

REPORT FOR THE HEARING
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

Norwegian Government, represented by the Royal Ministry of Cultural Affairs

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

I. Introduction

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.

II. Legal background

National legislation

2. According to the request, the decision to stop FilmMax's broadcasts was taken pursuant to section 4-5, first paragraph, litra b of Act No. 127 of 4 December 1992 on broadcasting (*kringkastingsloven*, hereinafter the "Broadcasting Act"). The provision entered into force on 1 January 1994.

3. Section 4-5, first paragraph, litra b of the Broadcasting Act 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."

4. Section 211 of the Norwegian General Civil Penal Code (*straffeloven*, Act no. 10 of 22 May 1902, hereinafter the "Penal Code"), last amended on 22 May 1992, reads:

"Any person shall be liable to fines or imprisonment for a term not exceeding two years, or to both, who

- a) gives public lectures or arranges public performances or exhibitions of an indecent or pornographic content,*
- b) publishes, offers for sale or hire or in any other way seeks to disseminate, or with intent to so disseminate, imports indecent or pornographic writings, pictures, films, videograms or the like,*
- c) delivers indecent or pornographic writings, pictures, films, videograms or the like to persons under 18 years of age,*
- d) possesses or imports pictures, films, videograms, or the like in which any person who is, must be considered to be or is presented as being under 16 years of age is shown in an indecent or pornographic manner.*

In this section indecent or pornographic depictions mean sexual depictions that have an offensive effect or in any other way are capable of having a humanly degrading or brutalizing effect, including sexual depictions showing children, animals, violence, duress, and sadism.

An accomplice shall be liable to the same penalty.

Any person who negligently commits any such act as is referred to in this section shall be liable to fines or imprisonment for a term not exceeding six months or both.

Any proprietor or superior who wilfully or negligently omits to prevent the commission in his business of any such act is referred to in this section shall be liable to the same penalty.

In the apportioning of the sentence the fact that the indecent or pornographic depictions include the use of children, animals, violence, duress, and sadism shall be treated as an aggravating circumstance.

This section shall not apply to films or videograms that the National Board of Film Censors has by prior control approved for commercial exhibition or sale.”

EEA law

5. 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”) is referred to in point 1 of Annex X to the EEA Agreement.

6. 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 co-ordinated 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.”*
7. 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.”

8. 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. Article 1(2) of Directive 97/36/EC amends Article 2 and inserts a new Article 2a. The new Article 2a reads:

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

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

- (a) *a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22 (1) or (2) and/or Article 22a;*

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

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

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

Article 1(27) of Directive 97/36/EC amends Article 22 of Directive 89/552/EEC. The new Article 22 reads:

- “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 paragraph 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.”*

In addition, a new Article 22a now provides that Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.

III. Facts and Procedure

9. TV 1000 Sverige AB is 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.

10. Both TV 1000 and FilmMax have at times broadcast films with explicit sexual scenes. In these cases, TV 1000 has 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.

11. 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 the Norwegian Penal Code.

12. Based on this, the Norwegian Mass Media Authority (*Statens medieforvaltning*) notified TV 1000 Sverige AB that the intention was 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 the Act of 10 February 1967 on procedure in cases concerning the public administration (the Public Administration Act – *forvaltningsloven*), which requires the Mass Media Authority to give such prior notice.

13. 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.

14. Pursuant to Council Directive 89/552/EEC, Norwegian authorities notified the EFTA Surveillance Authority (ESA) 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 EU Commission, 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. The EFTA Surveillance Authority found that all conditions were met for Norway to be able to take a decision on temporary interruption of broadcasts of FilmMax on Norwegian cable systems.

15. 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.

16. Before the national court, the plaintiff, TV 1000 Sverige AB, has 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 Directive 89/552/EEC, and that section 4-5, litra b, of 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.

17. Oslo byrett, considering that Article 22, first sentence of Council Directive 89/552/EEC may raise questions as to whether the provision leaves it up to the individual EU/EFTA country 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 EU standard with respect to what is to be accepted in terms of pornography, violence, etc., in the European Economic Area, has decided to refer a request to the EFTA Court to obtain an advisory opinion on certain questions.

IV. Questions

18. 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)?**

V. Written observations

19. Pursuant to Article 20 of the Statue of the EFTA Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the plaintiff, represented by Counsel Mr Birger Nilsen, Advokatfirma Meltvedt & Co., Oslo;
- the defendant, represented by the Office of the Attorney General (Civil Affairs), represented by Ms Bergljot Webster;
- 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.

TV 1000 Sverige AB

20. The *plaintiff* submits that, pursuant to Article 2(1) of the Directive, Swedish authorities are to ensure that the television programmes in question comply with the applicable national law. The plaintiff refers to the Preamble to the Directive in support of the view that it is for the transmitting State to ensure that broadcasts comply with national law as co-ordinated by the Directive, without secondary control on the same grounds in the receiving State. This is sufficient under Community law to ensure free movement of broadcasts.

21. All of the relevant films broadcast on FilmMax have been approved by Swedish authorities. No objections have been made as to the content of the broadcasts in other Nordic countries which receive broadcasts from FilmMax.

22. The plaintiff submits that the discretion provided for in Article 22 of the Directive concerns whether “programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence” may be broadcast. Further, the plaintiff submits, the provision applies “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.”

23. In approving the films broadcast on FilmMax, Swedish authorities have found that the films cannot seriously impair the physical, mental or moral development of minors. It is submitted that the physical, mental and moral development of Norwegian minors cannot be seriously impaired by films which do not have such an effect on Swedish minors. The films in question show actions between human beings which are permitted. If the films were to be found to seriously impair the development of minors, the plaintiff stresses that through the timing of the broadcast and through technical measures it is ensured that minors in the area will not normally hear or see the broadcasts. The films in question were broadcast starting as of midnight, and an active action is required from the subscriber in the ordering of the subscription and the payment of the fee. Additionally, a decoder is necessary to be able to receive the television signals; it normally has an interruption mechanism which allows the decoder to be blocked for use by minors.

24. In any event, the plaintiff argues that the films at issue do not manifestly, seriously and gravely infringe Article 22, cf. Article 2(2)(a) of the Directive. To suspend retransmissions of broadcasts under Article 2(2) of the Directive, a qualified infringement of Article 22 is required. No such infringement can be established in the case at hand.

The Norwegian Government

25. The *defendant*, the Norwegian Government, stresses 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 defendant refers to three Supreme Court judgments which establish this. The judgments are published in Norsk Rettstidende 1978:1111, 1984:1016 and 1987:1537.

26. The defendant further stresses that, when the new Broadcasting Act was enacted in 1992, the legislator stated that Norwegian law was in accordance with Directive 89/552/EEC, and the majority of the parliamentary committee dealing with the Act stated that the EEA Agreement did not give rise to a need to amend Norwegian legislation on pornography, which television programmes broadcast on cable systems in Norway must not violate.

27. The defendant interprets the Directive to the effect that a receiving State may not carry out further controls in addition to those effected by the transmitting State, except in certain limited circumstances, when a receiving State may implement controls and sanctions in the form of temporary suspension of the broadcast, pursuant to Article 2(2), second sentence.

28. The defendant submits that the wording of Article 22 of the Directive implies that the Directive assumes that pornography can seriously impair the “physical, mental and moral development” of minors. It is therefore not necessary to prove that pornography actually may have such an effect on children. The essential question is what is to be defined as pornography. The defendant submits that, subject to certain limits, it must be up to the Member States to establish that definition. It was never the intention to co-ordinate through the Directive the concept of pornography for all Member States. No attempts have been made to harmonize similar standards in other areas of EC law (Case C-34/79 *Regina v Henn and Darby* [1979] ECR 3795 and Case C-121/85 *Conegate v HM Customs & Excise* [1986] ECR 1007).

29. The defendant submits that the effects to be avoided are the impairment of children's mental and moral development, both of which are dependent upon the cultural environment. The Directive gives the Member States a margin of appreciation, subject to certain limits. The defendant submits that there is a lower limit for the concept of "pornography" under the Directive, below which a case must be considered under the second sentence of Article 22, for which the harm to minors need not be serious for a violation to be found. The Directive also implies an upper limit for what a State may allow to be broadcast, without violating the obligation to intervene against pornographic broadcasts. The defendant submits that the films in question clearly exceed the lower limit under the Directive and that there can be no doubt that the films referred to are of such a nature that a State must be able to characterize them as being pornographic within the meaning of the Directive.

30. The defendant proposes the following answers to the questions:

Question 1:

Council Directive 89/552/EEC is to be interpreted as not introducing a common standard for what "might seriously impair the physical, mental or moral development of minors". Each EU and EFTA State must determine the degree of pornography, violence, etc., which is to be deemed to have the damaging effects referred to in Article 22."

Question 2:

If the Court replies to question 1 by determining that Article 22 establishes a common standard:

The Swedish norm is not an expression of the common norm introduced by Article 22.

Question 3:

The provision in Article 22, first paragraph, second sentence of Council Directive 89/552/EEC does not apply to circumstances which are to be subsumed under Article 22, first paragraph, first sentence.

Question 4:

Article 2(2)(a) imposes further requirements, in addition to the requirements following from Article 22, that must be fulfilled before a Member State may effect temporary suspensions of broadcasts. Whether these requirements are fulfilled must be assessed according to that State's internal norms.

Question 5:

Repeated infringements of Article 22 of Council Directive 89/552/EEC may be subsumed both under Article 2(2)(a) and (b), in so far as the remaining conditions are met."

The Government of Sweden

31. The *Government of Sweden* submits written observations only as to the first question. The Government of Sweden points out that the Directive does not contain a harmonized definition of terms such as “pornography”, “gratuitous violence” or “which might seriously impair the physical, mental or moral development of minors”, as contained in Article 22 of the Directive. The Government refers to judgment of the ECJ in Case 34/79, *Regina v Henn and Darby* (cited above) on the interpretation of the term “public morality” in Article 36 EC, the case having established that, in principle, it is for each Member State to determine the requirements of public morality in its territory, in accordance with its own scale of values and in the form selected by it. The Government of Sweden further refers to judgments of the European Court of Human Rights, where it is stated that it is not possible to determine a uniform European conception of morals, and that the requirements of morals vary from time to time and from place to place (see the *Handyside Case*, Judgment of 7 December 1976 (Series A Vol. 24); the *Case of Müller and Others*, Judgment of 24 May 1988 (Series A Vol. 133); and the *Otto-Preminger-Institute Case*, Judgment of 20 September 1994 (Series A Vol. 295).

32. The Government of Sweden concludes that it is, in principle, for the individual Member State to determine, in accordance with its own scale of values, which programmes can, according to Article 22, paragraph 1, seriously impair the physical, mental or moral development of minors.

The Government of the United Kingdom

33. The *Government of the United Kingdom* supports the submissions of the defendant. It is submitted that the questions referred to the EFTA Court raise two issues: first, what test is to be applied by national authorities of an EEA State in determining whether a programme containing pornographic material received from another EEA State, where such material is not prohibited, for the purposes of retransmission by cable, “manifestly, seriously and gravely infringes Article 22 of the Directive” (Questions 1, 2, 4 and 5) and, second, whether the prohibition in Article 22(1), first sentence applies where a broadcaster ensures, by selection of time or by a technical measure, that minors in the area of transmission will not normally hear or see such broadcasts (Question 3).

Questions 1, 2, 4 and 5

34. As regards the first issue, the Government of the United Kingdom notes that Article 2(2) of the Directive imposes a general prohibition on secondary control by the national authorities of one EEA State of broadcasts from other EEA States. This applies even where a receiving State considers that authorities responsible for control over broadcast in the transmitting State have failed to exercise the degree of control required under the Directive (Case C-11/95 *Commission v Belgium* [1996] ECR I-4155; Case C-14/96 *Denuit* [1997] ECR I-2785).

35. However, in specific circumstances an exceptional procedure is allowed for as envisaged in the 15th recital of the Preamble to the Directive and implemented in Article 2(2) of the Directive, which in turn refers to Article 22. The Government of the United Kingdom notes that the answers to the questions referred to the EFTA Court are not affected by amendments to Articles 2 and 22 by Directive 97/36/EC of 30 June 1997, although the answer to question 3 is clarified by the amendments to Article 22.

36. The Directive is enacted pursuant to Articles 57(2) and 66 of the EC Treaty and is thus subject to Article 56(1), which provides for derogations from the free movement of services by the Member States on grounds of “public policy, public security and public health”. The protection of minors is a fundamental issue of public policy, rightly recognized by the Directive as a matter for the individual EEA States to regulate in accordance with individual traditions and specific conditions prevailing in their territories.

37. The Government of the United Kingdom submits that there is no uniform standard of morality throughout the EEA in relation to issues of this kind. The Government further submits that case law of the EC Court of Justice in relation to derogations from freedom of movement is relevant in relation to issues specified under Article 22 of the Directive. Like any secondary legislation, the Directive must be interpreted in the light of the Treaty rules on free movement of services, in particular Article 56 of the Treaty (Joined Cases C-427/93, 429/93 and 436/96 *Bristol-Myers Squibb and others v Paranova* [1996] ECR I-3457, at para. 27).

38. The same general principle applies in the context of the free movement of services as in the context of free movement of goods, *viz.* that Member States have a legitimate interest in controlling obscene material being imported into their territory (Case 34/79 *Regina v Henn and Darby* (cited above) at para. 21). This is confirmed by Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007 at paras. 22-23, and Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, at paras. 29-30. The Government of the United Kingdom submits that

rules in relation to the protection of minors against exposure to pornography plainly fall within the scope of this principle and points out that a similar principle has been applied by the European Court of Human Rights (Handyside (cited above), at para. 48).

39. The Government of the United Kingdom submits that the only interpretation of Articles 2(2) and 22 that would accord with general principles of Community law and the satisfactory construction of the Directive is that the national authorities of the receiving State should apply Article 2(2) by reference to the measures that it has adopted pursuant to its obligations under Article 22. The question of whether other States, including the transmitting State, have either more liberal or more stringent rules, is irrelevant to the interpretation of Article 2(2)(a). The Government in particular draws attention to the following: (1) Article 22 is not addressed to individual broadcasters; (2) it would be contrary to principle for the Norwegian authorities to be required to construe Swedish law; (3) if Norwegian authorities were of the opinion that Swedish law was infringed, the proper remedy would be to bring the matter to the attention of the Commission or the EEA Joint Committee; (4) no such action is provided for by the tailpiece to Article 2(2); (5) discretion is conferred on both Norwegian and Swedish authorities as regards “appropriate measures” in Article 22, and it cannot be expected that the measures are the same; and (6) it appears that both Norwegian and Swedish law are considered by the competent EC and EEA authorities to comply with Article 22.

40. As regards the conditions laid down in Article 2(2), the Government of the United Kingdom submits that it is true that, as a matter of general principle, that Article 56, and in particular the public policy exception recognized thereunder must be interpreted restrictively. The position under Articles 2(2) and 22 is different. The effect of these provisions is to replace the general principles by a formal procedure, applicable only under very restrictive conditions and under supervision by the Commission, whereby the EEA States retain a residual national competence to control television programmes of particular sensitivity.

41. Under Article 2(2) (a) and (b), the receiving EEA State must assess the material by reference to its own national rules and on the same basis as it would apply to material broadcast by a domestic broadcaster. Its right to provisionally suspend broadcasts arises where material of this kind has been broadcast three times within a 12-month period. The United Kingdom submits, in answer to the fifth question, that the fact that material is repeatedly broadcast is not to be taken into account under Article 2(2)(a), as the provision is directed at the nature of the material contained in a broadcast. Under Article 2(2)(b) the jurisdiction of a receiving State to adopt suspensory measures does not arise until it has identified three occasions within a 12- month period during which a single broadcaster has

infringed the national measures adopted pursuant to Article 22 in the manner laid down by Article 2(2)(a).

Question 3

42. As regards the issue raised by the third question, the Government of the United Kingdom refers to its submissions in Case C-327/93 *R v Secretary of State for National Heritage ex parte Continental Television Bvto and others*¹ at section 4.2, and to the amendments to Article 22 in Directive 97/36, designed to put this matter beyond doubt by separating the two sentences originally contained in Article 22. The Government of the United Kingdom proposes the following answer to the third question:

“The exception contained in the second sentence of Article 22, first paragraph – whereby programmes “which are likely to impair the physical, mental or moral development of minors” are not subject to the prohibition provided for in the first sentence of Article 22, first paragraph, “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” – does not extend to programmes “which might seriously impair the physical, mental or moral development of minors”, identified in the first sentence of Article 22, first paragraph.”

The EFTA Surveillance Authority

43. The *EFTA Surveillance Authority* notes that Council Directive 89/552/EEC has been amended by Directive 97/36 EC of 30 June 1997. As this Directive had, in February 1998, not been incorporated into the EEA Agreement, the Authority’s conclusions are not dependent on the existence of that Directive.

Questions 1, 2 and 3

44. The main purpose of the Directive is to ensure freedom to provide broadcasting services and in this respect the Directive lays down minimum rules. Among those rules are rules regarding jurisdiction over broadcasters, found in Article 2, first and second paragraph. Articles 2 and 3 of the Directive establish the so called “transmitting State principle”, under which the transmitting State shall supervise the broadcasters which operate under their jurisdiction, the jurisdiction being based on the broadcaster’s connection to that State’s legal system (Joined

¹ Case C-327/93 was removed from the register of the ECJ by order of 29 March 1996 of the President of the Court following the national court's withdrawal of the questions it had submitted.

Cases C-34/95, 35/95 and 36/95 *Konsumentombudsmannen v De Agostini Förlag AB and TV shop i Sverige AB* [1997] ECR I-3843. Under Article 2(2) EEA States are obliged not to interrupt broadcasts from other EEA States for reasons which fall within the fields co-ordinated by the Directive.

45. Article 22 requires EEA States to ensure that broadcasts under their jurisdiction do not include programs containing pornography or gratuitous violence which might seriously impair the physical, mental or moral development of minors. The Authority submits that it is clear that the provision does not purport to lay down any standards for what might have such detrimental effects, the different values and scales in the EEA States explaining why no attempt has been made to provide for a common standard in this respect. In the absence of any indications in the Directive, the values and scales regarding impairment of the development of minors can only be sought for in the respective national laws. The Directive thus leaves it to each EEA State to define the level of pornography or gratuitous violence that might seriously impair the physical, mental or moral development of minors.

46. In light of the answer proposed to the first question, the Authority submits that there is no need to answer the second question referred to the Court. As regards the third question, the Authority submits that it already follows from the construction and wording of Article 22 that the provision contains two different sets of prohibitions which operate under distinct conditions. This is supported by the legislative history of the provision and now by the amendments to the Directive, found in Directive 97/36/EC, which has clarified the issue without changing the substance of the rules.

Questions 4 and 5

47. The fourth and fifth questions concern the interpretation of Article 2(2) of the Directive. The EFTA Surveillance Authority points out that Article 2(2) constitutes an exception to the main rule of the Directive, which allows the receiving State to restrict the reception of television broadcasts, provided that certain conditions are fulfilled. ESA submits the following answer to the fourth question:

“A mere infringement of Article 22 is not sufficient in order to suspend broadcasts according to Article 2(2), as under the latter provision the infringement has to be manifest, serious and grave. An infringement of Article 22, first paragraph, first sentence, will normally be considered serious and grave.”

48. As regards the fifth question, the EFTA Surveillance Authority submits that all conditions listed in sub-paragraphs (a) to (d) of Article 2(2) must be fulfilled in order for the receiving State to restrict retransmission of broadcasts. (Opinion of Advocate General Lenz in Case C-11/95 *Commission v Belgium* [1996] ECR I-4115). The answer to the fifth question is thus, in the submission of the EFTA Surveillance Authority, the following:

“Both sub-paragraphs (a) and (b) of Article 2(2) have to be fulfilled in order for an EEA State to apply the exemption in Article 2(2) to suspend retransmission of television broadcasts from another EEA State.”

The Commission of the European Communities

49. The *Commission of the European Communities* proposes that the first question asked should be answered to the effect that no common standard has been established as to what “might seriously impair the physical, mental or moral development of minors”, but that each EU and EFTA country enjoys a considerable margin of discretion in determining the kind of programmes which are to be deemed to have the damaging effects referred to in Article 22 of the Directive. The Commission points out that even if Article 22 of the Directive should, in principle, have a uniform meaning common to all the Member States of the EU and EFTA countries, the nature of the concepts involved makes it inevitable that there will be differences of interpretation from one country to another, depending on different traditions and value systems.

50. Except in certain extreme cases, it is very difficult to determine objectively exactly what programmes are covered by Article 22, first sentence. Inevitably, therefore, each individual EU and EFTA country retains a margin of discretion in determining what programmes must be banned. The Commission notes that it has consistently adopted the position that a Member State retains the capacity to define the terms “pornography” and what “might seriously impair...minors” in accordance with their national moral standards. This is, in the Commission’s submission, in conformity with the jurisprudence of the European Court of Human Rights concerning Article 10 of the European Convention on Human Rights, the Article mentioned in the eighth recital of the Directive. This case law provides valuable guidance as to how the balance should be struck between freedom of information and protection of the rights of others, and leaves a certain supervisory function to the European Court of Human Rights, which will find a breach of Article 10 if the Member State’s discretion has been exercised in an entirely unreasonable way. The Commission refers to the *Handyside Case*, the *Case of Müller and Others* and, in the context of religious values, the *Otto-Preminger Institute Case* (all cited above).

51. The Commission submits that it is reasonable to follow the same approach as does the European Court of Human Rights in interpreting Article 22 of the Directive. An infringement of Article 22 could thus only be found where a State had clearly exceeded the margin of discretion allowed it.

52. The Commission submits that possible conflict between different national standards can in practice be solved by the receiving State having recourse to Article 2(2) of the Directive. This has been done on a number of occasions where offending material has ceased to be retransmitted in the receiving State.

53. In light of the answer to the first question, the Commission submits that the second question does not require an answer.

54. As regards the third question, the Commission refers to the intention of the legislator and the clarification made with Directive 97/36, and submits that the answer to the question must be in the negative. Article 22 sets out two different categories of programmes: those which might “seriously” impair the physical, mental or moral development of minors and those other programmes which are likely to impair the physical, mental or moral development of minors.

55. The fourth question has, in the Commission’s submission, to be answered in the affirmative, since Article 2(2)(a) requires not merely an infringement of Article 22, but one that is manifest, serious and grave.

56. As to the fifth question, the Commission submits that both Article 2(2)(a) and (b) have to be satisfied. The repeated nature of an infringement is relevant only for the assessment under Article 2(2)(b); the fact that an infringement has already occurred in the past is not relevant for determining the gravity of another infringement occurring later.

Thór Vilhjálmsson
Judge-Rapporteur