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**COMMUNICATION FROM THE COMMISSION**

**ON THE APPLICATION OF THE GENERAL PRINCIPLES OF FREE MOVEMENT  
OF GOODS AND SERVICES - ARTICLES 28 AND 49 EC – CONCERNING THE  
USE OF SATELLITE DISHES**

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## INTRODUCTION

The Lisbon European Council highlighted the potential for growth and job creation resulting from the changeover to a knowledge-based, digital economy. It also emphasised how important it was for enterprises and the people of Europe to have affordable access to a global communications infrastructure and a wide range of services<sup>1</sup>.

Satellite dishes meet all the criteria to achieve this: they are easy-to-use receivers that provide direct, affordable access to a wide range of high-quality services. They are currently winning over the general public and are becoming more and more popular, not only for professional use, but also in the home.

A user's "**right to satellite reception**" must be defined in sufficiently clear, well-balanced terms if access to modern technologies for consumers and enterprises is to be made easier and popularised. It is also a pre-condition for improving the investment opportunities in, and the competitiveness of, European industry, particularly in view of the probable explosion of satellite reception in Europe.

In accordance with the responsibilities granted it under Article 211 EC with regard to its mission to ensure the proper functioning and development of the Single Market, the Commission's aim in this communication is to contribute, in the light of existing principles, to legal certainty and provide a useful reference source for users, economic players and national governments. In particular, it wishes to eliminate real or potential obstacles to the use of satellite dishes for receiving cross-border services, and thus put a stop to the increasing number of infringement proceedings.

Although each Member State is responsible for setting the conditions which must be met within its internal legal system for installing and using satellite dishes, some national regulations may nonetheless affect what can be received. Thus, indirectly, they affect distribution of the wide range of services transmitted by satellite – which, by their very nature, cross borders – such as television and radio broadcasts, together with interactive services ("information society services"). Such national measures must therefore comply with the fundamental principles of the Treaty, such as the free movement of goods and the freedom to provide services within the Single Market, enshrined in Articles 28<sup>2</sup> to 30 and Articles 49<sup>3</sup> *et seq.* of the EC Treaty.

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<sup>1</sup> In response to the invitation from the Lisbon European Council, the Commission adopted on 29/12/2000 a Communication (COM(2000)888) setting out a new Internal Market strategy for services and highlighting, in particular, the new dynamic sparked in services by the information society by cutting the cost of transmitting and acquiring information, as well as the objective of improving the conditions for the free movement of services in order to strengthen competitiveness, growth and employment creation in our economy.

<sup>2</sup> Article 28: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

<sup>3</sup> Article 49 (1): "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of 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."

The large number of complaints, petitions and requests for information received by the Commission both from individuals and from other institutions<sup>4</sup> proves that there is increasing interest in this subject. The Commission does not, for the moment, intend to initiate any specific legislation. However, it does feel that it would be useful to provide, through this document, its own analysis of the scope and the effect of the fundamental principles of free movement of goods and services, as set out in the Treaty and interpreted by the case law of the Court of Justice, on national rules governing the conditions of use of satellite dishes.

The Commission will keep in constant touch and exchange information with individuals and the affected parties (businesses, national and Community authorities) to provide a follow-up to the guidelines in this communication. If necessary, it will take any initiative required to eliminate or nip in the bud any obstacles to the proper functioning of the Single Market in this area.

This communication is solely concerned with satellite dishes which simply receive services. It does not refer to those which are able to transmit information from the user (which are less common, and have been on the market for a shorter time), quite apart from the fact that the indications given below may, where applicable and *mutatis mutandis*, also largely apply to transmitting antennas. The technical specifications of satellite dishes which are only able to receive do not pose any problems regarding, for example, possible risks of magnetic wave emission or interference with other transmitters (airports, military installations, etc.) and may - as for other problems encountered by users in the satellite reception of services - in future require specific analysis.

The opinions expressed here by the Commission are based on the existing interpretation of the general principles of Community law and on the *de facto* elements currently available; for those reasons, these indications may be modified in future, in particular in the light of future developments in the case law of the Court of Justice, technological progress and other relevant changes in the circumstances.

In particular, moreover, this Communication in no way prejudices any specific interpretation that the Court of Justice of the European Communities may in future give on the questions raised below, in particular through future preliminary rulings pursuant to Article 234 of the EC Treaty.

## **I. SUBJECT OF THE COMMUNICATION - SATELLITE DISHES: AN INSTRUMENT FOR THE RECEPTION AND MOVEMENT OF SERVICES IN THE SINGLE MARKET**

### **1. Importance of satellite dishes**

Satellite dishes are an essential link in the chain of services distributed by satellite. By its very nature, satellite broadcasting transcends national borders. It covers extremely large geographical areas and several countries, or even the whole of the European Union (and beyond). Distance and borders have little meaning.

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<sup>4</sup> See, for example, Parliamentary written questions 1759/97, 4114/98, 99/2216, 01/718 and 01/883.

Satellite dishes are increasingly common, thanks to the drop in prices, which are now quite affordable, and to the constantly improving performance of the technology. By mid-2000, nearly 30 million households<sup>5</sup> in the EU were estimated to have direct satellite broadcast reception systems: i.e. individual dishes for a single household (DTH: Direct-to-Home) or shared dishes used for several homes (SMATV: Satellite Master Antenna Television).

Constant improvements are being made to the services that are accessible by satellite dish:

- in terms of quality, e.g. technical specifications for broadcasts, picture and sound definition, etc.; in addition, the usual diameter of the dish is gradually shrinking, with no loss of capacity;
- in terms of quantity, particularly via digitisation and digital compression which, by multiplying broadcasting opportunities, increase the supply of events (for example, pay-per-view broadcasts) and interactive services, and provide more broadcast times, language versions, camera angles of a single event, etc.

Technological progress means that satellite dishes have become a tool for interchange within the European Union, and not only in terms of economics. They are equally useful in cultural and social terms (often, they are the only way to receive radio and television broadcasts from Member States other than that of residence, and particularly broadcasts from the viewer's or listener's country, or even region, of origin), in linguistic terms (as an aid to learning foreign languages or, for providing families living abroad, and particularly their children, with exposure to their mother tongue), for information and distance learning (thanks to theme channels and interactive services) and for tourism (through the use of satellite dishes in vacation areas) etc.<sup>6</sup>

Moreover, satellite broadcasting is often not simply one choice among many (the others being terrestrial and cable broadcasting, with the latter sometimes even under a regional monopoly system where only a single operator is available). It is the only means of access to broadcasts or services which are not otherwise available. After all, very few, if any, channels from Member States other than the country of residence are usually available from terrestrial broadcasts or cable, while the number available via satellite is very high, and potentially unlimited.

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<sup>5</sup> Figure provided by Astra. More precisely, the number of households in the EU with a direct satellite reception system was 25.2 million in mid-1998, 27.7 million in mid-1999 and 29.4 million in mid-2000. It could reach 52 million by 2010. Other statistics, from a survey carried out by Crédome (Centre de Recherche Innovation/Médias du Groupe Publicis) for Eutelsat, estimated the total number of households in 1999 at a minimum of 26 million.

<sup>6</sup> See recital three of the "cable and satellites" Directive, Council Directive No 93/83/EEC (OJ L 248, 6.10.1993), which states that "*broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the most important ways of pursuing these Community objectives, which are at the same time political, economic, social, cultural and legal*".

## 2. A wide range of satellite services

Thanks to today's technology, the cross-border services transmitted via satellite and received by satellite dish are no longer made up only of television and radio broadcasts<sup>7</sup>, but also of information society services.

- (a) Television and radio broadcasts: There are several hundred broadcast channels available in Europe today. They may be analogue or digital, encrypted or otherwise, aimed at professionals (*business TV*) or at the general public. According to some forecasts<sup>8</sup>, the number of families who subscribe to satellite pay television services could reach 27 million by 2010, a 349% increase over ten years.
- (b) Information society services<sup>9</sup> must not be forgotten. These are accessible via the same satellite receiving dishes. They are on-line, interactive services, which are transmitted over electronic networks such as the Internet. More specifically, they consist of the transmission of data, documents, sounds and images. Regardless of the medium of transmission (e.g. by cable) of the "individual request" by the recipient, the latter can receive these services, transmitted by satellite, via a simple satellite receiving dish, which may also be the same one used to receive the broadcasting services referred to above. The information society services received by satellite are intended not only for consumers, but also for economic operators (business-to-business). For example, Internet service providers (who use satellite features to increase their connections to telecommunications networks and the bandwidth available to customers) or cross-border enterprises (which may carry out rapid, secure transfers of considerable amounts of data and files over private satellite networks).

In sum, as satellite dishes now provide access to a wide range of services, they can be considered a true multi-purpose terminal.

## 3. Widespread interest in using satellite dishes

Since the services on offer are so wide-ranging, the rules governing the installation and use of satellite dishes as receivers have direct or indirect repercussions for the many economic players involved in the manufacturing and sale of satellite dishes, and in the production and distribution of services delivered by satellite. The economic players involved can be broken down as follows:

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<sup>7</sup> Television broadcasting services were explicitly recognised by the Court of Justice as falling under Article 49 (ex Art. 59) of the Treaty in the Sacchi judgment of 30 April 1974, Case No 155/73. They were then regulated by the "Television without frontiers" Directive, No 89/552/EEC of 3 October 1989 (OJ L 298, 17.10.1989) as amended by Directive 97/36/EC of 30 June 1997 (OJ L 202, 30.07.1997).

<sup>8</sup> Baskerville Communications.

<sup>9</sup> Information society services are defined as services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. This concept was introduced in Article 1 (2) of Directive 98/48/EC (amending Directive 98/34/EC and laying down a transparent regulatory procedure, OJ L 217, 5.8.1998) and repeated in Directives 98/84/EC (on the legal protection of services based on, or consisting of, conditional access, OJ L 320, 28.11.1998) and 2000/31 (on electronic commerce, OJ L 178, 17.7.2000).

- users

television viewers, radio listeners and users of on-line services (consumers, professionals, businesses and public institutions);

- satellite dish technicians

who are involved in sales (retailers) and/or the installation and maintenance of satellite dishes (installers);

- satellite operators

who make their satellite frequencies available for distributing various services in the regions covered by their broadcasting infrastructure;

- satellite television and/or radio broadcasters

who use satellites as a means of distributing their programmes;

- providers of information society services

who use satellites to provide interactive services which the end users receive using satellite dishes;

- advertisers

for whom satellite distribution of services opens up new opportunities to increase the audience exposed to their advertisements;

- content providers

such as authors and producers of film, television and musical works and sports organisers who have a direct interest in ensuring that, thanks in part to satellite broadcasts, their products are made available to the largest possible number of end users;

- manufacturers and distributors

manufacturers of satellite dishes, and importers and wholesalers who handle retail distribution.

The above makes it clear that any restrictions on the use of satellite dishes has an impact not only on the end user, but also on a large number of intermediate financial operators – and thus on investment opportunities.

## II. THE FREE MOVEMENT OF GOODS AND SERVICES AND SATELLITE DISHES: GENERAL PRINCIPLES

*By virtue of the principles of the free movement of goods (Articles 28 to 30 EC) and the free movement of services (Articles 49 et seq. EC, as interpreted in the light of Article 10 of the European Convention on Human Rights), as a rule, every individual who wishes to have access to a satellite dish must have that opportunity.*

### 1. Satellite dishes and the Single Market

In a Single Market – an area free of internal borders – regulating the sale, installation and use of satellite dishes in the Member States raises questions - in so far as there is a cross-border element - particularly with regard to two fundamental freedoms enshrined in the EC Treaty: the free movement of goods and the freedom to provide services. Satellite dishes are, after all, a type of good<sup>10</sup> which opens up access to services which cross borders by their very nature<sup>11</sup>.

Articles 28 and 49 EC, as they have been interpreted by the Court of Justice of the European Communities, safeguard these two freedoms respectively by eliminating direct or indirect discrimination based on nationality, and abolishing any national restrictions, even those applied without distinction, which are liable to prohibit, impede or render less advantageous cross-border economic activities<sup>12</sup>.

To be accepted as exceptions to these fundamental freedoms of the Single Market, national measures which are liable to impede or render less advantageous activities in an unharmonised field such as the sale, installation and use of satellite dishes, must meet four conditions:

- they must be applied in a non-discriminatory way;
- they must be justified, either by the legitimate interests set out in the EC Treaty<sup>13</sup>, particularly public policy, public security or public health, or by other legitimate interests recognised by the case law of the Court of Justice whether they are “*imperative reasons relating to the public interest*” for services<sup>14</sup> or “*mandatory requirements*” for goods<sup>15</sup>; protection of consumers or of the environment are examples of this;
- they must be such as to guarantee the achievement of the intended aim;

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<sup>10</sup> These products can be valued in money and are capable, as such, of forming the subject of commercial transactions within the meaning of the Commission vs Italy judgment, Case 7/68.

<sup>11</sup> These services (via satellite) are normally provided for remuneration within the meaning of Article 50 of the EC Treaty (see the Bond van Adverteerders judgment, Case 352/85) and all the elements of the activity in question are not confined within a single Member State (see the Commission vs Greece judgment, Case C-198/89).

<sup>12</sup> See the following judgments: Dassonville, Case 8/74; Keck and Mithouard, Joined cases C-267/91 and C-268/91; Guiot, Case C-272/94 (par.10).

<sup>13</sup> Articles 30 and 46 EC.

<sup>14</sup> See the Dennemeyer judgment, Case C-76/90.

<sup>15</sup> See the Rewe judgment (“Cassis de Dijon”), Case 120/78.

- they must not go beyond what is necessary in order to achieve that objective, thus respecting the principle of proportionality<sup>16</sup>.

In this context, account should be taken of the Directive known as the "Television without frontiers" Directive<sup>17</sup> which, by laying down as a general rule that 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 that Directive, has as its main objective the establishment of the conditions necessary for the free movement of television broadcasts.

Articles 28 and 49 are to be directly and unconditionally applied in national legal systems<sup>18</sup> and have a direct effect. Specifically, the free movement of services throughout the Single Market is a fundamental principle of Community law which applies not only to providers of services, but also to recipients<sup>19</sup>.

Given that Community law takes precedence over national law, Articles 28 and 49 lay down rights for the interested parties that the national authorities are required to respect and protect.

Moreover, they not only render automatically inapplicable any conflicting provision of current national law, but also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions<sup>20</sup>. This inapplicability applies to both legislative and administrative provisions. The latter includes not only general abstract rules, but also specific individual administrative decisions<sup>21</sup>.

This prohibition also concerns any, administrative practices which the public authorities uniformly and regularly apply, or any incitements by them which, although they are not binding, may nonetheless affect the behaviour of economic agents and notably of consumers thus contravening Articles 28 and 49<sup>22</sup>.

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<sup>16</sup> See the following judgments: Rewe (above); Gebhard, Case C-55/94 (par. 37); and Zenatti, Case C-67/98 (par. 29).

<sup>17</sup> See footnote 7.

<sup>18</sup> See the Iannelli and Volpi judgment, Case 74/76 and the Van Binsbergen judgment, Case 33/74.

<sup>19</sup> See the Van der Elst judgment, Case 43/93 (par.13). At the terminological level, the reference to the free *movement* of services (which is even in the EC Treaty: see Article (c) and Article 14 (2) or Title III in Part III) confirms the idea that the fundamental freedom set out in Article 49 of the EC Treaty can be invoked not only service providers, but also by the recipients of services.

<sup>20</sup> See the Simmenthal judgment, Case 106/77, and the Carra judgment, Case 258/98.

<sup>21</sup> See the Ciola judgment, Case C-224/97.

<sup>22</sup> See the "Buy Irish" judgment, Case 249/81 and the Factortame judgment, Case C-213/89.

The bodies of every Member State are under an obligation to ensure the primacy of Community law. This holds not only for the national courts, but for all administrative bodies, including decentralised and local authorities, such as municipalities<sup>23</sup>. In several Member States, the rules governing the installation and use of satellite dishes are set at regional or local level (particularly at municipal level). These lay down detailed regulations on the subject, while the central and federal bodies limit themselves to setting out general principles.

As a result, this communication, on the basis of indications of a general nature in the established case law of the Court of Justice on freedom of movement, is addressed to all public bodies – regardless of their legal form – which bear responsibility for laying down and applying rules on the use of satellite dishes, whether they are at national, regional, provincial, municipal or any other level, without prejudice to the independence they enjoy under the internal legal order.

In addition, with regard to both the freedom to provide services and the free movement of goods, economic players have certain procedural guarantees which cover their dealings with the authorities. For example, it would be contrary to Community law to establish authorisation procedures which were not easily accessible, quick, and of affordable cost to the economic operator or the individual (particularly when compared with the cost of installing a satellite dish), and which did not provide him with a guarantee that, at his or her request, (s)he could have a duly substantiated Decision which could be subject to legal appeal<sup>24</sup>. In addition, the penalties applied to the interested party for non-compliance with national rules must be non-discriminatory and must not be excessive with regard to their intended aim<sup>25</sup>.

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<sup>23</sup> See the following judgments: *Brasserie du Pêcheur*, Joined Cases C-46/93 and C-48/93; Case 14/83; Case 106/89; *Fratelli Costanzo*, Case 103/88. Moreover, the Court added that the liability of a Member State arises whatever the agency of the State whose action or inaction was the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution (see the *Commission vs Belgium* judgment, Case 77-69, and Case 71/81).

Moreover, the rights created by the free movement of services may be relied upon by individuals against organisations or bodies which, whatever their legal status, are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable in relations between individuals (cf. judgment C-188/89). This extensively refers both to acts issued by the public authorities and to those issued by bodies which are legally considered private, but on whom the public authorities exercise a decisive influence by appointing directors, providing funding, etc. (see the *Commission vs France* judgment, Case 21/84; and the “Buy Irish” judgement referred to in note 22).

<sup>24</sup> See the following judgments: *Sandoz*, Case 174/82; *Heylens*, Case 222/86; *GB Inno-BM SA*, Case C-18/88. The *Commission v. Italy* judgment of 18/1/2001, Case C-1, 62/99, set out the requirement that national legislation must ensure the full application of Community law by “*adopting rules of law capable of creating a situation which is sufficiently precise, clear and transparent to allow individuals to know the full extent of their rights and rely on them before the national courts*”

<sup>25</sup> See the *Casati* judgment, Case 203/80, and the *Commission vs Greece* judgment, Case C-210/91.

## 2. Satellite dishes and freedom of expression

The Court has consistently held that fundamental rights form an integral part of the general principles of law in the Community legal order, the observance of which the Court ensures<sup>26</sup>.

The Court has therefore specified that “*the Community cannot accept measures which are incompatible with observance of the human rights*” and that any justification, provided for by Community law, for rules which are likely to obstruct the exercise of the freedom to provide services, must be interpreted in the light of the general principles of law and in particular of fundamental rights. The exceptions provided for under the Treaty can only be granted if they are compatible with the fundamental rights.

As a result, any national measure which limits the ability to receive transmissions and services via satellite dishes is also required to be compatible with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which specifically enshrines “*the freedom to receive ... information and ideas without interference by public authority and regardless of frontiers*”<sup>27</sup>.

More specifically, in its judgment of 22 May 1990 in the *Autronic* case, the European Court of Human Rights specified that Article 10 of the Convention “*applies not only to the content of information but also to the means of transmission or reception*” and that, in particular, “*the reception of television programmes by means of a dish or other aerial comes within the right laid down in the first two sentences of Article 10 (1)*”. The same judgment also emphasised, within the framework of the Convention, the importance of “*strict*” European supervision of State interference with the exercise of the rights and freedoms guaranteed in Article 10 (1).

### III. RESTRICTIONS ON THE USE OF SATELLITE DISHES CAUSED BY THE RULES OR ATTITUDES OF NATIONAL AUTHORITIES

Brief descriptions of the various kinds of restrictions arising at national level are provided below. The Commission’s aim in upholding of the principles set out in Articles 28 and 49 of the EC Treaty and in the light of Article 10 of the European Convention on Human Rights is to safeguard the resulting right of individuals to have access to a satellite dish, as this right is part and parcel of the proper functioning of the Single Market.

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<sup>26</sup> See the *Elliniki Radiophonia* judgment, Case C-260/89.

Moreover, Article 6 (2) of the Treaty on European Union specifically states that: “*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*”

<sup>27</sup> Article 11 of the Charter of Fundamental Rights of the European Union is dedicated to the freedom of expression and information and states in its paragraph 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.*”

In the same vein, Article 19 of the 1948 Declaration of Human Rights states: “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*”

These restrictions on the use of satellite dishes as instruments for receiving broadcast or information society services are often the result of rules or constraints of the following kinds:

- a) Technical specifications and standards;
- b) Administrative rules;
- c) Architectural and urban planning rules;
- d) Tax rules;
- e) Rules on reception.

a) *Technical specifications and standards*

***Any provision which lays down technical specifications and/or conditions concerning the installation of satellite dishes may constitute an obstacle to the free movement of goods and services.***

Legislation in Member States sometimes states that only equipment which complies with certain technical specifications may be sold and used on national territory. This problem is quite common with regard to the free movement of goods, and particularly so in the case of high-technology goods. It can affect, or even prevent, the reception and provision of services (referred to in section I) which may (sometimes exclusively) be accessed using such receivers of satellite signals.

These rules may extend to requiring that certain specifications be complied with (for example, concerning size, bandwidths, labelling, instructions on installation and use, etc.) or even that the product undergo an approval procedure prior to being placed on the market in the country.

It should be pointed out, firstly, that simple receiving dishes are covered by Directive 73/23/EEC relating to electrical equipment designed for use within certain voltage limits (OJEC L 77 of 23.3.1973, p. 29), as well as by Directive 89/336/EEC on the approximation of the laws of the Member States relating to electromagnetic compatibility<sup>28</sup>. Under the terms of these Directives, Member States must not prevent, for reasons of safety or electromagnetic compatibility, the placing on the market or the taking into service on their territory of equipment referred to in the two Directives which meets their provisions<sup>29</sup>

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<sup>28</sup> Council Directive 73/23/EEC of 19 February 1973 on the harmonisation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits (OJEC L 77 of 26/3/1973, p. 29) and Council Directive 89/336/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to electromagnetic compatibility (OJEC L 139 of 23/5/1989, p. 19).

<sup>29</sup> Transmitting antennas, for their part, are governed by Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (OJEC L 91 of 7/4/1999, p. 10): it lays down, in particular, that the Member States may restrict the placing on the market, the free movement and the taking into service in the Community of such equipment only for reasons of the effective use of the spectrum and to prevent harmful interference - to the exclusion, therefore, of requirements relating to the technology to be used, for example.

Moreover, when called on to give a ruling on Article 28 EC, the Court of Justice has several times come out against the requirements set by Member States concerning technical specifications and prior approval of products. It has specified that such measures may raise problems of compatibility with the principle of free movement of goods, as set out in the Treaty.

It is also obvious that the technical requirements must not have the objective or the effect of favouring local production of goods or services. If the measure in question were to be a means of arbitrary discrimination or a covert restriction, it would in any event contravene the provisions set out in the EC Treaty<sup>30</sup>.

Similarly, requirements concerning the diameter, bandwidths or technical characteristics of satellite dishes also pose problems of compatibility with Articles 49 *et seq.* of the EC Treaty. They could have the effect of making it more difficult, or even impossible, to receive those cross-border services (broadcasts or other) which require, for example, dishes of a sufficiently large diameter, capable of receiving certain bandwidths or with specific technical characteristics.

In addition to the above rules, measures are often taken for safety reasons which require certain technical rules to be followed as regards the arrangements for installing satellite dishes on buildings (fastening them to the ground or to a wall, electrical insulation, etc.). These provisions must be compatible with the Treaty and the said Directives and should not exceed the limits set by the principle of proportionality, nor should they affect competition between satellite dish installers.

b) *Administrative rules*

***Systematically requiring an administrative procedure to be followed prior to permitting the use of a satellite dish has restrictive implications.***

Installation of a satellite dish, whether collective or individual, sometimes - particularly under local regulations - requires an application to be submitted, accompanied by a series of arbitrary supporting documents and forms. On the basis of this application, the local

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<sup>30</sup> See Article 30 of the EC Treaty: “*The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.*” With regard to prior authorisation or certification, see the following judgments of the Court of Justice: C-188/84, “Type approval for woodworking machines”, and *Commission vs Belgium*, C-80/92. On discriminatory technical testing, see judgment C-50/85 of the Court of Justice. Similarly, Articles 49 *et seq.* EC are a specific application of the general principle of non-discrimination set out in Article 6 of the EC Treaty with regard to the free movement of services. According to the case law of the Court of Justice, this principle prohibits not only overt discrimination based on nationality, but also all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result (see the *Seco/Evi* judgment, Joined cases 62-63/81).

authorities then grant permission or a licence. Administrative fees are sometimes charged to cover the costs of these procedures<sup>31</sup>.

Without prejudice here to an analysis of the consequences that this might have on the right of establishment of satellite dish installers and operators, the general and systematic imposition of such requirements on an area (for example, a municipality) raises problems of compatibility with Articles 28 and 49 of the EC Treaty.

Firstly, it makes it more difficult to place on the market satellite dishes manufactured in other Member States and dissuades consumers from purchasing and using such products<sup>32</sup>.

Secondly, a general requirement for prior authorisation has restrictive implications, since it discourages the use (not to mention manufacturing and sale) of satellite dishes. As they are needed in order to receive the vast number of cross-border services transmitted in this way (see section I, above), and is likely to make the reception of broadcasts from other Member States less attractive and more difficult and consequently to hamper the movement of satellite services within the Community<sup>33</sup>. The Court of Justice has specified that freedoms directly recognised by the Treaty cannot be made subject to controls applied in such a manner as to render those freedoms illusory or to the discretion of national administrative authorities<sup>34</sup>.

Moreover, requiring a number of procedures to be followed and documents to be produced by the individuals concerned is contrary to the principle of proportionality, insofar as the goal which the authorities are pursuing by imposing such an administrative procedure could be achieved using less restrictive measures, such as requiring certain aesthetic or safety guidelines to be followed when installing satellite dishes, or, at most, requiring a declaration to be made after the dish has been installed. Direct checks could then be carried out more efficiently, and any specific solutions necessary could be implemented (for example, moving or adjusting the device, repairing the building, or applying targeted penalties).

Counting the installation of satellite dishes as one of the acts and works for which an administrative procedure must be completed prior to any action being taken seems excessive. In extreme cases, for which grounds would have to be provided, the authorities responsible might, however, be justified in requiring more detailed information and a specific check, including a requirement to provide information ahead of time (for example, in the case of exceptionally large satellite dishes, or when they are to be mounted on listed buildings<sup>35</sup>).

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<sup>31</sup> Such administrative constraints are here looked at as such, independently of the grounds for them (for example, architectural or urban planning reasons), which are specifically looked at in the next section.

<sup>32</sup> See the judgment of the Court of Justice in *Commission vs Belgium*, Case C-80/92. In this judgment, concerning a law on the marketing and use of radiocommunication equipment, the Court held that a certification procedure applied without distinction to all radiocommunications equipment capable of reception only contravened Article 30 (now Article 28) of the EC Treaty.

<sup>33</sup> See the following judgments: *Van der Elst*, Case C-43/93 (par.15), *Kohll*, Case C-158/96 (33-35), and *Commission v. Belgium* of 9/3/2000, Case C-355/98, where the Court reiterates that "*According to consistent case-law, national legislation which makes the provision of certain services on national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty*".

<sup>34</sup> See the *Luisi and Carbone* judgment, Joined cases 286/82 and 26/83, and *Anadir* of 20/2/2001, Case C-205/99.

<sup>35</sup> See the following paragraph.

Whatever the case may be, even in occasional cases where a more complex administrative procedure might be justified, the Treaty grants individuals certain procedural guarantees in their dealings with the public authorities, as discussed in section I above.

c) *Architectural and urban planning rules*

***Architectural and urban planning concerns can be efficiently addressed through measures which aim to minimise the visual impact of satellite dishes without infringing the right to satellite reception of the individuals concerned and without forcing them to pay excessive fees.***

Regulations in different countries, particularly at local level, often restrict the positioning of satellite dishes and cables. The grounds for this can be architectural, concerned with the appearance of the buildings in question, and/or based on urban planning with regard to neighbourhoods or residential areas.

Thus an attempt must be made to reconcile aesthetic considerations with the fundamental right of any interested individual to have access to information and services by installing a satellite dish.

Such an assessment can only be done by looking at the individual circumstances in each case. Nonetheless, such restrictions must be duly substantiated, and the aesthetic considerations must be real and not merely a pretext. In addition, given the principle of proportionality, these restrictions cannot be applied in general. Each individual case must be looked at, and, where specific restrictions are necessary, measures which impinge as little as possible on the fundamental freedom in question must be preferred.

A rule of thumb for the national authorities in charge, which obviously would have to be adapted to each specific case, would be to lay down any necessary rules, which, while they protect the individual's right to satellite reception of the services of his or her choosing, would prefer solutions which, at the same time, made it possible to keep the visual and aesthetic impact of installing a satellite dish to a minimum.

For example, purely as a guide, and to the extent that they would technically permit the individual to receive the broadcasts (s)he desired under reasonable conditions and at a reasonable cost, national regulations laying down the following might, at first glance, be acceptable under Articles 28 to 30 and 49 *et seq.* EC:

- giving preference to placing individual satellite dishes in areas that would not be visible from the street, or as unobtrusive as possible (for example on a private, interior balcony or in a spot behind the edge of the roof rather than on the facade of the building);
- providing for a single dish, rather than a number of them, for the same user, or installing a single, shared dish, rather than several individual dishes, for a reasonable number of different users (although this must not block the installation of additional private dishes for additional services, the choice of installers available to the individuals, or, whatever the circumstances, the option of setting up a private antenna if a dispute arises among the users);

- laying down rules covering specific, justifiable requirements for the shape, size or colour of dishes installed on buildings or in certain areas;
- requiring shared dishes and cables to be installed as unobtrusively as possible in buildings that are under construction or to be erected in future; for example, dishes could be installed on the side of the internal courtyard, or in places that cannot be seen from the street, while connecting cables could be located on the courtyard side, within the building itself, or in existing conduits.

These are general guidelines which focus on the free movement of services. However, specific situations might require certain aesthetic considerations to be taken into account on an ad hoc basis. This applies in particular to the urban planning of historical town centres and the architectural protection of listed buildings.

National authorities may therefore expect certain specific requirements to be complied with to preserve the consistency of an architectural whole and the aesthetic feel of neighbourhoods which have a special historical or artistic value. In such situations, more restrictive measures (concerning the places and methods of installation) could be justified provided that they avoid imposing excessive requirements or impinging any more than strictly necessary on the individual right to the use of a satellite dish.

Moreover, for aesthetic reasons, it is not uncommon for particularly strict conditions to be set for any changes or additions to be made to *listed buildings* because of their monumental, architectural or historical value.

In sum, these circumstances are highly unusual and may justify special rules precisely because they are so different from ordinary situations which have no such restrictions and constraints.

d) *Tax rules*

***Any taxation which applies only to satellite dishes as compared to other types of receivers is an obstacle to the free movement of services in the Single Market***

The Commission believes that any national tax measures which specifically target the use of satellite dishes (or connections to these dishes) as compared to other aeriels or means of reception, would be contrary to article 49 of the EC Treaty to the extent that their goal or effect is to hamper the reception of cross-border services<sup>36</sup>.

Although Community law currently holds that Member States are responsible for tax matters in this area, these – and any regional or local authorities responsible - must comply with the EC Treaty when addressing such matters<sup>37</sup>: more specifically, national tax provisions may not discriminate nor restrict the fundamental freedom guaranteed by Articles 49 *et seq.* EC without complying with the need and proportionality criteria mentioned above.

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<sup>36</sup> The Commission has already stated it is against such taxation during various infringement procedures (cf. IP 99/281 and 00/37), written questions (cf. note 2) and petitions submitted to the European Parliament (339/97, 128/2000 and 780/00).

<sup>37</sup> See in particular the Safir judgment, Case C-118/96 and the Wielockx judgment, Case C-80/94.

Tax measures, whether regular or one-offs, which specifically burden satellite dishes are restrictions to the free movement of satellite services within the Single Market<sup>38</sup>, affecting both the recipients of these services (particularly consumers) and the suppliers (operators).

Insofar as the recipients of services are concerned, such tax measures discourage the use of satellite dishes, or, at the very least, significantly increase the total cost and make it more burdensome to receive broadcasts and other services via satellite. Such taxation may even have an aspect of discrimination on the basis of nationality insofar as it is likely to affect most those spectators who are most attached to receiving cross-border broadcasts via satellite: those who live abroad and wish to view programmes from their country of origin.

As for the service providers, by making satellite reception less attractive, such taxation also limits the opportunities available to legally established operators active in other Member States to broadcast their services across borders: satellite communication companies, satellite broadcast television and radio stations, service providers (for example, Internet access providers).

In sum, the effects of such taxation are particularly harmful to the completion of the Single Market in cross-border communications, and to the technological development of services transmitted via satellite.

With regard to proportionality, protecting the aesthetics of the urban environment in certain neighbourhoods or certain buildings – sometimes given as a reason for the tax – is a goal that should be pursued using measures that are less restrictive and not general<sup>39</sup>.

Given that Article 49 EC is directly applicable here, Member States have an obligation to repay such a tax, levied in contravention of the Treaty: *“Entitlement to the repayment of charges levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting such charges. The Member State is therefore in principle required to repay charges levied in breach of Community law.”*<sup>40</sup>

However, national law courts have an obligation to enforce the repayment of such national taxes — and hence uphold the right of an individual to seek repayment — in accordance with both the form and the substance of the national legislation in question, particularly with regard to the deadlines for lodging such a claim. Naturally, these provisions must not be less favourable than those governing similar domestic actions and must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law<sup>41</sup>.

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<sup>38</sup> With regard to considering national taxes to be obstacles to the freedom to provide services, see the following judgments: *Commission vs France*, Case C-381/93, and *Corsica Ferries*, Case C-49/89.

<sup>39</sup> For example, tax incentives for the use of shared satellite dishes as opposed to individual satellite dishes would not seem to contravene Article 49 EC, according to section b) above.

<sup>40</sup> See the *Comateb* judgment, Joined cases C-192/95 to C-218/95.

<sup>41</sup> See the judgments in Joined cases C-10/97 to C-22/97.

e) *Rules on reception*

***The choice of the means of reception and of the possible services available via satellite belongs to the individual concerned.***

Any measure which might directly or indirectly be a disincentive to using a satellite dish as a means for receiving cross-border services must be compatible with Articles 49 *et seq.* of the EC Treaty.

Therefore, any obstacles to freedom of choice, discrimination between the alternative means of receiving services, or indirect restrictions on the right to use a satellite dish are unacceptable. The defence of the fundamental principle of the free movement of services within the Single Market requires national authorities to be neutral with regard to the various technological means available to users and their use.

This implies that authorities have an obligation not to adopt or maintain in force any regulations which are an obstacle to the use of satellite dishes, or which give preference to other types of reception. It would therefore be unacceptable to make it easier only for a specific type of user to install a satellite dish, or to restrict this option to situations where certain channels or services are not already available by cable.

In addition, the authorities must refrain from any action, encouragement or discouragement which, although it is not binding, is nonetheless such that it can affect the choice made by the individuals concerned, and may therefore be incompatible with the EC Treaty because of its negative impact on the cross-border movement of services<sup>42</sup>.

The choice of which of the vast array of broadcasts and services to receive via satellite dish is entirely the prerogative of each individual concerned.

Therefore, requiring an individual or shared satellite dish to carry particular satellite channels or services ("must carry") is an unacceptable restriction on the free movement of services, unless it can be demonstrated that such a requirement is justified for overriding reasons of general interest, that it is suitable for achieving that objective, and that it is at all events not excessive and cannot be replaced by a measure which is less restrictive for the user.

Since such a requirement for reception would force the satellite dish to be pointed at the satellites transmitting these services (in addition to or instead of other satellites), it would involve additional costs and fees for the consumer, discouraging the use of such a dish and thus having implications which were clearly restrictive.

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<sup>42</sup> See the "Buy Irish" judgment, referred to above (cf. note 22), which expressed the general concept that "even measures adopted by the government of a member state which do not have binding effect may be capable of influencing the conduct of traders and consumers in that state and thus of frustrating the aims of the Community", befitting the functioning of freedoms in the Single Market.