

JUDGMENT OF THE COURT (Sixth Chamber)

28 October 1999 *

In Case C-6/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Oberlandesgericht Stuttgart, Germany, for a preliminary ruling in the proceedings pending before that court between

Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD)

and

PRO Sieben Media AG,

supported by

SAT 1 Satellitenfernsehen GmbH,

Kabel 1, K 1 Fernsehen GmbH,

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 (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting as President of the Sixth Chamber, P.J.G. Kapteyn (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD), by W. Keßler, Rechtsanwalt, Stuttgart,
- PRO Sieben Media AG, by H.-J. Rabe, of the Brussels Bar,
- Kabel 1, K 1 Fernsehen GmbH, by T. Jestaedt, of the Brussels Bar,
- the Luxembourg Government, by N. Schmit, Director of International Economic Relations and Cooperation at the Ministry of Foreign Affairs, acting as Agent,
- the Netherlands Government, by J.G. Lammers, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,
- the Portuguese Government, by L. Fernandes, Director of the Legal Service of the Directorate General for the European Communities in the Ministry of Foreign Affairs, and P. Borges, a lawyer in the Directorate-General for the European Communities in that Ministry, acting as Agents,

- the Swedish Government, by E. Brattgård, Departementsråd in the Ministry of Foreign Affairs, acting as Agent,
- the United Kingdom Government, by D. Cooper, of the Treasury Solicitor's Department, acting as Agent, and R. Thompson, Barrister,
- the Commission of the European Communities, by J. Sack, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD), represented by W. Keßler; PRO Sieben Media AG, represented by H.-J. Rabe; Kabel 1, K 1 Fernsehen GmbH, represented by T. Jestaedt; the French Government, represented by A. Maitrepierre, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; the Italian Government, represented by F. Quadri, Avvocato dello Stato; the United Kingdom Government, represented by J. Eadie, Barrister; and the Commission, represented by J. Sack, at the hearing on 22 April 1999,

after hearing the Opinion of the Advocate General at the sitting on 24 June 1999,

gives the following

Judgment

- 1 By order of 17 December 1997, received at the Court on 12 January 1998, the Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two 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).
- 2 Those questions have arisen in legal proceedings between Arbeitsgemeinschaft Deutscher Rundfunkanstalten (hereinafter 'ARD') and PRO Sieben Media AG (hereinafter 'PRO Sieben'), supported by SAT 1 Satellitenfernsehen GmbH and Kabel 1, K 1 Fernsehen GmbH (hereinafter 'SAT 1 and Kabel 1').
- 3 ARD consists of 11 public-law broadcasting organisations of the German *Länder* which are jointly responsible for the television programming of ARD. PRO Sieben is a private television broadcasting company, as are SAT 1 and Kabel 1.

Legal framework

Directive 89/552, as amended by Directive 97/36

- 4 Article 3(1) of Directive 89/552 provides as follows:

'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.'

5 Under Article 11(1) of Directive 89/552, advertisements must as a rule be inserted between programmes; however, they 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.’

6 Article 11(2) of the Directive provides that, in programmes consisting of autonomous parts, such as the televised retransmission of sporting events, advertisements may be inserted only between the parts or in the intervals.

7 Article 11(3) of the Directive provides as follows:

‘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.’

8 Article 20 of Directive 89/552 provides:

‘Without prejudice to Article 3, Member States may, with due regard for Community law, lay down conditions other than those laid down in Article 11(2) to (5) and Articles 18 and 18a in respect of broadcasts intended solely for the national territory which cannot be received, directly or indirectly, by the public in one or more other Member States.’

The European Convention on Television

- 9 Article 14(3) of the European Convention on Transfrontier Television of 5 May 1989 (hereinafter 'the Convention') is worded as follows in the French and English versions, which are the authentic texts:

English version

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

French version

'La transmission d'œuvres audiovisuelles, telles que les longs métrages cinématographiques et les films conçus pour la télévision (à l'exclusion des séries, des feuilletons, des émissions de divertissement et des documentaires), à condition que leur durée soit supérieure à quarante-cinq minutes, peut être interrompue une fois par tranche de quarante-cinq minutes. Une autre interruption est autorisée si leur durée est supérieure d'au moins vingt minutes à deux ou plusieurs tranches complètes de quarante-cinq minutes.'

German law

- 10 The German *Grundgesetz* (Basic Law) confers on the *Länder* legislative competence in the matter of radio and television broadcasting. Under the terms of the *Staatsvertrag über den Rundfunk im vereinigten Deutschland* (Treaty on Broadcasting in the United Germany) (hereinafter ‘the *Rundfunkstaatsvertrag*’) of 31 August 1991, public-law broadcasting organisations may only broadcast a maximum of 20 minutes advertising in their televised programmes during any working day. Private television broadcasting companies may allocate a maximum of 20% of daily broadcasting time to advertising, including 15% for spot advertisements.
- 11 Article 26(4) of the *Rundfunkstaatsvertrag* provides as follows:
- ‘In derogation from the second sentence of paragraph (3), works such as feature films and television films, with the exception of series, serials, light entertainment programmes and documentaries, where they last for longer than 45 minutes, may be interrupted once for each complete period of 45 minutes. A further interruption is allowed if those programmes last for at least 20 minutes longer than two or more complete periods of 45 minutes.’
- 12 This provision was reproduced in Article 44(4) of the *Dritter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge* (Third Treaty amending the Treaties on Broadcasting Law), which entered into force on 1 January 1997.
- 13 By letter of 7 April 1992, the German Government informed the Commission that Directive 89/552 had been transposed and forwarded to it the 1991 *Rundfunkstaatsvertrag*.

Facts and questions submitted for a preliminary ruling

- 14 According to the case-file, the matter at issue in the main proceedings is the calculation of the number of advertising interruptions authorised under Article 26(4) of the *Rundfunkstaatsvertrag* in feature films broadcast by private broadcasting companies. Two interpretations are put forward, commonly called 'the gross principle' and 'the net principle'.
- 15 According to the gross principle, which is supported by PRO Sieben, SAT 1 and Kabel 1, the duration of advertisements must be included in the period of time in relation to which the permissible number of interruptions is calculated. According to the net principle, which is supported by ARD, only the duration of the films themselves is to be included. It is common ground that in certain circumstances application of the gross principle will permit a greater number of interruptions than would be allowed under the net principle.
- 16 By judgment of 10 October 1996, the Landesgericht Stuttgart (Regional Court, Stuttgart) ordered PRO Sieben to desist from interrupting by advertisements the broadcasting of audiovisual works such as feature films and television films whose duration, excluding interpolated advertising time (the net principle), does not exceed 45 minutes or interrupting by advertisements, more often than once per complete period of 45 minutes, longer television works, calculated according to the net principle. A further interruption, the Landesgericht ruled, would be permissible if the programme, calculated according to the net principle, lasted at least 20 minutes longer than two or more complete periods of 45 minutes.
- 17 On appeal against that decision to the Oberlandesgericht, PRO Sieben argued that, even though the net principle had to be applied under German legislation, this was contrary to Directive 89/552 and to primary Community law.

- 18 While it agreed with the interpretation of national law given by the Landesgericht Stuttgart, the Oberlandesgericht Stuttgart none the less considered that the resolution of the dispute depended on the interpretation of Directive 89/552.
- 19 In those circumstances, the Oberlandesgericht Stuttgart decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) Does Article 11(3) of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC (“the Television Amending Directive”) or the identical 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 (“the Television Directive”) prescribe the gross principle or the net principle?
- (2) On the assumption that Article 44(4) of the Dritter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (Third Treaty amending Treaties on Broadcasting Law, Annex B 33, p. 437 of the case-file) prescribes the net principle, is that then compatible with Article 11(3) in conjunction with Article 3(1) of the Television Directive or with primary Community law (Articles 5, 6, 30 et seq., 59 et seq. and 85 et seq. of the EC Treaty and the general principle of equality)?’

The first question

- 20 By its first question, the national court is asking essentially whether Article 11(3) of Directive 89/552, as amended by Directive 97/36, prescribes the gross principle or the net principle.

- 21 In the view of ARD and the French, Netherlands and Portuguese Governments, Article 11(3) of Directive 89/552, as amended, refers to the net principle. On the other hand, PRO Sieben, supported by SAT 1 and Kabel 1 and by the Italian, Luxembourg and United Kingdom Governments and by the Commission take the view that this provision refers to the gross principle.
- 22 In support of their respective interpretations, the parties to the main proceedings, the Governments which have submitted observations to the Court, and the Commission have relied on arguments based on the wording of Article 11(3) of Directive 89/552 in its German, English and French versions, on Article 14(3) of the Convention, on the scheme and purpose of Directive 89/552, and on the history of that directive and of Directive 97/36.
- 23 First of all, as the Advocate General points out in points 18 to 25 of his Opinion, the arguments based on the wording of Article 11(3) of Directive 89/552, as amended, do not provide any clear indication as to whether that provision prescribes the gross principle or the net principle.
- 24 With regard, next, to Article 14(3) of the Convention, the wording of which is identical to that of Article 11(3) of Directive 89/552, as amended, except that the first provision refers to 'duration', whereas the second provision refers to 'scheduled duration', it is sufficient for the Court to observe, as the Advocate General observes in point 29 of his Opinion, that this difference may be open to contradictory interpretations.
- 25 For the reasons mentioned in points 31 to 36 of the Advocate General's Opinion, neither the declaration by the Council and the Commission contained in the minutes of the Council of 3 October 1989 nor the proposal by the European Parliament of 14 February 1996 concerning Directive 97/36 allow any conclusive

arguments to be drawn in answer to the question whether Article 11(3) of Directive 89/552, as amended, prescribes the gross principle or the net principle.

- 26 The conclusion must therefore be that the wording of Article 11(3) of Directive 89/552, as amended, is ambiguous.
- 27 The Court has held that, when the text of a Community provision contains, in its different language versions, considered in the light of the history of the provision and the preparatory documents, on which the parties have based their arguments in their observations submitted to the Court, too many contradictory and ambiguous elements to provide the answer, it is necessary, in order to interpret that provision, to consider its context and the objective of the rules in question (Case 11/76 *Netherlands v Commission* [1979] ECR 245, paragraph 6).
- 28 As the Court found in Case C-412/93 *Leclerc-Siplec v TF1 Publicité and M6 Publicité* [1995] ECR I-179, paragraph 28, and in Joined Cases C-34/95, C-35/95 and C-36/95 *KO v De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 3, the main purpose of Directive 89/552, which was adopted on the basis of Article 57(2) (now, after amendment, Article 47(2) EC) and Article 66 (now Article 55 EC) of the EEC Treaty, is to ensure freedom to provide television broadcasting services.
- 29 A provision which imposes a restriction, in the matter of the provision of services, on an activity involving the exercise of a fundamental freedom such as the freedom to provide television broadcasting services must express that restriction in clear terms.

- 30 It follows that, when a provision of Directive 89/552 imposes a restriction on broadcasting and on the distribution of television broadcasting services, and the Community legislature has not drafted that provision in clear and unequivocal terms, it must be given a restrictive interpretation.
- 31 Since Article 11(3) of Directive 89/552, as amended, imposes a restriction as regards the possibility of interrupting the transmission of audiovisual works by advertising, that restriction must be interpreted in the strictest possible sense.
- 32 It is common ground that the gross principle allows a greater number of interruptions for advertising than the net principle.
- 33 The answer to be given to the first question must therefore be that Article 11(3) of Directive 89/552, as amended by Directive 97/36, is to be construed as prescribing the gross principle, so that, in order to calculate the 45-minute period for the purpose of determining the number of advertising interruptions allowed in the broadcasting of audiovisual works such as feature films and films made for television, the duration of the advertisements must be included in that period.

The second question

The first part of the second question

- 34 By the first part of its second question, the national court is asking essentially whether Article 11(3), in conjunction with Article 3(1), of Directive 89/552, as

amended by Directive 97/36, authorises Member States to prescribe the net principle.

35 PRO Sieben argues that it follows from both the purpose and scheme of Directive 89/552 that Article 3(1) thereof must be interpreted restrictively. It submits in particular that the right which Member States have under that provision to set more detailed or stricter rules cannot relate to Article 11 of Directive 89/552.

36 It states in this regard that, so far as concerns television advertising which, under Article 11(1), may be inserted during programmes on the conditions set out in Article 11(2) to (5), Member States cannot impose conditions other than those mentioned in Article 20 of Directive 89/552, as amended. However, according to PRO Sieben, the derogation provided for by the latter provision cannot justify application of the net principle in view of the fact that Article 20 concerns only broadcasts solely intended for the national territory which cannot be received, directly or indirectly, in one or more other Member States.

37 The Court observes first of all that it is clear from the wording of Article 20 of Directive 89/552 that it applies ‘without prejudice to Article 3’ of that directive.

38 Next, the Court observes that the interpretation advocated by PRO Sieben would render Article 3(1) nugatory as a general provision in an essential area covered by Directive 89/552, as amended.

39 Neither the recitals in its preamble nor the objective of Directive 89/552 suggest that Article 20 must be construed as depriving Member States of the right which Article 3(1) of that directive allows them.

- 40 The 27th recital in the preamble to Directive 89/552 refers in general terms, and without limiting it to the circumstances defined in Article 20, to the right which Member States have to set more detailed or stricter rules than the minimum rules and standards to which advertising is subject under that directive.
- 41 In contrast, the right which Member States have under Article 20 of Directive 89/552 is referred to in the 28th recital in its preamble, where reference is made to the right which Member States have to lay down different conditions for the insertion of advertising and different limits for the volume of advertising in order to facilitate those particular broadcasts, on condition that those broadcasts are intended solely for the national territory and may not be received, directly or indirectly, in one or more other Member States.
- 42 Finally, the attainment of the objective of Directive 89/552, which is to ensure freedom to provide television broadcasting services in accordance with the minimum rules which it lays down, is not affected in any way if Member States impose stricter rules on advertising.
- 43 The answer must therefore be that Article 11(3), in conjunction with Article 3(1), of Directive 89/552, as amended, authorises Member States to prescribe, for television broadcasters under their jurisdiction, the net principle for advertisements which may be inserted during programmes, and thus to provide that, in order to calculate that period, the duration of the advertisements must be excluded, on condition, however, that those rules are compatible with other relevant provisions of Community law.

The second part of the second question

- 44 By the second part of its second question, the national court asks whether Article 5 of the EC Treaty (now Article 10 EC), Articles 6, 30, 59 of the EC Treaty (now, after amendment, Articles 12 EC, 28 EC and 49 EC), Article 85 of the EC Treaty (now Article 81 EC) and the general principle of equality preclude a Member State from prescribing, under Article 3(1) of Directive 89/552, application of the net principle.

Article 30 of the Treaty

- 45 The Court has already held that legislation which prohibits televised advertising within a certain sector concerns selling arrangements since it prohibits a particular form of promotion of a particular method of marketing products (*Leclerc-Siplec*, cited above, paragraph 22).
- 46 Since the restriction on advertising in question in the main proceedings is of a similar, but less extensive, kind, it also concerns selling arrangements.
- 47 In paragraph 16 of its judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, the Court held that national provisions restricting or prohibiting certain selling arrangements are not caught by Article 30 of the Treaty so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
- 48 Those two conditions are clearly satisfied by rules on television advertising such as those at issue in the main proceedings.

Article 59 of the Treaty

- 49 As regards the compatibility with Article 59 of the Treaty of national rules imposing the net principle, which a Member State may prescribe by exercising its right under Article 3(1) of Directive 89/552, as amended, it must be observed that, since such rules limit the possibility for television broadcasters established in the State of transmission to broadcast advertisements for the benefit of advertisers established in other Member States, they involve a restriction on the freedom to provide services.
- 50 It must, however, be pointed out 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 constitute overriding reasons relating to the general interest which may justify restrictions on freedom to provide services (see, in particular, Case C-288/89 *Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media* [1991] ECR I-4007, paragraph 27).
- 51 As regards the proportionality of the restriction at issue, it is settled case-law that requirements imposed on the providers of services must be appropriate to ensure achievement of the intended aim and must not go beyond what is necessary in order to achieve that aim (see, in particular, *Collectieve Antennevoorziening Gouda*, cited above, paragraph 15, and Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141, paragraph 45).
- 52 There is nothing in the case-file to warrant the conclusion that those conditions are not satisfied in the case before the national court.

Articles 5, 6 and 85 of the Treaty and the principle of equal treatment

- 53 As the Advocate General observes in paragraphs 83 to 85 of his Opinion, Articles 5, 6 and 85 of the Treaty, as well as the principle of equal treatment, are not relevant to the situation described by the national court.
- 54 It follows from all of the foregoing that Articles 5, 6, 30 and 85 of the Treaty and the general principle of equal treatment do not apply to national rules which prescribe the application of the net principle for television broadcasters under their jurisdiction. Article 59 of the Treaty does not preclude a Member State from prescribing, under Article 3(1) of Directive 89/552, the application of the net principle.

Costs

- 55 The costs incurred by the French, Italian, Luxembourg, Netherlands, Portuguese, Swedish and United Kingdom Governments and by 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 (Sixth Chamber),

in answer to the questions referred to it by the Oberlandesgericht Stuttgart by order of 17 December 1997, hereby rules:

1. 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, is to be construed as prescribing the gross principle, so that, in order to calculate the 45-minute period for the purpose of determining the number of advertising interruptions allowed in the broadcasting of audiovisual works such as feature films and films made for television, the duration of the advertisements must be included in that period.
2. Article 11(3), in conjunction with Article 3(1), of Directive 89/552, as amended, authorises Member States to prescribe, for television broadcasters under their jurisdiction, the net principle for advertisements which may be inserted during programmes, and thus to provide that, in order to calculate that period, the duration of the advertisements must be excluded, on condition, however, that those rules are compatible with other relevant provisions of Community law.

Article 5 of the EC Treaty (now Article 10 EC), Articles 6 and 30 of the EC Treaty (now, after amendment, Articles 12 EC and 28 EC), Article 85 of the EC Treaty (now Article 81 EC) and the general principle of equal treatment

do not apply to national rules which prescribe the application of the net principle for television broadcasters under their jurisdiction.

Article 59 of the EC Treaty (now, after amendment, Article 49 EC) does not preclude a Member State from prescribing, under Article 3(1) of Directive 89/552, the application of the net principle.

Schintgen

Kapteyn

Ragnemalm

Delivered in open court in Luxembourg on 28 October 1999.

R. Grass

J.C. Moitinho de Almeida

Registrar

President of the Sixth Chamber