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**VT4 LTD. V. VLAAMSE GEMEENSCHAP: COURT OF
JUSTICE RULING HERALDS NEW AGE OF
EUROPEAN BROADCAST AND ADVERTISING
DEREGULATION**

KEITH TRAMMEL*

I. INTRODUCTION

VT4 Ltd. v. Vlaamse Gemeenschap (VT4) is the latest in a series of European Court of Justice (ECJ) decisions announcing the end of strict national regulation of television markets in EC Member States. *VT4* clarifies the earlier ECJ decision, *Commission v. United Kingdom*, which held that broadcasters come under the jurisdiction of the state in which they are established. In so doing, *VT4* sharpens the distinction that *Commission v. Belgium* and the *Joined Cases E8/94 and E9/94* have drawn between EC Member State's regulatory obligations under Articles 2 and 3 of the EC Television Directive. Although the Television Directive purports to require only minimal deregulation, the ECJ has left EC countries little alternative other than to embark upon wholesale deregulation of national television broadcast and advertising markets. This deregulation inevitably extends far beyond even the minimal provisions contained in the Television Directive and heralds a resounding victory for proponents of a single broadcast market in Europe.

II. FACTS AND HOLDING

VT4 arose from Belgium's (the Flemish Community) refusal to grant *VT4 Ltd.* permission to broadcast television programming on Flemish cable networks.¹ *VT4 Ltd.* is a television broadcasting company established and licensed in London under British law.² The company operates a branch office in Flanders, where it conducts advertising

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1. Case C-56/96, *VT4 Ltd. v. Vlaamse Gemeenschap*, [1997-1998 Transfer Binder] CEC (CCH) 1,309 (1997).

2. *Id.* at 1,312.

negotiations. Since February 1, 1995, VT4 Ltd. has broadcast programs via satellite from the UK exclusively to the Dutch-speaking Flemish public in Belgium.³

VT4 Ltd.'s attempt to access the Belgian cable network directly challenged the cable monopoly that Belgium's Cultural Ministry had previously granted to the privately owned Vlaamse Televisie Maatschappij NV (VTM). Under this monopoly, VTM enjoys exclusive rights to broadcast television advertising in Belgium's Flemish community.⁴

Flemish legislation authorizing the grant of this monopoly was consolidated by the Decree of the Government of the Flemish Community of 25 January 1995, later ratified by the Decree of the Council of the Flemish Community of 23 February 1995 (the Codex).⁵ The Codex incorporates provisions of the earlier Decree of 28 January 1987 Concerning the Retransmission of Radio and Television Programs on the Radio and Television Cable Networks (the 1987 Decree).⁶

Pursuant to Article 80, paragraph 2 of the Codex, "the Flemish Government may authorize only one of the broadcasters belonging to it or approved by it to broadcast commercial and non-commercial advertising aimed at the Flemish Community as a whole."⁷ In addition, Article 41, point 1 of the Codex stipulates that "only one private broadcaster may be authorized by the Flemish Government to broadcast to the entire Flemish community."⁸ To be eligible for this government authorization, Article 44(1) of the Codex requires that publishers of Dutch-language newspapers and magazines subscribe 51 % of the broadcaster's capital.⁹ Article 39(2) of the Codex incorporates the provision of the 1987 Decree requiring government-authorized broadcasters to locate their head offices in either Flanders or Brussels.¹⁰ Together, these provisions permit only one private company having its head office in Flanders or Brussels, and 51 % of whose capital is held by Dutch-language publishers to broadcast from Belgium all television advertis-

3. Commission Decision of 26 June 1997 97/606/EC pursuant to Article 90(3) of the EC Treaty on the Exclusive Right to Broadcast Television Advertising in Flanders, ¶ 10, 1997 O.J. (L 244) (visited June 1, 1998) <<http://europa.eu.int/cj/index.html>> [hereinafter Commission Decision of June 26, 1997].

4. *Id.* ¶ 3.

5. *VT4 Ltd.*, [1997-1998 Transfer Binder] CEC (CCH) at 1,312 (quoting BELGISCH STAATSBAD/MONITEUR BELGE, May 30, 1995, at 15,058)(corrected in BELGISCH, Oct. 30, 1995, p.30,555).

6. *VT4 Ltd.*, [1997-1998 Transfer Binder] CEC (CCH) at 1,311 (quoting BELGISCH STAATSBAD/MONITEUR BELGE, Mar. 19, 1987, at 4,196).

7. Commission Decision of 26 June 1997, *supra* note 3, ¶ 1.

8. *Id.*

9. *Id.*

10. *Id.*

ing targeted at the Flemish community. As a consequence of the 1987 Decree and relevant provisions of the Codex, VTM is the only private television company authorized by the Flemish Cultural Ministry to broadcast Dutch-language television programming and advertising to the entire Flemish community.¹¹

The Flemish Cultural Ministry regulates transmissions over Belgium's radio and cable television networks. The Cultural Ministry's current cable regulations appear in the Flemish "Executive Decree of 4 May 1994 on Television and Radio Cable Networks, referred to as the "Cable Decree."¹² Article 10(1), number 2 of the Cable Decree prohibits the operation of cable distribution networks and forbids modification to any programming without the prior authorization of the Flemish Executive.¹³ Article 10(2), number 4 of the Cable Decree provides that a cable distributor may retransmit "[t]elevision and radio programs of broadcasters licensed by the government of a [M]ember [S]tate of the European Union other than Belgium, provided that the broadcaster concerned is subject, in that [M]ember [S]tate, to proper supervision of broadcasters broadcasting to the public of that [M]ember [S]tate."¹⁴

Pursuant to Cable Decree Articles 10(1), number 2, and 10(2), number 4, VT4 Ltd. requested permission from the Flemish Cultural Ministry to broadcast on Belgium's cable television distribution network. Prior to requesting such access, VT4 Ltd. had obtained a license from the UK to broadcast Dutch-language programming via satellite from British territory to Belgium.¹⁵

The Minister of Cultural Affairs refused VT4 Ltd.'s request for access, giving two reasons for its decision. First, the Cultural Minister regards VT4 Ltd. as outside the scope of the Cable Decree because VT4 Ltd. is not licensed by Belgium to broadcast to the Flemish Community.¹⁶ Only VTM is authorized to broadcast cable programs to the Flemish Community.¹⁷ Second, Flemish authorities do not consider VT4 Ltd. a broadcaster subject to the broadcasting and licensing laws of another Member State. Instead, Belgium considers VT4 Ltd. a Flemish broadcaster established in the UK merely to circumvent Flemish regulations. For these reasons, by Ministerial Order, VT4 Ltd. was refused access to the Flemish cable network.¹⁸ The Belgian Raad van State

11. *Id.*

12. *VT4 Ltd.*, [1997-1998 Transfer Binder] CEC (CCH) at 1,312 (quoting BELGISCH STAATSBLAD/MONITEUR BELGE, June 4, 1994, at 15,434).

13. *Id.*

14. *Id.*

15. Commission Decision of 26 June 1997, *supra* note 3, ¶ 10.

16. *VT4 Ltd.*, [1997-1998 Transfer Binder] CEC (CCH) at 1,312-13.

17. Commission Decision of 26 June 1997, *supra* note 3, ¶ 10.

18. *Id.* (quoting the Order of the Flemish Minister for Cultural Affairs and for Brussels of Jan. 16 1995).

(Conseil d'État) intervened by suspending the Ministerial Order and referred the matter to the ECJ for a preliminary ruling to determine which Member State enjoys jurisdiction over VT4 Ltd. under the Television Without Frontiers Directive (Television Directive).¹⁹

The ECJ answered the Raad van State's request for a preliminary ruling, holding that under Article 2(1)²⁰ of the Television Directive, the jurisdiction of a Member State is based on a broadcaster's connection to a Member State's legal system.²¹ The ECJ held that a broadcaster's connection to a state's legal system "overlaps the concept of establishment as used in art. 59 of the EC Treaty."²² Thus, Articles 2(1) and 3(2)²³ of the Television Directive are understood "as meaning that a television broadcaster comes under the jurisdiction of the [M]ember [S]tate where it is established."²⁴ If a television broadcaster is established in more than one Member State, jurisdiction resides with the Member State in whose territory the broadcaster performs its central activities, in particular, where the broadcaster formulates program policy and makes final assembly of its programs prior to transmission.²⁵

The ECJ also emphasized that the mere fact that VT4 Ltd. broad-

19. Commission Decision of 26 June 1997, *supra* note 3, ¶ 10. The Television Without Frontiers Directive constitutes the legal framework for television broadcasting in Europe's internal market. Council Directive 89/552, 1989 OJ (L 298) 23 [hereinafter Television Directive]. Under Article 185 of the EC Treaty, the Television Directive binds all EC Member States. Each member state must ensure that all broadcasters under that state's jurisdiction comply with the Television Directive and the state's own broadcasting laws. Wolfgang Hoffman-Riem, *The Broadcasting Activities of the European Community and Their Implications for National Broadcasting Systems in Europe* 16 HASTINGS INT'L & COMP. L. REV. 599, 607 (1993).

20. Article 2(1) provides:

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.

Television Directive, *supra* note 19, art. 2(1).

21. *VT4 Ltd.*, [1997-1998 Transfer Binder] CEC (CCH) at 1,321.

22. *Id.* Article 59 of the EC Treaty specifically provides that restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect to nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. *See*, TREATY ON EUROPEAN UNION, Feb. 7, 1992, art. 59, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 (1992).

23. "Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction comply with the provisions of this Directive." Television Directive, *supra* note 21, art. 3(2).

24. *VT4 Ltd.*, [1997-1998 Transfer Binder] CEC (CCH) at 1,322.

25. *Id.*

casts programs and advertising exclusively for a Flemish audience does not by itself demonstrate that VT4 Ltd. is not established in the UK.²⁶ In the ECJ's view, the EC Treaty "does not prohibit an undertaking from exercising the freedom to provide services [in a foreign state] if it does not offer services in the [M]ember [S]tate in which it is established."²⁷

III. RELATED LEGAL AUTHORITY

VT4 gave the ECJ an opportunity to review and clarify earlier rulings in *Commission v. United Kingdom (United Kingdom)* and *Commission v. Belgium (Belgium)*. In both earlier cases, the ECJ confronted ambiguities in the newly adopted Television Directive.²⁸ *United Kingdom* resolved questions concerning which Member State may exercise jurisdiction over broadcasters within Article 2(1) of the Television Directive, and *Belgium* addressed the related topic of Member State regulatory obligations under Television Directive Articles 2(2) and 3(2).

United Kingdom promulgated the principle that a television broadcaster's place of establishment determines which Member State is required to exercise jurisdiction over that broadcaster pursuant to Article 2(1) of the Television Directive.²⁹ In *United Kingdom*, the EC Commission complained that section 43 of the UK 1990 Broadcasting Act violated Article 2(1) of the Television Directive. Section 43 of the UK Broadcasting Act relies on a television broadcaster's place of transmission in order to determine which broadcasters fall under UK jurisdiction.³⁰ Although the Television Directive contains no express formula for determining which Member State has jurisdiction over television broadcasters,³¹ the EC Commission maintained that the Television Directive nevertheless meant for a broadcaster to come under the jurisdiction of the state where the broadcaster is established.

In defense of the Broadcasting Act, the UK insisted that the Television Directive had to be interpreted in light of Article 5 of the Council of Europe Convention on Transfrontier Television (the Convention).³² According to Article 5, jurisdiction is determined by a broadcaster's point of transmission.³³ The ECJ rejected the UK position on two principle

26. *Id.*

27. *Id.*

28. Case C-11/95, *Commission v. Belgium*, [1997] 2 C.M.L.R. 289, 295 (1997).

29. Case C-222/94, *Commission v. United Kingdom*, 1996 ECR I-4025, [1996] 3 C.M.L.R. 793, 794 (1996).

30. *Id.* at 840.

31. *Id.* at 841.

32. Council of Europe Convention on Transfrontier Television, May 5, 1989, 28 I.L.M. 859 art. 5 [hereinafter Convention].

33 Article 5 of the Convention states in relevant part:

grounds. First, the ECJ views the Convention and Television Directive as textually irreconcilable. Whereas the Convention applies place of transmission as its primary determinant of Member State jurisdiction, the Television Directive employs transmission criteria only when the television broadcaster falls outside the Television Directive's other jurisdictional criteria. Writing for the ECJ, Justice Kapteyn held:

The second indent of [a]rticle 2(1) [of the Television Directive] refers to the situation in which a [M]ember [S]tate may assert either its jurisdiction in relation to the use of a satellite, or its territorial jurisdiction in relation to the use of an up-link, situated in that state, to a satellite which does not fall within its jurisdiction. However, the second indent envisages the exercise of such jurisdiction [based on place of transmission] only on the condition that no other Member State has jurisdiction under the first indent of [a]rticle 2(1).³⁴

The ECJ attributes the substantive divergence between the Television Directive and the Convention to the distinct legislative intent of each instrument. Many of the Television Directive's provisions first appeared in the European Commission's 1984 Green Paper on the Establishment of the Common Market for Broadcasting,³⁵ a document whose very title commends as its purpose the creation of a single European broadcast market.³⁶ The ECJ views the creation of a single broadcast market as related to, but distinguishable from the Convention's aim of easing transfrontier access to state broadcast markets. According to Article 1 of the Convention, the Convention's purpose is "to facilitate . . . the transfrontier transmission and retransmission of television program

1. Each transmitting Party shall ensure, by appropriate means and through its competent organs that all programs and services transmitted by entities or by technical means within its jurisdiction . . . comply with the terms of this Convention.

2. For the purposes of this Convention, the transmitting Party shall be:

a. in the case of terrestrial transmissions, the Party in which the initial transmission is effected; b. in the case of satellite transmissions;

i. the Party in which the satellite up-link is situated;

ii. the Party which grants the use of the frequency or a satellite capacity when the up-link is situated in a State which is not a party to this Convention;

iii. the Party in which the broadcaster has its seat when responsibility under subparagraphs (i) and (ii) is not established.

Convention, *supra* note 33, art. 5.

34. *United Kingdom*, [1996] 3 C.M.L.R. at 842 (emphasis added).

35. Paul Presburger & Michael R. Tyler, *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L & COMP. L. REV. 495, 496 (1990).

36. Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, COM (84) 300 final.

services.”³⁷

More notably, however, the Television Directive’s legislative history supports the view that place of establishment is dispositive for jurisdictional purposes under EC broadcast law. Specifically, Article 1(1) of the European Commission’s 1986 Draft Television Directive expresses “the principle that all broadcasting activity intended for reception within the territory of the Community must comply with the law of the . . . Member State in which the originating body is established.”³⁸

Any force the Convention might once have enjoyed was superseded months later when the Council of Europe adopted the Television Directive. Since the Council adopted the Television Directive after previously considering the Convention, the ECJ reasoned, “[T]here is no doubt that the Council was fully aware of the adoption of the Convention when it itself adopted the Television Directive.”³⁹ Indeed, in the Fourth Recital of the Preamble to the Television Directive, the Council expressly recognized that “the Council of Europe has adopted the European Convention on Transfrontier Television.”⁴⁰ The ECJ concluded that since the 1986 Commission Draft Directive was not amended to conform to the Convention, once the Council approved the Television Directive, the Council signaled its choice “to regulate television services in a way which differs from the path followed by the Convention.”⁴¹

Notwithstanding these considerations, the very terms of the Convention itself provide that any conflict between the Convention and other EC rules must be resolved against the Convention. As Article 27(1) of the Conventions states, “Parties . . . of the European Economic Community shall apply Community rules and shall not . . . apply the rules arising from the Convention except in so far as there is no community rule governing the particular subject concerned.”⁴² As a community rule covering the particular subject of transfrontier television broadcasting, the Television Directive trumps the Convention. Consequently, the ECJ correctly found no substantive or legislative basis in the Convention to counter the view that Article 2(1) of the Television Directive must be understood as a reference to the Member State in which the broadcaster is established.⁴³

The ECJ accepted the possibility that establishment criteria would cause difficulties for the many broadcasters established in more than

37. Convention, *supra* note 32, art. 1.

38. *United Kingdom*, [1996] 3 C.M.L.R. at 822 (quoting Bulletin of the E.C., Supplement 5/86, at 12-13).

39. *United Kingdom*, [1996] 3 C.M.L.R. at 844.

40. Television Directive, *supra* note 19, at mbl.

41. *United Kingdom*, [1996] 3 C.M.L.R. at 844.

42. Convention, *supra* note 32, art. 27(1).

43. *United Kingdom*, [1996] 3 C.M.L.R. at 844.

one Member State.⁴⁴ Without settling on a precise formula for resolving this difficulty, the ECJ recognized that in the event of a broadcaster's multi-state establishment, jurisdiction could reside with that Member State in whose territory the broadcaster performs its essential activities.⁴⁵ These essential activities include the formulation of decisions on programming policy, mixing, and program processing prior to transmission.⁴⁶

In *Belgium*, a related case, the ECJ considered the legality of Belgium's general law, embodied in its 1994 Cable Decree, requiring formal Ministry approval of all foreign programming and advertisements prior to their broadcast on Belgium's cable distribution network.⁴⁷ The Cable Decree requires cable operators to prove, to the satisfaction of Belgian authorities, that a foreign program has met the three following conditions set out in section 10(2)(4) of the Cable Decree: first, prior to being broadcast in Belgium, all foreign programming must be authorized by another Member State, second, the broadcaster originating the program must be subject to the control of that other Member State, and third, the foreign programming must not compromise Belgian public policy, good morals, or public order.⁴⁸

The ECJ ruled that the Cable Decree's systematic requirement of conditional prior authorization by Belgian authorities contravenes the Television Directive. According to the ECJ, Article 2(1) of the Television Directive stands for the principle that a television broadcaster may be subject only to the jurisdiction and broadcasting laws of the Member State where the broadcast originates.⁴⁹ Additionally, Article 3(2) allows only those Member States with jurisdiction to enforce provisions of the Television Directive. Finally, Article 2(2) of the Television Directive requires that Member States guarantee freedom of reception and refrain from blocking transmission of programs from other EC states.⁵⁰

44. *Id.* at 845.

45. *Id.* at 829.

46. *Id.*

47. *Belgium*, [1997] 2 C.M.L.R. at 289. In Belgium, the country's regions enjoy large responsibility for television broadcasting regulations. These regions are divided into the French Community, the Flemish Community, bilingual metropolitan Brussels, and the German-speaking Community. *Id.* at 298.

48. *Id.*

49. *Id.* at 332.

50. *Id.* at 327, 330. Article 2(2) reads in full:

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

(a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes [A]rticle 22;

Based on these provisions, the ECJ insisted that it is solely within the authority of the state from which a broadcast emanates to monitor compliance with State and EC laws. Absent the conditions needed to trigger broadcast restrictions under Article 2(2) of the Television Directive, the receiving Member State is not authorized to exercise its own controls.⁵¹ The conditions set forth in section 10(2)(4) of Belgium's 1994 Cable Decree thus violated Belgium's obligation as a receiving state to "ensure freedom of reception,"⁵² and "not to restrict transmission . . . of television broadcasts from other Member States."⁵³ For these reasons, Belgium's system of prior authorization constitutes an unauthorized control, which in the eyes of the ECJ poses "a serious obstacle to free movement of programs within the community."⁵⁴

In light of the *United Kingdom* and *Belgium* decisions, *VT4* imposes an appreciably more precise formula for determining Member State obligations under the Television Directive. Under *VT4* a television broadcaster falls under the jurisdiction of the Member State where the broadcaster is established. If the broadcaster is established in more than one Member State, the state competent to assert jurisdiction is the Member State where the broadcaster performs its essential activities. This Member State must ensure that the broadcaster complies with the Member State's own general broadcasting laws and with the provisions of the Television Directive. Of singular importance, recipient states must ensure near-absolute freedom of reception and retransmission of programs broadcast from other Member States.

IV. LEGAL IMPLICATIONS

VT4's significance concerns its refinement of "establishment" doctrine, which now operates as the basis for determining Member State jurisdiction under EC television broadcast laws. By confronting the problem of multi-state establishment, the *VT4* ruling will minimize conflicts of law between Member States. Nonetheless, this contribution is overshadowed by the stunning momentum *VT4*, *Belgium*, *United King-*

(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 in point (c), and the alleged infringement persists.

Television Directive, *supra* note 19, art. 2(2).

51. *Belgium*, [1997] 2 C.M.L.R. at 332.

52. *Id.* at 330.

53. *Id.*

54. *Id.* at 342.

dom, and the case law of the European Free Trade Association give to the rapidly galvanizing forces of television broadcast and advertising deregulation in the European Community.

Many European societies consider broadcasting both an economic and cultural phenomenon.⁵⁵ European states value mass media, not as an end in itself, but as a means to obtain normative social and political objectives, namely the promotion of democracy.⁵⁶ The government of each Member State, in particular the legislative branch, has responsibility for promoting these objectives and for safeguarding public information as well as the free exchange of ideas. Unavoidably, the legislature influences the shaping of values by the mass media. Most European states express confidence, however, that legislative control protects the mass media from public or private power holders.⁵⁷ The accepted view throughout the United States, that market forces offer the most effective means of protecting broadcasting freedoms, has simply not taken a firm hold in Europe.⁵⁸

Europe traditionally has held strong to the "public service broadcaster model," a concept that conceives of each Member State's respective television broadcasters as public trustees. Accordingly, the broadcast laws of European states emphasize the public tasks and obligations of mass media.⁵⁹ Public service broadcasting originally took the form of public monopolies, but European states have since developed dual systems involving both public monopolies and private broadcasters, with public monopolies competing for market share with private broadcast companies.⁶⁰ Despite the presence of such limited competition, in many cases, dual systems remain subject to extensive state regulation.⁶¹ Given this regulatory density, it is not surprising that Belgium's regional Communities retain such a large measure of control over privately broadcast cable television programming.

The structures of public-service broadcast monopolies and dual systems vary from state to state. In some cases, the monopolistic broadcaster is an autonomous corporation, in others, it is a division of a state ministry.⁶² But in all Member States, both private and public broadcast television companies are ultimately financed by the government and subject to extensive state programming supervision.⁶³ Throughout

55. Hoffman-Riem, *supra* note 19, at 599.

56. *Id.* at 600.

57. *Id.* at 601.

58. *Id.* at 602.

59. *Id.* at 603.

60. *Id.*

61. *Id.*

62. Leo Flynn, *Telecommunications and EU Integration*, in *NEW LEGAL DYNAMICS OF THE EUROPEAN UNION* 217, 222 (Jo Shaw & Gillian More eds., 1995).

63. *Id.*

Europe, "pragmatically and rhetorically, priority is given to the social and cultural orientation of broadcasting, and not its economic aspect."⁶⁴ Broadcasting takes on such social and political moment that in all EC states, broadcast regulations appear in separate communications constitutions, influenced in no small degree by each country's political and social system.⁶⁵

Although social and political concerns predominate, the public service model nevertheless takes on an economic dimension. National television broadcast companies have sprung vertical linkages to each Member State's technology industries by establishing and enforcing standards for equipment used to transmit and receive television broadcasts.⁶⁶ Member States also use national broadcast companies as vehicles for extensive industry and labor regulation.⁶⁷ Thus, homegrown socio-political and economic influences shape the content and structure of each Member State's television broadcast regulatory scheme.

In stark contrast to the public service model, the EC's regulatory point of reference conforms to a purely economic norm: the free movement of services as provided for under Article 59 of the EC Treaty.⁶⁸ It is settled law that the transmission of television signals – including advertisements – must be regarded as a service within the meaning of Article 59.⁶⁹ VT4's reliance on Article 59's principle of establishment only strengthens the relationship between television broadcasters and the freedom to provide transnational services within the EC.

There no longer remains any doubt concerning the Television Directive's definitive regulatory force in Europe. Consequently, large sections of Member States' domestic broadcast regulations may be declared incompatible with European law. This signals a paradigmatic departure from Europe's state-driven regulatory tradition. As German Professor Wolfgang Hoffman-Riem has stated:

In . . . [this new] order solely oriented towards economic freedoms . . . deregulation means implementation of the market principle. In this respect . . . non-regulation means supporting a certain broadcasting model. Such support would be associated with a renunciation of differentiated broadcasting models such as those which currently exist in the dual systems of the European countries. Treating the Television Directive as a definitive regulation of broadcasting in the E.C. is

64. Hoffman-Riem, *supra* note 19, at 603.

65. *Id.* at 604.

66. Flynn, *supra* note 65, at 222.

67. *Id.*

68. Hoffman-Riem, *supra* note 19, at 606.

69. *Belgium*, [1997] 2 C.M.L.R. at 295.

thus tantamount to shifting paradigms.⁷⁰

A paradigmatic shift is exactly what the Commission and the ECJ have accomplished. Both institutions downplay the force of the Television Directive, asserting that the Television Directive purports to lay down only "the minimum rules needed to guarantee freedom of transmission in broadcasting."⁷¹ For example, under the Television Directive, Member States retain authority to make legal commitments for their national broadcasters and to subject these national broadcasters to continued regulation. Additionally, Member States may freely impose upon broadcasters under their jurisdiction stricter norms relating to advertisements and the protection of minors.⁷²

Notwithstanding this pretense for minimalism, the Television Directive's reliance on establishment doctrine places considerable pressure on individual Member States to engage in comprehensive deregulation of their national broadcast markets. Under Article 2(2) of the Television Directive, Member States receiving broadcasts from other EC states must avoid placing restraints on foreign broadcasts. A receiving Member State's strict regulation of its own national broadcasters disadvantages these broadcasters in relation to otherwise unrestricted foreign competitors. Member States also must recognize that broadcasters now are free to establish themselves in host states with broadcast-friendly laws and continue to broadcast programs throughout Europe.

As *VT4* clearly indicates, the principle of unrestricted transmission applies to foreign broadcasters largely oriented to their own domestic states; but the same applies with no less force to broadcasters who transmit programs exclusively at a foreign recipient state. The recipient state is virtually powerless in the face of unrestrained foreign broadcast competition. In order to preserve the competitiveness of its national broadcasters, Member States must exempt national broadcasters from impedimentary regulations. This inevitably includes liberalization in regulatory fields not definitively regulated by the Television Directive.⁷³ Hence, although the Television Directive does not expressly prohibit Member States from retaining public-service broadcasting monopolies, European legislatures must abolish both public monopolies and dual systems alike if they hope to provide competitive opportunities for their domestic broadcasters.

In addition to settling the question of broadcaster jurisdiction, *VT4* also helped resolve questions raised in the *Joined Cases E-9/94*

70. Hoffman-Riem, *supra* note 19, at 612.

71. *Belgium*, [1997] 2 C.M.L.R. at 296.

72. Hoffman-Riem, *supra* note 19, at 612.

73. *Id.*

and E-9/94 (*Joined Cases*) concerning the complex matter of jurisdiction over television advertisements under the Television Directive.⁷⁴ The *Joined Cases* were decided by the Court of Justice of the European Free Trade Association (EFTA Court) after the Norwegian television channel, TV3, broadcast via satellite two commercials from the UK advertising children's products made by Mattel and Lego.⁷⁵ Seeking a ban on the Mattel and Lego ads, a Norwegian consumer advocate filed suit in the Norwegian administrative courts pursuant to a Norwegian national law prohibiting all advertising specifically targeting children.⁷⁶ Mattel and Lego challenged the Norwegian law as contrary to Television Directive provisions calling for the free circulation of television programs.⁷⁷

As discussed above, VT4 rejected transmission-based jurisdiction, transforming the "transmitting State principle" into the "home country control" principle, whereby a broadcaster is subject instead to the law of the country where a broadcaster is established. VT4 also emphasized the requirement that receiving countries must ensure freedom of reception and not restrict retransmission in their territory of programs from other Member States.⁷⁸ The *Joined Cases* read this requirement broadly to include advertisements as within the scope of the Television Directive's free circulation provisions.⁷⁹ Thus, the Television Directive is now interpreted to allow only the Member State where a broadcaster is established to regulate advertisements occurring in the broadcaster's programs. The power of a receiving state to impose restrictions on advertising is limited to actions under Article 2(2) of the Television Directive.⁸⁰

V. CONCLUSION

VT4 Ltd. v. Vlaamse Gemeenschap indeed marks the dawn of a new age for European television broadcasters. By furnishing added precision to the doctrine of establishment first articulated in *Commission v. United Kingdom*, VT4 further solidifies the distinction *Commission v. Belgium* and the *Joined Cases* drew between the obligations of originating and recipient states under the Television Directive. Together,

74. See Case E8-9/94, *Forbrukerombudet v. Mattel Scandinavia A/S and Lego Norge A/S*, [1996] 1 C.M.L.R. 313 (1996).

75. *Advertising: EFTA Court Accepts Mattel and Lego Ads*, TECH EUR., July 6, 1995, § 106.

76. *Forbrukerombudet*, [1996] 1 C.M.L.R. at 321.

77. See *id.* See also, *Advertising: EFTA Court Accepts Mattel and Lego Ads*, *supra* note 75.

78. *Id.*

79. *Id.* at 327-28.

80. *Id.* at 324.

these decisions place overwhelming pressure on EC Member States to recognize the imperative of wholesale broadcast and advertising deregulation. The famed American jurist Benjamin Cardozo once waxed, "Jurisdiction exists that rights may be maintained."⁸¹ As Europe begins to sow the jurisdictional firmament to a revolutionary new system of free and unrestricted television broadcasting, Cardozo's truism might also hint at yet another more novel maxim: jurisdiction exists that rights may be expanded.

81. *Berkovits v. Arbib*, 230 N.Y. 261, 274 (1921).