adequate protection since, due to the timing of the programmes, they were likely to be recorded on videos to which minors might gain access. In fact, had this question stood alone, Leggatt LJ felt the point clear enough to decide for himself, but since the first question was being referred anyway, he decided to refer the second question also.

In deciding to refuse the interlocutory injunction, Leggatt LJ was of the opinion that even if the applicants' case on the substantive issues gave them a 50/50 chance of success, the fact that the moral welfare of minors was involved should outweigh any arguments that the applicants might have as to loss of profits in the interim.

On 30 April, the day before the order became law, the refusal to grant interlocutory relief was challenged before the Court of Appeal. However, Glidewell LJ, delivering the main judgment, held that there was no basis for the appeal since Leggatt LJ had considered the merits of the case before exercising his discretion to refuse the interim injunction. He also added that, even if the Court of Appeal had been required to exercise its own discretion, it would have refused the application.

Whilst it seems clear that both the Divisional Court and the Court of Appeal were very keen to uphold the decision of the Secretary of State, a number of comments can be made on the method adopted to achieve this. Firstly, it is clear that the relevant provisions of the Directive were inadequately drafted, and it remains to be seen what the European Court can do to resolve this. Secondly, Leggatt LJ's dismissal of the applicants' arguments on Article 22 must have surprised many of those who believed that the timing of the broadcasts, and the fact that they are decoded, would pose a problem for the Government. It will be interesting to see how the European Court deals with this point (which was not an issue in the Court of Appeal) since it can be argued that by using the word 'broadcast' instead of 'programme' in the proviso, it should apply to both parts of the paragraph. It is also surprising that the Government did not seek to argue that Red Hot Television might 'incite to hatred on the grounds of sex', contrary to Article 22 paragraph 2. It remains to be seen how the European Court will deal with this matter, which seems likely to remain in the public eye for some time to come.

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Flemish cable decree too restrictive and discriminatory

What has seemed manifest for a long time has now been confirmed by the Court of Justice: the Flemish decree of 28 January 1987 on the cable distribution of radio and television programmes infringes the EC Treaty on several points (ECJ, 16 December 1992, Case C-211/91, EC Commission v Belgium).

As the final step in an infringement procedure on the basis of Article 169 EC Treaty, the Court came to the conclusion that the legislation on cable distribution in the Flemish Community infringed articles 52, 59, 60 and 221 EC Treaty. More specifically, some of the restrictions on the freedom to supply services were incompatible with the EC Treaty.

The Belgian government, representing the Flemish Community in the case, admitted liability for 3 infringements, before the Court issued its judgment, e.g. the prohibition in Article 3, para 2, 4° of the cable decree according to which private broadcasting organisations in other Member States were denied access to the Flemish cable networks. According to the same article, the distribution of these programmes from abroad was only possible when advance permission was delivered by the Flemish government. The Flemish regional government was competent to give this permission under certain conditions or obligations that had to be fulfilled by the private broadcasting organisation. In its submissions to the Court the Belgian government agreed that such a regulation was a breach of the EC Treaty.

The only restriction that was under discussion before the Court, concerned the prohibition on retransmission of programmes of broadcasting organisations of other Member States, when these programmes were not in the language or one of the languages of the Member State the broadcaster was established in. According to the Court such a restriction constituted discrimination, because it lead to the situation where broadcasters from other Member States - except the Netherlands - could not offer a programme in Flemish to the public in the Flemish Community, while of course the broadcasters in the Flemish community are entitled to do so because Flemish was not a language of that other Member State. It is to be noticed that the denial of access to the Flemish cable networks of the Luxemburg TV-station RTL-4 was based on the challenged article.

The Court was of the opinion that none of the derogative provisions of Article 59 of the EC Treaty could justify the discriminatory restrictions of the Flemish cable decree. In other words: the challenged restriction was not justified on grounds of public policy, public security or public health.

As a matter of fact, the Flemish government invoked some arguments in the context of cultural
policy, e.g. to maintain pluralism in the press, in order to secure the income of advertising of the Flemish broadcasting organisations and in order to conserve and stimulate Flemish audiovisual production.

However, the Court was of the opinion that these so-called 'cultural arguments' submitted by the Flemish government could not justify the discrimination.

In conclusion this means that the prohibition on Flemish cable networks in relation to the retransmission of TV-programmes of broadcasters of other Member States, when these programmes are not in the language of this region of the Member State, i.e. Flemish was a breach of the EC Treaty.

The Flemish parliament is working now on a new legislation on the cable distribution in the Flemish Community (Gedr. St., V1. Raad, BZ 1992, nr. 157). This actualisation was necessary to comply with the EC-Directive on transfrontier television (3 October 1989). The judgment of the European Court of Justice has offered some extra arguments for reconsideration of several restrictions and obligations in the Flemish cable decree. It questioned whether the elimination of the challenged article will have significant repercussions in practice.

D Voorhoof

Under age video supply: when is a company liable?

Tesco Stores Ltd v Brent London Borough Council [1993] 2 All ER 718 QBD, DC

Under the Video Recordings Act 1984, section 11, it is an offence to supply a video recording with an '18' classification certificate to a person under that age. A 14-year-old was sent by Brent's trading standards officer into one of the appellant's stores and he was sold an '18' video. Under section 11(2)(b) of the Act it was a defence that the accused neither knew nor had reasonable grounds to believe that the purchaser was under 18. The question arose as to whether the appellant company could avail itself of this defence. It was accepted that the appellant's checkout employee did indeed have reasonable grounds to believe the boy was under 18 and thus the conviction would stand unless the statute were interpreted so as to require the company itself to have such knowledge or reasonable grounds.

The appeal was largely based on an attempt to make sense of a famous but often misunderstood case concerning the same company, *Tesco Supermarkets Ltd v Nuttass* [1972] AC 153. This established that, where a company is charged with an offence requiring a mental element, it is only responsible for the acts and intentions of its 'directing will', its *alter ego*. This would include the actions of its directors and would certainly not cover those of its checkout operators. Long before this species of liability was established, companies had been capable of committing some offences through the acts of any of their employees. It is therefore vital to determine which type of liability is to apply.

In the period from about 1870 to 1930, when corporate liability for crime began to develop, courts were not particularly heedful of the later distinction between *mens rea* and strict liability offences. *Mens rea* was not regarded as problematic unless the offence fitted the perceived category of 'real' crime, in which case there would have been no liability at all.¹

The most likely cases to be brought against corporations were statutory 'public welfare' offences concerning trading standards, food safety and so on. The only limitation to liability was that the offence had to use a verb such as 'sell' or 'supply'; it had to make sense to say that the employee's act was that of the employer. It was only in 1944 that the notion that a corporation could be directly liable for committing a criminal offence with *mens rea* emerged and the modern law of corporate liability outside the so-called 'public welfare' field was born.²

The new *alter ego* liability was based on the idea of the company itself being *identified* with the acts of senior officers, rather than being accountable for the transgressions of any of its employees. Only now was the familiar division between vicarious liability for strict liability offences on the one hand and the *alter ego* theory for *mens rea* offences, on the other, forged.

What this neat division has never really adequately addressed are offences which can be committed without *mens rea* but for which there is a defence of due diligence, as in *Tesco v Nuttass*, or of lack of knowledge or belief as to a relevant circumstance, as in *Tesco v Brent LBC*. Section 11 of the Video Recordings Act does not, it can be noted, require proof of knowledge or suspicion that the purchaser was under 18; it merely provides that there is a defence if such knowledge or reasonable grounds are absent.

Before *Tesco v Nuttass* courts would probably