all involved.



Executive Director
European Audiovisual Observatory

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E X E C U T I V E S U M M A R Y

TRANSFRONTIER TELEVISION IN THE EUROPEAN UNION: MARKET IMPACT AND SELECTED LEGAL ASPECTS

Chapter 1: Transfrontier Television in the European Union - Prevalence and Market Impact

- As of January 2004, the European Audiovisual Observatory estimates that a total of 1,100 national or transnational television channels are available or originate in the European Union. **More than 200 of these channels target non-national markets.** In addition there are around 1,900 regional and local channels of which almost 70 are carried on satellites.
- Channel numbers have risen steeply from 103 in 1990 to more than 1,100 in 2003 (excluding local channels) - movie and sports themed channels are those showing the fastest increase in numbers.
- Five types of channels involved in transfrontier broadcasting can be identified:
 - i. Single-language pan-European channels
BBC World, TV5 Europe CNN International, ...
 - ii. Pan-European channels with distinct language versions
*Euronews
TV1000
Discovery Channel*
 - iii. 'Delocalised channels' established in country A and targeting country B
RTL9, TV3 (targeting Scandinavian countries).
 - iv. Channels serving country of origin A but with advertising windows targeting country B
Pro7, the future Irish version of Sky News, ...
 - v. Channels established outside Europe but relayed through European satellites
TV Globo International
- The impact of transfrontier television varies widely in terms of audience share, from marginal in the larger markets to a significant impact in smaller markets:
 - Less than 1% of total audience in the UK, France, Italy, Spain in 2002..
 - ...but 84% of total audience in Luxembourg,
 - 46% of total audience in Ireland,
 - and more than 30% in Austria, the French Community of Belgium, and Sweden.
- Estimating the economic impact of transfrontier television on national markets remains difficult if not impossible, as companies operating transfrontier channels publish no geographical breakdown of their revenues.
- From a methodological point of view, the Observatory faces increasing problems in tracking reliably the number of TV channels in existence in Europe and in ascertaining the country of establishment of a certain number of channel providers.

E X E C U T I V E S U M M A R Y

TRANSFRONTIER TELEVISION IN THE EUROPEAN UNION: MARKET IMPACT AND SELECTED LEGAL ASPECTS

Chapter 2: Jurisdiction Over Broadcasters EC-Rules, Case Law and an Ever-changing Audiovisual Landscape

- The balance between the interest of a state in regulating broadcasting within its territory (including organisational and content-related matters), and the fundamental freedom to disseminate and receive information is at the very heart of jurisdiction over broadcasters. Should a broadcaster perceive this balance as tilted to its detriment it will try to find a more hospitable environment for conducting its business.
- The freedom of services and freedom of establishment warranted under the EC Treaty, as well as secondary law translating these freedoms into regulation of specialised areas have facilitated decisions by broadcasters in favour of non-national establishment. Moreover, the “Television without Frontiers” Directive ensures that television broadcasts can circulate freely between Member States and that broadcasters can offer their services throughout the European Union, regardless of the Member State from which they operate.
- As a consequence, the question as to which Member State has jurisdiction over which broadcaster becomes highly relevant. The paper describes the basic principles by which the “Television without Frontiers” Directive regulates jurisdiction and summarises the most relevant case law. Due to the complexity of the issue, the enormous growth of the broadcasting sector in past years, and the impact of new technology on television services, open questions remain and these are highlighted by the paper.

TRANSFRONTIER TELEVISION IN THE EUROPEAN UNION: MARKET IMPACT AND SELECTED LEGAL ASPECTS

INTRODUCTION

The following paper by the European Audiovisual Observatory aims to describe the current European landscape in relation to transfrontier television in the European Union. This document was drawn up at the request of the Irish Presidency of the Union and provides background material for a discussion on “The impact of of transfrontier broadcasting services on television markets in individual Member States”. This discussion is to take place within the framework of an Informal Ministerial Conference on Broadcasting (Dublin and Drogheda, 1-3 March 2004).

This contribution by the Observatory should be considered as providing general market information on the current television broadcasting landscape, as well as a discussion of selected legal aspects relating to transfrontier television, but it does not pretend to provide an in-depth analysis of the impact of the ‘Television without Frontiers’ Directive.

Most of the market data in the first chapter of this document is drawn from the Observatory statistical *Yearbook*, 2003 edition¹. The contents of the second chapter dealing with selected legal aspects draw in part on an *IRIS Special: Jurisdiction over Broadcasters in Europe*, published in 2002 by the Observatory².

¹ *Yearbook 2003, Film, Television, Video and Multimedia in Europe*, 5 volumes, European Audiovisual Observatory, Strasbourg 2003.

² This publication resulted from a Round-table Discussion that the European Audiovisual Observatory organised jointly with the Institute for Information Law (University of Amsterdam) and the European Platform of Regulatory Authorities (epra) in Summer 2001. For more information see also:
http://www.obs.coe.int/oea_publications/iris_special/2002.html).

Chapter 1

TRANSFRONTIER TELEVISION IN THE EUROPEAN UNION: MARKET IMPACT

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I) **More than 3,000 television channels in 2004**

The combined effect of deregulation, the advance of digital technology, and over-capacity of European satellite systems has multiplied the number of television services available, to the extent that the simple counting of channels has become a complex issue (see Appendix 2 on "Methodological Issues").

According to recent estimates made by the European Audiovisual Observatory, based on a systematic identification of television channels operating in January 2004, the following classification of TV channels operating in the 15 Members of the European Union may be drawn up³:

- **38** public service channels with a licence for national coverage by analogue terrestrial transmission;
- **2** mixed ownership (public/private) channels with a licence for national coverage by analogue terrestrial transmission;
- **43** privately-owned channels with a licence for national coverage by analogue terrestrial transmission;
- **21** commercial packagers (digital platforms) distributing channels to end-users (cable-operators and DTT operators are not included here);
- **75** publicly-owned channels with national coverage through cable, satellite or DTT distribution;
- **702** privately-owned channels with national coverage through cable, satellite or DTT distribution,
- **218** channels (public or private) targeting non-national markets (including channels targeting markets outside the EU). Alternatively, **162** "dedicated channels" can be identified in the European Union, that is channels conceived for a specific country but established in another country;
- Around **1,900** channels with regional or local coverage, of which 62 are also accessible via satellite, meaning that they are *de facto* national or pan-European;
- **162** regional or local windows in national programming schedules.

II) **Historical evolution**

A useful overview of the historical trend in channel supply is provided in an analysis by *Screen Digest*⁴. The definitions used and the population studied are not entirely identical to those employed by the Observatory (for example *Screen Digest* does not include small local stations), but this analysis has the advantage of providing a historical view for the period 1990 to 2003, as well as a breakdown by genre. The number of channels counted has increased from 103 in 1990 to 1,132 in April 2003. Movie channels (from 7 in 1990 to 143 in 2003) and sports channels (from none in 1990 to 92 in 2003) have seen the biggest increases.

³ See Table 2, page 8

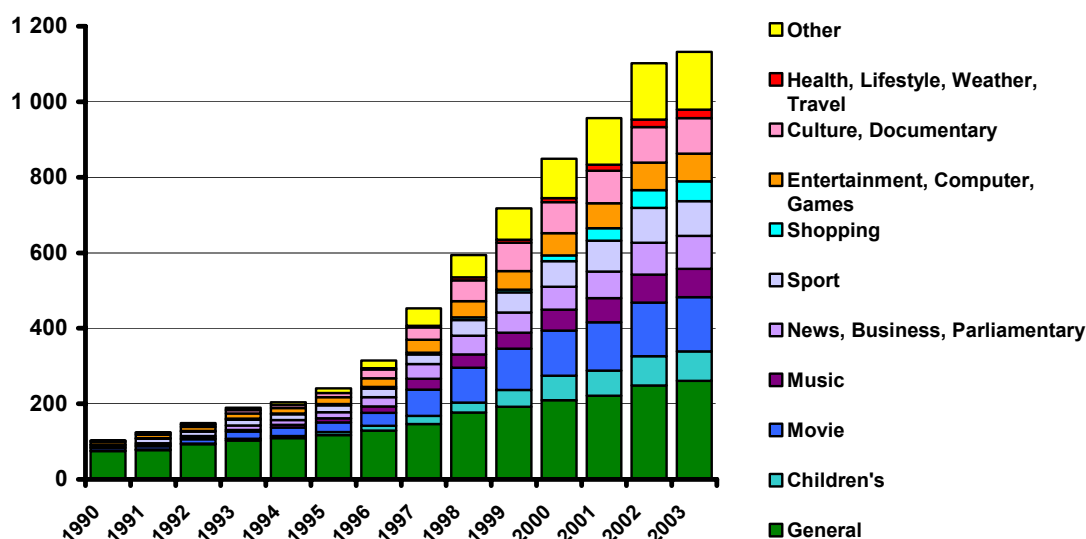
⁴ "European Multichannel Television. A high turnover business", *Screen Digest*, May 2003, pp. 149-156. See Table 1 and Figure 1 overleaf.

Table 1: Number of television channels by channel genre in Europe (1990 to May 2003)

	1990	1991	1992	1993	1994	1995	1996
General	75	77	93	103	109	117	129
Children's	1	2	2	5	6	8	13
Movie	7	9	11	19	22	26	34
Music	3	3	3	4	7	11	17
News, Business, Parliamentary	5	5	6	12	13	16	25
Sport	0	12	12	15	15	18	22
Shopping	1	1	1	3	3	3	5
Entertainment, Computer, Games	7	9	11	14	14	19	23
Culture, Documentary	3	5	6	8	8	11	23
Health, Lifestyle, Weather, Travel	0	0	0	0	0	0	3
Other	1	1	4	7	7	12	21
Total channels	103	124	149	190	204	241	315

	1997	1998	1999	2000	2001	2002	2003
General	147	177	192	210	222	249	261
Children's	21	26	45	64	66	77	78
Movie	70	93	109	120	128	142	143
Music	28	35	42	56	64	74	75
News, Business, Parliamentary	39	49	54	60	70	85	88
Sport	26	42	53	68	82	92	92
Shopping	5	7	7	15	33	47	52
Entertainment, Computer, Games	34	43	50	59	66	73	74
Culture, Documentary	33	55	75	82	86	94	94
Health, Lifestyle, Weather, Travel	4	8	8	11	16	20	22
Other	46	59	83	104	124	149	153
Total channels	453	594	718	849	957	1 102	1 132

Figure 1: Number of television channels by genre in Europe (1990 to 2003)



Source: Screen Digest

Table 2: Number of television channels in Europe (January 2004)

Country EUR 15	Nationwide channels (with analogue terrestrial licence)			Other nationwide channels (cable and/or satellite and/or DTT with no analogue terrestrial transmission)		Foreign channels targeting the country	Channels targeting foreign markets	Regional or territorial channels (terrestrial or cable) (1)		Local stations (terrestrial or cable)	Regional/local windows on national channels	Various
	Public	Mixed	Private	Public	Private			Public	Private			
AT	2		1		7	8		1 (1)		39	9	
BE (CFR)	2		1		7	10	1			12		1
BE (DSG)				1								
BE (VLG)	3		1		10	7				10		
DE	2		11	12	76	5	8	13 (11)	13 (6)	149	21	1
DK	2	2			6	23	1			17	20	
ES	2		3	13	85	18	12	16 (4)		897 (8)	17	
FI	2		2	3	4	11	1		2	56	9	
FR	4		3	4	116	13	37	2	13	110	25	
GB	3		2	18	203	10	116	1	15 (13)	12	6 (6)	1
GR	2		8	1	20	5	1	1	49			
IE	3		1							2		
IT	3		6	15	96	14	1	1	>250 (16)		20	
LU			1	1	3		8			1		
NL	3			1	26	10	15	12	>200		8	
PT	2		2	1	23	18	3	2				
SE	3		1	5	20	10	14			27	27	
EUR15	38	2	43	75	702	162	218	ca.1900 (62)			162 (6)	3

New Member States as at 1.5.2004

CY	2		3	1	1		4			8		1
CZ	2		2		5	11			12	17	3	
EE	1		3			1				7		
HU	1		2	2	20	11	4		41		6	
LT	2		3		1	1				10		
LV	2		2		1	2				24		
MT	1				9							
PL	2		3	1	33	16		12			12	
SI	2		3							36		
SK	2		2		2				3	72		

Other countries bound by the TWF Directive

IS	1		3		1				4			
NO	2		1	1	5	17				29	15	

(1) Numbers in brackets indicate the number of regional or local channels also broadcast on satellite
See Appendix 2 for a note on methodology and the classification criteria applied here.

Source: European Audiovisual Observatory

III) Transfrontier television

Cross-border television is not a new phenomenon: natural overspill and redistribution of channels from neighbouring countries in markets with high cable penetration such as the Netherlands, Belgium, Denmark or Ireland was already well advanced before the adoption of the 'Television without Frontiers' Directive in 1989. But it is also clear that the development of cable and satellite infrastructures and the establishment of a legal framework allowing the free circulation of channels has reinforced the importance of cross-border broadcasting.

Various categories of channels have been created with the clear objective of principally targeting markets outside their country of establishment. A suggested typology of this kind of channel would be:

- **Channels in a unique language but with a clear pan-European vocation.** This kind of channel was initiated in the mid-80's by services such as Sky Channel, Music Box, or, in the public service group, TV5 or 3-sat. The introduction of digital television, which allows for multilingual versions, has partly outdated this formula for private broadcasters, but it is still practised by public channels tailored for the international promotion of language and culture and by some music channels.

Examples: TV5 Europe, BBC World, BBC Prime, 3sat, BVN, MTV Europe, VH-1

- **Pan-European services with distinct linguistic versions** targeting specific linguistic markets, within and without the EU, and in particular Central and Eastern European markets. In Observatory statistics, the separate linguistic versions of a service are counted as distinct channels.

Examples: These kinds of services are provided by pan-European channels such as Eurosport, Eurosport News, Euronews.

This format is also used by Nordic digital packagers such as Canal Digital and Viasat, established in Sweden and broadcasting distinct linguistic versions of the same channel to Denmark, Finland and Norway.

This is also the typical format used by American groups broadcasting thematic channels to Europe from the UK or from the Netherlands (including Central and Eastern European countries). This is the case for Turner Broadcasting (TCM, Cartoon Network), Discovery Networks Europe (Discovery Channel, Animal Planet Europe,...), Fox (Fox Kids), Hallmark (Hallmark Channel), National Geographic, Viacom (MTV, Nickelodeon), UPC / chellomedia (Club, Reality TV, Romantica). Channels may be proposed with up to 12 different linguistic versions and some of those channels may include windows dedicated to a specific market.

- **“Delocalised channels”** : channels which are established in a country **A** but explicitly target the market of country **B**. This kind of practice has been at the origin of legal proceedings relative to the implementation of the Directive.

Examples: RTL-4 and RTL-5 (established in Luxembourg and targeting the Netherlands); RTL9 established in Luxembourg and targeting France and Switzerland; TMC established in Monaco and targeting France; TV3 and 3+ (established in the UK and targeting the Nordic countries), Kanal 5 established in the UK and targeting Sweden.

- **Channels tailored for market A but with *ad hoc* advertising windows or/and programme windows conceived for one or more neighbouring markets.**

Examples: Swiss and Austrian windows of German private channels (SAT.1, RTL, Pro7, Kabel1); Irish windows on Sky News. Some of these channels have obtained a licence from the targeted country (SAT.1 Österreich; SAT.1 Schweiz).

- **Channels not established in Europe** but broadcast through European satellites (in general with the signal “picked-up” from a non-European satellite).

Examples: HBN Herbalife Broadcasting Network (Europe), TV Globo International,...

IV) Access to foreign channels

Access to foreign channels is principally determined by the equipment of the viewer. A viewer equipped with an orientable satellite dish has of course a far wider choice than a viewer relying on standard analogue terrestrial transmission and, in principle, has the opportunity to receive almost all channels positioned on European satellites. For this ideal viewer the main limitation to the reception of foreign channels will be the encryption systems in use and the necessity to subscribe to pay-TV channels or to the package provided by digital platforms.

To obtain a more realistic idea of the supply of foreign channels commonly available in the various countries, we have drawn up the Table 3 overleaf which takes into account the complete channel offer by one of the leading cable-operators in each country as well as the offer of the digital satellite TV packagers. This table clearly demonstrates the extent to which the circulation of TV channels is now a reality in the European Union.

Table 3: Number of TV channels made available as part of the offer of main cable-operators and satellite packagers in the European Union

(as at February 2004)

			National Channels	Foreign Channels	Total	% Foreign Channels
AT	UPC Telekabel	Cable	8	27	35	77,1%
	Premiere Austria	Satellite	1	27	28	96,4%
BE (CFR)	Coditel	Cable	20	24	44	54,5%
	Le Bouquet	Cable		37	37	100,0%
BE (VLG)	Coditel	Cable	20	24	44	54,5%
	Canal Digitaal	Satellite	1	113	114	99,1%
DE	Kabel Deutschland	Cable	80	56	136	41,2%
	Premiere	Satellite	28	0	28	0,0%
DK	TDC Kabel TV	Cable	11	92	103	89,3%
	Canal Digital Danmark	Satellite	8	35	43	81,4%
	Viasat	Satellite	2	32	34	94,1%
ES	ONO	Cable	58	43	101	42,6%
	Digital+	Satellite	52	14	66	21,2%
FI	Helsinki Television	Cable	9	52	61	85,2%
	Canal Digital Finland	Satellite	3	37	40	92,5%
FR	Noos	Cable	93	27	120	22,5%
	Canal Satellite	Satellite	75	22	97	22,7%
	TPS	Satellite	62	10	72	13,9%
GB	NTL	Cable	125	5	130	3,8%
	Sky	Satellite	131	3	134	2,2%
GR	Nova	Satellite	14	16	30	53,3%
IE	NTL	Cable	3	12	15	80,0%
	Sky	Satellite	1	133	134	99,3%
IT	Sky Italia	Satellite	106	22	128	17,2%
NL	UPC	Cable	15	17	32	53,1%
	Canal Digitaal	Satellite	14	100	114	87,7%
PT	TV Cabo	Cable	n.a.	n.a.	n.a.	n.a.
	TV Cabo	Satellite	21	27	48	56,3%
SE	ComHem	Cable	15	46	61	75,4%
	Canal Digital	Satellite	11	37	48	77,1%
	Viasat	Satellite	20	16	36	44,4%

Methodological Note

Due to differences in marketing practices, these figures should be considered as indicative. Channels are considered as national once they are established in the targeted market whatever the nationality of their majority shareholding. In the case of Premiere (Germany), for example, Disney Channel Germany is considered as national as the channel holds a German broadcasting licence.

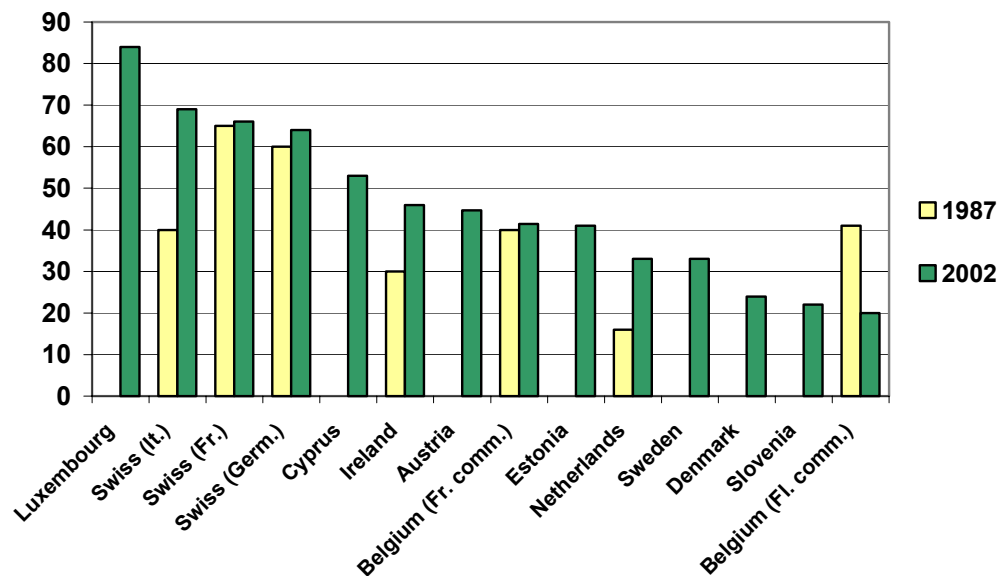
Source: European Audiovisual Observatory

V) The impact of transfrontier television on audiences and markets

The impact of cross-border television varies considerably from country to country, as shown by table T.8.4 published by the Observatory in Volume 2 of its *Yearbook 2003*⁵. In the major European markets (Germany, the UK, Italy, France, Spain), the market share of foreign channels can be considered as marginal as it corresponds to the market shares of pan-European channels such as Eurosport, TV5 Europe, BBC Worldwide or CNN International. It should be noted, however, that in France, during the first six months of 2003, foreign channels achieved a market share of 3.9% in households with access to cable and/or a satellite dish. 2.6% of the total of 3.9% was achieved by just one channel, RTL9.

Figure 2: TV daily audience market share for foreign channels in various European countries (2002)

In % of daily audience



Source: Eurodata-TV / European Audiovisual Observatory

On the contrary, the market share of foreign channels is very significant in smaller countries, which in general are also those with a high level of cable penetration. Three kinds of situations can be distinguished:

- In some small markets (Luxembourg, Belgium, Ireland, Cyprus), the importance of foreign channels is due almost entirely to the success of national channels of the bigger neighbouring countries.
- In a number of other countries (Denmark, Sweden, Norway, the Netherlands), the importance of audiences for foreign channels is mainly due to the success of channels established in other countries, but tailored specifically for the targeted market: this is the case for the TV3 channels,

⁵ *Yearbook 2003, Volume 2, Household Audiovisual Equipment – Transmission – Television Audience*, p.64, European Audiovisual Observatory, Strasbourg 2003.

based in the UK and targeting the Nordic countries, and for RTL4 - RTL5 established in Luxembourg and targeting the Dutch market. During a certain period, the two Belgian markets faced a similar situation: from the 60's to 1987, RTL, based in Luxembourg, targeted the French Community market, until it was recognised as a channel of the French Community, based in Brussels, under the name of RTL-Tvi. As for the Flemish Community, the channel VT4 was, between 1994 and 2002, a channel established in London, licensed by the ITC. Following long litigation, on 15 February 2002 the Flemish Community recognised the channel as Flemish.

- Another situation is that where national channels from larger countries broadcast versions with advertising windows dedicated to smaller neighbouring markets. This is the case of the German private channels (SAT.1, RTL, Pro7, Kabel1), which have created Austrian and Swiss versions. This is also the situation that Ireland will face once BSkyB has launched an Irish version of Sky News, including specific news bulletins dedicated to Ireland.

VI) The economic impact: the 'black box' economy of television in Europe

The economic impact of cross-border television on national markets is difficult to assess without precise data. One could imagine the collection of data on revenues (such as advertising, subscriptions and cable fees) of broadcasters derived from markets outside their country of establishment. However in general this kind of data is not made public by broadcasters. Transfrontier broadcasters do not, in most cases, publish detailed profit and loss accounts: this is in particular the case with broadcasters established in the UK and the Netherlands and targeting continental markets. For those rare transfrontier broadcasters who do publish their accounts, the breakdown of their revenues between the national market and other markets is generally not provided in sufficient detail.

European advertising market experts questioned by us on this issue have confirmed that it is almost impossible to analyse advertising revenue flows generated in these circumstances.

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Chapter 2 TRANSFRONTIER TELEVISION IN THE EUROPEAN UNION: SELECTED LEGAL ASPECTS

Jurisdiction over Broadcasters EC-Rules, Case Law, and an Ever-Changing Audiovisual Landscape

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I) Introduction⁶

In a Europe built on an open market economy and shared democratic values media play an important role. So far broadcasting has conquered the leading role amongst them. Thus it is not surprising that Member States attach great importance to who can claim the right to regulate broadcasting. In practical terms, this question involves the right of any given state to interfere with the right of any given broadcaster to conduct its business.

Jurisdiction is made up of two different legal aspects. On the one hand, it has to be determined who has the power to regulate which broadcaster (*personal jurisdiction*) and on the other what law will be applied in a given case (*subject matter jurisdiction*). European Community (EC) Law has rules on both aspects. They are the focus of this paper.

The EC law that we apply today to jurisdictional disputes derives to a significant extent from case law. It has been developed by the Court of Justice of the European Communities with regard to different aspects of regulating transborder broadcasting. Given the fact that this jurisprudence is the key to understanding EC-rules, this paper must include facts and findings from relevant cases.

The story of the EC-jurisdictional rules can certainly be told in many different ways. This paper follows the chronology of the EC-Directive “Television without Frontiers”. Therefore Part II will introduce the rules of the Directive 89/552/EEC⁷ and the case law interpreting these rules. Part III will follow this approach for Directive 97/36/EC,⁸ which amended Directive 89/552/EEC. Part IV will conclude this paper with some observations and forward-looking questions.

II) Directive 89/552/EEC

The legislative process leading to the Directive “Television without Frontiers” (hereinafter the 1989-Directive) was long and cumbersome. Starting with the publication of the European Commission’s “Television without Frontiers, Green Paper on the establishment of the Common Market for broadcasting, especially by satellite and cable”⁹ it underwent many critical stages before a qualified majority finally adopted it on 3 October 1989 against the

⁶ The preparation of this paper was significantly facilitated by the *IRIS Special: Jurisdiction over Broadcasters in Europe*, published in 2002 by the European Audiovisual Observatory. This publication resulted from a Round-table Discussion that the European Audiovisual Observatory organised jointly with the Institute for Information Law (University of Amsterdam) and the European Platform of Regulatory Authorities (epra) in summer 2001. Therefore, my special thanks go to the co-authors of the Round-table Report, T. McGonagle and A.v. Loon, to G. Lindberg, who chaired the workshop, and to all workshop participants. The publication is available in English, French, and German from the Observatory (contact Markus.Booms@obs.coe.int or phone +33-388 14 44 00, fax +33-388 14 4419. For more information see also http://www.obs.coe.int/oea_publ/iris_special/2002.html).

⁷ 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, OJEC L 298 of 17 October 1989, pp. 23-30.

⁸ 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, OJEC L 202 of 30 July 1997 pp. 60–70.

⁹ Communication from the Commission to the Council of 14 June 1984, COM (84) 300 final.

votes of Belgium and Denmark. On 3 October 1991 the Directive came into force and has since then provided *inter alia* the basis for decisions on jurisdictional questions.¹⁰

1. The Main Principles

The “1989-Directive” sought to establish a single market for television of cable and satellite broadcasting, the two transmission services that were, at the time, becoming increasingly popular and propelling the development of private television. In order to reach this goal, Article 2 paragraph 2 of the 1989-Directive stipulated that

“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”¹¹.

In addition, Article 2 paragraph 1 first alternative of the 1989-Directive, obliged Member States to

“ensure that all television broadcasts transmitted by broadcasters under its jurisdiction...comply with the law applicable to broadcasts intended for the public in that Member State.”

Read together, these two provisions formulated the basic idea of the 1989-Directive, namely that – in general – it is necessary but also sufficient if broadcasts comply with the law of the Member State from which they originate.¹² This idea has been reinforced by the jurisprudence of the Court of Justice of the European Communities and later by the Directive 97/36/EC amending the 1989-Directive.

As a corollary to the idea of a one-time control system, common standards for broadcasting had to be introduced. The 1989-Directive provided them for some key areas, namely the promotion of distribution and production of television programmes, advertising and sponsoring, youth protection, and the right of reply.

Since the passing of the Directive, the various broadcasting laws of the Member States have certainly been brought more into line. Yet recognising the limits of the envisaged harmonisation and possibly wishing to preclude shortcomings that might occur during the transformation of the Directive into national law, the EC legislator had also introduced a rule (Article 2 paragraph 2, second sentence) that allowed the receiving state to provisionally block broadcasts that could result in serious impairments of the development of minors or incite to hatred on grounds of race, sex, religion or nationality (Article 22). This permission, however, is formulated as the absolute exception and granted only under specific circumstances.

Articles 3, 19, 20 of the 1989-Directive are also important for jurisdictional matters as they determine the situations in which Member States may impose more stringent or (in the case of Article 20) other rules on broadcasters than those contained in the Directive. These provisions as well as the other jurisdictional rules of the 1989-Directive have been interpreted extensively by case law that we shall now address.

¹⁰ The Green Paper was preceded by various Resolutions of the European Parliament on broadcasting in the European Community adopted as early as 1982. For an overview of the origins and the development of the Directive, see E. Machet, *A Decade of EU Broadcasting Regulation – The Directive “Television without Frontiers”* (published by The European Institute for the Media), pp5 *et seq.*

¹¹ This rule has become Article 2 a of the 1997-Directive.

¹² See also Recital 15 of the 1989-Directive.

2. Case Law¹³

a) Personal Jurisdiction

The 1989-Directive had one important congenital defect in that it was mute on the question of how to determine the country of origin. While the Commission interpreted this principle by using the criteria of establishment, some Member States had different views on this issue. This was, for example, the case for the United Kingdom of Great Britain and Northern Ireland whose Broadcasting Act 1990 (Section 43), at the time, determined jurisdiction by primary criteria other than the Directive's, namely the reception of the broadcast, the place where the up-link was situated or the country whose frequency capacities were being used.¹⁴

Additional confusion was caused by the fact that the parallel European instrument on transfrontier television, the Convention on Transfrontier Television of the Council of Europe¹⁵ had originally adopted different criteria than the 1989-Directive. Since then the text of the Convention has been amended in line with the provisions of the Protocol (ETS No. 171), which entered into force on 1 March 2002, and is now largely equivalent to the rules of the 1997-Directive.¹⁶

Ruling on the claim against the United Kingdom of Great Britain and Northern Ireland, the Court of Justice of the European Communities cemented the principle of establishment. This recognition, however, did not end the discussion on how to determine jurisdiction.

Further questions on jurisdiction were raised by the fact that a broadcaster could be simultaneously established in two Member States. While this had been a theoretical question considered in passing in the case of Commission v. United Kingdom of Great Britain and Northern Ireland,¹⁷ the litigation between VT4 and the Flemish Community of Belgium¹⁸ two years later presented an actual case. The dispute arose because both the Flemish and the British regulatory authorities claimed jurisdiction over VT4 based on the establishment principle.

VT4, seated in London and owned by Scandinavian Broadcasting Systems SA (SBS), a company established under the laws of Luxembourg, operated under a non-domestic satellite licence, issued by the British ITC. VT4 transmitted its programmes from the UK, targeting the Flemish-speaking Community of Belgium. At the time it had a "sub-branch" in the Flemish Community of Belgium that it used in particular for contacts with advertisers, production companies and for news collection. VT4 applied to the responsible Ministry for the right to have its broadcasts transmitted via the Belgian cable system. The request was denied. The Flemish authorities took the position that because VT4 offered no services to the public in the UK, it did not suffice that it had been established in that Member State. In January 1995 an order of the *Raad van State/ Conseil d'Etat* (State Council) suspended the decision on VT4's application and by February 1995 the broadcaster was *de facto* able to use the Flemish cable networks for retransmission.

What made this case particularly interesting was the fact that VT4 could not have applied for an operating licence in Belgium because, based on two decrees from 1987 and 1991, the Flemish Community had given an exclusive license to *Vlaamse Televisie Maatschappij NV* (VTM). VTM had thus become the only Flemish commercial broadcaster.

¹³ For an overview of the cases cited in this paper including, where available, URL links to the texts of the decisions, see Appendix 1.

¹⁴ Case C-222/94 Commission v. United Kingdom of Great Britain and Northern Ireland [1996], Judgment of 10 September 1996, ECR I-4025.

¹⁵ European Convention on Transfrontier Television, Strasbourg 5 May 1989, European Treaty Series - No. 132, available in its amended version at:

<http://conventions.coe.int/Treaty/en/Treaties/Word/132.doc> .

¹⁶ For the text of the Protocol, see:

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=171&CM=7&DF=13/02/04&CL=ENG> .For the interpretation of the amended Convention, see the Explanatory Report, available at: <http://conventions.coe.int/Treaty/en/Reports/Html/132.htm> .

¹⁷ Case C-222/94.

¹⁸ Case C-56/96, VT4 Ltd. v. Vlaamse Gemeenschap [1997], Judgment of 5 June 1997, ECR I-3143.

The Court of Justice of the European Communities resolved this case by recalling a additional criterion for determining jurisdiction, namely the “centre of activities of the broadcaster” that it had already mentioned in the case *Commission v. United Kingdom of Great Britain and Northern Ireland*.¹⁹ The centre of activity was further characterised as “the place where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together”. The Court added that in order to benefit from the rules on the freedom of movement the broadcaster does not necessarily need to have business activities in its host Country.²⁰ The Flemish Authorities were also rejected on their second argument concerning circumvention as will be discussed *infra*.

Even these precisions could not clear up all of the ambiguities attached to the establishment criteria. Emerging and constantly evolving practice continues to fuel discussions as to which country has jurisdiction.²¹

The original Directive did not only trigger case law clarifying the determination of the country-of-origin principle. Its premise that no broadcaster should be subjected to double control was also tested in court. Disputes focusing on that issue mainly concerned situations in which the distribution of broadcasts from one into another Member States via the latter’s cable systems was blocked by the receiving Member State. Among the arguments defending the banning of broadcasts that were brought forward two deserve special mention. Firstly, circumvention was invoked, namely that the broadcaster had established itself in another country merely to avoid the jurisdiction of the receiving country. Secondly, even though the establishment of the broadcaster complied with the Directive, the receiving Member State had a need for, and a right to some form of secondary control.

Circumvention was alleged in the case *TV10 SA v. Commissariaat voor de Media*²² where the private broadcaster TV10 SA had chosen Luxembourg as a place of establishment in order to avoid the strict Dutch rules on national broadcasters. The *Commissariaat voor de Media* (Dutch Media Authority) banned TV10 from being distributed by Dutch cable networks. The Court of Justice of the European Communities found that if a broadcaster establishes itself in another Member State in order to circumvent the rules of the country or the countries to which its broadcasts are wholly or principally directed, it has to comply with the rules for national broadcasting stations of the receiving country.

Circumvention was equally discussed in case C-56/96. The case, which concerned the then British broadcaster VT4, has already been mentioned *supra* with regard to the questions relating to the establishment criterion. To recall, VT4’s request for permission to retransmit its programmes via cable had been denied by the Belgian authorities. In addition to the claim of original jurisdiction, the Flemish Ministry for Culture and Brussels Affairs alleged that VT4 had only established itself in the United Kingdom in order to avoid – circumvent – the regulation of the Flemish Community. Therefore, so the Flemish Ministry argued, VT4 could not be viewed as a broadcaster licensed by another Member State (namely the UK), which would have been a requirement for allowing the retransmission. The Court rejected the circumvention argument and held that the establishment criteria including the tie-breaker notion “centre of activities” had to be applied (see *supra*). The difference between the facts of the two decisions is mainly that at the respectively relevant times for the Belgian and the TV10 case, the Belgian system in principal allowed private commercial television but had in fact institutionalised a monopoly situation, while the Netherlands operated exclusively a non-commercial broadcasting system as part of its cultural policy (see also *infra* at b) for more information on this point).

¹⁹ Case C-222/94 at point 58.

²⁰ This point was further emphasised in *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* [1999], Case C-212/97, Judgment of 9 March 1999, ECR I-1459. Denmark had refused to register the branch of a UK-company on the grounds that the company had been set up in the UK solely in order to avoid the more stringent Danish requirements for establishing companies. Moreover, the company, owned by two Danish citizens, had never engaged in any business activities in the UK but whose sole aim was to make possible the setting up of a Danish subsidiary. The Court held that none of these facts were in violation of Article 52 and 58 ECT.

²¹ See *infra* at IV.

²² Case C-23/93, *TV 10 SA v. Commissariaat voor de Media* [1994], Judgment of 5 October 1994, ECR I-4795.

The second argument against the one-stop shop premise, namely that the receiving Member State had a need for, and a right to some form of secondary control, was addressed in the case *Commission v. Belgium*.²³ The bone of contention was the Belgian law (of the French and the Flemish Communities) providing for a general system of conditional prior authorisation for retransmission of television broadcasts.²⁴ Based on this system, Belgian authorities requested broadcasters already licensed in other Member States to apply for a second license allowing the retransmission of their broadcasts via cable. In a first step the Court had to clarify whether cable retransmission comes within the scope of the Directive. The Court answered this question in the affirmative.²⁵ In a second step, the Court held that requiring an extra license for cable retransmission was not in line with the premises of the Directive. The Court underlined that only the Member State from which television broadcasts emanate had the right to ensure the application of the law of the originating Member State and compliance with the Directive. In that regard, the receiving State lacked authority for exercising its own control.²⁶ The only exception to that rule, the Court said, was the possibility to suspend a broadcast provisionally under the conditions stated in Article 2 paragraph 2 (see *supra* at II.1.). The Court did emphasise that a Member State that doubts the correct control of the law by the host Member State may take that state to the Court of Justice of the European Communities for violation of the Directive.²⁷

The refusal of the Belgian authorities to let a broadcaster use the Belgian cable system led also to the case *Paul Denuit (TNT & Cartoon Network)*.²⁸ A company established in the United Kingdom on a British non-domestic satellite license operated TNT & Cartoon Network. The Court confirmed that the broadcaster came under UK-jurisdiction and denied Belgium the right to secondary control. The Belgian authority had assumed such a right with the argument that the TNT-channel was violating the quota rules of the Directive. The Court held, however, that this gave Belgium merely the right to pursue the question in an action against the UK following the appropriate procedural rules.²⁹ The Court also found that the alleged violation would not satisfy the requirements for measures under Article 2 paragraph 2 of the Directive.

b) The Underlying Conflict

The Court's reflection in case C-11/95, where it had addressed for the first time the Belgian system of conditional prior authorisation for retransmission of television broadcasts, also touches upon the fundamental issue in relation to jurisdiction. In essence, jurisdiction cases deal with the fundamental question of how to strike a balance between the broadcaster's right of free establishment guaranteed under the ECT³⁰ against the right of the Member States to regulate the (in particular technical) organisation of broadcasting within their territory (Art. 10 II 3 European Convention on Human Rights – ECHR). The latter right has been expressly recognised by the European Court of Human Rights in the *Groppera Radio* case³¹ and in the *Informationsverein Lentia* case.³² According to the jurisprudence of the Court of Justice of the European Community it is well established that fundamental rights guaranteed by the ECHR form part of the general principles of law that have to be safeguarded by the Court.³³

²³ Case C-11/95, *Commission v. Kingdom of Belgium* [1996], Judgment of 10 September 1996, ECR I-4115.

²⁴ In fact, that question was also relevant in the VT4 case but by the time case C-56/96 had reached the Court of Justice of the European Communities it had already been settled by Case C-11/95.

²⁵ According to the Court, this follows from a joint reading of the ninth and tenth recitals of the Directive, its Articles 1 (a), 2(2), from the third, fifth and twelfth recitals of Directive 93/88/EEC as well as from the Convention on Transfrontier Television of the Council of Europe, referenced in the fourth recital of the Directive.

²⁶ See Point 35 of the decision for the reasoning.

²⁷ See Point 36 of the decision. Applicable are either treaty infringement proceedings under Article 227 ECT (ex Article 170) or a request that the Commission itself take action against that Member State under Article 226 (ex Article 169).

²⁸ Case C-14/96, *Paul Denuit (TNT & Cartoon Network)*, Judgment of the Court of Justice of the European Communities of 29 May 1997.

²⁹ With regard to the appropriate procedures the Court of Justice of the European Communities referred to Point 36 of case C-11/95.

³⁰ Article 49 ECT, at the time of the decision still Article 59 ECT.

³¹ *Groppera Radio AG & Others v. Switzerland*, Judgment of the European Court of Human Rights of 28 March 1990, Series A, no. 173, para. 61.

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

³³ See, for example, case C-23/93 at points 24. and 25..

In *Commission v. Belgium*³⁴ the Court addresses the balance question by stating that a Member State's compliance with Article 10 ECHR (freedom of information) does not exclude that it may be acting against Community law. In contrast, in the TV10 case the Court held that a Member State maintains the right to take measures against a broadcaster even if the Broadcaster is established in another Member State provided that the place of establishment is chosen in order to avoid the otherwise applicable rules of the first Member State.³⁵ The important difference between both cases is that the Dutch law, which had been applied to the detriment of TV10, aimed in fact to protect the pluralism of Dutch broadcasting policy and diversity of opinions. In other words, it served the freedom of information. In contrast the concrete setting under the Belgian law in the VT4 case had led to a monopoly of a single commercial broadcaster (VTM).

We can extract additional information about the boundaries between the rights of Broadcasters and those of the Member States from another case. In *Veronica Omroep Organisatie v. Commissariaat voor de Media*³⁶ the Court had to answer the question whether a Member State could restrict the activities of a broadcaster operating under its jurisdiction without violating the EC-provisions on the freedom of services.³⁷ The activities in question related to the financial and logistical involvement of the non-commercial Dutch broadcaster Veronica Omroep in the establishment of a private broadcaster (RTL-Véronique) in Luxembourg. The birth of RTL-Véronique was potentially explosive in that its programmes were supposed to be transmitted via cable to the Netherlands. The *Commissariaat voor de Media* (Dutch regulatory authority for the media) took the view that the engagement of Veronica Omroep had violated the *Mediawet* (Dutch Media Law). The *Mediawet* allowed only activities for which a broadcaster was licensed or which were foreseen by law or authorised by the *Commissariaat voor de Media*. The Court ruled that the relevant provisions of the Dutch Media Law were in accordance with EC law emphasising the facts that the programmes of RTL-Véronique were expected to be retransmitted in the Netherlands and that the restriction imposed by the Dutch rules aimed at the safeguarding of the pluralistic non-commercial character of the broadcasting system introduced by the *Mediawet*.

The incompatibilities of broadcasters' and Member States' interests appear to have diminished over the past years and Community law has certainly had its impact. The (by now familiar) VT4 case³⁸ nicely illustrates how the audiovisual landscape and media legislation of the nineties were reshaped over the course of the years.

In 1998 the Flemish law that had rendered it impossible for VT4 to acquire an operating licence, was changed to allow other broadcasters to obtain licences from the Flemish Media Authority. In parallel VT4 was pressured to apply for a licence with the argument that it was established in the Flemish Community and that it operated under the British licence only in order to circumvent the Flemish broadcasting regulations.³⁹

Today, the situation looks completely different. VT 4 changed its place of establishment voluntarily to the Flemish Community. Since 1 March 2002 it operates under Flemish Law and is recognised by the Flemish Media Authority as a Flemish broadcasting organisation. That same day the ITC license under which it had operated so far in the United Kingdom ceased to be valid.

³⁴ Case C-11/95.

³⁵ The argument had been developed in Case 33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974], Judgment of 3 December 1974, ECR 1299.

³⁶ Case C-148/91, *Veronica Omroep Organisatie v. Commissariaat voor de Media* [1993], Judgment of 3 February 1993, ECR I-487.

³⁷ Article 49 ECT, ex Article 59.

³⁸ Case C-56/96.

³⁹ See also IRIS 2002-3: 7 for the chronology of events.

c) Subject-matter Jurisdiction

The case law discussed so far has focused on the question ‘Which country may exercise jurisdiction over a broadcasting company?’ Once this question is answered, another dimension of jurisdiction comes into play. It is necessary to define the extent to which a court can rule on the conduct of “a person” – in our specific context a broadcasting company.

The Court of Justice of the European Communities has dealt with this question under two different angles. Firstly, it had to interpret the rules of the Directive that allow national law to use more rigid standards than those set by the Directive. Relevant here are Article 19 that permits stricter rules for programming time and the procedures for television broadcasting under specific circumstances, Article 20 that gives the same right with regard to advertising intended solely for its territory and Article 3 paragraph 1 which appears to grant such a power in general with regard to broadcasters under their jurisdiction. Secondly, the Court had to determine the scope of the substantive rules of the Directive in order to determine for what subjects regulation by the Member States was not pre-empted.

As to the first aspect, in *Leclerc-Siplec v. TF1*⁴⁰ the Court interpreted Article 3 paragraph 1 of the 1989-Directive and confirmed that Member States may indeed impose stricter rules on television broadcasters under their jurisdiction in the areas covered by the Directive. On the basis of this provision, France was allowed to prohibit the broadcasting of advertisements for the retail sector by television broadcasters established on its territory. The Court stated that Article 3 does not contain any restrictions as to the interests which the Member States may take into consideration when prohibiting televised advertising.⁴¹ The use of more stringent rules may, however, not impair freedoms guaranteed by the ECT.⁴² The Court confirmed this interpretation of Article 3 paragraph 1 in another advertising case, this time concerning Italy.⁴³ Along the same lines, Sweden has been permitted to apply its ban on advertising aimed at children less than twelve years of age to broadcasters under its jurisdiction.⁴⁴

In contrast, if transborder television is concerned and if the Directive covers the subject matter, Member States may not impose stricter rules. This was made clear by the Court's ruling in *KO v. De Agostini* and *KO v. TV-Shop*,⁴⁵ in which the Court examined Article 11 of the Swedish Broadcasting Act, the very provision stipulating that TV commercials may not be directed at children under twelve. Such commercials were transmitted via satellite into Sweden by TV3, a broadcaster based and licensed in the United Kingdom. Because the protection of minors came within the scope of the Directive, Sweden was prohibited from applying Article 11 to TV3.

In the same judgement, the Court considered the possibility of applying Swedish rules on misleading advertising with regard to “infomercials” transmitted as part of a transfrontier service. Because misleading advertising was not addressed by the 1989-Directive, the Court

⁴⁰ Case C-412/93 of 9 February 1995, *Société d'Importation Édouard Leclerc-Siplec v. TF1 Publicité S.A. & M6 Publicité S.A.*, Rep. 1995, p.I-1799.

⁴¹ In particular, the interest was not restricted to the circumstances set out in Articles 19 and 20. See Points 38 to 48 of the Court's reasoning.

⁴² The case made specific reference to Articles 28 (ex Article 30), 76 (ex Article 80), 81 (ex Article 85), and 3 I (f) (Article 3 f) ECT. However, on 7 May 2002, the European Commission decided to commence infringement proceedings against France and sent formal notice in respect of the prohibition of advertising on television for literary publishing, the cinema, the press and the retail sector. This decision followed two complaints, one brought by a Belgian furniture retailer whose advertising was refused by the France 3-Nord television channel, and the other complaint brought by the magazine press trade union (*Syndicat de la presse magazine*), with the support of the press publisher Emap, whose promotion of its magazine FHM was refused by the M6 television channel. The Commission considered that this prohibition infringed the principle of the freedom to provide services, as prescribed in Article 49 ECT. The Commission felt that the ban hampered the free movement of services in the Community. Following this, on 7 October 2003 France issued a new Decree no. 2003-960 to amend Decree no. 92-280 of 27 March 1992, opening advertising on television to the literary publishing, cinema, press and retail sectors.

⁴³ Joined cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94, *R.T.I. and others v. Ministero delle Poste e Telecomunicazioni*, Judgment of the Court of Justice of 12 December 1996, ECR I-6471.

⁴⁴ See the 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. See further for the final decision in the De Agostini case the judgement by *Marknadsdomstol* (the Market Court) of 20 November 1998, Decision Nr 1998:17; IRIS 1999-2: 6.

⁴⁵ C-34/95, C-35/95 and C-36/95.

held that the Swedish rules could be applied to foreign broadcasts as long as this was not contrary to the free movement of services.⁴⁶

3. Prelude to Revising the 1989-Directive

The contours of the jurisdictional rules contained in the 1989-Directive were shaped with the help of the Court of Justice of the European Communities. When the Commission, on 31 May 1995, delivered its Communication (which contained not only the Report on the implementation of the Directive but also a Proposal for an amending Directive) to the European Parliament and the Council, it could build on the following general rules on personal jurisdiction:

- The *place of establishment* of a broadcasting company determines *personal jurisdiction*.
- If a broadcaster is *established in more than one Member State*, the place where the broadcaster has its *centre of activities* is decisive.
- *The Centre of activities* is characterised as *the place where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together*.
- *Double control* is in principle forbidden.
- Circumstances that allow the receiving country to apply its domestic rules to transfrontier television are the narrowly defined exceptions laid down in *Article 2 paragraph 2*, and cases of *circumvention*.

Furthermore it had been settled that:

- *Cable retransmission* is within the scope of the 1989-Directive.
- *The violation of quota rules* does not satisfy the requirements of Article 2 paragraph 2.
- *A broadcaster, which does not have business activities in its host country*, can nevertheless benefit from the rules on freedom of movement.

Concerning subject-matter jurisdiction, it had been clarified that:

- The Member State with jurisdiction *ensures the application of its own law as well as the rules of the Directive*.
- In *purely national cases* the Member States are generally allowed to impose higher standards provided that it does not hinder the goals of the free market.
- In *transfrontier settings* they may impose stricter rules only in areas not pre-empted by the Directive.

As will be described in the following sections, most of these findings were adopted, some even literally, by Directive 97/96/EC that amended the 1989-Directive.

⁴⁶ See also J.H. Lans, *European Union*, in Legal Guide to Audiovisual Media in Europe, European Audiovisual Observatory (publisher), Strasbourg, 1999.

III) Directive 97/36/EC

A major goal of Directive 97/36/EC (hereinafter the 1997-Directive) consisted in clarifying the existing rules on jurisdiction. Differing from its predecessor, the 1997-Directive introduced a rather complex system for the determination of jurisdiction.

1. New "Old" Rules

Article 2 of the 1997-Directive is the central provision.

Its first paragraph stipulates that the Member State who has jurisdiction must ensure compliance with the "rules of the system of law" applicable to broadcasts intended for the public in that Member State. The change of wording (previously only "the law applicable") clarifies what previous case law had suggested, namely that this includes the control of EC Law.

Article 2 second paragraph of the 1997-Directive lays down rules on how to determine (personal) jurisdiction. The application of these rules, Recital 13 explains, shall yield the result that, on the one hand, "one Member State and one only has jurisdiction" and, on the other hand, "cases where there is a vacuum of jurisdiction" are to be avoided. In order to achieve this goal the Directive uses a legislative technique which could be compared to the multi-layered construction of a Russian doll. More precisely, EC-Law offers one '*Matryoshka*' as the main and another as the ancillary principle.

Article 2 paragraph 2, first hyphen, introduces the first 'Russian doll', namely the **establishment principle**. According to this principle a Member State has jurisdiction over broadcasters established in that very Member State. The next layer of the 'Russian doll', that is paragraph three of Article 2, interprets the criteria of being established. A broadcaster shall be deemed to be established in a Member State where it has its *head office and where the editorial decisions* about programme schedules are taken (Art. 2 III a)). Should, however, the application of this rule point to two different Member States, the next layer of the 'Russian doll' stipulates that jurisdiction will be with the Member State where a *significant part of the workforce* involved in the pursuit of television broadcasting activity operates (Art. 2 III b) first alternative). If this is the case for both Member States in question, the *head office* becomes the decisive factor (Art. 2 III b) second alternative). The next layer of the 'Russian doll' treats the case where a significant part of the workforce can be found in neither of the two Member States in question. In that case jurisdiction lies with the Member State *where the broadcasting commenced* in accordance with the system of law of that Member State, provided that a stable and effective link with its economy persists (Art. 2 III b) third alternative). The last and smallest 'Russian doll' of the establishment series needs to be unveiled only if none of the scenarios described by Art. 2 III b) applies; where a broadcaster has its head office in a Member State but the decisions on programme schedules are taken in a third country, or vice versa. In that case the broadcaster is deemed to be established in that Member State provided that the "significant part of the workforce" criterion is also fulfilled with regard to that Member State (Art. 2 III c)).

In sum, Article 2 paragraph 2, first hyphen, in conjunction with Art. 2 III provide what Recital 12 of the Directive calls "a series of practical criteria" to determine the establishment of a television broadcaster. By and large these criteria perpetuate the findings of previous case law described earlier.

Yet under certain circumstance even these practical criteria might not allow to properly identify the country of jurisdiction. For this reason Article 2 paragraph 1, second hyphen proposes an ancillary 'Russian doll' in order to determine jurisdiction with regard to some technical criteria. Again reference is made to another provision namely the fourth paragraph of Article 2 that accounts for the following layers of the doll: the Member State whose frequency is being used (Article 2 IV a)), alternatively the Member State to which the satellite capacity used appertains (Article 2 IV b)), alternatively the Member State where the up-link

used is situated (Article 2 IV c)). Resort to this 'Russian doll', however, is possible only after having dismantled the first one without result.

Finally, the legislator has provided a fallback clause to ensure the determination of establishment even if none of the criteria mentioned so far are met. For these instances Article 2 paragraph 5 refers to the notion of establishment used in Articles 52 et seq. of the Treaty establishing the European Community (now Articles 43 et seq. ECT).⁴⁷

In addition to determining which Member State has jurisdiction over which broadcaster, the 1997-Directive reproduced faithfully the principle that no Member State shall impose restrictions for retransmission of broadcasts from other Member States with regard to issues coordinated by the Directive (Article 2a paragraph 1 that equals Article 2 paragraph 2 of the 1989-Directive). Furthermore, the Directive detailed and updated existing rules, and broadened the range of issues covered to include the transmission of major events and included a mechanism to facilitate implementation of the Directive (Contact Committee).

It also copied the exceptions under which a Member State may block the retransmission (see *supra* II. 1.) as well as the main traits of the procedure that ought to be followed in order to legitimise the suspension (Article 2a paragraph 2 and 3).

Since the amendment of the "Television without Frontiers" Directive, one Article 2a suspension case has reached the European Courts, namely the Court of First Instance (in Luxembourg).⁴⁸ The European Commission had confirmed a restrictive measure taken by the United Kingdom against Danish Satellite TV A/S (Eurotica Rendez-Vous Television; hereinafter DSTV) for breaching Article 22 of the Directive. DSTV, which is a Danish broadcasting company also received in the UK, asked the Court of First Instance for annulment of the Commission's confirmation of the UK-restrictive measure. The Court of First Instance dismissed the action as inadmissible because the company concerned was in fact asking for invalidation of a national measure, which it had had to seek before the national courts. The decision of the Commission, the Court found, was limited to the ex post facto finding of compatibility of the UK measure with Community law and could have been disputed only by the Member State concerned.

The EFTA Surveillance Authority more recently judged a similar case. It concerned the retransmission of the Swedish programmes *Canal+ Gul*, *Canal+ Blå* and *TV1000* over the Norwegian digital television cable network. In June 2003, the *Statens medievorvaltning* (Norwegian Mass Media authority) prohibited the retransmission because of pornographic content, which was found to violate Section 204 of *Almindelig borgerlig Straffelov* (the General Civil Penal Code). Referring to the exception provided by Article 2a (2) of the "Television without Frontiers" Directive, the Surveillance Authority found that the measures taken by the Norwegian authorities were in accordance with EEA law. In particular, the Surveillance Authority stressed the discretion of Norway "to restrict broadcast on its territory of programmes that collide with its national moral standards and that might thereby seriously impair the physical, mental or moral development of minors"⁴⁹ and that, in this regard, the programmes in question did meet the requirements of Article 22 paragraph (1) of the Directive. It is also interesting to note that the Surveillance Authority did accept that Norway laid down in the abstract terms of its penal code the conditions under which content is found to have detrimental effects on the development of minors. It attached the condition that this was done in compliance with the requirements of Article 22 paragraph 1 of the 1997-Directive.⁵⁰

⁴⁷ Article 2 paragraph 6 follows the former Article 2 paragraph 3 of the 1989-Directive in stating that the Directive does not apply to broadcasts intended exclusively for reception in third countries and that are not received by the public of any of the Member States.

⁴⁸ Case T-69/99, *Danish Satellite TV v. Commission of the European Communities*, Court of First Instance of the European Communities, judgement of 13 December 2000.

⁴⁹ See "EFTA Surveillance Authority confirms compatibility of Norwegian ban on certain cross-border television broadcasts with EEA law", Press Release of the EFTA Surveillance Authority PR(03)25, 8 October 2003 <http://merlin.obs.coe.int/redirect.php?id=8702>.

⁵⁰ The decision of the Surveillance Authority is in line with the advisory opinion delivered by the EFTA Court in Case E-8/97 *TV1000 Sverige AB v. Norway* [1998] EFTA Court Report 68.

Retransmission was also the focus of a decision by *Granskningsnämnden för radio och TV* (the Swedish Broadcasting Commission) that resulted in further clarification of the interpretation of the term. In this context it should be recalled that the “Television without Frontiers” Directive does not define “retransmission” though it is a key notion underlying many of its provisions.⁵¹ At the origin of the decision was a complaint concerning programme content for which TV3, a broadcaster licensed in the UK, was responsible. In Sweden TV3 distributed this content in a digital terrestrial multiplex under a Swedish licence obtained by its Swedish subsidiary TV3 AB but it already broadcast the same content via satellite in the United Kingdom. The Swedish licence had been issued according to the Swedish licensing system for digital terrestrial transmission and as foreseen by that system, it contained content-related provisions that were allegedly violated. The Swedish Broadcasting Commission found that the Swedish licence issued to TV3’s Swedish subsidiary TV3 AB had to be disregarded because the distribution of TV3’s programme in a digital terrestrial multiplex constituted a retransmission similar to cable transmission and Sweden had no way of subjecting TV3 to a second licensing system that would include content regulation.⁵² In drawing this parallel between the two transmission modes it appears that the Swedish Broadcasting Commission decided in line with the Case C-11/95 (see *supra* II. 2. c), *Commission v. Belgium*).

The 1997-Directive also follows the 1989-Directive regarding the possibility of a Member State applying stricter rules for broadcasters under its jurisdiction. The first two paragraphs of Article 3 of the 1997-Directive reiterate the previously existing provisions (Article 3 I and II of the 1989-Directive). The 1997-Directive added a third paragraph that obliges Member States to include in the measures the appropriate procedures so that directly affected third parties are in a position to seek effective compliance under national law.

Furthermore, the Court of Justice of the European Communities confirmed for the amended Directive the scope of application of Article 3 as defined by earlier case law for the 1989-Directive. The occasion for this clarification was provided by *ARD v. Pro Sieben Media*.⁵³ The Court of Justice had to be called upon in order to judge whether or not Germany’s law introducing the net-principle for calculating the time allowed for advertising was a proper transposition of the 1997-Directive into national law. At the origin of the case was a judgement by the *Landgericht Stuttgart* in which that German court of first instance had asked the defendant, Pro Sieben Media AG, to abstain from using advertising intervals in broadcasting that were in violation of the net-principle.⁵⁴ The private broadcaster had defended its advertising practice with the argument that Article 11 paragraph 3 of the 1997-Directive had introduced the gross-principle and that therefore the gross-principle should also have been transposed into German law. The Court of Justice of the European Communities agreed to the defendant’s interpretation of Article 11 of the 1997-Directive but did not draw the conclusion that the current German law was in violation of EC law. The Court explained that a Member State had the right to introduce stricter standards as long as its law was not violating the ECT. Furthermore, even a negative impact on the freedoms granted by the ECT could be justified (and would thus not violate EC law) if the national law served compelling public interests (*in casu* consumer interests in the framework of cultural policy) and was proportionate, as well as suited and necessary to achieve the goal set.⁵⁵ The Court of Justice of the European Communities based its decision on Article 3 paragraph 1 of the Directive.

⁵¹ In contrast the retransmission is specified in Article 2(b) of the European Convention on Transfrontier Television as: “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”.

⁵² In fact two decisions of the Swedish Broadcasting Commission, SB202 involving Kanal 5 and 203/00 involving TV3, with virtually identical facts treated the pertinent question. Both decisions date of 15 June 2000 and 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. See further, G. Lindberg, “DTT Licensees Found to Be British”, IRIS 2000-9: 11

⁵³ Case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. Pro Sieben Media AG* [1999], Judgment of 28 October 1999, ECR I-7599.

⁵⁴ The lawsuit had been brought by the *Arbeitsgemeinschaft Deutscher Rundfunkanstalten* (the eleven public broadcasters responsible for the ARD).

⁵⁵ See points 49-51 of the Decision.

Previous case law, in particular *Leclerc-Siplec v. TF1* (see *supra* II.2.c)) left its imprints also insofar as the 1997-Directive did not take up Article 19 of the 1989-Directive.

The 1997-Directive has also incorporated the jurisprudence on circumvention. In this regard, Recital 14 recalls that the Court of Justice of the European Communities has regularly confirmed the right of a Member State “to take measures against a television broadcasting organization that is established in another Member State but directs all or most of its activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the organization had it been established on the territory of the first Member State.” The wording of Recital 14 stresses that circumvention requires a specific intent as subjective element.

The 1997-Directive also introduced the definition of “broadcaster”. Article 1 b) of the Directive qualifies as broadcaster the “natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of (a)⁵⁶ and who transmits them or has them transmitted by third parties.” It is only after the broadcaster has been identified that we arrive at the second question of which Member State has jurisdiction over that broadcaster. It is important that regulatory authorities respect this sequence because the natural or legal person who applies for a licence may not be identical with the broadcaster.

The dispute between the *Commissariaat voor de Media* (Dutch Media Authority) and the *Commission indépendante de la radiodiffusion* (Broadcasting Commission of Luxembourg) concerning RTL4 and RTL5 illustrates the importance as well as the difficulties in determining the broadcaster. The question was whether RTL/Veronica de Holland Media Groep S.A. (HMG) or the CLT-UFA S.A. should be qualified as the broadcaster. Both companies were established in Luxembourg. The Dutch Media Authority took the view that HMG had exercised its editorial responsibility and made its programme decisions in the Netherlands where in addition the majority of personnel was working. In contrast, the Broadcasting Commission of Luxembourg emphasised that the centre of gravity as regards the ultimate responsibility as well as the strategic and commercial decisions were with CLT-UFA in Luxembourg.⁵⁷ The dispute reached the Dutch *Raad van State* (Council of State), who agreed with the Dutch Media Authority that the facts were pointing towards jurisdiction in the Netherlands. Nevertheless, it decided that the broadcaster was established in Luxembourg and thus in favour of jurisdiction in that same country. This was in order to avoid that RTL4 and RTL5, which were already operating under a licence from Luxembourg, be subject to double control. In its decision the Council of State stressed the responsibility of the Dutch Media Authority to implement the goals of the 1997-Directive but also the fact that the Directive lacked rules on how to handle cases where the establishment of a broadcaster already licensed had changed.⁵⁸

It should be noted that the parties involved used criteria such as editorial responsibility for determining the responsibility of broadcasters. These are similar to those governing the jurisdictional provisions of the 1997-Directive (to be applied once the broadcaster has been determined).

⁵⁶ Article 1 (a) adopted the definition of “television broadcasting” from the 1989-Directive.

⁵⁷ 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.

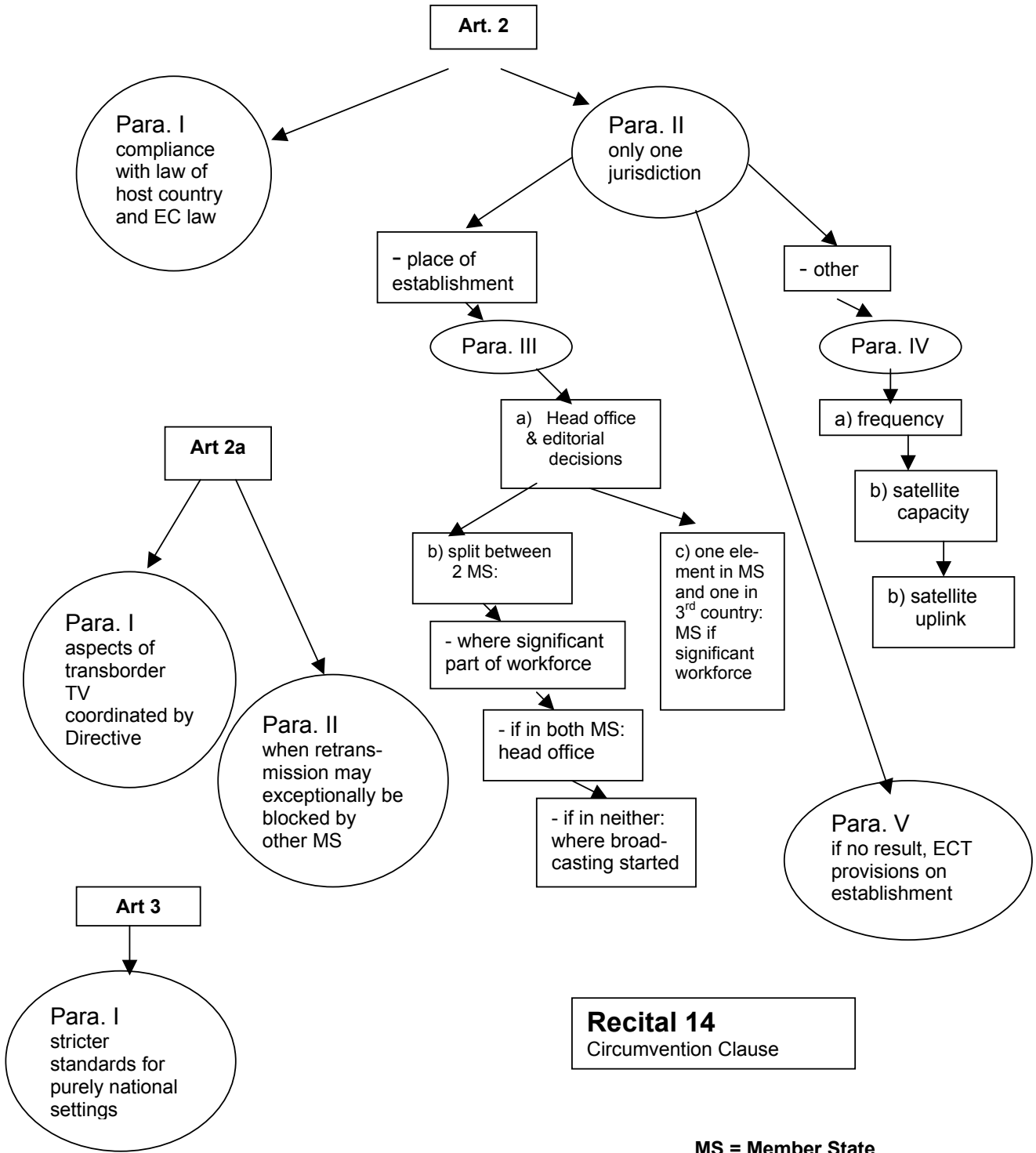
⁵⁸ The Ruling of the *Afdeling Bestuursrechtspraak* (Administrative Law Division) of the *Raad van State* (Council of State) of the Netherlands on the case of RTL/Veronica de Holland Media Groep S.A. and CLT-UFA S.A. v. the *Commissariaat voor de Media* (Dutch Media Authority) of 10 April 2001, Doc. CC TVSF (2001) 20.

2. In a Nutshell

The following diagram provides an overview of the status quo in relation to the most important rules on jurisdiction.

subject matter jurisdiction

personal jurisdiction



IV) Observations and Questions

Despite the evolution of the jurisdictional rules the determination of jurisdiction over broadcasters remains an issue for as long as broadcasters perceive the laws of some countries as more favourable than those of others. We have already looked at the “choice” between gross or net calculation of advertising time (ARD v. Pro Sieben Media), and the rules on misleading advertising (Joined Cases KO v. De Agostini and KO v. TV-Shop). These examples illustrate that different national standards emerge because the “Television without Frontiers” Directive allows Member States to apply stricter rules to broadcasters established on their territory, while stricter rules may be applied to foreign broadcasters only in areas not coordinated by the Directive.

In addition, European provisions other than those contained in the “Television without Frontiers” Directive are of great importance in choosing the place of establishment. This was demonstrated by the Centros case.⁵⁹ Two Danish nationals had established their company in the United Kingdom merely in order to avoid the payment of the minimum corporate capital of (at the time) DKK 200.000 (versus the payment of a converted approximate DKK 1.000 in the United Kingdom). The Court of Justice of the European Communities held that choosing the the country with the most benign company law was a legitimate use of the freedoms guaranteed by the ECT.⁶⁰

There are various other reasons to believe that differences in domestic laws transposing the “Television without Frontiers” Directive will persist:

First, the Directive lacks some important definitions, namely that of ‘television programme’ even though it is central for identifying the broadcaster (Article 1 b)) and determining jurisdiction.⁶¹ Depending on the facts of a given case we may have to ask: Is the linguistic adaptation of a programme a new programme? How about the tailoring of a programme, for example news programmes, to regional needs? Likewise the Directive includes no definition of the notion of retransmission, as already mentioned.

Secondly, even where definitions are provided they can still be interpreted differently. For example, “editorial responsibility/decisions”, again a key term for identifying who is the broadcaster (Article 1 b) and for determining jurisdiction (Article 2 paragraph 3 a) and b)), invites the question whether editorial responsibility/decisions is to be linked to daily or rather strategic decisions. And how is it to be handled if the broadcasting company’s organisational structure is composite and very complex – an economic reality not necessarily envisaged by the authors of the Directive but nonetheless quite common? What role is played by ownership and the right to give orders? Likewise, how shall we determine “significant part of the workforce”? Is it a quantitative or a qualitative approach? Is it restricted to the personnel involved in the transmission? Or does it include other staff members such as salespersons or technicians?

Third, technological innovations breed new jurisdictional challenges. These innovations range from the insertion of local windows, to virtual advertising, advertisement insertion by cable operators to semi-interactive (broadcasting) services. And more may be expected. Jurisdictional problems could arise if, for example, one Member State considers a local window as part of the same service⁶² and another Member State as a separate service. A country targeted from abroad by advertising windows may have a particular interest in applying its own advertising rules.⁶³ Concerning virtual advertising the key question may be

⁵⁹ See also footnote 20.

⁶⁰ See Case C-212/97 at Points 13-14 and 27.

⁶¹ In contrast, the European Convention on Transborder Television stipulates in Article 2 (d) that the equivalent notion of “programme service”, with which the Convention operates “means all the items within a single service provided by a given broadcaster within the meaning of the preceding paragraph”.

⁶² The Directive uses here the term “programme” in the sense of service.

⁶³ For example concerning (potential) advertising window of the French broadcaster M6 in Switzerland, see O. Sidler in IRIS 2001-9: 7 “[CH] Foreign Advertising Window Unwelcome”.

In the context of jurisdiction over advertising windows, see also J. P. Müßig in IRIS 2002-10: 7 “[DE] LPR Alleges Breach of Alcohol Advertising Rules in SAT.1 Swiss Advertising Window”. The background to these cases is the Swiss prohibition of advertising alcoholic beverages.

that of who carries the editorial responsibility. Similarly it could be questioned who is actually inserting advertising messages of cable operators in the programme schedule of a programme provider? Is it the broadcaster who contractually agreed to such the service or is it the advertising cable provider himself?⁶⁴

Fourth, cultural differences and mere unfeasibility make it unlikely that all aspects of transfrontier television that might warrant harmonisation will indeed be harmonised. The notion of pornography used in (Article 22 paragraph 1 of) the “Television without Frontiers” Directive is a prominent example for this phenomenon. “I could never succeed in intelligibly [defining pornography], but I know it when I see it.” is the often-quoted phrase coined in 1964 by judge Potter Stewart in *Jacobellis v. Ohio*,⁶⁵ which eloquently summarises the dilemma. Consequently the definition is to be taken on a case-by-case basis and left to the responsible national authorities.

Fifth, the subsidiary principle of the ECT even obliges the European legislator to exercise self-restraint especially in areas that do not fall within its exclusive competence. As a result “Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”⁶⁶ Likewise the case law of the European Court of Human Rights on the national margin of appreciation establishes some limits on the level of detail of EC Regulation.⁶⁷

We can conclude that national laws will continue to give expression to different standards and as a result broadcasters will continue to have an incentive for *forum shopping*. Hence, the potential for jurisdictional conflicts will persist. Consequently, the legal remedies available for solving them step into the limelight.

Article 23 a of the Directive establishes a Contact Committee that serves among others as a forum for “regular consultations on practical problems arising from its application” (paragraph 2 (a)) and the “exchange of information on the situation, and for the delivery of “opinions ... on the application by the Member States of the Provisions of this Directive” (paragraph 2 (b)), and for the facilitation of “the development of regulatory activities” (paragraph 2 (e)). The “Television without Frontiers” Directive lacks procedural measures for obtaining expeditious decisions from the Court of Justice of the European Communities. In the past, it has been mainly left to the national courts and tribunals concerned with litigation over jurisdiction to ask the Court of Justice of the European Communities for the correct interpretation and application of the Directive thereby following the procedure prescribed by Article 234 ECT.⁶⁸ In contrast, the European Convention on Transfrontier Television in addition to establishing a

⁶⁴ For further elaboration of this and the previous point see T. Mc Gonagle/A. van Loon in *IRIS Special Jurisdiction over Broadcasters in Europe* at page 16.

⁶⁵ 378 U.S. 184 (1964), available at: <http://www.aegis.com/law/SCT/Decisions/1964/378US184.html> .

⁶⁶ Article 5 (ex Article 3b), last sentence ECT.

⁶⁷ 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).”

⁶⁸ Article 234 (ex Article 177) ECT provides that:

“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.”

Standing Committee with functions similar to those of the Contact Committee⁶⁹ also provides for the resolution of disputes by conciliation⁷⁰ and arbitration.⁷¹

Last but not least the aspect of consistency between different jurisdictional approaches in various Directives concerning the audiovisual sector deserves some consideration.

The Satellite and Cable Directive, which regulates issues that had originally been envisaged to become parts of the “Television without Frontiers” Directive and now supplements the Directive with some copyright provisions also uses the “country-of-origin principle” but connects this principle to technical (rather than content) requirements.⁷²

Even more important, EC law distinguishes between three categories of communications services, namely broadcasting, information society services,⁷³ and electronic communications services.⁷⁴ While jurisdiction over information society services follows the establishment criteria of the EC Treaty, the Framework Directive does not contain any jurisdictional provisions for electronic communications services. Moreover the definition of electronic communications services explicitly excludes all services where editorial control plays a role. In times of convergence, consideration must be given both to the co-existence and to the lack of jurisdictional rules provided for each of these services.

Finally, what may be concluded about the impact of the “Television without Frontiers” Directive on national TV landscapes? Reviewing the dense web of technical and related economic developments in broadcasting, and the related case law and legislative activity touched upon here, the conclusion appears inescapably circular. In fact, the resemblance to the famous “chicken and egg” debate cannot help but strike us.

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⁶⁹ Article 21 of the European Convention on Transfrontier Television.

⁷⁰ Article 25 *ibid*.

⁷¹ Article 26 *ibid* with an Appendix describing the arbitration procedure in more detail..

⁷² See Article 1 paragraph 2 (b) and (d) of 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, 6 October 1993 p. 15-21.

⁷³ 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, *OJEC* L 217 , 5 August 1998 p. 18-26 defines “Information Society Service”. 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”) *OJEC* L 178 , 17 July 2000 p. 1–16.

⁷⁴ “Electronic communications service” is defined in Article 2 c) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) *OJEC* L 108, 24 April 2002 pp. 33-50.

APPENDIX 1

SELECTION OF RELEVANT CASE LAW AT THE 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=61974J0033

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

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://merlin.obs.coe.int/iris/1995/1/article8.en.html>

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-412/93 of 9 February 1995, Société d'Importation Édouard Leclerc-Siplec v. TF1 Publicité S.A. & M6 Publicité S.A., Rep. 1995, p.I-1799, available at:
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=61993J0412&model=guichett
<http://merlin.obs.coe.int/iris/1995/3/article9.en.html>

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

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

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://merlin.obs.coe.int/iris/1996/10/article6.en.html>

Joined cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-330/94, R.T.I. and others v. Ministero delle Poste e Telecomunicazioni, Judgment of the Court of Justice of 12 December 1996, available at:

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=61994J0320&model=guichett
<http://merlin.obs.coe.int/iris/1997/1/article9.en.html>

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://merlin.obs.coe.int/iris/1997/8/article7.en.html>

Case C-14/96, Paul Denuit (TNT & Cartoon Network), Judgement of the Court of Justice of the European Communities of 29th May 1997

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=61996J0014&model=guichett
<http://merlin.obs.coe.int/iris/1997/7/article6.en.html>

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://merlin.obs.coe.int/iris/1997/7/article7.en.html>

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://merlin.obs.coe.int/iris/1999/10/article5.en.html>

Case T-69/99, Danish Satellite TV v. Commission of the European Communities, Court of First Instance of the European Communities, judgement of 13 December 2000, available at:

<http://merlin.obs.coe.int/redirect.php?id=230>
<http://merlin.obs.coe.int/iris/2001/2/article3.en.html>

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>

SELECTION OF DECISIONS TAKEN AT A NATIONAL LEVEL

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>

Conseil d'Etat, 25 November 1998, applications no.172407 and no.168125, Compagnie Luxembourgeoise de Télédiffusion (CLT).
<http://merlin.obs.coe.int/iris/1999/1/article6.en.html>

District Court Amsterdam, judgment of 7 September 2000, case 98/3461. Holland Media Groep (Holland Media Group) v. Commissariaat voor de Media (Dutch Media Authority).
<http://merlin.obs.coe.int/iris/2000/9/article22.en.html>

Vlaams Commissariaat voor de media VT4 [BE v. GB]
Decision of the Vlaams Commissariaat voor de Media (Flemish Media Authority) of 15 February 2002 (nr. 2002/15), licensing VT4 for a period of nine years as a Flemish broadcasting organisation under article 41, 1° of the Broadcasting Act 1995
<http://merlin.obs.coe.int/iris/2002/3/article11.en.html>

Case - CLT-UFA SA [NL v. LU]
Dutch Supreme Court in administrative proceedings, Judgment of 6 August 2003, Case No 200203476/1
<http://merlin.obs.coe.int/redirect.php?id=8564>
<http://merlin.obs.coe.int/iris/2003/8/article24.en.html>

OTHER

Survey of TV3 Broadcasts in relation to certain regulations in EC Directive 89/552/EEC on "Television without Frontiers" (Survey based on TV3 transmissions 19-23 November 1996), 18 March 1997
<http://merlin.obs.coe.int/iris/1997/6/article31.en.html>

Section 177 order which proscribes Eurotica Rendez Vous, which came into force at Friday 11 September 1998.

IRIS 1998-9:16/31

<http://merlin.obs.coe.int/iris/1998/9/article31.en.html>

APPENDIX 2

METHODOLOGICAL ISSUES RELATING TO THE IDENTIFICATION OF TV CHANNELS IN EUROPE

Sources for monitoring TV channels

Various sources are available to assist in the identification of television channels operating in European markets:

- the list of licences awarded as published by national regulatory authorities;
- the list of channels communicated by the Member States to the Commission in the framework of reporting on implementation of Articles 4 and 5;
- the line-ups published by cable and satellite operators and terrestrial transmission operators;
- the marketing documentation published by the distributors of various TV channels ("packagers") in order to explain to clients or prospective clients the channels that they may receive via the service;
- TV programme magazines or websites;
- observations published by independent trackers, in particular in relation to channels made available on satellites.

Each of those sources has its own merits and weaknesses and a comprehensive listing for market analysis needs to be based on a cross-checking process.

The principal problem is the identification of the real existence of satellite television channels. For a number of years the European Audiovisual Observatory has used the detailed listing published by an independent Swedish "satellite-tracker", [lyngsat.com](http://www.lyngsat.com), which works with a network of correspondents throughout the world. The website <http://www.lyngsat.com> provides detailed listings of TV and radio channels, based on the observation of almost all the commercial satellites existing worldwide, with a technical description (position, number of transponder, system of encryption, language,...) and daily up-dates. It should be recognised that such a source provides information complimentary to the other sources and, in particular to the lists as published by the regulatory authorities, which, for various reasons, may provide incomplete information. It should also be underlined that cross-checking between the various sources does not always allow to identify in a entirely reliable manner the country of establishment and the country of up-link of the channels.

What is a TV channel?

Establishing the number of television services available on a European level poses diverse methodological problems, problems generally related to the diversity of the different national definitions and to the need to call upon frequently heterogeneous sources. **Table 2** is an attempt to overcome these problems by adopting a unique definition and applying it consistently to all the Member States of the European Union.

The definitions applied in this table are as follows:

Channels holding a national terrestrial analogue broadcasting licence: we include here the 'traditional' channels, distinguishing between publicly and commercially operated services. Most of these national channels are also available through satellite or cable.

Other channels with national coverage: included here are channels made available by satellite and by cable (in the case of national or near-national coverage), and digital terrestrial television (at present available only in Berlin-Brandenburg, Finland, the United Kingdom and Sweden). We do not include here 'dedicated' channels based in another country, even if they have as chief target the country in question, nor channels based in the country but principally targeting foreign markets. A channel's staggered retransmission service is not counted as a

distinct channel and a pay-per-view service is counted as a single channel, even if a number of channels with distinct programme schedules are available.

Regional windows of national channels: under this heading we count the number of windows or opt-outs targeting a specific region within national public or private channels. Italian local or regional channels affiliated to a syndication service are not included.

Regional or territorially based channels: we count here public or private channels targeting a regional or territorial unit (a 'Land' in Germany, a 'Comunidad' in Spain, the DOM-TOM in France...) or a linguistic minority (Welsh language channels in the United Kingdom, services for the Swedish-speaking minority in Finland, etc.). It should be noted that these channels are increasingly carried by satellite, giving them *de facto* a national or even European coverage.

Local channels: we count here local stations, whether public (municipal), community-run (not-for-profit) or private, and whether transmitted free-to-air, via cable or even, in certain exceptional cases, via satellite.

'Dedicated' foreign channels: included here are channels based in a foreign country but clearly targeting the market of the reference country, either because their programme schedules are specifically conceived for this market (for example RTL4 and RTL5, two Luxembourgish channels targeting the Dutch market), or because they provide a specific language version of a pan-European channel (for example the various language versions of Cartoon Network, Fox Kids, TCM...).

Channels targeting foreign markets: we count here channels based in the country in question but targeting foreign markets. This can include channels specifically intended for export (for example, BBC Worldwide, TV5...), or 'reduced' versions of national channels (RTP Internacional, RTVE Internacional...), pan-European channels (e.g. MTV Europe) or channels targeting the national markets of one or more of the Member States (e.g. RTL4 and RTL5, TV3, VT4...). Each different language version of any one service is counted as a separate channel. It should be noted that certain of these channels are identical with those accounted for in the category "'Dedicated' foreign channels".

Various: we include here specific services such as those intended for the American Armed Forces.

Channel packages: these are not shown in the version of Table 2 reproduced here but are included in the complete version of this table published in the Volume 5 of the Observatory *Yearbook*⁷⁵. Included in the *Yearbook* table is the number of channel packages commercialised directly as such. Packages such as those composed by cable operators on the basis of existing satellite packages, and those which are not made directly available to the public (in particular packages put together by public service organisations) are not taken into account. A number of cases exist of packages targeting markets other than their country of origin (the Orbit package in Cyprus, aimed at Arab countries, Zone in the United Kingdom and UPC/chellomedia in the Netherlands serving in both cases Central Europe,...).

⁷⁵ *Yearbook 2003*, Volume 5, *Television Channels – Programme Production and Distribution*, pp.10-11, European Audiovisual Observatory, Strasbourg 2004.



The EUROPEAN AUDIOVISUAL OBSERVATORY

Set up in December 1992, the European Audiovisual Observatory's goal is to gather and diffuse information on the audiovisual industry in Europe. The Observatory is a European public service body comprised of 35 member states and the European Community, represented by the European Commission. It operates as a partial agreement of the Council of Europe and works alongside a number of partner and professional organisations from within the industry, together with a Europe-wide network of correspondents. In addition to contributions to conferences, other major activities are the publication of a Yearbook, a newsletter and reports, the management of the LUMIERE, KORDA and IRIS MERLIN databases, and the provision of information through the Observatory's Internet site: (<http://www.obs.coe.int/>).

Following the conference, this report can be downloaded in PDF format by using the link :

http://www.obs.coe.int/online_publication/transfrontier_tv.pdf.en

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