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The Transmission State Principle: The End of the Broadcasting Sovereignty of the Member States?

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I. INTRODUCTION

OBSERVERS OF THE media policies of the European Union contend that the transmission state principle of the Television Without Frontiers Directive, by ruling out the restriction of transfrontier broadcasts, which are in compliance with the laws of the originating state, has signified the end of the broadcasting sovereignty of the Member States.[1] The transmission state principle is central to the objective of the Television Without Frontiers Directive to create an internal market in broadcasting services. Laid down initially in Article 2(2) of Directive 89/552/EEC,[2] it has been transferred to Article 2a(1) following the adoption of the revised Directive 97/36/EC.[3] The meaning of the principle has remained the same: Member States are obliged to ensure the unhindered reception of broadcasts lawfully transmitted in their state of origin. They only have a limited possibility to derogate provisionally from the transmission state principle, when foreign television broadcasts manifestly,

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[1] Humphreys, PJ *Mass Media and Media Policy in Western Europe* (Manchester, Manchester University Press, 1996) 276.

[2] 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, [1989] OJ L 298/23.

[3] Article 2a of European Parliament and Council Directive 97/36/EC of 30 June 1997 amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation and Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, [1997] OJ L 202/60:

> 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.

seriously and gravely breach provisions concerning the protection of minors or public order.[4]

The transmission state principle is a specific manifestation of the principle of mutual recognition developed by the European Court in its *Van Binsbergen* case with regard to services and in its *Cassis de Dijon* case with regard to goods.[5] However, even though the *Cassis de Dijon* line of reasoning comes close to creating a presumption in favour of the free movement

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. Para. 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.

[4] Article 22 of Dir. 97/36/EC, [1997] OJ L 202/60:

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.
2. The measures provided for in para. 1 shall also extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.
3. Furthermore, when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.

Article 22a of Dir. 97/36/EC, [1997] OJ L 202/60:

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

[5] Case 33/74 *Van Binsbergen v Bestuur van de Bedrijsvereniging voor de Metaalnijverheid* [1974] ECR 1299; [1975] 1 CMLR 298; Case 120/78 *Rewe Zentrale v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649; [1979] 3 CMLR 494.

of goods and services satisfying the legal requirements of the home state,[6] it does not remove the capacity of the receiving state to impose its laws within the boundaries set by *Cassis*, including proportionality. The transmission state principle goes beyond mutual recognition, in that the grounds of general interest falling within the ambit of the Directive, which can be invoked by the state of destination, are narrowly circumscribed by the legislature. This is due to the fact that the transmission state principle goes hand in hand with the harmonisation of limited areas of the national broadcasting laws, which has been necessary so as to enable Member States partially to renounce their regulatory powers on cross-border television.[7]

Nonetheless, the extent to which Member States' sovereignty in the area of broadcasting has actually been compromised as a result of the transmission state principle is contentious. Article 2a(1) of Directive 97/36 states that Member States 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'. Does this mean that Member States can still invoke interests not covered by the Directive so as to restrict the transmission of foreign broadcasts? If so, one would need to know the scope of the fields coordinated by the Television Without Frontiers Directive with great precision.

These questions are of great cultural significance, since they impinge upon the power of the Member States to apply to foreign broadcasts programme requirements that are laid down in their broadcasting laws.[8] Such programme requirements are: the duty to present the plurality of views, the duty of impartiality of programmes, the maintenance of cultural identity and the protection of human dignity and morals.[9] In spite of the increasing

[6] Weatherill, S and Beaumont, P *EU Law. The Essential Guide to the Legal Workings of the European Union*, 3rd edn (London, Penguin, 1999) 569; contra Seidel, M 'Europa und die Medien' in Schwarze, J (ed) *Fernsehen ohne Grenzen. Die Errichtung des Gemeinsamen Marktes für den Rundfunk, insbesondere über Satellit und Kabel* (Baden-Baden, Nomos, 1985), 141.

[7] De Witte, B 'The European Content Requirement in the EC Television Directive—Five Years After' (1995) I *Yearbook of Media and Entertainment Law* 101, 105; Drijber, BJ 'The Revised Television Without Frontiers Directive: Is it Fit for the Next Century?' (1999) 36 *CML Rev* 87, 92.

[8] Niedobitek, M *The Cultural Dimension in EC Law* (London, Kluwer Law International, 1997) 162; see Mestmäcker, EJ, Engel, C, Gabriel-Bräutigam, K and Hoffmann, M *Der Einfluß des europäischen Gemeinschaftsrechts auf die deutsche Rundfunkordnung* (Baden-Baden, Nomos, 1990), 30; Seidel, M, '"Fernsehen ohne Grenzen". Zum Erlaß der EG-Rundfunkrichtlinie' (1991) 2 *NVwZ* 120, 122; ARD/ZDF, 'EG-Politik im Bereich des Rundfunks—Auswirkungen auf die Rundfunkordnung in der Bundesrepublik Deutschland' (1991) *MP Dokumentation II* 75, 79; Hitchens, LP 'Identifying European Community Audio-visual Policy in the Dawn of the Information Society' (1996) II *Yearbook of Media and Entertainment Law* 45, 65, 70.

[9] Barendt, EM *Broadcasting Law. A Comparative Study* (Oxford, Clarendon Press, 1995) 96 ff; Ossenbühl, F *Rundfunk zwischen nationalem Verfassungsrecht und Europäischem Gemeinschaftsrecht*, Rechtsgutachten erstattet der Regierung des Landes Nordrhein-Westfalen (Frankfurt am Main, 1986) 60; Hoffmann-Riem, W *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (New York, Guilford Press, 1996), 297 ff.

trend to relax programme commitments, they continue to be an inalienable feature of the public broadcasting landscape in a number of countries. Given that the imposition of such requirements on domestic broadcasters would be rendered absurd if foreign broadcasters were not equally obliged to comply with them, certain states simply extend their broadcasting standards to cross-frontier broadcasts. It is questionable whether the Directive countenances such practices.

This article will consider, first, the criteria determining the state having jurisdiction over a broadcaster in the light of the case law of the European Court. The Television Without Frontiers Directive seeks to ensure that 'one Member State and one only has jurisdiction over a broadcaster'.[10] The question as to which Member State can claim the right to regulate the activities of a broadcaster is relevant but complex. The freedom of establishment and the freedom to provide services guaranteed under the EC Treaty and in secondary legislation allow broadcasters to establish themselves in any Member State and to target non-national markets. Differences in the broadcasting standards of the Member States invite broadcasters to engage in forum shopping so as to find the most congenial environment from which to operate.[11] Jurisdictional problems typically arise if a channel having established itself in a country exclusively targets the audience of another country.[12] Also, if it tailors its programme for the market of the place of establishment while at the same time capturing the markets of neighbouring countries with advertising or programme windows targeting people in these additional audiences.[13] A reception state wishing to apply its own laws will have to prove that it has jurisdiction over this channel.

Secondly, the operation of the transmission state principle will be explained. The rules on jurisdiction and the transmission state principle go hand in hand. While the former determine the one country having personal jurisdiction over a broadcaster, the latter entrusts this very country with the sole responsibility of supervising this broadcaster's programmes to the exclusion of all other countries receiving these programmes. The transmission state principle seeks to ensure that there are no control gaps and, what is crucial for the creation of the internal market in broadcasting services, no double control of broadcasts in the Community.

[10] Recital 13 of Dir. 97/36/EC.

[11] Nikoltchev, S 'Jurisdiction over Broadcasters: EC-Rules, Case Law, and an Ever-Changing Audiovisual Landscape' in *Transfrontier Television in the European Union: Market Impact and Selected Legal Aspects*, Background Paper prepared by the European Audiovisual Observatory for a Ministerial Conference on Broadcasting organised by the Irish Presidency of the European Union (Dublin & Drogheda 1–3 March 2004), http://www.obs.coe.int/online_publication/transfrontier_tv.pdf (last visited on 22 April 2004), 28.

[12] Lange, A 'Transfrontier Television in the European Union: Market Impact' in *ibid* 6, 10. An example are RTL-4 and RTL-5 which are established in Luxembourg, but target the Netherlands.

[13] *Ibid.* German private channels SAT.1, RTL, Pro7 and Kabel1 have Swiss and Austrian windows. SAT.1 has obtained a licence from the targeted countries.

This seemingly hard and fast rule is not as clear-cut in reality. There is no doubt that the receiving state cannot be entirely divested of its regulatory responsibilities, yet the Directive does little to clarify the subjects for which this type of control is not pre-empted. The final section therefore assesses the residual powers of receiving Member States to control incoming broadcasts and concludes that the jurisprudence of the Court of Justice has yet to define more clearly the relationship between partial harmonisation and the protection of valuable and vulnerable values in the national broadcasting orders.

II. THE TRANSMISSION STATE

Given that the competence of supervising broadcasts is only bestowed on the transmission state and that no overarching European broadcasting authority exists as yet, it is apparent that the possibility of clearly identifying the Member State having jurisdiction with regard to a particular broadcaster is of paramount importance.

Directive 89/552 gave rise to legal uncertainty in this respect by choosing not to lay down criteria determining jurisdiction.[14] The revised Directive 97/36 responded to this unsatisfactory state of affairs by developing elaborate rules of conflict. Before looking at these amendments, it is pertinent to outline the decisions adopted by the Court under the old regime, since they decisively influenced the legislative process leading to the new Directive. Two of these cases concern infringement proceedings initiated by the Commission against the United Kingdom and Belgium on the ground of the incorrect transposition of the Directive into national law. The other cases arose out of preliminary references concerning broadcasters having links with more than one Member State.

A. The Case Law of the European Court

In the case *Commission v United Kingdom*[15] the Commission brought infringement proceedings against the United Kingdom for violation of its

[14] Art. 2 (1) of Dir. 89/552/EEC, [1989] OJ L 298/23:

> Each Member State shall ensure that all television broadcasts transmitted—by broadcasters under its jurisdiction, or—by broadcasters who, while not being under the jurisdiction of any Member State, make use of a frequency or a satellite capacity granted by, or a satellite up-link situated in, that Member State, comply with the law applicable to broadcasts intended for the public in that Member State.

[15] Case C-222/94 *Commission v United Kingdom* [1996] ECR I-4025.

obligations under the Directive. The Broadcasting Act 1990 determined jurisdiction for satellite broadcasts according to their place of transmission, thereby distinguishing between domestic and non-domestic satellite services. As a result, the United Kingdom also supervised broadcasts transmitted by broadcasters falling under the jurisdiction of other Member States.

The European Court held that the interpretation advocated by the United Kingdom could not be reconciled with the wording of Article 2(1) of Directive 89/552, since the place from which a broadcast is transmitted is referred to in the second indent of Article 2(1) as a criterion applicable to broadcasters who are not under the jurisdiction of any Member State. In the Commission's point of view jurisdiction *ratione personae* over a broadcaster could only be founded on the broadcaster's connection to the State's legal system which is tantamount to its establishment as this concept is used in Article 49(1) EC.[16] The Court agreed with the Commission's opinion, mainly because of the greater efficiency of the criterion based on establishment. The rule adopted by the United Kingdom would entail the risk of conflicting claims of jurisdiction, given that a broadcaster could transmit its programmes via up-links situated in several Member States.[17] The Court conceded that this risk also exists with the criterion of establishment. It could, however, be reduced by construing establishment as 'the place in which a broadcaster has the centre of its activities, in particular the place where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together'.[18] Moreover, the criterion supported by the United Kingdom would enhance the risk of abuse, since it would be easy for broadcasters to move their up-links to another Member State in order to benefit from its legislation.[19]

A noteworthy contribution of this decision to the understanding of Article 2(1) of Directive 89/552 is that it made clear that all television broadcasts transmitted by broadcasters coming under the jurisdiction of a Member State should comply with roughly the same rules.[20] These rules are, according to Article 2(1), 'the law applicable to broadcasts intended for the public in that Member State'. The Court found the United Kingdom to have violated this obligation by applying, in section 43 of the Broadcasting Act 1990, a different regime to non-domestic satellite services (NDSS) than that applicable to domestic satellite services (DSS).[21] More precisely, NDSS were treated more leniently, since they were exempted from the obligation to abide by Articles 4 and 5 of the Directive. It is not

[16] *Ibid* paras 35ff.
[17] AG Lenz in Case C–222/94 *Commission v United Kingdom* [1996] ECR I–4025, para 68.
[18] Case C–222/94, para 58.
[19] *Ibid* para 60.
[20] Drijber, BJ, above n 7, 97; see Harrison, J and Woods, L 'Determining Jurisdiction in the Digital Age' (1999) 5 *European Public Law* 583, 593.
[21] Case C–222/94, paras 70ff.

surprising that NDSS, in contrast to DSS, could also be received beyond the United Kingdom. Such attempts by Member States to deregulate broadcasts addressed to foreign viewers, attracting thus satellite channels to operate from their territory, are precluded by the Directive.

B. The Revised Television Without Frontiers Directive

The application of Directive 89/552/EEC revealed the need to clarify the concept of jurisdiction in relation to the audiovisual sector.[22] Hence, detailed criteria have been enshrined in Article 2 of the revised Directive with the aim of covering all possible constellations in which a Member State is responsible for the activities of a certain broadcaster. In accordance with the case law of the European Court, the establishment criterion has been made the 'principal criterion determining the jurisdiction of a particular broadcaster'.[23] It is helpful to cite Article 2 of Directive 97/36/EC in full in this context:

> 1. Each Member State shall 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.
> 2. For the purposes of this Directive the broadcasters under the jurisdiction of a Member State are:
>   — those established in that Member State in accordance with paragraph 3;
>   — those to whom paragraph 4 applies.
> 3. For the purposes of this Directive, a broadcaster shall be deemed to be established in a Member State in the following cases:
>   (a) the broadcaster has its head office in that Member State and the editorial decisions about programme schedules are taken in that Member State;
>   (b) if a broadcaster has its head office in one Member State but editorial decisions on programme schedules are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those Member States, the broadcaster shall be deemed to be established in the Member State where it has its head office; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in neither of those Member States, the broadcaster shall be deemed to be established in the Member State

[22] 10th recital to Dir 97/36/EC.
[23] 10th recital to Dir 97/36/EC.

where it first began broadcasting in accordance with the system of law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;

(c) if a broadcaster has its head office in a Member State but decisions on programme schedules are taken in a third country, or vice-versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in that Member State.

4. Broadcasters to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:
   (a) they use a frequency granted by that Member State;
   (b) although they do not use a frequency granted by a Member State they do use a satellite capacity appertaining to that Member State;
   (c) although they use neither a frequency granted by a Member State nor a satellite capacity appertaining to a Member State they do use a satellite up-link situated in that Member State.
5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the broadcaster is established within the meaning of Articles 52 and following of the Treaty establishing the European Community.
6. This Directive shall not apply to broadcasts intended exclusively for reception in third countries, and which are not received directly or indirectly by the public in one or more Member States.

The place of establishment is determined in Article 2(3) according to rules relying on the place where the broadcaster has its head office, where editorial decisions about programme schedules are taken, where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates, and where the broadcaster first began broadcasting. These rules are set out in a hierarchical order.[24] The prototype case is the one where the broadcaster has its head office in the same Member State in which editorial decisions about programme schedules are taken. This coincides as a rule with the State where the programmes are broadcast, since programme policy is commonly designed there.

If the place where the broadcaster has its head office differs from that where editorial decisions on programme schedules are taken, then, according to Article 2(3)(b), the place of establishment is deemed to be the place where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates.[25] The criterion of the place of the

[24] Drijber, BJ, above n 7, 93.

[25] In a case concerning the transmission of the RTL 4 and 5 services to the Dutch market the Commissariaat voor de Media (CvdM) concluded by decision of 5 February 2002 that the broadcaster Holand Media Group (HMG) was established in the Netherlands according to Art 2(3)(b). HMG's head office was located in Luxembourg, but its editorial decisions were taken in the Netherlands and a major part of the company's workforce was located there. The question whether HMG or the Luxembourg licensed satellite broadcaster CLT-Ufa is responsible for the two channels is in contention between the CvdM and the European Commission. See COM(2002)778, final Fourth Report on the application of Directive 89/552/EEC 'Television without Frontiers', 6 January 2003, 9.

head office prevails, however, if a significant part of the workforce is active in each of those Member States. If no decision can be reached on the basis of these rules, because a significant part of the workforce operates neither in the place of the head office nor in the place where editorial decisions about programme schedules are taken, the Directive introduces a rule of last resort. The Member State, where the broadcaster began broadcasting in accordance with its system of law, is considered to be its place of establishment.

When none of the rules of paragraph 3 are applicable to a broadcaster, it is deemed to be under the jurisdiction of the Member State from whose territory its broadcasts have been transmitted. Criteria identical to those laid down in the second indent of the former Article 2(1) are employed in Article 2(4), namely the use of a frequency granted by that Member State, of a satellite capacity appertaining to that Member State or of a satellite up-link situated in that Member State. A difference between the two provisions is that, while under the former Article 2(1) this last category of broadcasters was referred to as 'not being under the jurisdiction of any Member State', under the new Article 2(4) these broadcasters are deemed to be under the jurisdiction of a Member State.

Finally, in cases where jurisdiction cannot be determined in accordance with paragraphs 3 and 4, Article 2(5) refers to the concept of establishment within the meaning of Article 52 (now 43) ff EC so as to avoid the emergence of a vacuum of competence.[26] It is doubtful whether this test can result in a Member State having jurisdiction other than the one where the broadcaster's head office is located.[27]

The most commonly held view in legal writing is that the rules in Article 2(3), (4) and (5) have increased legal certainty.[28] Moreover, the

[26] Common position (EC) No 49/96 adopted by the Council on 8 July 1996 with a view to adopting Dir 96/.../EC of the European Parliament and of the Council amending Council Dir 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, [1996] OJ C 264/52, recital 11.

[27] Harrison, J and Woods, L above n 20, 597.

[28] Lenz, CO 'Das Sendestaatsprinzip als Teil der europäischen Medienordnung' in *Europäisches Medienrecht—Fernsehen und seine gemeinschaftsrechtliche Regelung*, Schriftenreihe des Instituts für Europäisches Medienrecht Saarbrücken, Vol 18 (Munich, 1998), 21; Pingel-Lenuzza, I 'La nouvelle directive 'Télévision sans frontières' ou la lente structuration du droit communautaire de l'audiovisuel' (1999) 2 *Revue des affaires européennes* 173, 176; Meyer-Heine, A 'Les apports de la nouvelle directive 'Télévision sans frontières' du 30 juin 1997 entrée en vigueur le 31 décembre 1998' (1999) 35 *Revue trimestrielle de droit européen* 95, 98.

argument has been put forward that they have raised the hurdles to be cleared by broadcasters who claim to fall under the jurisdiction of a certain Member State with the aim of circumventing another Member State's legislation.[29] It is not sufficient any more to establish that the legal seat of a broadcasting company is located in a certain Member State. In addition, it has to be demonstrated that editorial decisions concerning programme policy are also taken there.

However, the view prevailing in the Commission is that the new Article 2 has given rise to more problems of interpretation than it has resolved.[30] It is for example not clear what is meant by the place where editorial decisions about programme schedules are taken. Is it in the sense of the 'centre of activities test' the place where decisions concerning programme policy are taken or the place where the programmes to be broadcast are finally put together?[31] While editorial decisions are customarily taken by senior managers, programme scheduling is often made in the receiving state by personnel of a lower rank.[32] The wording used makes the first alternative seem more plausible.[33] However, would this solution be appropriate in cases where significant decisions concerning programme scheduling are taken in branch offices in the receiving states? Also, the 12th recital to Directive 97/36 refers to the place where the programme to be broadcast to the public is finally mixed and processed.

The precise meaning of 'significant part of the workforce' is equally open to speculation. It emerges from the common position of the Council that quantitative as well as qualitative aspects have to be taken into account when determining which percentage is 'significant'. It is ultimately the task of the European Court to draw the exact line.

All in all, one is left with the suspicion that the criterion of establishment, as it has been interpreted in the case law of the Court, would have made it possible to determine the jurisdiction of a Member State more clearly. Also, the adoption at Community level of criteria determining the place of establishment of television broadcasters means an indirect interference with the organisation and operation of broadcasting systems. Member States do not have a free hand any more to lay down in their national legislation conditions under which a broadcaster falls under their

[29] Farrar, C 'EC Broadcasting Law Clarified: The Paul Denuit and VT4 Cases and the New "Television Without Frontiers" Directive' (1998) 1 *Entertainment Law Review* 16, 19.
[30] From interviews at the Commission, DG Internal Market (MARKT) and DG Education and Culture (EAC) conducted for this study in March 2000.
[31] Helberger, N 'Die Konkretisierung des Sendestaatsprinzips in der Rechtsprechung des EuGH' (1998) 1 *Zeitschrift für Urheber- und Medienrecht* 50, 56.
[32] Harrison, J and Woods, L, above n 20, 596.
[33] Drijber, BJ, above n 7, 96. Note also the decision of the Dutch Council of State from 12 April 2001 which held that the commercial TV stations RTL4 and RTL5 fell under Luxembourg media law, not under the more restrictive Dutch media law. RTL's production facilities were located in the Netherlands. However, its strategic and commercial decisions were made in Luxembourg.

jurisdiction. This development is in sharp contrast with the proclamation in the 13th recital of Directive 89/552 that the responsibility of the Member States and their authorities with regard to the organisation of broadcasting, including the systems of licensing, administrative authorisation or taxation, will remain unaffected.

III. THE SCOPE OF THE TRANSMISSION STATE PRINCIPLE

The transmission state principle distinguishes between the powers of the transmitting and those of the receiving Member State. The obligation is incumbent upon the former to ensure that television broadcasts emanating from broadcasters under its jurisdiction comply with the legislation applicable to broadcasts intended for the public in that Member State (Article 2(1) of Directive 97/36/EC) including the provisions of the Directive (Article 3(2) of Directive 97/36/EC). The latter, on the other hand, is obliged not to restrict retransmissions on its territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive according to Article 2a(1) of Directive 97/36/EC. It is thus divested of the power to control Community broadcasts with the sole exception of Article 2a(2).

Given that the burden of ascertaining the legality of broadcasts rests entirely on the Member State under whose jurisdiction a broadcaster falls, it is pertinent to consider briefly the nature of the control exercised by that state. Thereafter, the obligation of the receiving state not to restrict retransmissions will be analysed.

A. The Control Exercised by the Transmission State

The Directive stipulates that the transmission state shall exercise control over broadcasts transmitted by broadcasters under its jurisdiction without, however, determining the ways in which this control will be carried out. Consequently, the methods of control, the competent authority, the imposition of penalties in the case of transgression have to be regulated in the domestic legislation of each Member State. A provision proposed by the Commission, according to which Member States should enforce compliance with the Directive by means of effective, proportionate and dissuasive sanctions, was left out during the negotiations in the Council on the ground that it would clash with the independent status of broadcasters.[34]

Article 3(2) of Directive 97/36 stipulates that Member States shall by appropriate means ensure, within the framework of their legislation, that

[34] Drijber, BJ, above n 7, 105.

television broadcasters under their jurisdiction effectively comply with the provisions of this Directive. The question has been posed whether an obligation binding upon the Member States is enshrined in this provision.[35] This question has to be answered in the affirmative, given that the effective exercise of control by the transmission state is of paramount importance for the creation of the internal market in broadcasting services. This view is also borne out by the 15th recital to Directive 89/552, which refers to 'the requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive'.

Finally, it is important to note that the amended Directive removed the ambiguity previously existing as to which broadcasting organisations are subject to the supervision of the transmission state. Article 3(2) refers to broadcasters under the jurisdiction of Member States. The former Article 2(1) used to distinguish them, however, from broadcasters who, while not being under the jurisdiction of any Member State, made use of the technical infrastructure of a Member State. This created the impression that Member States do not have a duty to ensure that broadcasters making use of their technical infrastructure comply with the provisions of the Directive. On the other hand, according to Article 2(1) of Directive 89/552, these broadcasters also had to comply with the domestic broadcasting legislation of the transmission state. As was seen above, the new Article 2(2), (4) created the fiction that non-Community broadcasters using the technical facilities of a Member State are under its jurisdiction. It thus made it clear that these broadcasters fall under Article 3(2) so that they have to conform to the provisions of the Directive.

B. The Obligation of the Reception State not to Restrict Retransmission

(i) The Meaning of 'Retransmission'

A first point which needs to be clarified with regard to the obligation of the reception state not to restrict retransmission is the meaning of the term 'retransmission'. Unlike the European Convention on Transfrontier Television that defines retransmission as 'the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public', the Directive does not contain any definition of this term. The ensuing ambiguities were brought to the attention of the European Court.

[35] Saxpekidou, E *Eleutheri kykloforia tileoptikon ypiresion stin Europaïki Oikonomiki Koinotita* (Thessaloniki, Ekdoseis Sakkoula, 1990) 149.

A significant question concerning the term 'retransmission' was raised in the case of *Red Hot Television*.[36] This case concerned a channel, which took up broadcasting in July 1992 from a satellite up-link situated in the Netherlands and, from December 1992, from a satellite up-link situated in Denmark, while its broadcasting activities were partially carried out in the United Kingdom. The British authorities decided to put an end to the transmission of the programme from their territory. However, it turned out that the channel did not fall under the jurisdiction of either of the countries involved, given that they applied different criteria linking broadcasters to their legal systems. Denmark and the Netherlands regarded establishment as the relevant criterion, while the United Kingdom attached weight to the place of transmission.

This incident of a conflicting disclaimer of jurisdiction was used to argue that the Directive had to be amended so as to terminate the state of uncertainty reigning under Article 2(1) of Directive 89/552. The Court, finally, did not have to pass judgment on this case, since it was removed from the register following the withdrawal of the questions submitted by the national court.[37]

Nonetheless, an interesting question was posed in this case: Does retransmission only apply to cable or does it also apply to satellite television? The Commission argued that retransmission should be broadly interpreted so as not to treat satellite and cable television in an unequal manner. Otherwise, retransmission could be provisionally suspended, where a cable channel infringed Article 22, while the same would not apply to a satellite channel. This misconception with regard to the bandwidth of the provisional suspension procedure has been dispelled in the revised Directive 97/36, where the phrase 'provisionally suspend retransmissions of television broadcasts' has been replaced by the phrase 'derogate from paragraph 1'. It has thus been made plain that the defence mechanism of Article 2a(2) applies equally to direct reception and to cable retransmission.

The mirror image of the question raised in *Red Hot Television* has been at issue in *Commission v Belgium*.[38] In this case the Belgian Government argued that the Directive only applies to primary television broadcasting, and not to secondary forms of broadcasting, such as transmission by cable. The Court refuted this argument, drawing from the preamble to Directives 89/552, 93/83[39] and the European Convention on Transfrontier Television.

[36] See COM(95)86 final Report on application of Directive 89/552/EEC and Proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC, 31 May 1995, 19.

[37] AG Lenz in Case C-222/94 *Commission v United Kingdom* [1996] ECR-I 4025, para 74 n 49.

[38] Case C-11/95 *Commission v Belgium* [1996] ECR I-4117, paras 15ff.

[39] Council Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, [1993] OJ L 248/15.

It reached the conclusion that cable retransmission falls within the scope of the Directive. This finding of the Court clarified some aspects of the term 'retransmission'; others, however, still remain in the dark. The question whether programmes have to be retransmitted simultaneously and in their entirety or whether active cable retransmission is also included within Article 2a(1) has not been answered.[40] Admittedly, the Court was not faced with this problem in the present case, since the Belgian legislation in question only concerned the passive retransmission of television programmes. Nevertheless, this is an important issue that is bound to arise in future.

'Television broadcasting' as defined in Article 1(a) of Directive 89/552 only refers to the initial transmission of television programmes.[41] Even though the communication of programmes between undertakings with a view to their being relayed to the public is included in this definition, no reference is made to their retransmission. This leaves no doubt that Member States do not have a duty to supervise programmes retransmitted by cable network operators in their territory.[42]

Nonetheless, the line between primary television broadcasting and active cable retransmission is difficult to draw. Active cable retransmission takes place where foreign programmes are not retransmitted unchanged at the same time, but where cable distributors are empowered to interfere with their content. This interference can range from the simple postponement of a broadcast to the compilation of parts of different broadcasts. According to the definition of the European Convention, only the simultaneous transmission of broadcasts in their entirety constitutes retransmission, while it is appropriate to speak of initial transmission where the broadcasts are modified. If this analysis is correct, the Member State where the active cable distribution takes place has to be held responsible under Article 2(1). It may, however, be felt that this result is undesirable in the case where the content of broadcasts stays the same, while their transmission is deferred. Since the cable distributor does not really create a new programme in this case, it seems justified to subject such broadcasts to the jurisdiction of the state of initial transmission only.

(ii) The Case Law of the European Court on the Prohibition on Restricting Retransmission

The European Court had the opportunity for the first time to enforce the prohibition on restricting retransmission in the case *Commission v Belgium*.[43] This case concerned legislation in the French and Flemish community that created a system of prior authorisation for the retransmission by cable of television broadcasts from other Member States. The Court struck down one after another the arguments brought forward by the Belgian Government in support of this legislation. The Belgian Government's main argument was that the receiving Member State must have the power to control whether foreign broadcasts comply with the law of the transmission state, including the provisions of the Directive, pursuant to Articles 2(1) and 3(2).[44]

The Court objected that this interpretation is not compatible with the division of obligations between the transmission state and the state of reception in Directive 89/552. According to the system of the Directive, it is only for the former to bring its broadcasts into line with its legislation as adapted to the Directive. Apart from the exceptional circumstances under Article 2(2), in which the receiving Member State may suspend retransmission, its only other weapon is the recourse to Treaty infringement proceedings under Article 227 EC or the instigation of an action by the Commission under Article 226 EC. In view of the ephemeral character of television broadcasts, the receiving State could also request the Court to prescribe interim measures under Article 243 EC.

For the same reasons, the Court also rejected the argument that the Belgian law was justified on cultural grounds since it sought to secure fulfilment of Articles 4 and 5 of the Directive.[45] Furthermore, the Belgian Government invoked the elusive principle of subsidiarity so as to defend the secondary control imposed on foreign broadcasts. The Court preferred not to touch upon the delicate issue as to whether the subject-matter of the Directive falls entirely within the Community's exclusive powers.[46] It simply stated that a Member State could not go against the letter of the Directive by relying on Article 5(2) EC, implying that the transmission state principle is in line with the principle of subsidiarity.

An interesting point made by the Belgian Government is that prior authorisation of foreign broadcasts is necessary so as to ascertain that they emanate from a Member State and are hence entitled to free circulation in the Community. The European Court rejected this argument as well. It found that the system of prior authorisation was not indispensable for

[40] De Nanclares, JM-P *Die Bedeutung des Gemeinschaftsrechts für das Fernsehen: Die Fernsehrichtlinie*, Vorträge, Reden und Berichte aus dem Europa-Institut der Universität des Saarlandes, vol 253 (Saarbrücken, Europa-Institut der Universität des Saarlandes, 1991), 104; Saxpekidou, E, above n 35, 127; Coulthard, A 'Dutch Television—Too Red Hot for UK!' (1993) 14 *Media Law and Practice* 116 referring to the opinion of Leggatt LJ in *Red Hot Television*.

[41] Case C–11/95, above n 38, para 16.

[42] Saxpekidou, E, above n 35, 126.

[43] Case C–11/95 *Commission v Belgium* [1996] ECR I–4117.

[44] *Ibid* paras 30ff; paras 87ff.

[45] See also Case C–14/96 *Criminal Proceedings against Paul Denuit* [1997] ECR I–2785, paras 31ff where the European Court equally dismissed this argument.

Arts 4 and 5 stipulate that broadcasters have to reserve a majority proportion of their transmission time for European works and at least 10% of their transmission time or of their programming budget for independent works. Further: Katsirea, I 'Why the European Broadcasting Quota should be Abolished' (2003) 2 *ELR* 190.

[46] AG Lenz in Case C–11/95, para 60.

achieving this aim.[47] This finding of the Court cannot, however, be taken as a denial of the power of the Member States to verify that foreign programmes retransmitted in their territory fall within the scope of the Directive.[48] The outcome would have been different if the legislation in question merely required cable operators to notify the broadcasting authorities of the origin of the programmes relayed by them.

By dismantling the Belgian legislation that raised obstacles to the free retransmission of programmes the European Court bolstered the transmission state principle significantly. It goes without saying that broadcasts originating from third countries do not fall under Article 2 and thus do not receive the same treatment. Member States are at liberty to take whatever measures they deem appropriate against such broadcasts as long as they respect Community law and the international obligations of the Community.[49]

The prohibition for the state of reception to interfere with broadcasts retransmitted in its territory also formed the subject matter of three joined cases judged by the European Court (referred to hereinafter as *De Agostini*) as a result of a reference for a preliminary ruling by the *Marknadsdomstol*, the Swedish Market Court.[50] These cases arose from injunctions applied for by the Consumer Ombudsman, who is entrusted with the enforcement of the Marketing Practices Law, to order De Agostini and TV Shop to cease certain trade practices in relation to a children's magazine (Case-34/95), skin-care products (Case 35/95) and a detergent (Case C–36/95).

More precisely, the first of these cases, Case C–34/95, concerned De Agostini, the publisher of a children's magazine about dinosaurs that was advertised on the television channels TV 3 and TV 4. TV 3 is a broadcasting company established in the United Kingdom whose programmes are transmitted by satellite to Denmark, Sweden and Norway. TV 4 is a Swedish channel. The Consumer Ombudsman considered the publicity for the magazine in question to be infringing Article 11 of the Swedish Broadcasting law, which stipulates that television advertisements must not be designed to attract the attention of children under 12 years of age. He, therefore, applied for an injunction based on the Marketing Practices Law to restrain De Agostini, subject to penalty payment, from marketing the magazine in this manner or, subsidiarily, to supply additional information in his advertisements.

The Cases C–35/95 and C–36/95 concerned TV Shop, a company specialised in teleshopping that broadcast two 'infomercials' for skin-care products and a detergent on TV 3 and on Homeshopping Channel, a

[47] *Ibid* para 86.
[48] Drijber, BJ, above n 7, 99.
[49] 23th Recital to Dir 97/36/EC.
[50] Joined Cases C–34/95, C–35/95 and C–36/95, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and Konsumentombudsmannen* (KO) *v TV-Shop I Sverige AB* [1997] ECR I–3843.

Swedish channel. The Consumer Ombudsman found these television spots to be contrary to the Marketing Practices Law, in that they were unfair towards consumers, mainly by making misleading statements about the products' effectiveness. He asked the *Marknadsdomstol* for an order prohibiting TV-Shop from making such statements in connection with the marketing of these products.

The *Marknadsdomstol* referred to the European Court questions on the compatibility of such injunctions with Articles 28 and 49 of the Treaty or Directive 89/552. Only the questions in connection with the Directive are relevant to our examination. It seems helpful to outline the answers of the Court in a reverse order from which they were given, namely by looking first at Case C–34/95.

The Court held that Articles 16 and 22 of the Directive, which afford protection to minors from television programmes in general and television advertising in particular, have totally harmonised national laws dealing with the permissible content of television advertising in relation to minors. As a result, the subject matter of Article 11 of the Broadcasting Law fell within the fields coordinated by the Directive and could not be opposed to broadcasts from other Member States by virtue of Article 2a(1). This finding only precluded the application of the provision in question to TV 3. Its application to the domestic channel TV 4 was not contrary to the Directive in view of Article 3(1), which allows for more stringent rules to be adopted by a Member State vis-a-vis broadcasters under its jurisdiction.

With this ruling the Court tied the hands of national authorities to measure programmes from abroad against the standards of their own broadcasting legislation with regard to minors. It showed, however, respect for the legal order of the state of reception by stating that it is still entitled to apply its legislation 'designed to protect consumers or minors *in general*, provided that its application does not prevent retransmission, *as such*, in its territory of broadcasts from another Member State'.[51] The meaning of this distinction will be considered in the next section.

IV. RESIDUAL POWERS OF THE MEMBER STATES TO CONTROL COMMUNITY BROADCASTS

A. Express Powers under Article 2a (2) of Directive 97/36/EC

The only exception from the transmission state principle is stipulated in Article 2a (2), according to which a Member State may derogate from the requirements of the first paragraph under strict conditions.

[51] *Ibid*, para 59.

First of all, a television broadcast coming from another Member State must be manifestly, seriously and gravely infringing Article 22(1) or (2) and/or Article 22a. These provisions constituted previously two separate paragraphs of one and the same Article 22. They have now been split into two separate Articles, the first dealing with the protection of minors, the second with the maintenance of public order by means of the prohibition of programmes containing an incitement to hatred on grounds of race, sex, religion or nationality. This rearrangement of Article 22 has helped avoid any misunderstanding as to whether the transmission ban on broadcasts provoking hatred on the above-mentioned grounds only applies in the framework of the protection of minors. If this were the case, such broadcasts could be transmitted late at night, when minors would be unlikely to watch them. This interpretation would contradict the attempts of the Community to combat racism and xenophobia and has now become untenable. This is also manifest in the heading of Chapter V where the phrase 'and public order' has been added to the 'protection of minors'.

The protection of minors is realised in Article 22 of the Directive by means of a total transmission ban on programmes 'which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence'.[52] These programmes are distinguished in the second paragraph of Article 22 of the amended Directive from others 'which are likely to impair the physical, mental or moral development of minors'. This second category of programmes presents less of a danger to minors, as becomes apparent from the omission of the adjective 'seriously'.[53] Therefore, they are only prohibited at times when minors normally watch television, whereas their transmission is permitted, 'where it is ensured, by selecting the time of the broadcast or by a technical measure, that minors in the area of transmission will not normally hear or see the broadcasts'.

It makes sense to interpret the 'area of transmission' as the area in which programmes are received directly or are being retransmitted. A different interpretation, placing emphasis on the time of transmission only, would fail to take account of the time difference between Member States, going thus against the *telos* of Article 22.[54]

Article 22(2) tries to balance the protection of minors with the freedom of expression and information and takes the view that a varied, pluralistic programme cannot be achieved, unless certain broadcasts not suitable for minors are shown. Additional safeguards to ensure that minors will not be exposed to such broadcasts are contained in the third paragraph of Article 22 in form of an acoustic warning preceding them or a visual symbol throughout their

[52] Drijber, BJ, above n 7, 102.
[53] Saxpekidou, E, above n 35, 157; Drijber, BJ, above n 7, 102.
[54] Saxpekidou, E, above n 35, 160.

duration. However, differences between the transmitting and the receiving state concerning the assessment of the necessity to adopt such precautionary measures do not entitle the latter to derogate from the transmission state principle.[55]

Article 22 is phrased in a general way, given that neither the notions of pornography nor of gratuitous violence are defined nor the kind of programmes which are likely to impair the development of minors.[56] Likewise, the definition of the age group of minors and of the time that is suitable for adult programmes to be transmitted is left to the discretion of the Member States. This is a wise choice of the Community legislator, since considerable differences exist between national laws, revealing a diversity of opinion on the upbringing and education of young people and, ultimately, of moral standards.[57] It is true that the elbowroom left to the Member States can give rise to obstacles to the free circulation of television services. Yet this is a fair price to pay for upholding the power of the Member States to decide such sensitive issues, especially since the competence of the Community to regulate them is doubtful.

Less laudable is the subjection of the right of the receiving state to derogate from the transmission state principle to tight requirements limiting its practical value.[58] Not only does Article 2a(2) require that the infringement of the above-mentioned provisions be manifest, serious and grave; what is more, the receiving Member State has to put up with it on at least two occasions, before it is entitled to initiate a preliminary procedure by notifying the transmitting Member State and the Commission of the measures it intends to take, should the infringement persist. Also, consultations with a view to an amicable settlement have to take place. Only if these consultations fail, may the receiving Member State prevent access to the programme in question by means of the suspension of retransmission or other adequate measures.

These procedural requirements have not been changed in the revised Directive. However, the supervision exercised by the Commission of the legality of measures adopted by receiving states by virtue of Article 2a (2) is now regulated in more detail. Under the new Directive the Commission has

[55] Harrison, J and Woods, L, above n 20, 591.
[56] *Ibid*, 158; Drijber, BJ, above n 7, 103.
[57] 2nd Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Dir. 89/552/EEC 'Television Without Frontiers', 24 October 1997, COM(97)523 final, para 4.2; Recital 18 to Council Recommendation 98/560/EC on the protection of minors and human dignity in audiovisual and information services, 24 September 1998, [1998] OJ L 270/48; contra Woods, L and Scholes, J 'Broadcasting: the Creation of a European Culture or the Limits of the Internal Market?' (1997) 17 *Yearbook of European Law* 47, 80.
[58] See the Joint Comment of ARD and ZDF on the Review of the Television Without Frontiers Directive, 14 July 2003, http://www.europa.eu.int/comm/avpolicy/regul/review-twf2003/contribution.htm (last visited on 19 February 2004): 'In all probability these requirements can hardly be met in practice'.

to take a decision on the compatibility of such measures with Community law within a period of two months. This amendment is commendable in view of the grave implications of a suspension of retransmission for the broadcaster affected.

B. Power of the Member States to Restrict Retransmission for Reasons not Falling within the Fields Coordinated by the Directive

(i) The Non-exhaustive Character of Article 2a(1) of Directive 97/36/EC

The wording of Article 2a(1) leaves no doubt that Member States must not restrict retransmissions on their territory of Community broadcasts for reasons only which fall within the fields coordinated by the Directive. It follows *a contrario* that Member States are free to impose on foreign broadcasts those aspects of their broadcasting legislation, which have not been harmonised by the Directive. This view, which is widely accepted,[59] has led some commentators to the conclusion that the Directive does not constitute the first step towards the adoption of a Community media policy.[60]

This conclusion has been countered with the argument that the mutual recognition of national rules afforded by the Directive goes beyond the areas harmonised by it.[61] Decisive importance has been attached, in reaching this verdict, to the 12th recital in the preamble to the Directive 89/552 according to which it is 'necessary and sufficient that all broadcasts comply with the law of the Member State from which they emanate'. Also, the 14th recital stresses that it is the law of the originating Member State that has to be respected by broadcasts intended for reception in another Member State.

This argument is disputable. According to the 15th recital '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', ie on grounds

[59] Petersen, N *Rundfunkfreiheit und EG-Vertrag. Die Einwirkungen des Europäischen Rechts auf die Ausgestaltung der nationalen Rundfunkordnungen* (Baden-Baden, Nomos, 1994), 101; Seelmann-Eggebert, S *Internationaler Rundfunkhandel: im Recht der World Trade Organisation und der Europäischen Gemeinschaft* (Baden-Baden, Nomos, 1998), 216; Steindorff, E *Grenzen der EG-Kompetenzen* (Heidelberg, Verlag Recht und Wirtschaft, 1990), 101; Gulich, J *Rechtsfragen grenzüberschreitender Rundfunksendungen. Die deutsche Rundfunkordnung im Konflikt mit der Dienstleistungsfreiheit* (Baden-Baden, Nomos, 1990), 86; Lenz, CO, above n 28, 26; Kugelmann, D *Der Rundfunk und die Dienstleistungsfreiheit des EWG-Vertrages* (Berlin, Duncker und Humblot, 1991), 51, 43; see Kühn, M 'Harmonisierung des Rundfunkrechts in Europa. Zum Entwurf der Richtlinie der EG-Kommission' (1986) 11 *Zeitschrift für Urheber- und Medienrecht* 585f.

[60] Kugelmann, D above n 59, 43.

[61] Niedobitek, M above n 8, 163.

pertaining to areas coordinated by the Directive. This implies that the freedom of transmission in broadcasting is not guaranteed by the Directive in absolute terms, but only in so far as national laws have been harmonised.

Furthermore, a pure recognition principle, which would preclude importing Member States from invoking both harmonised and non-harmonised interests, would hardly be compatible with the Community legal order.[62] It is true that, by shifting the focus away from harmonisation, mutual recognition obviates the need for a cumbersome regulatory Community mechanism. Furthermore, it is more deferential to the autonomy of the Member States. Nevertheless, mutual recognition entails the risk that the standards of the importing Member State might be lowered. Therefore, a pure recognition principle would have to be based on the assumption that a common core of broadcasting policy standards exists in the Member States. Such an assumption stands out in sharp relief to the variety of programme content requirements to be encountered in the Community. Completely deprived of the possibility to exclude foreign broadcasts not consistent with their legislation, receiving Member States would be forced to lower their domestic requirements as well. This is a far cry from the high level of protection to be achieved by means of harmonisation according to Article 95 (3) EC.[63]

Moreover, the endorsement of the pure recognition principle would signify a departure from the approach consistently taken by the European Court, that the state in which a service is provided is not entitled to undertake supplementary controls if the supplier is already subject to equivalent controls in the state of establishment.[64] Factual equivalence, as required by this approach, would be replaced by fictitious equivalence.[65]

Finally, the pure recognition principle would be inconsistent with the 17th recital, which states that the Directive is without prejudice to future Community acts of harmonisation.[66] If a free market in broadcasting services was created as a result of the pure recognition principle, the subsequent harmonisation provided for in this recital would operate as autonomous lawmaking, not serving the elimination of obstacles to the free movement of television broadcasts. The question whether Community competence can be that far-reaching is a matter for speculation. However, the relevant Treaty provisions, namely Articles 3(h), 47 (2), 94 and 95, only allow harmonisation measures to be adopted if they are necessary for the common or internal market to function. Also, the repealed Article 100b(2) provided for mutual recognition as an alternative to harmonisation, not in

[62] Steindorff, E above n 59, 101.

[63] *Ibid.*

[64] Case 279/80 *Webb* [1981] ECR 3305; [1982] 1 CMLR 406; Case 205/84 *Commission v Germany* [1986] ECR 3755; [1987] 2 CMLR 69.

[65] Steindorff, E, above n 59, 102.

[66] *Ibid* 99; contra, AG Jacobs in *De Agostini*, para 77.

addition to it, in case the internal market programme had not been completed by the end of 1992. It is therefore unlikely that the Directive empowers the Community to adopt harmonisation acts as instruments of autonomous law-making.

The technique of mutual recognition *cum* harmonisation adopted by the Television Without Frontiers Directive is thus a *via media*. An important conclusion to be drawn from the foregoing is that the transmission state principle is not written in black and white in the Treaty nor does it emanate from the fundamental freedoms in the interpretation given to them by the European Court in *Cassis de Dijon*.[67] It is no more than a method called into play by the Community legislature, so as to complete the internal market in broadcasting services.[68]

In view of the foregoing considerations, it seems right to conclude that Article 2a(1) is non-exhaustive so that restrictions of Community broadcasts on grounds not coordinated by the Directive are legitimate.

(ii) Which Fields are Coordinated by the Directive?

The extent to which Member States are still allowed to restrict retransmission is not clear. A central controversy concerns the meaning of the terms 'the fields coordinated by this Directive' but also the characteristics of the laws affecting retransmission. The extent of the power of the Member States to subject foreign programmes to national laws not harmonised by the Directive has been at issue in *Commission v Belgium*[69] and *De Agostini*.[70]

In the first of these cases, one of the justifications adduced by the Belgian Government in support of the system of prior authorisation for retransmission by cable of broadcasts from other Member States in the French Community was the need to safeguard pluralism in the media. The Court recalled its judgments in the cases *Gouda*[71] and *Commission v Netherlands*[72] where it had found a cultural policy aimed at safeguarding pluralism to constitute an overriding requirement relating to the general interest, which justifies a restriction on the freedom to provide services. It considered it superfluous to examine whether the question of preservation of pluralism in the media had been exhaustively regulated by the provisions of Directive

[67] See Case C-233/94 *Germany v European Parliament and Council* [1997] ECR I-2405, para 64, noted at (1998) 35 *CML Rev* 459; Drijber, BJ, above n 7, 87 n 2.
[68] AG Lenz in Case C-222/94 *Commission v United Kingdom* [1996] ECR I-4025, para 38.
[69] Case C-11/95 *Commission v Belgium* [1996] ECR I-4117.
[70] Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and Konsumentombudsmannen* (KO) *v TV-Shop I Sverige AB* [1997] ECR I-3843.
[71] Case C-288/89 *Stichting Collectieve Antennevorzienning Gouda and Others* [1991] ECR I-4007.
[72] Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069.

89/552 on advertising, in particular Articles 10(1), 11(1), 17(1) (a) and 19, as the Commission contended. The Court observed that in any event 'the Belgian Government has not shown adequately in detail that the system of prior authorisation was necessary and proportional for protecting pluralism in the audiovisual field or in the media generally'.[73]

The reasoning of the Court is compelling, given that Article 49 EC is the fall-back standard against which rules impeding the transmission of transfrontier broadcasts, which have not yet been harmonised at Community level, have to be measured. Nonetheless, it is regrettable that the Court avoided answering the question whether the Directive completely covers the topic of media pluralism. The Commission's contention relies on the fact that advertising rules concerning 'when, where and how advertisements may be placed'[74] do not only aim to protect the interests of the captive viewer. An equally if not more important purpose served by them is to secure the diversity of opinion in television programmes, in which the advertisements are embedded, but also of the media in general, especially of the written press.[75] However, as Advocate-General Lenz observed, the rules in Article 10 *et seq* are technical in nature, are not immediately related to pluralism in the media and cannot, therefore, regulate this matter comprehensively.[76] Hence it is suggested that national laws on pluralism in the media have not been fully harmonised by the Directive so that restrictions of retransmission are still permitted on these grounds.

The Belgian Government argued further that the authorisation required for the cable retransmission of foreign programmes in the Flemish community was justified on grounds of public policy, public morality or public security.[77] The receiving State should have the power to control whether foreign broadcasts violated these objectives, given that no harmonisation had taken place at Community level in this respect. The Court did not accept this argument either. It held that matters related to these legitimate interests were not alien to the Directive yet it was cautious enough to add that, in so far as the rules contained therein were not exhaustive, the prior authorisation of broadcasts from other Member States was not justified, since it effectively nullified the freedom to provide services.

Once again one is bound to subscribe to the view of Advocate-General Lenz that questions of public policy, good morals and public security are not expressly and, at any rate, not comprehensively dealt with in the

[73] Case C-11/95 *Commission v Belgium* [1996] ECR I-4117, para 55.
[74] AG Jacobs in Joined Cases C-34/95, C-35/95 and C-36/95, para 58.
[75] Bullinger, M 'Werbung und Quotenregelung zwischen nationalem und europäischem Rundfunkrecht' in Stern, K *et al. Eine Rundfunkordnung für Europa—Chancen und Risiken*, Schriftenreihe des Instituts für Rundfunkrecht an der Universität zu Köln, vol 54 (Munich, CH Beck, 1990), 85, 91f; Müller, M 'Die Revision der EG-Fernsehrichtlinie—EMR-Dialog am 2.12.1993 in Mainz in Zusammenarbeit mit SAT.1' (1994) 1 *Archiv für Presserecht* 26, 29.
[76] AG Lenz in Case C-11/95, para 63.
[77] *Ibid*, para 91.

Directive.[78] They are only cursorily touched upon in connection with television advertising and with the protection of minors under Articles 12, 16 and 22. Also, Article 22a in the amended Directive 97/36 aims at the protection of public order. These provisions cannot, however, be taken to constitute an exhaustive regulation of the vulnerable values in question. Suffice it to say that no standards have been set with regard to the treatment of subjects such as violence and sex in programmes addressed to adult audiences.[79]

Consequently, the fact that the Directive vests the receiving States with the express power to deviate from the transmission state principle in the case of infringement of Article 22 cannot be taken to imply that all other defence of public policy and morals against broadcasts from other Member States is outlawed.[80] Admittedly, this reasoning strikes a heavy blow to the principle of mutual trust. Nonetheless, a balanced solution cannot be achieved by denying every right of the receiving states to assert their fundamental interests in the protection of their public order. Instead, the proportionality test should be strictly applied so as to ensure that the curbing of foreign programmes is indispensable.

The judgment of the European Court in the case *Commission v Belgium* has been described as 'the strongest statement of the ECJ to date that the country of origin principle is primary and cannot be overridden by the concerns of the receiving State regarding the content of programming except in limited circumstances involving a grave and serious breach of Article 22'.[81] This reading of the judgment is not convincing, given that the Court did not pronounce the receiving state ineligible to control transfrontier broadcasts for reasons such as the protection of pluralism or of public policy and good morals.[82] It is only on the facts of this case, in view of the far-reaching secondary control imposed on foreign broadcasts in the French and Flemish community, that the Court upheld the Commission's objections.

The validity of this conclusion is born out in the judgment handed down by the Court in the *De Agostini* case.[83] A main difference between case C–11/95, *Commission v Belgium* and this case is that, while the former

[78] *Ibid*, para 100.
[79] Hoffmann-Riem, W 'Defending Vulnerable Values: Regulatory Measures and Enforcement Dilemmas' in Blumler, JG (ed) *Television and the Public Interest. Vulnerable Values in West European Broadcasting* (London, Sage, 1992), 173, 190.
[80] Contra AG Lenz in Case C–11/95, para 101. See, however, para 104 of the same opinion, where AG Lenz left the option open that, in the case of flagrant offences against public policy, public security or good morals a Member State might be entitled to take action against broadcasts from other Member States.
[81] Pullen, M and Ris, B 'Television Without Frontiers: The Saga Continues' (1997) 1 *Entertainment Law Review* 3.
[82] Knothe, M and Bashayan, H 'Die Revision der EG-Fernsehrichtlinie. Ein europäischer Entscheidungsprozeß im Lichte nationaler Kompetenzen' (1997) 6 *Archiv für Presserecht* 849.
[83] Joined Cases C–34/95, C–35/95 and C–36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and Konsumentombudsmannen* (KO) *v TV-Shop I Sverige AB* [1997] ECR I–3843.

concerned an obstacle to the retransmission as such of foreign programmes, the latter is about national measures restricting the marketing of products in a manner unfair towards consumers, which only indirectly have repercussions on the broadcasting of programmes.[84] As already mentioned, in cases C–35/95 and C–36/95 the Consumer Ombudsman sought to restrain TV-Shop from making unsubstantiated statements in connection with the marketing of skin care products and a detergent. The Court distinguished between provisions in the Directive on the content of television advertisements and others on where and how advertisements can be inserted. It came to the conclusion that the Directive only partially coordinates national laws on television advertising.

Once again, the Court did not directly address the question whether misleading advertising falls within the fields coordinated by the Directive.[85] It took a different approach instead by drawing a line between provisions specifically regulating the broadcasting and distribution of programmes and others having the general aim of protecting consumers from misleading advertising.[86] In the Court's opinion, the Directive and hence the transmission state principle are only concerned with the broadcasting and distribution of programmes; they are not applicable to the general advertising legislation of the Member States. Consequently, Member States are not precluded from imposing their legislation on consumer protection on foreign television advertisements.

This power has however been subjected to two, somewhat obscure conditions. The measures taken against an advertiser with regard to advertisements transmitted from another Member State should not entail a secondary control of television broadcasts on top of that exercised by the transmitting state.[87] Moreover, they should not restrict retransmission *as such* of foreign television broadcasts.[88] These conditions will be explored in the following.

It has been argued that the Court created a link between two unrelated issues, namely the question whether advertisers can invoke the transmission state principle and the question which fields have been coordinated by the Directive.[89] However, this judgment cannot be interpreted as excluding advertisers from the scope of the Directive. The allegation that the Directive only applies to broadcasters and not to advertisers was made by the claimants and disputed by Advocate-General Jacobs and the defendants

[84] Drijber, BJ, above n 7, 99.
[85] AG Jacobs in Joined Cases C–34/95, C–35/95 and C–36/95, paras 79ff.
[86] Joined Cases C–34/95, C–35/95 and C–36/95, paras 33f.
[87] *Ibid*, para 34.
[88] *Ibid*, para 38.
[89] Drijber, BJ, above n 7, 100.

on the ground that it would weaken the transmission state principle in its purpose and effect. [90]

The Court took account of this argument in its judgment. Nonetheless, it did not directly answer the question posed, but made a general observation on the relationship between the Television Without Frontiers Directive and the Misleading Advertising Directive.[91] The latter defines misleading advertising and lays down minimum requirements for its control in the interest of consumers. Drawing support from a judgment handed down by the EFTA Court in a case similar to *De Agostini*,[92] the European Court ruled that the Misleading Advertising Directive would become ineffective as regards television advertising if the receiving Member State was not allowed to apply its implementing legislation to foreign broadcasts.

The Court thus confirmed that measures can be taken against advertisers producing commercials contrary to the Misleading Advertising Directive, without, however, excluding the category of advertisers *in toto* from the Television Directive. Such a result would have been inconsistent with the Directive, given that advertising is the area most extensively regulated therein.[93] Moreover, it would not have chimed with the second part of the judgment in which De Agostini successfully relied on the transmission state principle so as to prevent the application of Swedish broadcasting law to its advertisements. All in all, the Directive equally applies to the activity of broadcasters and to more ancillary activities such as those of advertisers or sponsors.

What is the reasoning then behind the distinction drawn by the Court between laws regulating television advertising per se, which fall within the ambit of the Directive, and general legislation on the protection of consumers against misleading advertising, which does not? We have already seen that the Court drew an analogous distinction in the second part of this judgment between general legislation on the protection of minors and legislation specifically designed to control the content of television advertising with regard to minors.[94] These distinctions seem justified, given that the Directive only coordinates provisions concerning the pursuit of television broadcasting activities. The reasoning of the Court is based on a pragmatic view of the scope of the Directive. Since the Directive subjects advertising

[90] AG Jacobs, paras 35ff.
[91] Council Directive 84/450/EEC of 10 September 1984 Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, [1984] OJ L 250/17.
[92] Joined Cases E–8/94 and E–9/94 *Forbrukerombudet v Mattel Scandinavia and Lego Norge*, Judgment of 16 June 1995; Joined Cases C–34/95, C–35/95 and C–36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and Konsumentombudsmannen* (KO) *v TV-Shop I Sverige AB* [1997] ECR I–3843, noted at (1997) 34 *CML Rev* 1445, 1449.
[93] Criscuolo, A 'The 'TV Without Frontiers' Directive and the Legal Regulation of Publicity in the European Community' (1998) 23 *ELR* 357, 363.
[94] See p 121 above.

only to limited rules protecting consumers or minors in their capacity as television viewers,[95] it could not be regarded as a comprehensive piece of consumer protection or child welfare legislation. Being obliged to respect the responsibility of Member States for the financing of programmes,[96] the Directive had to weigh advertising restrictions against their repercussions on the funding of television. Consequently, depriving Member States of their right to apply their general laws to Community broadcasts would curtail their power to set consumer or child protection standards.

In the light of these considerations, the reasoning adopted by the Court has to be welcomed. By putting emphasis on the general nature of the provisions at hand instead of their subject matter (unfair advertising), the Court answered the question as to the extent of coordination in the Directive in an ingenious way. General legislation falls in any case outside the ambit of the Directive.

The Commission's proposition that misleading advertising is not within the fields coordinated by the Directive was dealt with in a more straightforward manner by Advocate-General Jacobs. He disagreed with the Commisison on account of the difference between the 'fields coordinated by the Directive' and 'the specific matters regulated by it'.[97] He held that it is the former concept, which is decisive for the application of the transmission state principle. In his view, even though there are no specific rules in the Directive on misleading advertising, it suffices that television advertising in general is one of the areas coordinated by the Directive.

In support of Advocate-General Jacob's approach, an intriguing argument has been derived by Drijber from the comparison of Article 2a(1) with Article 3(1) and the 44th recital of Directive 97/36.[98] Article 3(1) allows Member States to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules *in the areas covered by the Directive*. The 44th recital sets out by way of example stricter rules *in the fields coordinated by this Directive*, which can be applied by Member States to broadcasters under their jurisdiction, with the aim of the achievement of language policy goals, the protection of pluralism etc. Drijber took issue with the judgment of the Court in *Leclerc-Siplec*.[99] In his opinion, this ruling brings out the breadth of Article 3(1). The Court found a national provision prohibiting the broadcasting of advertisements for the distribution sector with the aim of protecting the written press to be in accordance with Article 3(1), even though neither rules on advertising by the distribution sector nor on the protection of pluralism are specifically contained in the

[95] See 27th recital to Dir. 89/552.
[96] See 13th recital to Dir. 89/552.
[97] AG Jacobs, para 80.
[98] Drijber, BJ, above n 7, 101.
[99] Case C–412/93 *Société d'Importation Édouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I–179.

Directive. The fact that the Directive does not encompass these interests was not considered by the Court to limit the scope of Article 3. Similarly, the rules listed in the 44th recital as falling within the 'fields coordinated by the Directive' pursue interests, which have not particularly been dealt with in the Directive. Notably, instead of referring to the 'areas covered by the Directive' as in Article 3(1), this recital uses the same phraseology as Article 2a(1). Given that the 44th recital merely elaborates on Article 3, Drijber considered that the terms 'areas covered by the Directive' and 'fields coordinated by the Directive' are applied interchangeably. Therefore, their meaning in Article 2a(1) and in Article 3(1) is the same. From this he concluded that the subject matter of a rule, not the value protected by it, determine whether it falls within a coordinated field.

It is submitted that this argument, compelling though it might seem at first sight, is not conclusive. In Article 3(1), the term 'areas covered by this Directive' does not serve to draw an accurate distinction from the areas not covered by the Directive, since the Member States are equally free to adopt stricter or more detailed rules in the latter areas. If televised advertising for the distribution sector had been found to be outwith the scope of the Directive in *Leclerc-Siplec*, France would have been all the more at liberty to outlaw advertising for this sector. Therefore, the definition of the exact boundaries of the fields coordinated by the Directive was not material to assessing the legality of the provision in question. On the contrary, the phrase 'fields coordinated by this Directive' in Article 2a(1) circumscribes the areas in which the transmission state principle applies, so that retransmission of broadcasts from other Member States may not be restricted. A stricter interpretation of this phrase in the sense of 'the specific matters regulated by the Directive' seems justified, so as not to let sensitive aspects of the Member States' broadcasting policy go by the board.

Having shed some light on the meaning of the phrase 'the fields coordinated by the Directive', it is necessary to consider, lastly, the above-mentioned conditions for the application of general laws to transfrontier broadcasts. What does the requirement mean that national rules should not involve secondary control of television broadcasts nor prevent retransmission as such? A clue given by the Court in paragraph 35 of the judgment is that consumer protection legislation which 'provides for a system of prohibitions and restraining orders to be imposed on advertisers enforceable by financial penalties' satisfies this requirement. First, this passage suggests that measures should not be taken against the broadcaster, but only against the advertiser. Secondly, there should be no control of broadcasts prior to their transmission. The commercials could only be scrutinised by the courts or other state authorities after their airing.[100]

[100] Dommering, EJ 'Advertising and Sponsorship Law—Problems of Regulating Partly Liberalised Markets' in *Europäisches Medienrecht—Fernsehen und seine gemeinschaftsrechtliche Regelung*, Schriftenreihe des Instituts für Europäisches Medienrecht Saarbrücken, vol 18 (Munich, Jehle-Rehm, 1998), 45

It is true that injunctions against advertisements broadcast from other Member States also prevent their retransmission. Nonetheless, such measures are less likely to be motivated by the wish to restrict the free circulation of broadcasting services. More immediate methods of blocking retransmission are available to this end, not least in view of the practical difficulties of enforcing remedies available in the receiving state's legal system against an advertiser established in a different state.[101]

It is interesting to note that these conditions on national legislation preventing the distribution of foreign broadcasts parallel the jurisprudence of the Federal Constitutional Court of Germany on freedom of speech. According to Article 5(2) of the German Constitution (GG), freedom of speech as well as freedom of the press find their limits in the general laws, in the rules on the protection of youth and in the right to personal honour. General laws have been defined by the Federal Constitutional Court rather long-windedly as laws that 'do not prohibit an opinion or the expression of an opinion as such but are directed towards the protection of legal rights which need such protection regardless of any specific opinion'[102], in other words, laws that are directed towards the protection of a community value, that takes precedence over the exercise of free speech.[103] The European Court, by allowing the free movement of broadcasting services to be limited only by laws satisfying requirements analogous to the ones under Article 5(2) GG, emphasised its constitutional rank. Only laws that do not pursue the segregation of the national broadcasting markets behind the cover of general interests are in keeping with the Television Directive.

In conclusion, it may appear that the Court in *De Agostini* made two steps forward and one step back in the completion of the internal market in broadcasting services. On the one hand, it precluded the application of the Swedish broadcasting law prohibiting advertisements directed at children under 12, while on the other it sanctioned the application of the consumer protection legislation. The first part of the judgment is surprisingly considerate towards the interest of the Member States to stem the flood of imported broadcasts in contravention of their general legislation. One should bear in mind, however, that it is merely the general legal order of the Member States to which the Court has been deferential. As for the rest, it remains doubtful how far cultural values cherished in the national broadcasting laws qualify to hinder the free movement of services.

[101] AG Jacobs, para 84

[102] *Lüth* Case (1958) 7 BVerfG 198, 209.

[103] Kommers, DP *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn (Durham, NC, Duke University Press, 1997) 365.

V. CONCLUSION

The transmission state principle is the mechanism chosen by the drafters of the Television Without Frontiers Directive so as to distribute regulatory powers over a single event: the transmission of a transfrontier broadcast. This principle is symptomatic of the subjection of broadcasting to the logic of the internal market that requires only one Member State to be responsible for the content of a given broadcast. It is the transmission state that is entrusted with the supervision of broadcasts falling under its jurisdiction, while the reception state has the power to intervene in exceptional circumstances only. The obvious drawback is that the state, where broadcasts are received and which is therefore primarily affected, is restrained from asserting its legitimate interests. The present article has examined the question whether the Directive has succeeded in resolving the tension between transmission and reception state satisfactorily by means of a balanced and legally secure regulatory framework.

The identification of the state having jurisdiction over a certain broadcaster has been fundamental to the Directive's conception. Directive 89/552 failed to flesh out the link between state and broadcaster, thus giving rise to legal uncertainty. The revised Directive 97/36 went from the one extreme to the other by aspiring to cover all possible factual constellations through complex rules of conflict. This formalistic approach is misconceived, since it is prone to abuse and to interpretative difficulties. The more open-ended 'centre of activities' test developed by the European Court is the better option.

It has been suggested that the Directive provides two compensatory mechanisms in an effort to rise to the challenge of creating the internal market in broadcasting services, while giving leeway to the reception state to regulate content issues.[104] First, Article 2a(2) of Directive 97/36 permits a derogation from the transmission state principle on the ground of protection of minors. This exception can only be invoked under very strict

[104] The last arrow in the reception states' quiver is circumvention that can be pleaded by Member States whose legislation has been evaded by broadcasting organisations directing most of their programmes to their territory, while being established in different Member States. Uncertainty reigns as to the conditions that have to be satisfied for the substantiation of abuse of Community law. See the case law of the Court in Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299; Case C-211/91 *Commission v Belgium* [1992] ECR I-6757; Case C-148/91 *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487; Case C-23/93 *TV 10 SA v Commissariaat voor de Media* [1994] ECR I-4795; Case C-11/95 *Commission v Belgium* [1996] ECR I-4117; Case C-56/96 *VT4 v Vlaamse Gemeenschap* [1997] ECR I-3143; Case C-212/96 *Centros Ltd. v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459 and the commentary by Huglo, JG 'Droit d' établissement et libre prestation des services' (1992) 28 *Revue trimestrielle du droit européen* 687; Sevinga, K 'Dutch Broadcasting Continued' (1993) 4 *Utilities Law Review* 137; Farrar, C above n 29, 16; Hatzopoulos, V 'Recent Developments of the Case Law of the ECJ in the Field of Services' (2000) 37 *CML Rev* 43.

conditions that are hardly commensurate with the sensitive issues involved. Instead of taking a proactive attitude towards programmes unsuitable for minors, the Directive puts up with their repeated transmission and allows a belated reaction only. Second, the retransmission of foreign broadcasts can be restricted on grounds not coordinated by the Directive. Initial doubts about this interpretation have been undeniably cleared by the judgments of the Court in *Commission v Belgium* and *De Agostini*. In these cases, the Court did not seize the opportunity to define more accurately the area occupied by the Directive. It is, therefore, open to debate whether cultural considerations of the Member States related to pluralism and morality in the media fall therein. The Court took recourse to the proportionality test and to the distinction between general and broadcasting legislation instead. Understandably so, given that this approach is more flexible and mitigates the impression of a far-reaching deregulation via quasi-regulation of questions of content. Nonetheless, the fact remains that Member States are loaded with an onerous burden of proof that their restrictive measures are proportionate. It follows that the balance between transmission and reception state struck by the Directive is precarious to the extent that it neglects legitimate concerns of the latter. Since these concerns are often related to the cultural priorities of national broadcasting systems, they cannot be catered for by a narrow economic outlook.

During 2003 a public consultation took place on the possible need to adjust the Directive to technological developments in the audiovisual market. The criteria determining jurisdiction and certain aspects of the derogation from the transmission state principle were subject to review. The Commission presented its conclusions in its recent Communication on the 'Future of European Regulatory Audiovisual Policy'.[105] Many stakeholders have expressed concerns as regards the effective enforcement of the rules on the protection of minors and public order in a digital and online environment. The Commission proposed the update of the Recommendation on the protection of minors and human dignity with an emphasis on self- and co-regulatory models.[106]

As far as the provisions on jurisdiction are concerned, the Commission admitted that the rules of the Directive have occasionally caused certain problems of application. In the case of the programmes RTL4 and RTL5 for example the Netherlands granted itself jurisdiction in a way that triggered a situation of dual jurisdiction.[107]

[105] Communication from the Commission on the Future of European Regulatory Audiovisual Policy, 15 December 2003 COM(2003)784 final.

[106] Council Recommendation of 24 September 1998 on the Development of the European Audiovisual and Information Services Industry by Promoting National Frameworks Aimed at Achieving a Comparable and Effective Level of Protection of Minors and Human Dignity [1998] OJ L 270/48.

[107] See n 30 above. The Commission closed the infringement proceedings initiated against the Netherlands subsequent to a ruling passed by the Dutch Council of State.

Some Member States also raised the problem of the diversity of national laws and the ensuing risk of the establishment of broadcasters in the States with the least strict legislation. A related matter of concern is the already mentioned practice of area-specific advertising.[108] It is feared that this practice could diminish the advertising revenue and jeopardise the financial health of the audiovisual industry of the neighbouring countries. Also, stricter advertising rules of some Member States such as the Swiss prohibition of advertising alcoholic beverages could be weakened by advertising screens from abroad complying with a laxer set of rules. Yet area-specific advertising is perfectly consistent with the free movement of broadcasting services and the transmission state principle unless the tough test of circumvention is found to be satisfied. Mr Dermot Ahern, the Irish Minister for Communications, commented: 'If a country wants to restrict advertising in relation to minors or alcohol, they should be able to do that. Presently we have no such powers.'[109]

Is the thesis correct then that the transmission state principle has signified the end of the broadcasting sovereignty of the Member States? This rather extreme suggestion contains a grain of truth. Undeniably, the transmission state principle encroaches upon the power of the Member States to shape their broadcasting orders at will. National broadcasting laws that have been coordinated *expressis verbis* by the Directive cannot be applied to transfrontier broadcasts any more. More worryingly, the shadow of the European Court is hanging over the capacity of the Member States to impose their broadcasting standards on foreign transmissions.

Nonetheless, it is suggested that the impact of the transmisison state principle has to be seen against the background of fundamental political and technological changes, which have taken place in the last two decades in Europe, putting traditional models of broadcasting regulation into question. The main factors contributing to the decrease of the state's regulatory responsibility are the emergence of private broadcasting companies and of satellite transmission.

When broadcasting made its appearance in Western Europe in the 1920s, it was not left to the dynamics of the economic market, but was embedded by the state in a narrow regulatory framework known as the public service model. This model is based on the assumption that broadcasting has to be publicly regulated, so as to conform with a cluster of social values such as its general geographic availability, its impartiality and diversity and its cultural vocation.[110]

[108] See p 108 above.
[109] EU Presidency 2004 Website, http://www.ue2004.ie (last visited on 22 March 2004).
[110] Dyson, K and Humphreys, P 'Regulatory Change in Western Europe: From National Cultural Regulation to International Economic Stratecraft' in Dyson, K and Humphreys, P *Broadcasting and New Media Policies in Western Europe: A Comparative Study of Technological Change and Public Policy* (London, Routledge, 1988), 96; Blumler, JG 'Public Service Broadcasting before the Commercial Deluge' in Blumler, JG (ed) *Television and the Public Interest. Vulnerable Values in West European Broadcasting* (London, Sage, 1992), 7f.

The most widely invoked rationale for the legal regulation of broadcasting has been the scarcity argument.[111] It has been claimed that, due to the limited number of frequencies available for broadcasting, not allowing everyone to have access, the state had to intervene, so as to oblige licensees to present a balanced variety of views as well as to hinder signal disturbance.[112]

The scarcity argument has been challenged by the proliferation of broadcasting outlets as a result of the development of cable and satellite technologies. The expansion of spectrum usage removed this justification for the public service paradigm and provided grist to the mill of the proponents of the commercialisation of broadcasting.[113] It was argued that a great number of private channels would, as a matter of course, offer a wide range of programmes. This external pluralism would be preferable to the artificial internal pluralism created by public broadcasting institutions. Under the market model of broadcasting, reliance is placed for the satisfaction of the communication needs of the public on free access by various interest groups to the broadcasting profession rather than on government intervention.[114]

Private channels have increasingly been dispensed from traditional programme standards. This deregulatory tendency has in turn left its imprint upon public channels, which under the pressure of competition for advertising revenues and broadcasting rights also had to adapt to the demands of the market.[115] A shift in the aims of broadcasting regulation has occurred concomitant to these developments. Programming requirements that are not in keeping with the market logic, such as impartiality or plurality duties, have been markedly relaxed. Fairness requirements have been diminished to inflexible, decorative norms with regard to informational programming, while content-related regulation of the field of entertainment has become scarce.[116]

This is not to say that a total eclipse of programme requirements has taken place. Interests that cannot be adequately protected by market self-regulation, are still within the state's regulatory responsibility. This applies to private interests such as personal integrity, copyright and consumer rights. Further vulnerable values that are guarded by supervisory authorities are morality, decency and the protection of minors.[117] These are, however, the very values that are also protected under Article 2a(2) of the Television Without Frontiers Directive. Moreover, the Directive does not raise

[111] Dyson, K and Humphreys, P above n 110, 95–6; Barendt, E above n 9, 4.
[112] *Ibid.*
[113] Humphreys, above n 1, 161.
[114] Hoffmann-Riem, W above n 9, 283.
[115] *Ibid* 341; Hoffmann-Riem, W 'Trends in the Development of Broadcasting Law in Western Europe' (1992) *European Journal of Communication* 147, 153.
[116] Hoffmann-Riem, W, above n 9, 340, 345.
[117] *Ibid* 346, 361.

obstacles to the safeguarding of private interests. As has emerged from *De Agostini*, general legislation, which is quite appropriate for the protection of such interests, will now as ever be applicable to transfrontier broadcasts.

A further factor that has undermined the regulatory authority of the Member States, next to the emergence of commercial broadcasting, is the introduction of direct broadcasting satellites (DBS) providing television direct to home. Neither fortuitous 'overspill' nor intentional satellite transmission to foreign territories can easily be contained.[118] Unless states completely refrain from creating the necessary infrastructure for the reception of satellite signals, have recourse to technical devices restricting such reception, or enter into bilateral agreements to this effect, they are exposed to programmes broadcast from abroad without being able to exercise any influence over their content.

The immunity of direct broadcasting satellite television from the broadcasting laws of the Member States has been recognised by the courts and legislators at the national level and has influenced the content of these laws.[119] Concomitantly, programme requirements applicable to the cable retransmission of foreign programmes have also long been relaxed at the national level despite the fact that the distribution via cable easily lends itself to regulatory interventions.[120] The general tendency is to dispense cable and satellite broadcasting from programme content requirements, but to impose on them the same restrictions on the transmission of violent and indecent programmes as on terrestrial channels.[121] These are precisely the vital interests of the Member States the Community also recognises by allowing them to restrict transfrontier broadcasts in accordance with Article 2a(2), 22.

Consequently, the division of powers between the transmitting and the receiving state under Article 2a of the Television Directive reflects changes in the media systems of the Member States, which have been effectuated through national law. The Directive does not expressly preclude Member States from applying their programme standards to foreign broadcasts. However, their real possibility to do so will be very limited in view of the power of satellite broadcasting to transcend national borders. What is more, the interest in rigorously enforcing these standards will be weak, given that the state's influence on domestic commercial channels has also declined.

The situation is not entirely dissimilar to the abolition of the broadcasting monopoly in Italy and of the restrictions to the diffusion of commercial

[118] Seidel, M, above n 6, 127, 139.
[119] The impossibility of the isolation of national media systems has been insightfully captured by the German Constitutional Court in its *Fourth Television Case*, 73 BVerfGE 118 (1986).
[120] Seidel, M, above n 6, 138.
[121] Barendt, E, above n 9, 110.

advertising on cable television in Belgium. These developments have not been instigated by the Community. After all, the Court had accepted the national choices in the cases *Sacchi*[122] and *Debauve*.[123] They have been sparked off by the national legislators or interest groups in the respective Member States.[124] Nonetheless, these findings cannot distract from the fact that the failure of the Member States to reach agreement on a more comprehensive matrix of programme requirements, opting instead for a Directive with a predominantly economic orientation, drastically influences television towards the market model of broadcasting.

[122] Case 155/73 *Giuseppe Sacchi* [1974] ECR 409; [1974] 2 CMLR 177.
[123] Case 52/79 *Procureur du Roi v Marc JVC Debauve and others* [1980] ECR–I 833.
[124] Reich, N 'Rundfunkrecht und Wettbewerbsrecht vor dem Forum des europäischen Gemeinschaftsrechts' in Hoffmann-Riem, W *Rundfunk im Wettbewerbsrecht. Der öffentlich-rechtliche Rundfunk im Spannungsfeld zwischen Wirtschaftsrecht und Rundfunkrecht*, Symposien des Hans Bredow-Instituts, vol 10 (Baden-Baden, Nomos, 1988), 227; Berg, K 'Rechtsprobleme des grenzüberschreitenden Fernsehens—Stellungnahme zum Grünbuch der EG-Kommission aus der Sicht der öffentlich-rechtlichen Rundfunkanstalten' in Schwarze, J (ed) *Fernsehen ohne Grenzen. Die Errichtung des Gemeinsamen Marktes für den Rundfunk, insbesondere über Satellit und Kabel* (Baden-Baden, Nomos, 1985), 200.