

ADVISORY OPINION OF THE COURT

12 June 1998*

(Council Directive 89/552/EEC – Transfrontier television broadcasting – Pornography)

In Case E-8/97

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo byrett (Oslo City Court) for an advisory opinion in the case pending before it between

TV 1000 Sverige AB

and

The Norwegian Government, represented by the Royal Ministry of Cultural Affairs

on the interpretation of Council Directive 89/552/EEC.

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson (Judge-Rapporteur) and Carl Baudenbacher, Judges,

Registrar: Asle Aarbakke, Legal Secretary

* Language of the request for an advisory opinion: Norwegian.

after considering the written observations submitted on behalf of:

- the plaintiff, represented by Counsel Mr Birger Nilsen, Advokatfirma Meltvedt & Co., Oslo;
- the defendant, represented by Ms Bergljot Webster, Office of the Attorney General (Civil Affairs), acting as Agent;
- the Government of Sweden, represented by Mr Erik Brattgård, acting as Agent;
- the Government of the United Kingdom, represented by Mr J.E. Collins, acting as Agent, and Mr Rhodri Thompson, Barrister;
- the EFTA Surveillance Authority, represented by Ms Helga Óttarsdóttir, Officer, Legal & Executive Affairs, acting as Agent;
- the Commission of the European Communities, represented by Ms Karen Banks, Member of its Legal Service, acting as Agent.

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff, the defendant, the Government of the United Kingdom, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 12 May 1998,

gives the following

Advisory Opinion

Facts and Procedure

- 1 By an order dated 21 October 1997, registered at the Court on 24 October 1997, Oslo byrett (Oslo City Court), a Norwegian municipal court, made a reference to the EFTA Court for an advisory opinion in a case brought before it by TV 1000 Sverige AB against the Norwegian Government, represented by the Royal Ministry of Cultural Affairs. The dispute before the Norwegian court concerns the validity of a decision of the Royal Ministry of Cultural Affairs, by which it prohibited further

broadcast of the FilmMax channel on the Norwegian cable system as of 22 May 1995.

- 2 The case concerns TV 1000 Sverige AB, a Swedish broadcasting company which broadcasts on *inter alia* the TV 1000 and FilmMax channels. Television programmes are broadcast from Sweden in the form of satellite signals that are captured by Norwegian receiving stations. These are in turn linked to Norwegian cable systems, which broadcast the television signals to Norwegian homes. The broadcasts are encoded so that they can only be received by paying subscribers. The television channels can also be received directly by subscribers with satellite dishes and decoding equipment.
- 3 Both TV 1000 and FilmMax at times broadcast films with explicit sexual scenes. In these cases, TV 1000 placed a black square on the screen image which takes up about one-third of the screen surface. However, the pornographic films were transmitted in uncensored form on the FilmMax channel. As of 24.00 hrs on 16 September 1994, FilmMax broadcast the film "Andrew Blake's girls". As of 00.30 hrs on 17 September 1994, the film "The best of Andrew Blake" was broadcast. As of 23.30 hrs on 18 September 1994, the film "A Pussy called Wanda" was broadcast.
- 4 The Norwegian Board of Film Classification (*Statens Filmtilsyn*), which is the administrative body which assesses whether the content of films and videograms violate Norwegian legislation, found that all three films clearly violated section 211 of Act No. 10 of 22 May 1902 (*straffeloven*, hereinafter the "Norwegian Penal Code").
- 5 Based on this, the Norwegian Mass Media Authority (*Statens medieforvaltning*) notified TV 1000 Sverige AB that it intended to take a decision to prohibit further broadcast of FilmMax on Norwegian cable systems if FilmMax again broadcast films which were in violation of section 211 of the Penal Code. The notice was given on 24 October 1994 pursuant to section 16 of Act No. 54 of 10 February 1967 on procedure in cases concerning the public administration (*forvaltningsloven*, the Public Administration Act), which requires the Mass Media Authority to give such prior notice.
- 6 On 10 November 1994, FilmMax broadcast the film "Justin et Juillet". The Norwegian Board of Film Classification found that this film also clearly violated section 211 of the Norwegian Penal Code.
- 7 Pursuant to 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 (hereinafter the

“Directive”), Norwegian authorities notified the EFTA Surveillance Authority of plans to interrupt FilmMax’s broadcasts on Norwegian cable systems. Pursuant to Article 2(2)(d) of the Directive, a consultation meeting was held on 15 February 1995, with the EFTA Surveillance Authority, Norwegian and Swedish authorities, as well as representatives from the Commission of the European Communities, without an amicable settlement being reached. In a report of the meeting, the EFTA Surveillance Authority concluded that Norwegian authorities had fulfilled their obligations under the EEA Agreement and that the conditions were met for Norway to be able to take a decision on temporary interruption of broadcasts of FilmMax on Norwegian cable systems.

- 8 On 30 November 1994, the Mass Media Authority decided to prohibit the broadcast of FilmMax on Norwegian cable systems as of 9 December 1994. On 21 December 1994, TV 1000 Sverige AB, TV 1000 Norge AS, Norske Fjernsynsantenner AS and Mr Einar Brustad filed a complaint against the decision of the Mass Media Authority with the Norwegian Royal Ministry of Cultural Affairs. Norske Fjernsynsantenner is a cable company that distributes television signals through a separate system, and Mr Einar Brustad was a subscriber to FilmMax. On 15 May 1995, the Norwegian Royal Ministry of Cultural Affairs made a decision on the complaint, which was to prohibit further broadcasts of FilmMax as of 22 May 1995 as of 24.00 hrs.
- 9 Before the national court the plaintiff, TV 1000 Sverige AB, argued that the decision of 15 May 1995 by the Ministry of Cultural Affairs suffers from shortcomings relating to competence and content which render the decision invalid. The plaintiff has argued that Norway is subject to the Directive, and that section 4-5, litra b, of Act No. 127 of 4 December 1992 on broadcasting (*kringkastingsloven*, hereinafter the “Broadcasting Act”), on which the decision is based, must be interpreted as having the same meaning as Article 2, cf. Article 22 of the Directive.
- 10 Oslo byrett, considering that Article 22, first sentence of the Directive may raise questions as to whether the provision leaves it up to the individual EU/EFTA State to determine the degree of pornography, violence, etc., which can be deemed to seriously impair the physical, mental or moral development of minors, or whether the Directive seeks to introduce a common EEA standard with respect to what is to be accepted in terms of pornography, violence, etc., in the European Economic Area, decided to refer a request to the EFTA Court to obtain an advisory opinion on certain questions.

Questions

11 The following questions were referred to the EFTA Court:

1. *Does Article 22, first sentence of Council Directive 89/552/EEC introduce a common standard for what “might seriously impair the physical, mental or moral development of minors” or is it left up to each individual EU and EFTA country to determine the degree of pornography, violence, etc., which is to be deemed to have the damaging effects referred to in Article 22?*
2. *In the event that Article 22, first sentence of Council Directive 89/552/EEC establishes a common standard for the European Economic Area: is the Swedish norm which accepts scenes shot in close-ups with masturbation, licking and sucking of sexual organs, intercourse, dwelling on ejaculation in the mouths of women and group sex an expression of the common norm in Article 22 which is to apply for the European Economic Area?*
3. *Can the provision in Article 22, first paragraph, second sentence of Council Directive 89/552/EEC concerning the choice of broadcast time and technical measures apply to circumstances which are to be subsumed under Article 22, first paragraph, first sentence?*
4. *If a film is deemed to be contrary to Article 22, first paragraph, first sentence of Council Directive 89/552/EEC, is Article 2(2)(a) a further impediment to the temporary interruption of further broadcast of television broadcasts under Article 2(2)?*
5. *Are repeated acts contrary to Article 22 of the TV Directive to be subsumed under Article 2(2) (a) or (b)?*

12 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Legal background

1. *EEA law*

13 Article 36(1) of the EEA Agreement on the freedom to provide services is in substance identical to Article 59, first paragraph of the EC Treaty. Article 36(2)

EEA states further that Annexes IX to XI contain provisions on the freedom to provide services. 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, is incorporated into the EEA Agreement through a reference in Annex X to the Agreement.

14 Article 2 of the Directive provides:

- “1. 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.
- 2. Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive. Member States may provisionally suspend retransmissions of television broadcasts if the following conditions are fulfilled:*

 - (a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22;*
 - (b) during the previous 12 months, the broadcaster has infringed the same provision 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 its intention to restrict retransmission should any such infringement occur again;*
 - (d) consultations with the transmitting State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in point (c), and the alleged infringement persists.*

The Commission shall ensure that the suspension is compatible with Community law. It may ask the Member State concerned to put an end to a suspension which is contrary to Community law, as a matter of urgency. This provision is 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.

3. *This Directive shall not apply to broadcasts intended exclusively for reception in States other than Member States, and which are not received directly or indirectly in one or more Member States.*

15 Article 22 of the Directive provides:

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

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

- 16 The Court notes that the English version of the Directive’s text uses “or” in the expression “impair the physical, mental *or* moral development of minors”. Most other language versions, including the French, Italian, Danish and Swedish texts, are similarly phrased. The Norwegian version uses “og” and the German version uses “und”, which translate as “and”, but cannot reasonably be interpreted as establishing cumulative conditions.
- 17 Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, amending Council Directive 89/552/EEC, has not yet been incorporated into the EEA Agreement by a decision of the EEA Joint Committee.

2. *National legislation*

- 18 According to the request, the decision to stop FilmMax’s broadcasts was taken pursuant to section 4-5, first paragraph, litra b of the Broadcasting Act. That provision, which entered into force on 1 January 1994, reads as follows:

“The Mass Media Authority may prohibit further broadcast by television stations which ... broadcast programmes with pornography or violence in violation of Norwegian law.”

- 19 Section 211 of the Norwegian Penal Code lays down sanctions for *inter alia* dissemination of pornographic writings, pictures, films, videograms or the like. During the proceedings, the Norwegian Government has stressed that, under Norwegian law, films with a strong emphasis on sexual organs in a sexual context and which are aimed at being sexually exciting for the viewer are usually beyond what may be acceptable under section 211 of the Norwegian Penal Code. The Norwegian Government refers to three Supreme Court judgments which allegedly establish this. The judgments are published in Norsk Rettstidende 1978:1111, 1984:1016 and 1987:1537.

Questions 1, 2 and 3

- 20 By its first three questions, the referring court seeks clarification on the interpretation of Articles 2(2) and 22 of the Directive. The referring Court primarily asks whether it is left up to each Contracting Party to determine the degree of pornography, violence etc., which is to be deemed to have the damaging effects referred to in Article 22 or whether there is a common standard for what “might seriously impair the physical, mental or moral development of minors” and, if so, whether the Swedish norm, as derived from accepted practices in Sweden, is the expression of the common standard.
- 21 The *Norwegian Government*, the *Government of Sweden*, the *Government of the United Kingdom*, the *EFTA Surveillance Authority* and the *Commission of the European Communities* all argue that, under Article 2(2), it is for the national authorities of the receiving State to determine, in accordance with that State’s values and national legislation, which programmes might seriously impair the physical, mental or moral development of minors within the meaning of Article 22, first paragraph, first sentence. At the oral hearing, the *plaintiff* conceded that it was, in principle, for each Member State to carry out this control, although Article 22 of the Directive limited somewhat the discretion of the Member States in this area.
- 22 The *Court* has noted in its case law that the Directive has established an overriding principle of division of responsibilities among the Member States. Following the so-called “transmitting State principle”, a receiving State may not carry out further controls in addition to those effected by the transmitting State (see Joined Cases E-8/94 and E-9/94 *Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge A/S* [1994-1995] EFTA Court Report 113, hereinafter “*Mattel/Lego*”). However, both the EFTA Court and the Court of Justice of the European Communities have

accepted that certain restrictions on television broadcasting, for example, measures against advertisements targeting children, may be upheld by the Member States under Council Directive 84/450/EEC, which concerns misleading advertising (see *Mattel/Lego* and Joined Cases C-34/95, C-35/95 and C-36/95 *KO v De Agostini and TV-Shop* [1997] ECR I-3843).

- 23 Furthermore, an exceptional procedure of temporary suspension is allowed pursuant to Article 2(2) of the Directive, if the conditions of that provision are fulfilled, including the criterion that a television broadcast coming from another Member State must manifestly, seriously and gravely infringe Article 22.
- 24 The reference in Article 2(2)(a) of the Directive to a television broadcast infringing Article 22 must be understood as being a reference to the criterion that it “might seriously impair the physical, mental or moral development of minors”. The Court notes that, as pointed out by *inter alia* the EFTA Surveillance Authority and the Commission of the European Communities, the provision does not purport to lay down any standards for what might have such detrimental effects, leaving it up to the Member States to define these terms, as well as the term “pornography”, in accordance with their national legislation and moral standards. This applies equally to the transmitting State, pursuant to Article 22, with regard to broadcasts under its jurisdiction and to the receiving State exercising its powers under Article 2(2), second sentence, cf. Article 22.
- 25 The Court notes, however, that even if Article 22 mentions “pornography” as content of a programme which might seriously impair the physical, mental or moral development of minors, not all broadcasts of sexually explicit material automatically fall under Article 22, first paragraph, first sentence, as conceded by the Norwegian Government. The decisive criterion is whether a programme may have the effects on minors referred to in the first sentence of the Article.
- 26 Protection of minors is a legitimate goal of each of the Contracting Parties to the EEA Agreement. The protection of the mental and moral development of minors forms an important part of the protection of public morality, an area where it is not possible to determine a uniform European conception, as the requirements of morals vary, depending on time and place (see the *Handyside* judgment of the European Court of Human Rights of 7 December 1976, Series A Vol. 24). This approach has been confirmed by the ECJ (see Case 121/85 *Conegate v HM Customs and Excise* [1986] ECR 1007). In that judgment, the ECJ observed that a Member State is permitted by the EC Treaty to make its own assessment relating to public morality within its territory. Nevertheless, a State is guilty of arbitrary discrimination if it seeks to prohibit the importation of goods or services that could be made and marketed lawfully within its territory.

- 27 The Court does not accept the plaintiff's submission to the effect that programmes which might seriously impair the physical, mental or moral development of minors must be considered by virtue of Article 22, first paragraph, second sentence, not to have seriously impairing effects if, through selection of the time of broadcast or technical measures, it is ensured that minors in the area will not normally hear or see such broadcasts.
- 28 It is sufficient to note, as the defendant, the Government of the United Kingdom, the EFTA Surveillance Authority and the Commission of the European Communities all point out, that it follows from the wording of Article 22, first paragraph, that the provision sets out two different categories of programmes, with the second sentence allowing for the possibility of taking into account the measures intended to prevent minors from seeing broadcasts which are likely to impair the physical, mental or moral development of minors, without falling into the category of broadcasts that might seriously impair the development of minors.

Questions 4 and 5

- 29 By its fourth and fifth questions, the referring court seeks clarification on the provisions contained in Article 2(2) of the Directive, in particular (a) and (b). The *plaintiff* has argued that, according to Article 2(2)(a), a qualified infringement of Article 22 is required, and that such a qualified infringement has not been established in the case at hand.
- 30 The *Court* notes that Article 2(2)(a) to (d) of the Directive list the conditions under which a Contracting Party may provisionally suspend retransmissions of television broadcasts from other Contracting Parties. All the conditions listed in Article 2(2)(a) to (d) must be fulfilled in order for the receiving State to restrict retransmission. The measures taken are subject to supervision by the Commission and the EFTA Surveillance Authority, as the case may be.
- 31 The Court notes that it is for the national authorities to assess, with regard to the facts of each case, if the infringement of Article 22 is manifest, serious and grave, as required by Article 2(2)(a). The Court further notes that Article 2(2)(a) and (b) list separate criteria, with (a) regulating the gravity of the infringement, while (b) is to be interpreted to the effect that the right to provisional suspension of retransmission arises when material infringing Article 22, as laid down in Article 2(2)(a), has been broadcast on three occasions within a period of twelve months.

- 32 The Court finally notes that, in decisions on provisional suspension of retransmission, regard must be had to the principle of proportionality.

Costs

- 33 The costs incurred by the Government of Sweden, the Government of the United Kingdom, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by Oslo byrett by an order of 21 October 1997, hereby gives the following Advisory Opinion:

Under Article 2(2) of Council Directive 89/552/EEC, it is for the national authorities of the receiving State to determine, in accordance with that State's values and national legislation, which programmes might seriously impair the physical, mental or moral development of minors within the meaning of Article 22, first paragraph, first sentence of the Directive.

The exception in the second sentence of Article 22, first paragraph does not extend to programmes "which might seriously impair the physical, mental or moral development of minors" dealt with in the first sentence of Article 22, first paragraph.

All the conditions listed in Article 2(2)(a) to (d) of the Directive must be fulfilled in order for the receiving State to restrict retransmission, regard being had to the principle of proportionality and the decision being subject to supervision by the Commission and the EFTA Surveillance Authority, as the case may be.

The criteria in Article 2(2)(a) and (b) are separate criteria, with (a) regulating the gravity of the infringement and (b) providing that the right to provisional suspension of retransmission arises when material infringing Article 22, as laid down in Article 2(2)(a), has been broadcast on three occasions within a period of twelve months.

Bjørn Haug

Thór Vilhjálmsson

Carl Baudenbacher

Delivered in open court in Luxembourg on 12 June 1998.

Bjørn Haug
President

Asle Aarbakke
Registrar
Legal Secretary