

JUDGMENT OF THE COURT (Fifth Chamber)
23 October 2003 *

In Case C-245/01,

REFERENCE to the Court under Article 234 EC by the Niedersächsisches Oberverwaltungsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

RTL Television GmbH

and

Niedersächsische Landesmedienanstalt für privaten Rundfunk,

on the interpretation of Article 11(3) 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 (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),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans (Rapporteur), President of the Fourth Chamber, acting for the President of the Fifth Chamber, D.A.O. Edward and P. Jann, Judges,

Advocate General: F.G. Jacobs,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- RTL Television GmbH, by J. Sommer and T. Tschentscher, Rechtsanwälte,

- the Niedersächsische Landesmedienanstalt für privaten Rundfunk, by R. Albert, acting as Agent,

- the United Kingdom Government, by G. Amodeo, acting as Agent, assisted by P. Harris, Barrister,

- the Commission of the European Communities, by C. Tufvesson, acting as Agent, assisted by W. Berg, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of RTL Television GmbH, represented by T. Tschentscher and J. Sommer; of the Niedersächsische Landesmedienanstalt für privaten Rundfunk, represented by A. Fischer, acting as Agent; and of the Commission, represented by C. Tufvesson, assisted by W. Berg, at the hearing on 29 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2003,

gives the following

Judgment

1 By order of 15 June 2001, received at the Court on 25 June 2001, the Niedersächsisches Oberverwaltungsgericht (Lower Saxony Higher Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 11(3) 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 (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) (hereinafter 'Directive 89/552').

- 2 Those questions have been raised in proceedings between RTL Television GmbH (hereinafter ‘RTL’), a private television broadcaster, and the Niedersächsische Landesmedienanstalt für privaten Rundfunk (Lower Saxony Media Office for Private Broadcasting, hereinafter ‘the NLM’), a public body of the *Land* of Lower Saxony which succeeded the Niedersächsischer Landesrundfunkausschuss (hereinafter ‘the NLA’) and assumed its supervisory powers over private broadcasters, concerning a decision of the NLA that certain films broadcast by RTL had infringed the legislation on the frequency of advertising breaks.

Legal background

Community law

- 3 The sixth, seventh and eighth recitals in the preamble to Directive 89/552 are worded as follows:

‘Whereas television broadcasting constitutes, in normal circumstances, a service within the meaning of the Treaty;

Whereas the Treaty provides for free movement of all services normally provided against payment, without exclusion on grounds of their cultural or other content and without restriction of nationals of Member States established in a Community country other than that of the person for whom the services are intended;

Whereas this right as applied to the broadcasting and distribution of television services is also a specific manifestation in Community law of a more general principle, namely the freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by all Member States; whereas for this reason the issuing of directives on the broadcasting and distribution of television programmes must ensure their free movement in the light of the said Article and subject only to the limits set by paragraph 2 of that Article and by Article 56(1) of the Treaty’.

4 The 27th recital in the preamble to Directive 89/552 states:

‘Whereas in order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction’.

5 Article 3(1) of Directive 89/552 provides:

‘Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive’.

6 Under Article 11(1), (3) and (4) of Directive 89/552:

‘1. Advertising and teleshopping spots shall be inserted between programmes. Provided the conditions set out in paragraphs 2 to 5 are fulfilled, advertising and teleshopping spots may also be inserted during programmes in such a way that the integrity and value of the programme, taking into account natural breaks in and the duration and nature of the programme, and the rights of the rights holders are not prejudiced.

...

3. The transmission of audiovisual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries), provided their scheduled duration is more than 45 minutes, may be interrupted once for each period of 45 minutes. A further interruption shall be allowed if their scheduled duration is at least 20 minutes longer than two or more complete periods of 45 minutes.

4. Where programmes, other than those covered by paragraph 2, are interrupted by advertising or teleshopping spots, a period of at least 20 minutes should elapse between each successive advertising break within the programme.’

The European Convention on Transfrontier Television

7 Article 14(1), (3) and (4) of the European Convention on Transfrontier Television of 5 May 1989 (hereinafter 'the European Convention'), as amended, is worded as follows:

'1. Advertising and tele-shopping shall be inserted between programmes. Provided the conditions contained in paragraphs 2 to 5 of this article are fulfilled, advertising and tele-shopping spots may also be inserted during programmes in such a way that the integrity and value of the programme and the rights of the rights holders are not prejudiced.

...

3. The transmission of audiovisual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries), provided their scheduled duration is more than 45 minutes, may be interrupted once for each complete period of 45 minutes. A further interruption is allowed if their scheduled duration is at least 20 minutes longer than two or more complete periods of 45 minutes.

4. Where programmes, other than those covered by paragraph 2, are interrupted by advertising or tele-shopping spots, a period of at least 20 minutes should elapse between each successive advertising or tele-shopping break within the programme.'

The European Convention for the Protection of Human Rights and Fundamental Freedoms

- 8 Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ‘the ECHR’), entitled ‘Freedom of expression’, provides:

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

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

German Law

- 9 The German Grundgesetz (Basic Law) confers on the *Länder* legislative competence in matters of radio and television broadcasting.

10 Paragraph 26(2) to (4) of the Staatsvertrag über den Rundfunk im vereinigten Deutschland (State Treaty on Broadcasting in the United Germany, hereinafter 'the Rundfunkstaatsvertrag') of 31 August 1991 provides:

'2. Television advertising must be inserted in blocks between programmes. It may also be inserted during programmes subject to the requirements of subparagraphs (3) to (5), so long as the programme's integrity and character are not affected.

3. In television programmes consisting of independent parts, or in sports programmes or broadcasts of events and similar occasions containing breaks, advertising may be inserted only between the independent parts or during the breaks. In other programmes, the interval between two successive interruptions within the programme must be at least 20 minutes. Subparagraphs (4) and (5) are not affected.

4. In derogation from the second sentence of subparagraph (3), works such as feature films and television films (excluding series, serials, light entertainment programmes and documentaries), where they last longer than 45 minutes, may be interrupted once for each complete period of 45 minutes. A further interruption is allowed if those programmes last at least 20 minutes longer than two or more complete periods of 45 minutes.'

11 Those provisions were repeated, with amendments irrelevant to the main proceedings, in Paragraph 44(2) to (4) of the Vierter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (Fourth State Treaty amending the State Treaties on Broadcasting Rights, hereinafter 'the Vierter Rundfunkstaatsvertrag').

- 12 Paragraph 28(2) of the Niedersächsisches Landesrundfunkgesetz (Law of the *Land* of Lower Saxony on Television, hereinafter ‘the Landesrundfunkgesetz’), as amended, provides that the NLA, the body which was succeeded by the defendant in the main proceedings, may determine that a programme or broadcast infringes the Landesrundfunkgesetz or the terms of licences and order the broadcaster and those responsible for the programme’s content to put an end to the infringement.
- 13 Paragraph 33(5) to (7) of the Landesrundfunkgesetz contains provisions similar to those of Paragraph 26(2) to (4) of the Rundfunkstaatsvertrag and Paragraph 44(2) to (4) of the Vierter Rundfunkstaatsvertrag.
- 14 Subsequent references in this judgment to Paragraph 26(2) to (4) of the Rundfunkstaatsvertrag must be understood as also referring to the corresponding provisions of the Landesrundfunkgesetz and the Vierter Rundfunkstaatsvertrag mentioned in the previous paragraph.

The main proceedings and the questions referred

- 15 On 7 October 1993, RTL broadcast ‘The Revenge of Amy Fisher’, a film lasting 86 minutes, interrupting it four times with advertising. It did the same a week later during the broadcasting of ‘Cries in the Forest’, a film lasting 90 minutes. Those films were broadcast as part of a sequence entitled ‘Dangerous Liaisons’.
- 16 By decision of 12 November 1993, the NLA determined that, by interrupting each of those films by four advertising breaks, RTL had infringed the first

sentence of Paragraph 26(4) of the Rundfunkstaatsvertrag. It ordered that, if those films were rebroadcast, they should not be interrupted by more than one or more than two advertising breaks respectively.

- 17 By the same decision, the NLA further ordered RTL not to interrupt eight other films or any feature or television film broadcast as part of a series whose scheduling was advertised (that is, the series 'Dangerous Liaisons', 'Family Fortunes' and 'Great Television Stories'), by more frequent advertising than that permitted by the first sentence of Paragraph 26(4) of the Rundfunkstaatsvertrag.
- 18 In support of its decision, the NLA argued that the broadcasts in question could not be regarded as forming part of a series within the meaning of Paragraph 26(4) of the Rundfunkstaatsvertrag and could not, therefore, be interrupted by advertising at 20-minute intervals.
- 19 In its decision, the NLA stated, in particular, that the concept of a series is closely connected to that of a serial and assumes that the different films will be largely identical from the point of view of plot and characters. The NLA decided, in particular, that neither the identical broadcasting slots nor the fact that the scripts are based on novels or that there are common themes such as love, passion or family relationships in general, create a sufficient link for such programmes to be regarded as forming a series.
- 20 On 23 November 1993, RTL brought an action in the Niedersächsisches Verwaltungsgericht (Lower Saxony Administrative Court) (Germany) for annulment of the NLA's decision.

- 21 In support of its action RTL claimed that that decision was based on too strict a construction of the meaning of ‘series’. That term should be defined as the grouping of several self-standing stories with a common theme characterised both by criteria of content, such as film genre, and similarity of script and theme, and by criteria of external form, such as length of broadcast and broadcasting slot, and various other factors, for example, a specific director.
- 22 The NLM stated that the concept of a series requires that the connection between the broadcasts which form the series relates to their content. To accept criteria mainly of form, as suggested by RTL, would give the television operator complete latitude frequently to interrupt programmes with advertising.
- 23 By judgment of 25 September 1997, the Niedersächsisches Verwaltungsgericht dismissed RTL’s action on the ground that the television films in question could not be treated as a series within the meaning of Paragraph 26(4) of the Rundfunkstaatsvertrag.
- 24 RTL appealed against that judgment to the referring court. In support of its appeal RTL claims that the definition upheld by the Niedersächsisches Verwaltungsgericht is incompatible with Article 11(3) of Directive 89/552.
- 25 As a preliminary point, the national court notes that according to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany) it has no doubts under constitutional law based on the first sentence of Article 5(1) of the German Basic Law as to the application of Paragraph 26(4) of the Rundfunkstaatsvertrag, which is the legal basis of the decision at issue in the main proceedings. That provision is based closely on Article 11(3) of Directive 89/552.

- 26 The national court considers that the function of Paragraph 26(4) of the Rundfunkstaatsvertrag is to safeguard the artistic value of cinema and television films and to protect them from too frequent advertising breaks.
- 27 Such a teleological construction is, according to the national court, supported by the background to Paragraph 26(4) of the Rundfunkstaatsvertrag. That provision relates first to Article 14(3) of the European Convention, which reflects the compromise reached by the Council of Europe between the objective of increased protection for cinema and television films and the interests of advertisers. Article 11(4) of Directive 89/552 is also based on that compromise. The national court notes that the *Länder*, the parties to the Rundfunkstaatsvertrag, wished to bring German law into line with the European rules in respect of advertising breaks. It follows that, according to the Court's case-law, the national provision at issue in the main proceedings must be considered and construed in the light of the letter and spirit of Article 11(3) of Directive 89/552.
- 28 The national court observes also that neither the wording nor the scheme of Article 11(3) of Directive 89/552 supports RTL's argument that cinema films alone should be safeguarded and not television films, on the ground that the latter are made to be broadcast specifically on the basis of advertising breaks.
- 29 The national court notes that it has already ruled that the concept of a series requires the existence of a link between the different programmes from the point of view of their content or their action.
- 30 It considers that its point of view is confirmed by the Guidelines of the United Kingdom's Independent Television Commission (hereinafter 'the ITC') as well as by the common guidelines adopted by the *Länder*.

- 31 It finds that, in the present case, the matters relied upon by RTL to connect the different episodes from the thematic or dramatic point of view — with themes such as love affairs, marital crises, existential crises, crime, violence, prostitution, surrogate mothers and natural disasters, which present broad points in common since a central character may be confronted with a dramatic situation and must overcome it — are too vague to be regarded, even in conjunction with other factors relating to form, as forming a series.
- 32 The national court concludes that the outcome of the main proceedings depends on the definition of a ‘series’ and the criteria to be taken into account in that regard. Since the Court of Justice has not yet ruled on this subject in its case-law relating to Article 11(3) of Directive 89/552, the national court takes the view that there are good grounds for referring questions for a preliminary ruling.
- 33 In those circumstances, the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘1. Does Article 11(3) 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 (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), by restricting advertising breaks, pursue the objective of protecting the artistic value of feature films and films made for television, irrespective of whether films made for television have from the outset been produced for television and provided with breaks designed for the insertion of advertising spots?’

2. What criteria must be satisfied for the broadcasting of several feature films and films made for television to be classified as a “series”, derogating from the advertising restrictions for feature films and films made for television?

3. Are broadcasts consisting of several parts which manifest a common concept due to common features of theme, content and form, and which are broadcast at connected times, to be regarded as a “series” for the purposes of Article 11(3) of Directive 89/552/EEC as amended by Directive 97/36/EC?

4. Does the interpretation of the term “series” for the purposes of Article 11(3) of Directive 89/552/EEC as amended by Directive 97/36/EC permit common points of theme or content of the episodes to be wholly or largely regarded as unnecessary and predominantly points of form or form of reception taken as the criterion?’

The questions referred

The first question

- 34 By its first question the referring court is asking, in essence, whether films which have been made for television and which provide, from their conception, for breaks for the insertion of advertising come within the meaning of ‘films made for television’ in Article 11(3) of Directive 89/552, particularly in view of the purpose of that provision, which is to limit advertising breaks so as to protect the artistic value of feature and television films.

Observations submitted to the Court

- 35 RTL maintains that Article 11(3) of Directive 89/552 is primarily intended to protect the integrity and artistic value of audiovisual works as well as editorial freedom. Consumer protection is only a secondary objective of that provision.
- 36 According to RTL, the protection of the artistic value of audiovisual works cannot, however, be extended to films which have been produced specifically for television and designed from the outset to provide breaks for the insertion of advertising spots. Such an extension would constitute an unjustified interference with the fundamental rights of television broadcasters.
- 37 RTL claims that the freedom of television broadcasters to produce and transmit television films is part of the freedom to communicate and broadcast — which includes, among other things, television advertising, an independent form of communication — which constitutes a fundamental right guaranteed by Community law.
- 38 Such a fundamental right arises first from Article 10(1) of the ECHR, which provides for the freedom to receive and impart information and ideas, which is part of the freedom of opinion. This right is also enshrined in Article 11(2) of the Charter of Fundamental Rights.
- 39 According to the case-law of the European Court of Human Rights relating to Article 10(1) of the ECHR, such a right also includes the freedom of broadcasting, of television and of the cinema, does not vary according to the content or character of the information broadcast and also covers advertising.

- 40 RTL points out finally that the Court has accepted that the maintenance of pluralism in the audiovisual field is linked to the freedom of expression ensured by Article 10 of the ECHR, which is one of the fundamental rights guaranteed by the Community legal order.
- 41 In that regard, RTL submits that the eighth recital in the preamble to Directive 89/552 states that the right freely to broadcast and distribute television programmes, enshrined in that directive and guaranteed as regards the freedom to provide services by Article 59 of the EC Treaty (now, after amendment, Article 49 EC), is also a specific manifestation in Community law of a more general principle, namely the freedom of expression guaranteed by Article 10(1) of the ECHR.
- 42 RTL maintains that the freedom of a producer to make television programmes which include advertising breaks is part, secondly, of artistic freedom, a fundamental right of the Community legal order which covers both the creation of a work and its broadcasting or transmission.
- 43 RTL concludes from this that the restrictions in respect of advertising contained in Article 11(3) of Directive 89/552 with regard to the broadcasting of the television films at issue in the main proceedings interfere with both broadcasting freedom and artistic freedom.
- 44 The question therefore arises whether the restrictions on those two fundamental freedoms by the regulation of advertising at issue in the main proceedings can be justified under Community law.

- 45 RTL claims that it follows from the Court's case-law that restrictions on fundamental rights can be justified in Community law only to the extent to which they are appropriate, necessary and proportionate for the purpose of attaining a lawful objective. It is clear also from the case-law that restrictions on fundamental rights must be clearly defined, failing which they must be construed narrowly.
- 46 Those principles also accord with the case-law of the European Court of Human Rights concerning, in particular, Article 10(2) of the ECHR, under which a restriction which lacks clarity must be construed strictly.
- 47 With particular regard to the consideration of the justification for the restriction at issue in the main proceedings, RTL claims that the protection of the artistic integrity of films as audiovisual works sought by the restrictions on advertising cannot be imposed on RTL since it is itself the creator of the works at issue in the main proceedings, protection of which it does not seek since they were specifically designed to be interrupted by advertising. The case therefore does not involve protection of the rights of others under Article 10(2) of the ECHR.
- 48 It follows that, in order to ensure a construction in conformity with the Treaty, the scope of the protection of the work provided by Article 11(3) of Directive 89/552 must be understood, in so far as concerns television films, as meaning, in particular, that it applies only to the extent to which it meets the wishes of the creators of the films, and therefore of those entitled to exercise the fundamental rights.
- 49 RTL concludes that the protection of work under Article 11(3) of Directive 89/552 does not apply when those concerned have made, from the outset, films produced for television which include advertising breaks.

50 The NLM, the United Kingdom Government and the Commission contend that the provision in which feature and television films are subject to stricter standards in respect of advertising breaks was expressly retained through the most recent revision of Directive 89/552, and that, therefore, those two types of films should be treated in the same way in that regard. The wording of Article 11(3) of Directive 89/552 can no longer be construed otherwise.

Reply of the Court

51 At the outset, it is appropriate to point out that Chapter IV of Directive 89/552 lays down provisions in respect of television advertising, sponsorship and teleshopping. Among those provisions is Article 11 regulating the frequency of advertising breaks.

52 Under Article 11(1) of Directive 89/552 television advertising must, in principle, be inserted between programmes. However, advertising may be inserted during programmes on condition that certain principles are observed, namely that the advertising breaks do not adversely affect either the integrity or the value of the programmes, that they take account, particularly, of the nature and duration of the programme and that they do not prejudice the rights of the rights holders.

53 The particular conditions under which programmes may be interrupted by advertising are set out in Article 11(2) to (5).

54 Under Article 11(4) a period of at least 20 minutes must separate successive advertising breaks within a programme.

- 55 Article 11(3) of Directive 89/552 provides for a scheme of increased protection for audiovisual works, such as feature films and films made for television, namely a single advertising break per period of 45 minutes with an additional break if the programme's duration is at least 20 minutes longer than two or more complete periods of 45 minutes.
- 56 However, Article 11(3) of Directive 89/552 lays down an exception for series, serials, light entertainment programmes and documentaries, which are therefore covered by the abovementioned rule in Article 11(4).
- 57 RTL maintains that films made for television which provide, from their conception, for breaks for the insertion of advertising do not come within the meaning of 'films made for television' in Article 11(3) of Directive 89/552.
- 58 Such a construction conflicts with both the wording of that provision and its history.
- 59 The wording of Article 11(3) of Directive 89/552 is unambiguous. There is nothing in it which permits a distinction to be drawn for a category of films made for television which, on the ground that they provide from their conception for the insertion of advertising breaks, do not come within the meaning of 'films made for television'.
- 60 That is also confirmed by the history of Article 11(3), as recalled in particular by the national court. The amendment to that provision proposed by the Commission, which was intended to exclude films made for television from the

provision's scheme, was not accepted by the Council. That proposal was based precisely on the consideration that, in such films, natural breaks can be provided from the conception of the film, enabling advertising to be inserted without threatening the integrity of the work.

- 61 The construction of Article 11(3) of Directive 89/552 advocated by RTL is likewise not required by its purpose.
- 62 It follows from the 27th recital in the preamble to Directive 89/552, as well as from Article 11(1) thereof, that Article 11 is intended to establish a balanced protection of the financial interests of the television broadcasters and advertisers, on the one hand, and the interests of the rights holders, namely the writers and producers, and of consumers as television viewers, on the other.
- 63 That aim is clear also from paragraphs 245 and 246 of the Explanatory Report accompanying the European Convention, which was drafted at the same time as Directive 89/552 and is referred to in the fourth recital in its preamble (see, to that effect, Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 *RTI and Others* [1996] ECR I-6471, paragraph 33).
- 64 Even were it true, as RTL maintains, that for the films at issue such an objective, in so far as it relates to the protection of the interests of television broadcasters and those of the rights holders, is irrelevant since such protection is not claimed in this case, there none the less remains another essential aspect of that objective, namely the protection of consumers, as viewers, from excessive advertising, which is clearly relevant in this case.

- 65 RTL's suggested construction disregards this aspect, which is none the less essential, of the objective of balanced protection sought by Article 11 of Directive 89/552. In addition, as regards the system of increased protection under Article 11(3), the protection of television viewers is specifically of particular importance.
- 66 Such a construction also risks depriving the increased protection conferred by that provision of its substance since it would enable television broadcasters easily to circumvent that protection by buying and producing only films which include, from their conception, breaks for the insertion of advertising.
- 67 Finally, a construction under which the system of increased protection under Article 11(3) of Directive 89/552 applies to films made for television, such as those at issue in the main proceedings, does not lead to a result which is contrary to fundamental rights.
- 68 Admittedly, such increased protection may amount to a restriction on the freedom of expression as enshrined in Article 10(1) of the ECHR, to which the eighth recital in the preamble to Directive 89/552 refers.
- 69 Such a restriction appears, however, to be justified under Article 10(2) of the ECHR.
- 70 The restriction at issue pursues a legitimate aim involving 'the protection of the... rights of others' within the meaning of that provision, namely the protection of

consumers as television viewers, as well as their interest in having access to quality programmes. Those objectives may justify measures against excessive advertising.

- 71 The Court has, moreover, already held that the protection of consumers against abuses of advertising or, as an aim of cultural policy, the maintenance of a certain level of programme quality are objectives which may justify restrictions by the Member States on freedom to provide services in relation to television advertising (see Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 27, and Case C-6/98 *ARD* [1999] ECR I-7599, paragraph 50).
- 72 With regard to the proportionality of the restriction at issue, it is appropriate to point out that this does not relate to the content of the advertising, is not a prohibition but only a limit on frequency applying to every operator and, in principle, leaves broadcasters free to decide the timing (see paragraph 249 of the Explanatory Report accompanying the European Convention) and, within the confines of Article 18 of Directive 89/552, the length of the advertising breaks.
- 73 It is also clear from the case-law of the European Court of Human Rights on Article 10(2) of the ECHR that national authorities have a discretion in deciding whether there is a pressing social need capable of justifying a restriction on freedom of expression. According to that case-law, such a discretion is particularly essential in commercial matters and especially in a field as complex and fluctuating as advertising (see *VGT Verein gegen Tierfabriken v Switzerland*, judgment of the ECHR of 28 June 2001, Reports of Judgments and Decisions 2001-VI, paragraphs 66 to 70).
- 74 In view of the foregoing, the answer to the first question must be that films which have been made for television and which provide, from their conception, for

breaks for the insertion of advertising are covered by the term ‘films made for television’ in Article 11(3) of Directive 89/552.

The second, third and fourth questions

- 75 By its second, third and fourth questions, which it is appropriate to examine together, the Niedersächsisches Oberverwaltungsgericht is asking the Court, in essence, what must be the connections between films to enable them to come within the exemption provided for ‘series’ in Article 11(3) of Directive 89/552.

Observations submitted to the Court

- 76 RTL submits that the term ‘series’ must, first, be construed with regard to the guarantee of the freedom to provide services.
- 77 In that regard, RTL observes that, according to the Court’s case-law, the primary objective of Directive 89/552 is to ensure freedom to provide services, in particular freedom to broadcast television programmes.
- 78 It follows in particular from that case-law that, since the first sentence of Article 11(3) of Directive 89/552 contains a restriction on freedom to broadcast television programmes, which is not clearly worded — since, among other

things, the directive does not indicate clearly under what conditions the broadcasting of television films, in so far as such films form a series, is not subject to the restriction of the 45-minute period between advertising breaks — it must be construed strictly, in accordance with the directive's aim. The term 'series' must for that reason be construed as broadly as possible.

- 79 With regard to a literal construction of Article 11(3) of Directive 89/552 in its various language versions, RTL maintains that an analysis of its various language versions shows that it is not univocal but admits of many meanings.
- 80 The German term 'Reihe' ('feuilleton' in the French version) corresponds, according to RTL, to such a variety of translations that a clear and uniform definition is impossible.
- 81 In order to interpret that provision, it is therefore appropriate, in accordance with the Court's case-law, to consider the context and the objective pursued by the relevant legislation.
- 82 A systematic construction indicates also that the terms 'series' and 'serial', since they are mentioned side by side, must have separate meanings.
- 83 To come within the meaning of 'series' it is sufficient that several television films with independent plots are broadcast regularly in a certain time slot and that they are connected by other criteria of form and concept and by a common general theme, for example, the representation of the widest variety of relationship crises.

- 84 So far as concerns, finally, the interpretation of Article 11(3) of Directive 89/552 in the light of the directive's aims, RTL argues that too restrictive a construction of the term 'series' would adversely affect the possibilities of financing and would therefore be contrary to one of the objectives of that directive, namely the promotion of European audiovisual productions.
- 85 RTL claims that the term 'series' must, secondly, be construed in the light of the fundamental Community rights of the freedom of television broadcasting and artistic freedom.
- 86 In that regard, RTL argues that the making of several films as a series, even if they have only a tenuous thematic link, incorporating within them advertising slots, comes within the protection under Community law of the fundamental rights relating to those freedoms. A narrow construction of the term 'series' would seriously undermine those rights.
- 87 Furthermore, such a narrow construction involving the application of the strict limits on advertising breaks laid down by Article 11(3) is not justified by the pursuit of lawful interests.
- 88 RTL set aside the justification based on protection of a work's integrity in its observations concerning the first question referred, essentially on the ground that this case does not involve protection of the rights of others to the integrity of work (see paragraph 47 of this judgment). RTL submits further that neither protection of the quality of television output nor consumer protection can constitute justification.
- 89 RTL asserts in particular that, within the framework of the pluralist regime of the audiovisual, programme quality is not in itself a general legitimate interest which

can justify strict limits on advertising for television films since advertising breaks have, in themselves, no effect on a film's quality. In addition, broadcasting and press freedom precludes the imposition on television broadcasters of a certain standard of programmes.

90 RTL points out also that a strict construction of the term 'series' is neither appropriate nor necessary to guarantee effective protection of consumers.

91 Consumers have a vast choice between different channels showing more or less advertising. Consumers choosing private channels do so knowing that there is a greater number of advertising breaks on such channels than on others, such as public or specialised cultural channels. Such freedom of choice is, moreover, in itself a regulatory mechanism, because, if consumers took the view that the programmes on a private channel carry too much advertising, the viewing figures of that channel would fall, forcing it to adapt such programmes to consumers' wishes.

92 RTL argues further that in this case it is not necessary to impose the more rigorous rule of the 45-minute period flowing from a strict construction of the term 'series' since there are less restrictive means to ensure the effective safeguarding of consumers' freedom of choice, among others a duty to inform, that is to say, an obligation to state the length and frequency of advertising in the magazines which publish television schedules or at the start of the programmes concerned.

93 In that regard, RTL refers by analogy to the Court's case-law on the free movement of goods from which it follows that, in order to safeguard consumers' freedom of choice, it is sufficient as a general rule to inform them about products, for example as to the raw materials used in their manufacture.

- 94 The NLM, the United Kingdom Government and the Commission maintain that a definition of the term ‘series’ based on criteria of form cannot be upheld. Accepting such a definition would render meaningless the special protection of feature films and films made for television, since it would be easy to construct a formal connection between any type of film and thereby to evade that protection.
- 95 It is appropriate, on the other hand, to require there to be a substantial connection between the programmes from the point of view of content, nature or theme for them to be regarded as a serial or series.
- 96 The United Kingdom Government asserts in particular that, in the same way as is set out in the ITC’s guidance note, the most genuine links between programmes are those which result from the storyline, that is to say the script carrying on from one episode to the next and/or some of the characters, at least, reappearing from one episode to another.

Reply of the Court

- 97 It is appropriate to state at the outset that neither Directive 89/552 nor the documents relevant to its construction, such as the preparatory documents or the Explanatory Report accompanying the European Convention, shed any light on the criteria defining the respective scope of the expressions ‘films made for television’ and ‘series’ in Article 11(3) of Directive 89/552.
- 98 Nor is a construction according to the usual meaning of those expressions or based on a comparison of the language versions of Directive 89/552 any more capable of providing an unambiguous reply to that question.

99 The provision in question must therefore be construed by reference to the purpose and general scheme of the rules of which it forms part (see, to that effect, in particular, Case C-257/00 *Givane and Others* [2003] ECR I-345, paragraph 37).

100 As is clear from paragraph 62 of the present judgment, the purpose of Article 11 of Directive 89/552 is to establish a balanced protection of the interests of television broadcasters and advertisers, on the one hand, and those of the rights holders and consumers as television viewers, on the other.

101 For audiovisual works such as, in particular, films made for television, Article 11(3) of Directive 89/552 is intended to provide television viewers with increased protection against excessive advertising.

102 A conception based essentially on criteria of form defining the term ‘series’, as advanced by RTL, cannot be upheld since it would undermine that purpose.

103 Such a conception would make it possible for the increased protection to be circumvented and would therefore risk rendering it illusory. Television broadcasters could easily construct a common framework based on form linking films of great diversity on the basis, inter alia, of the same broadcasting slot, of a broadcast under the same title or theme, or of a presentation before or after the programmes.

- 104 Links based on form such as those suggested by RTL cannot therefore be sufficient for the purposes of the definition of the term ‘series’ within the meaning of Article 11(3) of Directive 89/552.
- 105 It follows that the term ‘series’ requires links of substance, that is to say, common elements which relate to the content of the films concerned.
- 106 In order to circumscribe further the nature of the criteria defining the term ‘series’, it is necessary to identify the reasons why Directive 89/552 provides less protection for television viewers against excessive advertising during programmes such as series.
- 107 As the Advocate General points out in paragraph 51 of his Opinion, that lower level of protection can be explained by the fact that series, particularly because of the basic elements linking the different films which constitute them, such as, for example, the development of the same story or the reappearance of one or more characters, require less sustained concentration on the part of the television audience than do films.
- 108 In view of the foregoing, the reply to the second, third and fourth questions must be that the connections which must link films in order that they can come within the exception laid down for ‘series’ by Article 11(3) of Directive 89/552 must relate to the content of the films concerned, such as, for example, the development of the same story from one episode to another or the reappearance of one or more characters in different episodes.

Costs

109 The costs incurred by the United Kingdom Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Niedersächsisches Oberverwaltungsgericht by order of 15 June 2001, hereby rules:

1. Films which have been made for television and which provide, from their conception, for breaks for the insertion of advertising are covered by the term 'films made for television' in Article 11(3) 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.

2. The connections which must link films in order that they can come within the exception laid down for 'series' by Article 11(3) of Directive 89/552 must relate to the content of the films concerned, such as, for example, the development of the same story from one episode to another or the reappearance of one or more characters in different episodes.

Timmermans

Edward

Jann

Delivered in open court in Luxembourg on 23 October 2003.

R. Grass

Registrar

V. Skouris

President