

Court of Justice EU, 23 October 2003, RTL Television



BROADCASTING

Films made for television and -series

- Films which have been made for television and which provide, from their conception, for breaks for the insertion of advertising are covered by the term 'films made for television' in Article 11(3) of Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997.
- The connections which must link films in order that they can come within the exception laid down for 'series' by Article 11(3) of Directive 89/552 must relate to the content of the films concerned, such as, for example, the development of the same story from one episode to another or the reappearance of one or more characters in different episodes.

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Court of Justice EU, 23 October 2003

(C.W.A. Timmermans, D.A.O. Edward and P. Jan)

JUDGMENT OF THE COURT (Fifth Chamber)

23 October 2003 *

In Case C-245/01,

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

RTL Television GmbH

and

Niedersächsische Landesmedienanstalt für privaten Rundfunk,

on the interpretation of Article 11(3) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60),

THE COURT (Fifth Chamber),

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

Advocate General: F.G. Jacobs,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

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

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

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

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

having regard to the Report for the Hearing,

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

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

gives the following

Judgment

1 By order of 15 June 2001, received at the Court on 25 June 2001, the Niedersächsisches Oberverwaltungsgericht (Lower Saxony Higher Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 11(3) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) (hereinafter 'Directive 89/552').

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

Legal background

Community law

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

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

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

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

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

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

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

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

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

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

...

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

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

The European Convention on Transfrontier Television

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

'1. Advertising and tele-shopping shall be inserted between programmes. Provided the conditions contained in paragraphs 2 to 5 of this article are fulfilled, advertising and tele-shopping spots may also be inserted

during programmes in such a way that the integrity and value of the programme and the rights of the rights holders are not prejudiced.

...

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

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

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

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

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

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

German Law

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

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

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

3. In television programmes consisting of independent parts, or in sports programmes or broadcasts of events and similar occasions containing breaks, advertising may be inserted only between the independent parts or during the breaks. In other programmes, the interval between two successive interruptions within the pro-

gramme must be at least 20 minutes. Subparagraphs (4) and (5) are not affected.

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

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

12 Paragraph 28(2) of the Niedersächsisches Landesrundfunkgesetz (Law of the Land of Lower Saxony on Television, hereinafter 'the Landesrundfunkgesetz'), as amended, provides that the NLA, the body which was succeeded by the defendant in the main proceedings, may determine that a programme or broadcast infringes the Landesrundfunkgesetz or the terms of licences and order the broadcaster and those responsible for the programme's content to put an end to the infringement.

13 Paragraph 33(5) to (7) of the Landesrundfunkgesetz contains provisions similar to those of Paragraph 26(2) to (4) of the Rundfunkstaatsvertrag and Paragraph 44(2) to (4) of the Vierter Rundfunkstaatsvertrag.

14 Subsequent references in this judgment to Paragraph 26(2) to (4) of the Rundfunkstaatsvertrag must be understood as also referring to the corresponding provisions of the Landesrundfunkgesetz and the Vierter Rundfunkstaatsvertrag mentioned in the previous paragraph.

The main proceedings and the questions referred

15 On 7 October 1993, RTL broadcast 'The Revenge of Amy Fisher', a film lasting 86 minutes, interrupting it four times with advertising. It did the same a week later during the broadcasting of 'Cries in the Forest', a film lasting 90 minutes. Those films were broadcast as part of a sequence entitled 'Dangerous Liaisons'.

16 By decision of 12 November 1993, the NLA determined that, by interrupting each of those films by four advertising breaks, RTL had infringed the first sentence of Paragraph 26(4) of the Rundfunkstaatsvertrag. It ordered that, if those films were rebroadcast, they should not be interrupted by more than one or more than two advertising breaks respectively.

17 By the same decision, the NLA further ordered RTL not to interrupt eight other films or any feature or television film broadcast as part of a series whose scheduling was advertised (that is, the series 'Dangerous Liaisons', 'Family Fortunes' and 'Great Television Stories'), by more frequent advertising than that permitted by the first sentence of Paragraph 26(4) of the Rundfunkstaatsvertrag.

18 In support of its decision, the NLA argued that the broadcasts in question could not be regarded as forming

part of a series within the meaning of Paragraph 26(4) of the Rundfunkstaatsvertrag and could not, therefore, be interrupted by advertising at 20-minute intervals.

19 In its decision, the NLA stated, in particular, that the concept of a series is closely connected to that of a serial and assumes that the different films will be largely identical from the point of view of plot and characters. The NLA decided, in particular, that neither the identical broadcasting slots nor the fact that the scripts are based on novels or that there are common themes such as love, passion or family relationships in general, create a sufficient link for such programmes to be regarded as forming a series.

20 On 23 November 1993, RTL brought an action in the Niedersächsisches Verwaltungsgericht (Lower Saxony Administrative Court) (Germany) for annulment of the NLA's decision.

21 In support of its action RTL claimed that that decision was based on too strict a construction of the meaning of 'series'. That term should be defined as the grouping of several self-standing stories with a common theme characterised both by criteria of content, such as film genre, and similarity of script and theme, and by criteria of external form, such as length of broadcast and broadcasting slot, and various other factors, for example, a specific director.

22 The NLM stated that the concept of a series requires that the connection between the broadcasts which form the series relates to their content. To accept criteria mainly of form, as suggested by RTL, would give the television operator complete latitude frequently to interrupt programmes with advertising.

23 By judgment of 25 September 1997, the Niedersächsisches Verwaltungsgericht dismissed RTL's action on the ground that the television films in question could not be treated as a series within the meaning of Paragraph 26(4) of the Rundfunkstaatsvertrag.

24 RTL appealed against that judgment to the referring court. In support of its appeal RTL claims that the definition upheld by the Niedersächsisches Verwaltungsgericht is incompatible with Article 11(3) of Directive 89/552.

25 As a preliminary point, the national court notes that according to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany) it has no doubts under constitutional law based on the first sentence of Article 5(1) of the German Basic Law as to the application of Paragraph 26(4) of the Rundfunkstaatsvertrag, which is the legal basis of the decision at issue in the main proceedings. That provision is based closely on Article 11(3) of Directive 89/552.

26 The national court considers that the function of Paragraph 26(4) of the Rundfunkstaatsvertrag is to safeguard the artistic value of cinema and television films and to protect them from too frequent advertising breaks.

27 Such a ideological construction is, according to the national court, supported by the background to Paragraph 26(4) of the Rundfunkstaatsvertrag. That provision relates first to Article 14(3) of the European Convention, which reflects the compromise reached by the

Council of Europe between the objective of increased protection for cinema and television films and the interests of advertisers. Article 11(4) of Directive 89/552 is also based on that compromise. The national court notes that the Länder, the parties to the Rundfunkstaatsvertrag, wished to bring German law into line with the European rules in respect of advertising breaks. It follows that, according to the Court's case-law, the national provision at issue in the main proceedings must be considered and construed in the light of the letter and spirit of Article 11(3) of Directive 89/552.

28 The national court observes also that neither the wording nor the scheme of Article 11(3) of Directive 89/552 supports RTL's argument that cinema films alone should be safeguarded and not television films, on the ground that the latter are made to be broadcast specifically on the basis of advertising breaks.

29 The national court notes that it has already ruled that the concept of a series requires the existence of a link between the different programmes from the point of view of their content or their action.

30 It considers that its point of view is confirmed by the Guidelines of the United Kingdom's Independent Television Commission (hereinafter 'the ITC') as well as by the common guidelines adopted by the Länder.

31 It finds that, in the present case, the matters relied upon by RTL to connect the different episodes from the thematic or dramatic point of view — with themes such as love affairs, marital crises, existential crises, crime, violence, prostitution, surrogate mothers and natural disasters, which present broad points in common since a central character may be confronted with a dramatic situation and must overcome it — are too vague to be regarded, even in conjunction with other factors relating to form, as forming a series.

32 The national court concludes that the outcome of the main proceedings depends on the definition of a 'series' and the criteria to be taken into account in that regard. Since the Court of Justice has not yet ruled on this subject in its case-law relating to Article 11(3) of Directive 89/552, the national court takes the view that there are good grounds for referring questions for a preliminary ruling.

33 In those circumstances, the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does Article 11(3) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60), by restricting advertising breaks, pursue the objective of protecting the artistic value of feature films and films made for television, irrespective of whether films made for television have from the outset been produced for television and provided with breaks designed for the insertion of advertising spots?

2. What criteria must be satisfied for the broadcasting of several feature films and films made for television to

be classified as a "series", derogating from the advertising restrictions for feature films and films made for television?

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

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

The questions referred

The first question

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

Observations submitted to the Court

35 RTL maintains that Article 11(3) of Directive 89/552 is primarily intended to protect the integrity and artistic value of audiovisual works as well as editorial freedom. Consumer protection is only a secondary objective of that provision.

36 According to RTL, the protection of the artistic value of audiovisual works cannot, however, be extended to films which have been produced specifically for television and designed from the outset to provide breaks for the insertion of advertising spots. Such an extension would constitute an unjustified interference with the fundamental rights of television broadcasters.

37 RTL claims that the freedom of television broadcasters to produce and transmit television films is part of the freedom to communicate and broadcast — which includes, among other things, television advertising, an independent form of communication — which constitutes a fundamental right guaranteed by Community law.

38 Such a fundamental right arises first from Article 10(1) of the ECHR, which provides for the freedom to receive and impart information and ideas, which is part of the freedom of opinion. This right is also enshrined in Article 11(2) of the Charter of Fundamental Rights.

39 According to the case-law of the European Court of Human Rights relating to Article 10(1) of the ECHR, such a right also includes the freedom of broadcasting, of television and of the cinema, does not vary according to the content or character of the information broadcast and also covers advertising.

40 RTL points out finally that the Court has accepted that the maintenance of pluralism in the audiovisual field is linked to the freedom of expression ensured by

Article 10 of the ECHR, which is one of the fundamental rights guaranteed by the Community legal order.

41 In that regard, RTL submits that the eighth recital in the preamble to Directive 89/552 states that the right freely to broadcast and distribute television programmes, enshrined in that directive and guaranteed as regards the freedom to provide services by Article 59 of the EC Treaty (now, after amendment, Article 49 EC), is also a specific manifestation in Community law of a more general principle, namely the freedom of expression guaranteed by Article 10(1) of the ECHR.

42 RTL maintains that the freedom of a producer to make television programmes which include advertising breaks is part, secondly, of artistic freedom, a fundamental right of the Community legal order which covers both the creation of a work and its broadcasting or transmission.

43 RTL concludes from this that the restrictions in respect of advertising contained in Article 11(3) of Directive 89/552 with regard to the broadcasting of the television films at issue in the main proceedings interfere with both broadcasting freedom and artistic freedom.

44 The question therefore arises whether the restrictions on those two fundamental freedoms by the regulation of advertising at issue in the main proceedings can be justified under Community law.

45 RTL claims that it follows from the Court's case-law that restrictions on fundamental rights can be justified in Community law only to the extent to which they are appropriate, necessary and proportionate for the purpose of attaining a lawful objective. It is clear also from the case-law that restrictions on fundamental rights must be clearly defined, failing which they must be construed narrowly.

46 Those principles also accord with the case-law of the European Court of Human Rights concerning, in particular, Article 10(2) of the ECHR, under which a restriction which lacks clarity must be construed strictly.

47 With particular regard to the consideration of the justification for the restriction at issue in the main proceedings, RTL claims that the protection of the artistic integrity of films as audiovisual works sought by the restrictions on advertising cannot be imposed on RTL since it is itself the creator of the works at issue in the main proceedings, protection of which it does not seek since they were specifically designed to be interrupted by advertising. The case therefore does not involve protection of the rights of others under Article 10(2) of the ECHR.

48 It follows that, in order to ensure a construction in conformity with the Treaty, the scope of the protection of the work provided by Article 11(3) of Directive 89/552 must be understood, in so far as concerns television films, as meaning, in particular, that it applies only to the extent to which it meets the wishes of the creators of the films, and therefore of those entitled to exercise the fundamental rights.

49 RTL concludes that the protection of work under Article 11(3) of Directive 89/552 does not apply when

those concerned have made, from the outset, films produced for television which include advertising breaks.

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

Reply of the Court

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

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

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

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

55 Article 11(3) of Directive 89/552 provides for a scheme of increased protection for audiovisual works, such as feature films and films made for television, namely a single advertising break per period of 45 minutes with an additional break if the programme's duration is at least 20 minutes longer than two or more complete periods of 45 minutes.

56 However, Article 11(3) of Directive 89/552 lays down an exception for series, serials, light entertainment programmes and documentaries, which are therefore covered by the abovementioned rule in Article 11(4).

57 RTL maintains that films made for television which provide, from their conception, for breaks for the insertion of advertising do not come within the meaning of 'films made for television' in Article 11(3) of Directive 89/552.

58 Such a construction conflicts with both the wording of that provision and its history.

59 The wording of Article 11(3) of Directive 89/552 is unambiguous. There is nothing in it which permits a distinction to be drawn for a category of films made for television which, on the ground that they provide from their conception for the insertion of advertising breaks, do not come within the meaning of 'films made for television'.

60 That is also confirmed by the history of Article 11(3), as recalled in particular by the national court. The amendment to that provision proposed by the

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

61 The construction of Article 11(3) of Directive 89/552 advocated by RTL is likewise not required by its purpose.

62 It follows from the 27th recital in the preamble to Directive 89/552, as well as from Article 11(1) thereof, that Article 11 is intended to establish a balanced protection of the financial interests of the television broadcasters and advertisers, on the one hand, and the interests of the rights holders, namely the writers and producers, and of consumers as television viewers, on the other.

63 That aim is clear also from paragraphs 245 and 246 of the Explanatory Report accompanying the European Convention, which was drafted at the same time as Directive 89/552 and is referred to in the fourth recital in its preamble (see, to that effect, Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 RTI and Others [1996] ECR I-6471, paragraph 33).

64 Even were it true, as RTL maintains, that for the films at issue such an objective, in so far as it relates to the protection of the interests of television broadcasters and those of the rights holders, is irrelevant since such protection is not claimed in this case, there none the less remains another essential aspect of that objective, namely the protection of consumers, as viewers, from excessive advertising, which is clearly relevant in this case.

65 RTL's suggested construction disregards this aspect, which is none the less essential, of the objective of balanced protection sought by Article 11 of Directive 89/552. In addition, as regards the system of increased protection under Article 11(3), the protection of television viewers is specifically of particular importance.

66 Such a construction also risks depriving the increased protection conferred by that provision of its substance since it would enable television broadcasters easily to circumvent that protection by buying and producing only films which include, from their conception, breaks for the insertion of advertising.

67 Finally, a construction under which the system of increased protection under Article 11(3) of Directive 89/552 applies to films made for television, such as those at issue in the main proceedings, does not lead to a result which is contrary to fundamental rights.

68 Admittedly, such increased protection may amount to a restriction on the freedom of expression as enshrined in Article 10(1) of the ECHR, to which the eighth recital in the preamble to Directive 89/552 refers.

69 Such a restriction appears, however, to be justified under Article 10(2) of the ECHR.

70 The restriction at issue pursues a legitimate aim involving 'the protection of the... rights of others' within the meaning of that provision, namely the protection of

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

71 The Court has, moreover, already held that the protection of consumers against abuses of advertising or, as an aim of cultural policy, the maintenance of a certain level of programme quality are objectives which may justify restrictions by the Member States on freedom to provide services in relation to television advertising (see Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 27, and [Case C-6/98 *ARD* \[1999\] ECR I-7599](#), paragraph 50).

72 With regard to the proportionality of the restriction at issue, it is appropriate to point out that this does not relate to the content of the advertising, is not a prohibition but only a limit on frequency applying to every operator and, in principle, leaves broadcasters free to decide the timing (see paragraph 249 of the Explanatory Report accompanying the European Convention) and, within the confines of Article 18 of Directive 89/552, the length of the advertising breaks.

73 It is also clear from the case-law of the European Court of Human Rights on Article 10(2) of the ECHR that national authorities have a discretion in deciding whether there is a pressing social need capable of justifying a restriction on freedom of expression. According to that case-law, such a discretion is particularly essential in commercial matters and especially in a field as complex and fluctuating as advertising (see *VGT Verein gegen Tierfabriken v Switzerland*, judgment of the ECHR of 28 June 2001, Reports of Judgments and Decisions 2001-VI, paragraphs 66 to 70).

74 In view of the foregoing, the answer to the first question must be that films which have been made for television and which provide, from their conception, for breaks for the insertion of advertising are covered by the term 'films made for television' in Article 11(3) of Directive 89/552.

The second, third and fourth questions

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

Observations submitted to the Court

76 RTL submits that the term 'series' must, first, be construed with regard to the guarantee of the freedom to provide services.

77 In that regard, RTL observes that, according to the Court's case-law, the primary objective of Directive 89/552 is to ensure freedom to provide services, in particular freedom to broadcast television programmes.

78 It follows in particular from that case-law that, since the first sentence of Article 11(3) of Directive 89/552 contains a restriction on freedom to broadcast television programmes, which is not clearly worded — since, among other things, the directive does not indicate clearly under what conditions the broadcasting of television films, in so far as such films form a series, is not

subject to the restriction of the 45-minute period between advertising breaks — it must be construed strictly, in accordance with the directive's aim. The term 'series' must for that reason be construed as broadly as possible.

79 With regard to a literal construction of Article 11(3) of Directive 89/552 in its various language versions, RTL maintains that an analysis of its various language versions shows that it is not univocal but admits of many meanings.

80 The German term 'Reihe' ('feuilleton' in the French version) corresponds, according to RTL, to such a variety of translations that a clear and uniform definition is impossible.

81 In order to interpret that provision, it is therefore appropriate, in accordance with the Court's case-law, to consider the context and the objective pursued by the relevant legislation.

82 A systematic construction indicates also that the terms 'series' and 'serial', since they are mentioned side by side, must have separate meanings.

83 To come within the meaning of 'series' it is sufficient that several television films with independent plots are broadcast regularly in a certain time slot and that they are connected by other criteria of form and concept and by a common general theme, for example, the representation of the widest variety of relationship crises.

84 So far as concerns, finally, the interpretation of Article 11(3) of Directive 89/552 in the light of the directive's aims, RTL argues that too restrictive a construction of the term 'series' would adversely affect the possibilities of financing and would therefore be contrary to one of the objectives of that directive, namely the promotion of European audiovisual productions.

85 RTL claims that the term 'series' must, secondly, be construed in the light of the fundamental Community rights of the freedom of television broadcasting and artistic freedom.

86 In that regard, RTL argues that the making of several films as a series, even if they have only a tenuous thematic link, incorporating within them advertising slots, comes within the protection under Community law of the fundamental rights relating to those freedoms. A narrow construction of the term 'series' would seriously undermine those rights.

87 Furthermore, such a narrow construction involving the application of the strict limits on advertising breaks laid down by Article 11(3) is not justified by the pursuit of lawful interests.

88 RTL set aside the justification based on protection of a work's integrity in its observations concerning the first question referred, essentially on the ground that this case does not involve protection of the rights of others to the integrity of work (see paragraph 47 of this judgment). RTL submits further that neither protection of the quality of television output nor consumer protection can constitute justification.

89 RTL asserts in particular that, within the framework of the pluralist regime of the audiovisual, programme quality is not in itself a general legitimate interest

which can justify strict limits on advertising for television films since advertising breaks have, in themselves, no effect on a film's quality. In addition, broadcasting and press freedom precludes the imposition on television broadcasters of a certain standard of programmes. 90 RTL points out also that a strict construction of the term 'series' is neither appropriate nor necessary to guarantee effective protection of consumers.

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

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

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

94 The NLM, the United Kingdom Government and the Commission maintain that a definition of the term 'series' based on criteria of form cannot be upheld. Accepting such a definition would render meaningless the special protection of feature films and films made for television, since it would be easy to construct a formal connection between any type of film and thereby to evade that protection.

95 It is appropriate, on the other hand, to require there to be a substantial connection between the programmes from the point of view of content, nature or theme for them to be regarded as a serial or series.

96 The United Kingdom Government asserts in particular that, in the same way as is set out in the ITC's guidance note, the most genuine links between programmes are those which result from the storyline, that is to say the script carrying on from one episode to the next and/or some of the characters, at least, reappearing from one episode to another.

Reply of the Court

97 It is appropriate to state at the outset that neither Directive 89/552 nor the documents relevant to its construction, such as the preparatory documents or the Explanatory Report accompanying the European Convention, shed any light on the criteria defining the respective scope of the expressions 'films made for television' and 'series' in Article 11(3) of Directive 89/552.

98 Nor is a construction according to the usual meaning of those expressions or based on a comparison of the language versions of Directive 89/552 any more capable of providing an unambiguous reply to that question.

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

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

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

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

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

104 Links based on form such as those suggested by RTL cannot therefore be sufficient for the purposes of the definition of the term 'series' within the meaning of Article 11(3) of Directive 89/552.

105 It follows that the term 'series' requires links of substance, that is to say, common elements which relate to the content of the films concerned.

106 In order to circumscribe further the nature of the criteria defining the term 'series', it is necessary to identify the reasons why Directive 89/552 provides less protection for television viewers against excessive advertising during programmes such as series.

107 As the Advocate General points out in paragraph 51 of his Opinion, that lower level of protection can be explained by the fact that series, particularly because of the basic elements linking the different films which constitute them, such as, for example, the development of the same story or the reappearance of one or more characters, require less sustained concentration on the part of the television audience than do films.

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

Costs

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

On those grounds,

THE COURT (Fifth Chamber),

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

1. Films which have been made for television and which provide, from their conception, for breaks for the insertion of advertising arc covered by the term 'films made for television' in Article 11(3) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997.

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

RTL TELEVISION

OPINION OF ADVOCATE GENERAL JACOBS

delivered on 22 May 2003(1)

1. In these proceedings, the Court is asked by the Niedersächsisches Oberverwaltungsgericht (Lower Saxony Higher Administrative Court) to interpret the scope of Article 11(3) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities(2) (hereinafter the 'Television Directive' or the 'Directive') as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997.(3) That provision regulates the frequency with which advertising interruptions are permitted during the course of feature films and films made for television. It imposes a longer duration between such interruptions than is required in the case of other programmes. Series and serials are, however, expressly excluded from the application of Article 11(3).

2. The questions referred to the Court raise two issues. The first is whether Article 11 (3) of the Directive applies to films made for television which have from the outset been designed for the insertion of advertising interruptions. The second concerns the criteria which must be satisfied for the broadcast of several films made for television to be classified as a series so as to take them outside the ambit of Article 11(3).

Legal framework

Community law

3. The Television Directive was adopted on 3 October 1989 and its provisions were to be implemented by 3 October 1991. It was amended by Directive 97/36 of 30 June 1997 which was to be implemented by 31 December 1998. Although the litigation in the present case commenced before the latter directive was adopted, the order for reference was not made until June 2001 and is accordingly phrased in terms of both directives. Article 1(13) of the latter directive amended Article 11 of the Directive, but left intact those parts of that provision which are of relevance to the present case.

4. The Directive has as its primary purpose to facilitate the free movement of television broadcasts within the Community by introducing a framework of common rules which all Member States must, as a minimum, apply to the broadcasters under their jurisdiction.⁽⁴⁾ The common rules include provisions governing television advertising, sponsorship and teleshopping, which are contained in Chapter IV of the Directive (Articles 10 to 20).

5. Article 11 contains rules relating to the frequency of advertising breaks.

6. Article 11(1) permits advertisements to be inserted during as well as between programmes provided that the conditions specified in paragraphs 2 to 5 of that Article are fulfilled, in such a way that 'the integrity and the value of the programme, taking into account natural breaks in and the duration and nature of the programme, and the rights of the rights holders are not prejudiced'.

7. Article 11(4) lays down the general rule (hereinafter 'the general rule') that a period of at least 20 minutes should elapse between each successive advertising break within a programme. Article 11(3) provides for a special rule in respect of 'the transmission of audiovisual works such as feature films and films made for television' (hereinafter 'the special rule'). Those types of work, provided their scheduled duration is more than 45 minutes, may be interrupted once for each period of 45 minutes. A further interruption is allowed if their scheduled duration is at least 20 minutes longer than two or more complete periods of 45 minutes. However, Article 11(3) also stipulates an exclusion from the special rule (hereinafter 'the exclusion'), in any event in so far as it applies to films for television. The exclusion encompasses 'series, serials, light entertainment programmes and documentaries', with the consequence that those types of work are subject to the general rule.

8. The object of Article 11 emerges in part from the 27th recital of the preamble to the Directive which states that 'in order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards...'

9. The Directive is closely modelled on the European Convention on Transfrontier Television, adopted within the Council of Europe shortly before the Directive was enacted, work on both instruments having proceeded

simultaneously. Article 14 of the Convention is for present purposes identical to Article 11 of the Directive.

10. The European Council, meeting at Rhodes on 2 and 3 December 1988, indicated the importance of deploying the Community's efforts in a manner consistent with the Council of Europe Convention. 5 The Convention also finds mention in the fourth recital of the preamble to the Directive. The Convention is accompanied by an Explanatory Report which has been cited by the Court of Justice as an aid to the interpretation of the Directive.⁽⁶⁾

11. The Explanatory Report states (at paragraph 245) that Article 14 of the Convention aims to establish a reasonable balance between the financial interests of the broadcaster and advertiser, on the one hand, and the interests of viewers, authors and creators of programmes, on the other hand.

12. It is therefore reasonable to conclude that the provisions of Article 11 seek to achieve a balance between a number of potentially conflicting interests: those of viewers, of broadcasters, or advertisers on whom broadcasting is financially dependent, and of the makers of the programmes.⁽⁷⁾

13. Some confusion has arisen in the present proceedings concerning the terms 'series' and 'serial' as those terms appear in the exclusion, and in particular concerning the term 'Reihe' which occurs in the German-language version of the exclusion and in the questions referred by the national court. If one compares the word order of the German-language version ('Serien, Reihen...') with the English and French versions ('series, serials...'; 'séries, feuilletons...'), it would seem that 'Reihe' corresponds to 'serial' in the English version and to 'feuilleton' in the French version, and that the German term 'Serie' corresponds to 'series' in the English version and to 'série' in the French version. 14. It seems, however, that, correctly understood, the term 'Reihe' has a broader scope than 'Serie', as indeed is suggested by the terms of the questions referred by the national court, and that 'Reihe' in fact corresponds to the English 'series' and to the French 'série'.

15. In any event, what is necessary for present purposes in construing the exclusion is to determine in what circumstances several audiovisual works will be sufficiently linked to constitute a series or serial and therefore to fall within the exclusion. Provided that the outer limits of those two concepts are made clear, it does not seem to me necessary to arrive at a precise demarcation of the line between the two, especially given that they appear, in at least some language versions, to be imprecise and overlapping in their meanings.

European Convention on Human Rights

16. Article 10 of the Convention has been cited in the course of the proceedings. It reads as follows:

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

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

National law

17. In Germany, broadcasting is within the competence of the German Länder, rather than of the federal government. A coordinated approach to broadcasting regulation is secured by an agreement amongst the Länder (the Rundfunksstaatsvertrag). In Lower Saxony, television regulation is contained in the State Broadcasting Law (Niedersächsisches Landesrundfunkgesetz). Both the Rundfunkstaatsvertrag and the State Broadcasting Law contain provisions which are in all relevant respects substantially identical to Article 11(1), (3) and (4) of the Directive.

Factual background and questions referred

18. In the proceedings before the national court, the plaintiff, RTL Television GmbH (hereinafter 'RTL') seeks the annulment of a decision dated 12 November 1993, taken by the Landesrundfunkausschuss (Lower Saxony Broadcasting Board, hereinafter 'the Board') which was at that time the body responsible for the regulation of private television channels in the state of Lower Saxony, but which has since been replaced in that role by the defendant, the Niedersächsische Landesmedienanstalt für privaten Rundfunk (hereinafter 'the NLM').

19. The contested decision concerned certain films broadcast and to be broadcast by RTL. The films in question were made for television and were grouped together into a sequence, under the title of 'Great Television Stories', comprising various thematic categories, which were in their turn given such titles as 'Family Fortunes', 'Dangerous Liaisons' and 'Fateful Encounters'. They were specifically designed to incorporate advertising interruptions at the frequency permitted under the general rule.

20. The Board held that, despite RTL's attempts to group the films in question, they could not be considered to form part of a 'series' (Reihe) because the individual broadcasts lacked any identity of content in the form of a shared plot structure or common characters. As a consequence, they fell within the provisions of national law implementing the special rule and could therefore be interrupted less frequently than the general rule provides.

21. RTL brought proceedings in which it challenged the validity of the Board's decision on various grounds, one of which was that the Board's interpretation of 'series' (Reihe) failed to accord with the correct meaning of that term as a matter of Community law. RTL argued that for a number of works to constitute a 'series', it was sufficient if they were characterised both

by criteria of content, such as film genre, similarity of script and similarity of theme, and by criteria of external form, such as length of broadcast and broadcasting slot, and various other factors, for example a particular director.

22. On that definition, RTL claimed, 'Great Television Stories' amounted to a series and therefore fell within the exclusion rather than the special rule. As regards content, the films which comprised it were distinguished by similarity of theme. This was reflected in a uniform basic structure in which there was always a central character as the focal point of each film who as the plot progressed had to overcome an extreme life situation, closely related to reality and the present day. The films were also accorded a fixed broadcasting slot, the length of each broadcast being roughly the same.

23. Having failed at first instance, RTL appealed to the Oberverwaltungsgericht. Although the Oberverwaltungsgericht is inclined to share the interpretation of 'series' (Reihe) adopted by the Board, it recognises that the question is one of Community law, and has decided to stay the proceedings before it and to refer the following questions to the Court of Justice:

'(1) Does Article 11(3) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60), by restricting advertising breaks, pursue the objective of protecting the artistic value of feature films and films made for television, irrespective of whether films made for television have from the outset been produced for television and provided with breaks designed for the insertion of advertising spots?

(2) What criteria must be satisfied for a broadcast of several feature films and films made for television to be classified as a series, derogating from the advertising restrictions for feature films and films made for television?

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

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

24. The first question therefore concerns the scope of the special rule itself, and more precisely whether films made for television fall within it even when designed to incorporate advertising slots. The remaining questions are concerned with the scope of the exclusion. They seek clarification of the criteria for determining wheth-

er several films constitute a series. In particular, they are aimed at establishing whether the films in question must be linked by a close connection of content or whether a shared general theme and/or formal points in common are sufficient.

25. The Court received written submissions from RTL, the NLM, the United Kingdom Government and the Commission, all of which, with the exception of the United Kingdom Government, were represented at the hearing.

Assessment

The first question

26. By its first question, the referring court wishes in essence to know whether, in the light of the objectives pursued by the special rule, that rule extends to films made for television which have, from the outset, been designed for the insertion of advertising breaks.

27. RTL submits that the regulation of advertising constitutes a restriction of the producer's and broadcaster's fundamental rights to freedom of expression and artistic freedom, rights which are enshrined in the general principles of the Community legal order. Accordingly, in order to be compatible with Community primary law, the regulation of advertising in the Television Directive must be shown to be appropriate, necessary and proportionate to the achievement of a legitimate objective.

28. RTL accepts that the protection of the artistic integrity of films is capable of constituting a legitimate goal justifying the restriction of fundamental rights but only in so far as it contributes to the realisation of the rights of 'others' in the sense of the second paragraph of Article 10 of the European Convention on Human Rights. RTL concludes that, in the present context, the 'others' must be understood as the creators of the films the integrity of which is being protected.

29. RTL therefore asserts that if the creator of a film can be shown to have intended it to be interrupted more frequently than the special rule provides, there is no longer any legitimate purpose for applying the special rule in restriction of fundamental rights. Such a restriction would not be permissible in order to protect the rights of the work's creator, given that it would run directly counter to the creator's own wishes. It would also compromise the pluralism of the audiovisual media, given that the postfinancing of films depends on the ability of broadcasters to insert advertising breaks more frequently than the special rule allows.

30. RTL concludes that, where possible, Community legislation should be interpreted in such a way as to ensure its conformity with fundamental rights, and that accordingly, the special rule is to be construed as only applying to films in so far as that is the wish of the films' creators, whose rights go to justify that rule.

31. By contrast, the United Kingdom Government, the Commission, the referring court and the NLM all consider that the special rule should extend to films made for television whether or not they have been made to incorporate advertising breaks.

32. I am not convinced by RTL's submissions on the first question.

33. Considering first the text of Article 11(3) of the Directive, it seems to me to be entirely unambiguous as regards the current question. As the Commission points out, the special rule which that provision lays down is clearly stated to apply to films made for television as well as to feature films, and makes no distinction on the basis of whether a film made for television was designed to incorporate advertising breaks.

34. The meaning suggested by the text of Article 11(3) is confirmed when reference is made to the legislative history of Directive 97/36, which introduced that provision in its present form. As the United Kingdom Government, the Commission and the referring court note, the Commission's original proposal to amend the Television Directive proposed to remove films made for television from the special rule. In an explanatory memorandum the Commission explained the proposed amendment partly on the basis that 'films made for television can, from the outset, have natural breaks built in allowing advertising spots to be inserted without detracting from the integrity of the work', whereas 'there are no planned advertising breaks' in films made for cinema.⁽⁸⁾ The rejection of the Commission's proposed amendment during the legislative process tends to support the notion that the special rule is intended, as its wording indicates, to encompass all films for television without the distinction for which RTL contends.

35. As the Commission notes, the interpretation proposed by RTL would render the special rule entirely optional in the case of films made for television, its application dependent upon the intentions of the producers of such films. That interpretation would therefore in effect accomplish the amendment to Article 11(3) proposed by the Commission but rejected by the Community legislature.

36. Nor do the objects pursued by the special rule suggest any need to depart from its clear and unambiguous wording by reading into it an additional exclusion for television films designed to incorporate advertising breaks. In the light of the 24th recital to the Directive, and of the Explanatory Report to the Television Convention, the special rule contained in Article 11(3) can be understood not only to serve the interests of the creators of audiovisual works but also to protect the consumers of those works against excessive advertising in the context of films for television, an aim which would apply equally to films designed to incorporate advertising breaks.

37. The question remains whether such an interpretation of the special rule would, as RTL claims, constitute an unjustified infringement of the fundamental rights enshrined in the general principles of Community law.

38. I am not convinced that the regulation of television advertising will necessarily and in all cases involve a restriction on the fundamental rights of broadcasters and producers to freedom of expression and artistic freedom. Even assuming, however, that the special rule does constitute a restriction of those rights which therefore needs to be justified, I consider that RTL is wrong to assume that the only interest capable of justifying it

is that of the creators of the films at issue. In my view, it is equally legitimate to have regard to the interests of viewers as consumers. The special rule can therefore be defended on the basis that it serves to protect viewers against excessive advertising.

39. In its submissions on the remaining questions referred, RTL explicitly acknowledges the possibility that the special rule might be defended by reference to such a purpose, but argues that, at least if it were given a broad interpretation and if its exclusion were narrowly construed, the special rule would not constitute a proportionate method of furthering that purpose. For reasons which I explain below, I do not accept that the special rule is disproportionate when interpreted in the manner which I propose.

The second, third and fourth questions

40. The remaining questions referred all concern what criteria should be applied to determine whether a given work constitutes a 'series' for the purposes of Article 11(3) of the Directive.

41. RTL submits that the term 'series' is ambiguous, not receiving any clear definition in the Directive, and not having any clear and consistent meaning across the various language versions of the Directive. It must therefore be interpreted according to its context and to the objectives of the Directive, and so as to avoid any restriction of the fundamental rights enshrined in the general principles of Community law. RTL submits that each such method of interpretation points in favour of a broad interpretation of 'series', whereby several works will constitute a series when they are broadcast at a fixed time, and are bound together by other formal and conceptual criteria, and by a general common theme, as in the case of 'Great Television Stories'.

42. In RTL's view, a contextual interpretation of 'series' suggests that, in order to avoid rendering that term redundant, it should be given a definition which sufficiently differentiates it from 'serial'. The exclusion would not have contained both terms unless they were intended to convey different meanings. The former term should not therefore entail such a close connection between its various component parts as is required by the latter concept. According to RTL, whereas a serial requires a unity of action, place and persons, a series will exist according to the more general criteria set out in the preceding paragraph.

43. RTL argues further that the purposes of the Directive militate in favour of a broad interpretation of 'series'. It points, first, to the Directive's primary objective of promoting the free movement of services. It suggests that advertising restrictions which are too severe run counter to that objective. Any ambiguity in those restrictions must therefore be interpreted in restrictive fashion. Given that 'series' forms part of the exclusion from the restriction represented by the special rule, it must accordingly be given the broad meaning contended for by RTL.

44. RTL also draws attention to the Directive's objective of promoting European audiovisual production, which is evident from the 19th, 20th and 22nd recitals of the preamble to the Directive. By limiting the fre-

quency of advertising breaks, the special rule undermines the capacity of broadcasters to recoup the costs entailed in producing films for television within Europe. By contrast, producers in the United States are better placed to recover the costs of producing films, given the more frequent advertising interruptions which they are permitted to make.

45. Lastly, RTL submits that there is no legitimate basis for construing the concept of 'series' narrowly, and accordingly it must be given as broad as possible a reading in order to minimise the restriction of fundamental rights represented by the special rule. A narrow interpretation of the concept would not be justified by the protection of the quality of audiovisual works, given the subjective nature of qualitative judgments and the need to avoid conferring the power to make such judgments upon the state in a pluralistic and democratic society.

46. Whilst RTL accepts that the protection of consumers could constitute a legitimate reason for imposing a restriction of the kind contained in the special rule, it considers that such a restriction is not a proportionate method of achieving that objective. Sufficient protection is assured to consumers by their freedom to choose between a variety of broadcasters. If a particular broadcaster made provision for more advertising interruptions than consumers were prepared to accept, it would suffer from a corresponding reduction in its viewing figures. However, should more protection be considered necessary for viewers, it would be sufficient to require broadcasters to indicate, when publishing their listings, the frequency with which advertising interruptions would occur, by analogy with the Court's case-law in the context of the free movement of goods.

47. The referring court, the Commission, the United Kingdom Government, and the NLM, all reject RTL's proposed interpretation of the concept of 'series'.

48. I am equally unconvinced by RTL's submissions on the second, third and fourth questions referred.

49. I agree that the concept of a series is an imprecise one, as is that of a serial. It seems to me, however, that a sufficiently clear delineation of the two concepts, as they are generally understood, can be given for the purposes of the present issue. From the observations which have been submitted, it seems that several audiovisual works must, in order to constitute a serial, be linked together by a continuing narrative of which they constitute episodes. For several such works to constitute a series, they need to be linked either by a continuing narrative or to have characters (*dramatis personae*) in common. Connections of form, however, of the kind suggested by RTL, are neither necessary nor sufficient.

50. Such an approach also accords better, in my view, with the objectives pursued by Article 11(3) of the Directive than RTL's proposed interpretation. As I have already stated in my analysis of the first question, I consider that the special rule can be understood to protect viewers against excessive advertising when viewing feature films and films made for television. The intention is clearly that viewers should enjoy a higher level of protection when watching those types of work

than ordinary programmes, except in cases where the exclusion applies. However the exclusion is interpreted, it must be given a meaning which would not entirely undermine the special rule itself. As the Commission, the United Kingdom Government and NLM all note, RTL's understanding of 'series' would allow broadcasters easily to evade the special rule by grouping together films made for television on the basis of vague and subjective general themes and by giving them a regular slot in the schedules. Only by requiring a link which is solidly related to content is it possible to avoid such an outcome, which cannot have been the intention underlying the exclusion.

51. Moreover, it seems to me reasonable to presume that films are singled out for special treatment in Article 11(3) because of the more sustained concentration required of viewers when both plot and characters must be developed during the course of a single and self-standing work, which would be unduly disrupted if advertising interruptions occurred with the frequency permitted by the general rule. Such a rationale provides a further basis for interpreting series and serial as I have proposed. Those categories appear in the exclusion precisely because, where the narrative or the characters involved in a work are developed over the course of a number of parts, there is not the same need to preserve the sustained concentration of viewers by imposing greater limitations than normal upon the permitted frequency of advertising interruptions.

52. Such an interpretation of series, although less expansive than that favoured by RTL, would not, in my view, result in any unjustified restriction of fundamental rights. As I have argued above, and as RTL itself recognises in its submissions on the second, third and fourth questions, the protection of consumers is a legitimate goal which is capable of justifying any restriction represented by the special rule as limited by the exclusion.

53. Even assuming that the special rule as I have interpreted it and the exclusion to it constitutes a restriction of fundamental rights, I consider it a proportionate method of protecting viewers. I would note, first of all, that RTL's argument on the question of proportionality appears to me to possess a more radical logic than RTL attributes to it. If it were true, as RTL appears to suggest, that it would be sufficient, in order to protect viewers from excessive advertising, for broadcasters to inform viewers of the frequency of advertising breaks, and that any further restrictions on advertising were disproportionate, then it would follow that neither the special rule nor the general rule nor indeed the rules in the Directive regulating the overall quantity of advertising could be allowed to stand, at least in cases where the rights of the creators of the material broadcast were not in issue. Given that those rules in the Directive could not be interpreted in such a way as to render them proportionate on RTL's assessment, they would need to be set aside as incompatible with broadcasters' and producers' fundamental rights.

54. In any event, I do not share RTL's reservations as to the proportionality of the interpretation of the special

rule and the exception which I have here proposed. As appears from the case-law of the European Court of Human Rights applying the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights, that Court has shown itself willing to accept considerable restrictions on commercial advertising,⁽⁹⁾ and has emphasised the particular importance of according to national authorities a margin of appreciation in commercial matters, especially in an area as complex and fluctuating as that of advertising.⁽¹⁰⁾

Conclusion

55. I am therefore of the opinion that the questions referred to the Court should be answered as follows:

(1) Article 11(3) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities as amended by Directive 97/36/EC of 30 June 1997 applies irrespective of whether films made for television have from the outset been produced for television and provided with breaks designed for the insertion of advertising spots.

(2) Several audiovisual works constitute a series within the meaning of that provision where they share either a continuing dramatic narrative or characters (*dramatis personae*) in common.

1 — Original language: English.

2 — OJ 1989 L 298, p. 23.

3 — OJ 1997 L 202, p. 60.

4 — Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraphs 28 and 29 of the judgment.

5 — EC Bulletin, No 12/1988, pp. 8 and 10.

6 — Joined cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 *RTI and Others* [1996] LCR I-6471, paragraph 33 of the judgment.

7 — See paragraph 10 of my Opinion in case C-6/98 *ARD* [1999] LCR I-7599.