

OPINION OF ADVOCATE GENERAL

BOT

delivered on 5 May 2011¹

1. In these cases, the Court is requested to determine the scope of the condition set out in Article 22a of Council Directive 89/552/EEC,² under which television broadcasts from a Member State must not contain any incitement to hatred on grounds of race, sex, religion or nationality.

2. The Bundesverwaltungsgericht (Federal Administrative Court, Germany) asks whether that condition must be interpreted as covering the requirement laid down in German law, under which a television broadcast must not infringe the principles of international understanding.

3. This question arises from the fact that, under the system provided for by the Directive, a Member State may not prevent the retransmission of a television broadcast from another Member State on a ground which falls within the fields coordinated by the Directive, except in the specific conditions laid

down by the Directive, after notifying the European Commission of the measures it intends to take.

4. This question originates from the prohibition on transmission to Germany of broadcasts by a Danish television broadcaster on the ground that these broadcasts were attempting to justify the Kurdistan Workers' Party ('the PKK') and thus were infringing the principles of international understanding in terms of German law, even though the competent Danish authorities had decided that these broadcasts were not infringing Article 22a of the Directive.

5. In this Opinion, I shall set out the reasons why the prohibition on any incitement to hatred on grounds of race or nationality laid down in Article 22a of the Directive must be construed, semantically, as meaning that it also prohibits broadcasts which, in attempting to justify a group classified as a 'terrorist' organisation by the European Union, may create reactions of animosity or rejection

¹ — Original language: French.

² — Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('the Directive').

between communities of different ethnic or cultural origin.

6. I shall also show that this interpretation is the most consistent with the Directive's objective of guaranteeing freedom of transmission in television broadcasting by abolishing restrictions resulting from disparities in national laws in the field of protection of public order as regards broadcasts of a discriminatory nature.

I — Legal framework

A — *The Directive*

7. The Directive is based on the premiss that existing disparities in the laws of Member States concerning the pursuit of television broadcasting activities may impede the free movement of broadcasts within the European Community and that, under the EC Treaty, these restrictions must be abolished.³ Consequently, the Directive is intended to achieve the harmonisation necessary and sufficient to ensure this free movement.⁴

³ — The 9th and 10th recitals in the preamble to the Directive.

⁴ — The 13th recital in the preamble to the Directive and recital 44 in the preamble to Directive 97/36.

8. In addition, under the eighth recital in the preamble to the Directive, the free movement of television broadcasting services is a specific manifestation in Community law of Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').⁵

9. The Directive is based on the 'principle of the originating Member State', which is another expression of the principle of mutual recognition, according to which, as set out in the 12th recital in the preamble to the Directive, it is necessary and sufficient that all broadcasts comply with the law of the Member State from which they emanate.

10. The 14th and 15th recitals in the preamble to the Directive state:

'... it is necessary, in the common market, that all broadcasts emanating from and intended for reception within the Community, and in particular those intended for reception in another Member State, should respect the law

⁵ — Article 10(1) of the ECHR provides that '[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'. The first sentence of this article is identical to Article 11(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). In addition, Article 11(2) of the Charter provides that the freedom and pluralism of the media shall be respected.

of the originating Member State applicable to broadcasts intended for reception by the public in that Member State and the provisions of this Directive;

... the requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Community law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States; ... however, the receiving Member State may, exceptionally and under specific conditions provisionally suspend the retransmission of televised broadcasts.

11. The Community legislature's intentions, expressed in these recitals, are implemented as follows in the normative provisions of the Directive.

12. Under Article 2(1) of the Directive, each Member State is to ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State.

13. Under Article 1(b) of the Directive, 'broadcaster' is defined as the natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of Article 1(a) and who transmits them or has them transmitted by third parties.

14. Under Article 2(2) and (3) of the Directive, a broadcaster under the jurisdiction of a Member State is one established in that Member State, that is, the broadcaster has its head office in that Member State and the editorial decisions about programme schedules are taken in that Member State.

15. Under Article 3(2) of the Directive, Member States must, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction effectively comply with the provisions of that directive.

16. Article 2a of the Directive provides:

'1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive.

2. Member States may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled:

- (a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22(1) or (2) and/or Article 22a;
- (b) during the previous 12 months, the broadcaster has infringed the provision(s) referred to in (a) on at least two prior occasions;
- (c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again;
- (d) consultations with the transmitting Member State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in (c), and the alleged infringement persists.

The Commission shall, within two months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Community law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.

3. Paragraph 2 shall be without prejudice to the application of any procedure, remedy or sanction to the infringements in question in the Member State which has jurisdiction over the broadcaster concerned.'

17. Articles 22 and 22a of the Directive form part of Chapter V thereof, entitled 'Protection of minors and public order'. They provide:

'Article 22

1. Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.

...

Article 22a

Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.'

B — *National law*

18. Paragraph 3 of the Law governing the public law of associations (*Gesetz zur Regelung des öffentlichen Vereinsrechts*) of 5 August 1964⁶ provides that an association may be regarded as prohibited when the competent authorities have made an order determining that its aims or its activities infringe criminal law or the constitutional order of the Federal Republic of Germany or the principles of international understanding.

19. Paragraph 18 of the *Vereinsgesetz* provides, regarding the prohibition of associations with a head office abroad:

‘Prohibitions on associations which have their head office outside the geographical scope of this Law, but which have subsidiary organisations within that scope cover only the subsidiary organisations in that geographical scope. If the association has no organisation within the geographical scope of this Law, the prohibition applies to ... its activities in that scope.’

II — Factual background and the question referred for a preliminary ruling

20. Mesopotamia Broadcast A/S METV (‘Mesopotamia Broadcast METV’) is a holding company with limited liability incorporated under Danish law with a registered office in Denmark. It owns several Danish broadcasting licences and operates, inter alia, the broadcaster Roj TV A/S (‘Roj TV’), which is also a limited company incorporated under Danish law.

21. Since 1 March 2004, Roj TV’s programmes, which are produced mainly in Kurdish, have been broadcast via satellite throughout Europe and to the Middle East, in particular to Turkey. Roj TV has broadcasts produced by VIKO, a production company established in Wuppertal (Germany), and produces broadcasts at its own production facilities in Denderleeuw (Belgium).

22. In 2006 and in 2007, the Turkish authorities lodged complaints with the Danish Radio and Television Committee, which is responsible for the application of national rules implementing the Directive, alleging that, by its broadcasts, Roj TV supported the objectives of the PKK, which the European Union has classified as a ‘terrorist’ organisation.

23. By its decisions of 3 May 2007 and 23 April 2008, the Danish Radio and

⁶ — BGBl. 1964 I, p. 593, as amended by Paragraph 6 of the Law of 21 December 2007 (BGBl. 2007 I, p. 3198) (‘*Vereinsgesetz*’).

Television Committee decided that Roj TV had not infringed the Danish provisions implementing Articles 22 and 22a of the Directive. In the Committee's view, the features included in the Roj TV broadcasts subject to complaint did not contain any incitement to hatred on grounds of race, nationality or religion. Instead, it took the view that they communicated information, news and opinions as part of news and discussion programmes. Broadcast images involving scenes of violence reflected the real violence in Turkish society and Kurdish areas.

24. By order of 13 June 2008, the German Federal Ministry of the Interior prohibited Mesopotamia Broadcast METV from pursuing through Roj TV all activities covered by the Vereinsgesetz. It also prohibited Roj TV from undertaking its activities.

25. The Federal Ministry of the Interior justified these prohibitions on the ground, *inter alia*, that Roj TV's broadcasts supported the use of violence to achieve the political aims of the PKK and in relations between Turks and Kurds, thus infringing the principles of international understanding for the purposes of the Vereinsgesetz.

26. These decisions to prohibit their activities were challenged by Mesopotamia Broadcast METV and by Roj TV before the Bundesverwaltungsgericht.

27. The applicants in the main proceedings claimed that their cross-border activities in

the field of television are covered by the Directive and that, under the Directive, only the Kingdom of Denmark, in whose territory they are established, may exercise control over these activities.

28. In its order for reference, the Bundesverwaltungsgericht observes that the programmes broadcast by Mesopotamia Broadcast METV through the medium of Roj TV are in fact attempting to justify the PKK's armed conflict with the Republic of Turkey and thus fall within the prohibition on infringements of the principles of international understanding for the purposes of the Vereinsgesetz.

29. The referring court explains that, under that legislation, this ground for prohibition is applicable when a group supports a movement which through its use of violence impairs the peaceful coexistence of peoples.

30. It points out, however, that, under the Directive, a Member State may not prohibit the retransmission of broadcasts from another Member State on a ground which falls within the fields coordinated by the Directive.

31. Therefore the Bundesverwaltungsgericht decided to stay proceedings and to refer a question to the Court of Justice, in the two cases, on whether 'and, if so, under what circumstances, national legislation concerning

the prohibition of an association for infringement of the principles of international understanding fall within the field coordinated by the Directive, and is it thus precluded by Article 2a of the Directive?'

Broadcast METV, which operates Roj TV, is entitled to rely on the provisions of the Directive intended to ensure the free movement of its television broadcasts.

32. The two cases were joined by order of 3 August 2010.

36. In its order of reference, the referring court describes this Danish company as a television broadcaster within the meaning of Article 1(b) of the Directive, who transmits television programmes intended for reception by the public within the meaning of Article 1(a) of the Directive and who falls under the jurisdiction of the Kingdom of Denmark, in accordance with Article 2(2) and (3) of the Directive, since its head office, where the editorial decisions about programme schedules are taken, is in the territory of that Member State.

III — Analysis

A — *Preliminary observations*

33. Before examining the question referred for a preliminary ruling, it seems necessary to clarify what is involved.

34. As the order of reference and the explanations provided by the parties in the course of the hearing show, the effect of the contested measures taken by the German authorities is to prohibit all Roj TV's activities in Germany and the retransmission on German territory, to the public, of that company's television broadcasts from Denmark.

35. In contesting the decision of the competent German authorities, Mesopotamia

37. In addition, the referring court has pointed out that, contrary to what the competent German authorities might have thought, the documents in the case do not show that the company's activities were entirely or principally directed towards Germany. It has shown that Roj TV's broadcasting activities were directed towards the whole of western Europe and to the Middle East, and not only towards Kurds living in Germany.

38. Therefore the competent German authorities did not have sufficient evidence to be able to treat Mesopotamia Broadcast METV as a national broadcaster on the basis

of the case-law mentioned in recital 14 in the preamble to Directive 97/36.⁷

39. Consequently, this company is entitled to rely on Article 2a of the Directive, under which a Member State such as the Federal Republic of Germany may not restrict retransmissions on its territory of television broadcasts by the company through the medium of its broadcaster Roj TV for reasons which fall within the fields coordinated by the Directive, that is to say, in these cases, on the ground that these broadcasts contain incitements to hatred for reasons of race, sex, religion or nationality.

40. Under the system set up by the Directive and as stated in the 15th recital in the preamble to the Directive, the control exercised by the originating Member State over television broadcasts transmitted by broadcasters under its jurisdiction is regarded as sufficient to ensure compliance with the requirements of the Directive as set out in Article 22a of the Directive. The receiving Member States are

not permitted to exercise secondary control over compliance with these requirements.

41. According to this system, if a receiving Member State makes a different assessment of compliance with these requirements, it may act only under the procedure provided for in Article 2a(2) of the Directive, which, inter alia, compels it to notify the broadcaster in question and the Commission of the measures it intends to take and which, if no amicable settlement is produced and if these measures are adopted, provides that the Commission may call on this Member State to withdraw them.

42. However, as stated in Article 2a(1) of the Directive, secondary control by the receiving Member State is unacceptable only within the fields coordinated by the Directive. In other words, the prohibition on secondary control by the receiving Member States applies only where control should have been exercised by the originating Member State. As has been pointed out in the case-law on several occasions, the Directive does not completely harmonise the rules relating to the areas which it covers.⁸

43. That is why the referring court is asking whether a prohibition such as that provided

⁷ — Recital 14 states that the Court of Justice has constantly held that a Member State retains the right to take measures against a television broadcasting organisation 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 organisation had it been established on the territory of the first Member State. Case 33/74 *van Binsbergen* [1974] ECR 1299 and Case C-23/93 *TV10* [1994] ECR I-4795 are cited in the footnote.

⁸ — See Case C-222/07 *UTECA* [2009] ECR I-1407, paragraph 19 and the case-law cited.

for by the Vereinsgesetz, allowing restriction of television broadcasts which infringe the principles of international understanding, may be regarded as already being contained in the obligation laid down in Article 22a of the Directive, under which television broadcasts must not contain any incitement to hatred on grounds of race, sex, religion or nationality.

44. The implications of the reply to the question asked by the referring court are thus very obvious.

45. Either the competent German authorities were entitled to unilaterally prohibit the retransmission of the broadcasts at issue or they were required to observe the conditions laid down in Article 2a(2) of the Directive.

46. In the first situation, the measures taken by these authorities against Mesopotamia Broadcast METV's broadcasts fell within the scope of the Treaty rules on the freedom to provide services. The task of the national court would be to establish that the prohibitions challenged in the main proceedings were justified on legitimate grounds and that they were proportionate to this objective.

47. In this regard, it cannot be seriously denied that a Member State in whose territory

large Turkish and Kurdish communities live side by side could legitimately take the view that television broadcasts attempting to justify the PKK, which the Council of the European Union has classified as a 'terrorist' organisation,⁹ might disrupt public order. The national court would still have the task of establishing that the prohibitions at issue were part of a consistent, systematic course of action to protect public order and that they were proportionate.

48. In the second situation, the unilateral action of the German authorities must be adjudged contrary to the Directive. However, this interpretation of Article 22a of the Directive must not be construed as meaning that broadcasts which would infringe the principles of international understanding according to German law can be broadcast freely in the Member States.

9 — In order to implement United Nations Security Council Resolution 1373(2001), the Council adopted Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93). Common Position 2001/931 includes an annex containing the list of 'persons, groups and entities involved in terrorist acts'. The PKK was added to this list by Council Common Position 2002/340/CFSP of 2 May 2002 (OJ 2002 L 116, p. 75). The organisation was kept on this list by subsequent Council common positions and finally by Council Decision 2010/386/CFSP of 12 July 2010 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP (OJ 2010 L 178, p. 28). Similarly, the PKK was added to the list of terrorist groups by Council Decision 2002/334/EC of 2 May 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2001/927/EC (OJ 2002 L 116, p. 33).

49. It is important to state that this interpretation must be construed as meaning that the originating Member State, which must verify that broadcasts by broadcasters under its jurisdiction comply with the requirements of Article 22a of the Directive, should establish that these broadcasts do not infringe the principles of international understanding.

50. It is solely because such a check is deemed to have been carried out by the originating Member State that the receiving Member States which make a different assessment of compliance with the requirements of Article 22a may act only under the procedure provided for in Article 2a(2) of the Directive.

51. Therefore the issue in these cases is not to clarify the meaning of the limitation on freedom of expression laid down in Article 22a of the Directive. It is established that the fundamental right to freedom of expression laid down in Article 11 of the Charter constitutes the principle and that limitations on this principle such as those provided for in Article 22a of the Directive must be interpreted strictly.

52. The issue in these cases is to determine the extent of the transfer of jurisdiction in respect of the protection of public order which the Member States intended to grant under Article 22a of the Directive.

53. It is in the light of those considerations that I propose the Court should examine the question submitted by the Bundesverwaltungsgericht.

B — Analysis of the question referred for a preliminary ruling

54. The referring court is asking whether Article 22a of the Directive covers broadcasts which, by attempting to justify the PKK, may impair understanding between the communities of Turkish and Kurdish origin living in Germany.

55. Thus it is asking, in essence, whether Article 22a of the Directive, under which Member States must ensure that television broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality, must be interpreted as also prohibiting broadcasts which, in attempting to justify a group classified as a ‘terrorist’ organisation by the European Union, may create reactions of animosity or rejection between communities of different ethnic or cultural origin.

56. The referring court voices doubts about the possibility of answering this question in the affirmative, on the following grounds.

57. According to the referring court, firstly, the condition provided for in Article 22a of the Directive, unlike the concept of impairment of the principles of international understanding, which relates to a principle of universally applicable law, presupposes, according to its wording, an individual concern arising on the basis of subjective exclusionary criteria.

58. Secondly, Article 22a of the Directive, in referring to incitement to hatred, is directed at a stronger message than a simple impairment of the principles of international understanding.

59. Finally, the differences between persons of Turkish and Kurdish origin are primarily of an ethnic and cultural nature, and not differences of race or nationality.

60. I do not share the referring court's reservations. Like the Commission and unlike Mesopotamia Broadcast METV and the German and French Governments, I take the view that the ground for prohibition covered by Article 22a of the Directive may be applicable to a broadcast which infringes the principles of international understanding as this concept is defined in German law.

61. I base that analysis on the following considerations.

62. The first point to be made here is that the Directive contains no definition of the terms mentioned in Article 22a.

63. Next, I can likewise find no relevant information in the drafting history of the Directive. The drafting history of Directive 89/552, where the condition set out in Article 22a of the Directive appeared in the second paragraph of Article 22, provides no information relating to the scope of that condition. As for the drafting history of Directive 97/36, it simply confirms that the Community legislature intended to lay down in Article 22a of the Directive a ground for prohibition based on public order which would be distinct from grounds relating particularly to the protection of minors.¹⁰

64. According to the case-law of the Court, the scope of Article 22a of the Directive must therefore be determined from the usual meaning of its terms in everyday language, in

¹⁰ — The explanatory report on the amendments introduced by Directive 97/36 states that '[t]he original Article 22 has been divided into two to make the public order provision easier to understand. This has a much more general scope than the protection of minors and seeks also to protect adults from programmes that are physically, mentally or morally harmful. See Report on Application of Directive 89/552/EEC and Proposal for a European Parliament and Council Directive 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 (COM(95) 86 final, p. 45).

relation to the system set up by the Directive and to the purposes of the Directive.¹¹

65. Article 22a of the Directive provides that television broadcasts must not contain any incitement to hatred on grounds of race, sex, religion or nationality. The prohibition laid down in that provision therefore applies to a television broadcast only if that broadcast cumulatively satisfies the two following conditions, namely, firstly, that it incites hatred and, secondly, that this hatred is based on one of the grounds cited.

66. As regards, first of all, the meaning of the words ‘incitement’ and ‘hatred’ in everyday language, the first is an action intended to direct behaviour and the second is a violent feeling which leads one to wish somebody ill and to take delight in any harm suffered by that person.¹²

67. Unlike the referring court, I do not find in these definitions any grounds permitting the inference that incitement to hatred means something significantly different from

infringement of the principles of international understanding. Incitement to hatred actually means seeking to create a feeling of animosity towards or rejection of another person, which leads to the person who experiences that feeling no longer being able to live harmoniously, and therefore in understanding, with that other person.

68. Furthermore, to give the concept of infringement of the principles of international understanding a broader meaning so that it would cover messages which are not likely to arouse a feeling of intolerance would go against the fundamental right to freedom of expression. In other words and according to Article 54 of the Charter, the freedom of expression guaranteed in Article 11 of the Charter ceases to operate when the message infringes other principles and fundamental rights recognised by the Charter, such as the protection of human dignity and the principle of non-discrimination.

69. Therefore, in my opinion, the same behaviour may be covered by the concepts of incitement to hatred and infringement of the principles of international understanding.

70. Next, as regards the meaning of the words ‘race’ and ‘nationality’, mentioned in Article 22a of the Directive, I likewise do not believe that they can be understood in

11 — Case C-336/03 *easyCar* [2005] ECR I-1947, paragraph 21 and the case-law cited.

12 — See *Le Nouveau Petit Robert, Dictionnaire alphabétique et analogique de la langue française*. These definitions also correspond to the versions of Article 22a of the Directive in Spanish (‘incitación al odio’); German (‘zu Haß aufzuztacheln’); Greek (‘καμία παρότρυνση σε μίσος’); English (‘incitement to hatred’); Italian (‘incitamento all’odio’); Dutch (‘geen enkele aansporing tot haat’); and Portuguese (‘incitamento ao ódio’).

the restrictive way envisaged by the referring court, according to which they do not apply to differences of an ethnic or cultural nature, such as those which may exist between Kurds and Turks.

that one or more of these categories were inherently superior or inferior to the others.

71. As the Commission points out with good reason, the word 'race', so far as human beings are concerned, has no objective scientific meaning. Therefore it cannot be defined. It does not correspond to any genetic criterion, blood relationship or other criterion. All that can be said is that it refers, in everyday language, to visible general characteristics, such as skin colour, which are relative and partial in nature. As stated expressly in recital 6 in the preamble to Council Directive 2000/43/EC,¹³ European Union law rejects theories which attempt to determine the existence of separate human races.

73. Thus in Council Directive 2004/83/EC,¹⁴ which introduces criteria common to the Member States in order to assess stateless persons or third-country nationals who need protection, the concept of 'race' under Article 10(1)(a) includes 'in particular considerations of colour, descent, or membership of a particular ethnic group'. Similarly, Article 10(1)(c) of Directive 2004/83 states that the concept of nationality is not confined to citizenship or lack thereof but in particular includes membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State.

72. When the Community legislature prohibits any incitement to hatred on grounds of race, it is therefore referring, in my opinion, to forms of discrimination based on a criterion which, according to theories it condemns, would permit the division of human beings into different categories and the inference

74. Therefore I take the view that the fact that in Article 22a of the Directive the Community legislature has cited only race and nationality

13 — Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

14 — Directive of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

as criteria for discrimination, while in many other provisions¹⁵ ethnic origin has been expressly added to these two criteria, cannot be interpreted as intending to exclude discrimination based on ethnic origin from the fields coordinated by the Directive.¹⁶

the meaning of the concept of discrimination based on race and does not extend its scope.¹⁷

75. In my opinion, the insertion of the concept of ethnic origin into other provisions covering discrimination on the grounds of origin merely serves to illustrate and clarify

76. Finally, I do not find anything convincing in the wording of Article 22a of the Directive to support the interpretation envisaged by the referring court, according to which this article covers only discrimination based on subjective criteria and does not cover broadcasts which may undermine public security.

77. It is established that Article 22a of the Directive, in prohibiting broadcasts with discriminatory content, aims to protect human dignity. However, no element of its meaning justifies making a distinction between discriminatory broadcasts according to their effects on public order. On the contrary, it may

15 — See, *inter alia*, Article 13 EC, under which ‘the Council ... may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. See, also, recital 12 in the preamble to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), under which the surrender of a person must be refused ‘when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation’.

16 — This analysis is also supported by the European Convention on Transfrontier Television, which is mentioned in the fourth recital in the preamble to the Directive and which provides, in Article 7, that programmes must not incite racial hatred. Under Recommendation No R (97) 20 of the Committee of Ministers to Member States on ‘hate speech’, to which the explanatory report on the Convention refers in order to clarify the scope of the condition laid down in Article 7, the term ‘hate speech’ is to be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

17 — Even more detailed forms of wording are to be found, for example, in Article 21 of the Charter, under which ‘[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited’. An almost identical form of wording is adopted, *inter alia*, in the last recital in the preamble to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigenda in OJ 2004 L 229, p. 35, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28). However, the simpler form of wording in Article 22a of the Directive continues to be used, for example in the first indent of Article 3(4)(a)(i) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (‘Directive on electronic commerce’) (OJ 2000 L 178, p. 1).

be deduced from the use of the word 'aucune' ['not ... any'] in the French-language version that the Community legislature intended to prohibit all broadcasts including incitement to hatred on grounds of race or nationality, irrespective of their possible effects on public order.¹⁸

78. Therefore, in my opinion, semantic analysis of Article 22a of the Directive tends to support the view of the Commission. That view is borne out by the system set up by the Directive and by the purposes of the Directive.

79. As has been noted, the Directive is intended to ensure the free movement of television broadcasts. This free movement is implemented in the Directive in the following two ways: firstly, through the harmonisation

of the minimum conditions necessary with regard to the content of programmes and, secondly, in the principle of recognition by all the Member States of the check on compliance with these conditions carried out by the originating Member State.

80. The free movement of television broadcasts can be fully ensured only if the meaning and scope of the minimum conditions imposed by the Directive are clearly established. Legal certainty for television broadcasters, who must be able to know precisely the effects of the check carried out by the competent authorities of the Member State where they are established on the powers allowed only to the receiving Member States, depends on the clarity of these conditions.

81. In Articles 22 and 22a of the Directive, the Community legislature has laid down the minimum standards necessary for the protection of minors and of public order.

82. It is true that Article 22a does not exhaustively harmonise those restrictions on the free movement of television broadcasts which may be justified by public order concerns. Unlike, for example, Article 10(2) of

18 — I do not propose to substitute my assessment of the meaning of Article 22a of the German-language version of the Directive for that of the referring court. However, I consider my analysis to be applicable in the versions of this article in Spanish ('Los Estados miembros velarán por que las emisiones no contengan ninguna incitación al odio por motivos de raza, sexo, religión o nacionalidad'); Greek ('Άρθρο 22α Τα κράτη μέλη μεριμνούν ώστε οι εκπομπές να μην περιλαμβάνουν καμία παρότρυνση σε μίσος λόγω διαφορών φυλής, φύλου, θρησκείας ή ιθαγένειας'); English ('Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality'); Italian ('Gli Stati membri fanno sì che le trasmissioni non contengano alcun incitamento all'odio basato su differenze di razza, sesso, religione o nazionalità'); Dutch ('De lidstaten dragen er zorg voor dat uitzendingen geen enkele aansporing tot haat op grond van ras, geslacht, godsdienst of nationaliteit bevatten'), and Portuguese ('Os Estados-membros assegurarão que as emissões não contenham qualquer incitamento ao ódio por razões de raça, sexo, religião ou nacionalidade').

the ECHR,¹⁹ it applies only to broadcasts of a discriminatory nature.

broadcasts which undermine human dignity alone and those which may also undermine the internal or external security of a Member State.

83. Nevertheless, any division of the check on the non-discriminatory nature of television broadcasts between the originating Member State and the receiving Member States is as a matter of principle contrary to the aim of the Directive and the system set up by the Directive. Such a division would be compatible with the requirement of legal certainty only if it could be made on the basis of precise, easily applicable criteria.

85. The objective pursued by the Directive through the harmonisation undertaken in Article 22a of the Directive leads, in my opinion, to a broad interpretation of the concept of incitement to hatred on grounds of race or nationality as also covering broadcasts which may infringe the principles of understanding between different ethnic or cultural communities, such as the Kurdish and Turkish communities living in Germany.

84. Yet, as has been noted, the concept of race does not exist in European Union law, so it would be difficult to distinguish clearly between incitement to hatred on grounds of race, covered by Article 22a of the Directive, and incitement to hatred on grounds of ethnic origin, which would continue to fall within the jurisdiction of each Member State. It would also be very difficult to draw the exact dividing line between discriminatory

86. I place a great deal of importance on the transfer of jurisdiction by the Member States which such an interpretation has the effect of establishing. The assessment of the discriminatory nature of a television broadcast may legitimately vary from one Member State to another. Furthermore, it is each Member State that ultimately bears the burden and the responsibility of ensuring the protection of public order in its territory. Finally, the impact on public order of television broadcasts inciting hatred between different ethnic or cultural communities obviously depends on the presence of these communities in the national territory and the Member States are perfectly justified in doing everything necessary to ensure that existing conflicts in

19 — Article 10(2) of the ECHR provides that freedom of expression may be subject to restrictions necessary in a democratic society, 'in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

third countries are not imported into their territory.

87. However, for the following two reasons, I do not consider these arguments to justify the acceptance of a restrictive interpretation of Article 22a of the Directive.

88. Firstly, the express purpose of a harmonised standard is to be common to all the Member States and, consequently, it must be applied by each of them. Therefore, as I said above, if the Court holds that Article 22a of the Directive precludes the transmission of broadcasts infringing the principles of international understanding, compliance with that condition will have to be verified by the competent authorities of the Member State which has jurisdiction over the broadcaster in question, irrespective of the presence in that Member State of the ethnic or cultural communities concerned.

89. The application of the prohibition laid down in Article 22a of the Directive does not depend on the potential effects of the broadcast in question in the originating Member State or in one Member State in particular, but only on the combination of the two conditions stipulated in that provision, namely incitement to hatred and grounds of race or nationality.

90. Secondly, a Member State which considers that broadcasts from another Member State do not comply with the conditions set out in Article 22a of the Directive does not completely lack the possibility of taking

action. As has been noted, the procedure provided for in Article 2a(2) of the Directive is available to that Member State and allows it, under the conditions set out in that provision, to adopt restrictive measures against such broadcasts.

91. That guarantee, which is accordingly available to the receiving Member States and which is intended to best reconcile the exercise of the fundamental right to freedom of expression with the equally legitimate right of the Member States to protect their public order, also, in my opinion, supports a broad interpretation of the transfer of jurisdiction provided for in Article 22a of the Directive.

92. This view is a fortiori supported by that guarantee because, as was demonstrated at the hearing, the measures permitted under Article 2a(2) of the Directive may be more effective than those adopted unilaterally by a receiving Member State. Thus, in these cases, the application of the procedure provided for in Article 2a(2) of the Directive could lead, where relevant, to a prohibition by the Kingdom of Denmark on all television broadcasts by Mesopotamia Broadcast METV attempting to justify the PKK, while the only tangible effect of the German measures at issue is to define retransmission of these broadcasts in public places in Germany as a criminal

offence but not their reception on German territory in a private context.

93. Having regard to these considerations, therefore, I propose that the Court reply to the question referred for a preliminary ruling

that Article 22a of the Directive, under which Member States are to ensure that television broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality, must be interpreted as also prohibiting broadcasts which, in attempting to justify a group classified as a 'terrorist' organisation by the European Union, may create reactions of animosity or rejection between communities of different ethnic or cultural origin.

IV — Conclusion

94. In the light of the above considerations, I propose that the Court answer the question referred by the Bundesverwaltungsgericht as follows:

Article 22a of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, under which Member States are to ensure that television broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality, must be interpreted as also prohibiting broadcasts which, in attempting to justify a group classified as a 'terrorist' organisation by the European Union, may create reactions of animosity or rejection between communities of different ethnic or cultural origin.