1. A national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling under Article 177 of the Treaty unless a dispute is pending before it in the context of which it is called upon to give a decision which could take into account the preliminary ruling. Conversely, the Court of Justice has no jurisdiction to hear a reference for a preliminary ruling when at the time it is made the procedure before the court making it has already been terminated.

2. Medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty.

3. The provision of information on an economic activity is not to be regarded as a provision of services within the meaning of Article 60 of the Treaty where the information is not distributed on behalf of an economic operator but constitutes merely a manifestation of freedom of expression.

As a result, it is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.

REPORT FOR THE HEARING
in Case C-159/90 *

I — Facts and procedure

1. *Legal background*

Abortion has always been prohibited in Ireland, first of all under the common law, then by an 1803 Statute (43 Geo. III, c. 58), the Offences against the Person Act 1839 and finally by sections 58 and 59 of the Offences against the Person Act 1861. The 1861 Act is still in force in Ireland, and was reaffirmed by the Oireachtas in the Health (Family Planning) Act 1979.

In 1983 a constitutional amendment approved by referendum inserted in Article

* Language of the case: English.

40, Section 3, of the Irish Constitution a third subsection worded as follows:

'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.'

In *Attorney General at the relation of the Society for the Protection of Unborn Children Ireland Ltd* v *Open Door Counselling Ltd and Dublin Wellwoman Centre Ltd*, the High Court, in a judgment of 19 December 1986, then the Supreme Court, in a judgment of 16 March 1988, held that to assist pregnant women in Ireland to travel abroad to obtain abortions by making their travel arrangements or by informing them of the identity and location of a specific clinic or clinics where abortions are performed and how to contact such clinics was illegal under Article 40.3.3 of the Irish Constitution. Both courts also granted an injunction restraining the defendants from engaging in such activities.

Following those judgments the defendants submitted two applications against Ireland to the European Commission of Human Rights, pursuant to Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, for breach of Articles 8 (right to respect for private and family life), 10 (freedom of expression and information) and 14 (prohibition of discrimination on grounds of sex) of the Convention. By a decision of 15 May 1990 (Applications No 14234/88, *Open Door Counselling Ltd* v *Ireland*, and No 14235/88, *Dublin Wellwoman Centre and Others* v *Ireland*), the European Commission of Human Rights declared both applications admissible.

2. *Background of the case*

The Society for the Protection of Unborn Children Ireland Ltd (hereinafter referred to as 'SPUC'), the plaintiff in the main proceedings, is a company incorporated under Irish law whose purpose is to prevent the decriminalization of abortion and to affirm, defend and promote human life from the moment of conception.

In 1989/90 the defendants in the main proceedings were officers of one or the other of the following three unincorporated students associations: the Union of Students in Ireland (USI), the University College Dublin Students Union (UCDSU) and the Trinity College Dublin Students Union (TCDSU).

In recent years USI has published a monthly publication which includes a section containing information for students concerning the availability of medical termination of pregnancy in the United Kingdom and the means of contacting certain clinics where abortions are lawfully carried out in the United Kingdom. The UCDSU publishes an annual guide for distribution to students; its 1989/90 edition contained information similar to the foregoing and

gave the names and locations of a number of clinics performing abortions in the United Kingdom. The TCDSU publishes an annual guidebook and diary which in its 1989/90 edition also included such information. None of these publications advocated or promoted abortion.

In a letter of 12 September 1989 SPUC requested the defendants, in their capacity as officers of their respective associations, to undertake not to publish information of the kind described above during the academic year 1989/90. The defendants did not reply to that letter.

SPUC then brought proceedings against the defendants in the High Court for a declaration that the publication of information such as that described above was unlawful and for an injunction restraining the publication or distribution of such information.

By a judgment of 11 October 1989 the High Court decided that in order to be in a position to rule on the grant of the injunction applied for by the plaintiff it should refer certain questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the Treaty.

On 19 December 1989 the Supreme Court upheld the appeal brought by SPUC against that judgment and granted an injunction restraining the printing, publishing or distribution of any publication providing information on the identity and location of and method of communication with a specified clinic or clinics where abortions are performed. However, the Supreme Court did not quash the part of the judgment of the High Court in which the latter referred questions to the Court of Justice for a preliminary ruling. Each of the parties was given leave to apply to the High Court before the final decision in order to vary the judgment of the Supreme Court in the light of the preliminary ruling to be given by the Court of Justice. Following the judgment of the Supreme Court the plaintiff resumed the proceedings before the High Court, seeking the same relief as before.

3. *Questions referred to the Court of Justice for a preliminary ruling*

As it had already indicated in its judgment of 11 October 1989, the High Court considered that the case raised problems of interpretation of Community law; by order of 5 March 1990 the High Court decided pursuant to Article 177 of the EEC Treaty to stay proceedings until the Court of Justice should have given a preliminary ruling on the following questions:

'1. Does the organized activity or process of carrying out an abortion or the medical termination of pregnancy come within the definition of "services" provided for in Article 60 of the Treaty establishing the European Economic Community?

2. In the absence of any measures providing for the approximation of the laws of Member States concerning the organized activity or process of carrying

out an abortion or the medical termination of pregnancy, can a Member State prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another Member State where abortions are performed?

3. Is there a right at Community law in a person in Member State A to distribute specific information about the identity, location and means of communication with a specified clinic or clinics in Member State B where abortions are performed, where the provision of abortion is prohibited under both the Constitution and the criminal law of Member State A but is lawful under certain conditions in Member State B?'

4. *Procedure*

The decision making the reference was registered at the Court of Justice on 23 May 1990.

In accordance with Article 20 of the Protocol on the Statute of the Court (EEC), written observations were submitted by SPUC, the plaintiff in the main proceedings, represented by James O'Reilly, SC, and Anthony M. Collins, Barrister-at-law, instructed by Collins, Crowley & Co., Solicitors, the defendants in the main proceedings, represented by Mary Robinson, SC, and Seamus Woulfe, Barrister-at-law, instructed by Taylor & Buchalter, Solicitors, the Irish Government, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted by Dermot Gleeson, SC, and Aindrias O'Caoimh, Barrister-at-law, and the Commission of the European Communities, represented by Karen Banks, a member of its Legal Department, acting as Agent.

By an order of the Second Chamber of 20 September 1990 pursuant to Articles 76 and 104(3) of the Rules of Procedure the Court granted legal aid to those of the defendants in the main proceedings who had applied for it.

The Irish Government requested pursuant to Article 95(2) of the Rules of Procedure that the case be heard in plenary session. On 5 December 1990, after hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

1. *Jurisdiction of the Court*

SPUC, the plaintiff in the main proceedings, submits as a preliminary point that no question of Community law arises in these proceedings. First of all, the assistance provided by the defendants does not fall within the concept of 'services' for the purposes of Article 60 of the Treaty, which

covers services normally provided for remuneration. The defendants distributed the information in question free of charge and for no consideration, and did not do so in the context of any economic activity carried on by them. The question whether a service is provided in the context of an economic activity seems to constitute a determining factor for the purposes of the application of Articles 59 to 66 of the Treaty. Secondly, since the provision of information took place entirely within Ireland and there was no cross-border element, Community law cannot apply. That is clear from a number of judgments concerning the application of Article 48 of the Treaty on freedom of movement for workers (judgments of 28 March 1979 in Case 175/78 *Regina* v *Saunders* [1979] ECR 1129, 27 October 1982 in Joined Cases 35 and 36/82 *Morson and Jhanjan* v *Netherlands* [1982] ECR 3723, and 28 June 1984 in Case 180/83 *Moser* v *Land Baden-Württemberg* [1984] ECR 2539).

In the light of those considerations SPUC submits that the Court of Justice should decline to answer the questions referred by the High Court and remit the matter to that Court to be determined according to national law.

The *Commission* observes that for some reason which is not clear no question was referred to the Court of Justice following the judgment of the High Court of 11 October 1989 on the grant of an interlocutory injunction. It appears that the order of the High Court of 5 March 1990 by which the reference for a preliminary ruling was finally made to the Court of Justice was in fact delivered in the context of the main action. However, that order refers for its reasoning to the judgment of 11 October 1989. It is thus unclear whether the preliminary ruling is still requested in the interlocutory proceedings or if it is now requested in order to enable the High Court to reach a decision on the substance of the case.

On the first hypothesis, since the injunction applied for was in fact granted by the Supreme Court it might appear at first sight that there is nothing left for the High Court judge to decide in relation to that matter. The result would be that in accordance with the judgment of 21 April 1988 in Case 338/85 (*Pardini* v *Ministero del Commercio con l'Estero* [1988] ECR 2041) a request by that court for a preliminary ruling could no longer be entertained by the Court of Justice. A national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a dispute is pending before it in the context of which it is called upon to give a decision capable of taking into account the preliminary ruling. However, it appears from the judgment of the Supreme Court of 19 December 1989 that each of the parties is free to apply to the High Court to vary the injunction granted by the Supreme Court. It follows that the High Court has still a role to play even as regards the interlocutory injunction.

If, conversely, the reference for a preliminary ruling relates to the substantive action, the High Court is certainly the competent court.

2. *First question*

SPUC contends that nothing contained in the objects of the Treaty (Articles 2 and 3(c)) or in the definition of services (Article 60) requires that the process of carrying out an abortion be regarded as falling within

those provisions. Whilst the provision of abortion within the law in certain Member States may give rise to financial gain or reward, that alone does not qualify it to be described as an 'economic activity'. Moreover, the fact that particular activities, even grossly immoral ones, may be permitted to a greater or a lesser extent in some Member States does not mean that they are considered to be economic activities which come within the scope of the objectives of the EEC Treaty.

In so far as it may be argued that the medical termination of pregnancy, as a form of medical treatment, falls within the definition of services, it should be observed that it is unique in two senses. First of all, it is the only form of medical treatment which involves a third party, the unborn child. Secondly, it is the only form of medical treatment which necessarily involves the destruction of human life. SPUC therefore submits that, if required, the Court should reply to the first question as follows:

'The organized activity or process of carrying out an abortion or the medical termination of pregnancy does not come within the definition of "services" provided for in Article 60 of the Treaty establishing the European Economic Community.'

Mr Grogan and the other defendants in the main proceedings submit that the organized activity or process of carrying out an abortion or the medical termination of pregnancy comes within the scope of services under Article 60 of the EEC Treaty. Article 60 refers to services where they are normally provided for remuneration. A person seeking an abortion in the United Kingdom must normally pay for this medical treatment, and it is thus 'normally provided for remuneration'.

Article 60 provides a non-exhaustive list of services, which includes activities of the professions. This encompasses the medical profession and the medical termination of pregnancy, which is provided as a service in most Member States of the Community.

In its judgment of 31 January 1984 in Joined Cases 286/82 and 26/83 (*Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377), the Court held that medical treatment constituted services under the relevant Treaty provisions and that persons receiving medical treatment were to be regarded as recipients of services. According to the defendants in the main proceedings, medical treatment includes and encompasses the medical termination of pregnancy or abortion. Consequently, a pregnant woman travelling from one Member State to another for an abortion lawfully provided there must be regarded as a recipient of services governed by the Treaty provisions.

The *Irish Government* considers that issues of Community law arise only in the context of economic activity. In so far as the activity of the defendants is not of an economic nature it does not come within the scope of Community law and must be governed by Irish national law alone.

The first question does not admit of a simple affirmative or negative answer. Since

the defendants in the main proceedings are acting neither as the providers of services nor as the agents of clinics in other Member States where abortions are carried out, there is no trans-frontier aspect to the case. In that regard it is clear from the judgment of 18 March 1980 in Case 52/79 (*Procureur du Roi* v *Debauve* [1980] ECR 833) that the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State.

It is further to be noted that none of the defendants are engaged in the provision of services as defined by the Treaty, that none of them is or intends to be a recipient of such services and that no person established in another Member State is involved in the proceedings. The sole circumstance in issue is the distribution free of charge within Ireland of certain information which is unlawful in Ireland. In its judgment of 26 April 1988 in Case 352/85 (*Bond van Adverteerders* v *Netherlands* [1988] ECR 2085), the Court dealt as a preliminary matter with the question whether the services in question were trans-frontier in nature for the purposes of Article 59 of the Treaty and whether they were services normally provided for remuneration within the meaning of Article 60 of the Treaty. The present case does not involve the provision of any such service by any of the parties but solely the distribution of information which does not satisfy any of the criteria referred to by the Court in its judgment in Case 352/85.

The *Commission* points out that under Article 60 of the Treaty professional activities which are normally carried out for remuneration constitute a service in so far as they are not governed by the provisions of the Treaty relating to free movement of goods, capital and persons. Since none of those provisions is applicable to the termination of pregnancy, which, because of its medical character, must be considered to fall within the 'activities of the professions' for the purposes of Article 60, the determining question is whether it is normally provided for remuneration.

It is clear from the judgment of 27 September 1988 in Case 263/86 (*Belgium* v *Humbel* [1988] ECR 5365) that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service. The Court held that that characteristic was lacking in the case of courses provided under a national education system normally funded not by pupils or their parents but from the public purse, a system which the State established and maintained not in order to engage in a gainful activity but in order to fulfil its duties towards its own population in the social, cultural and educational fields. The medical termination of pregnancy thus fulfils the conditions laid down in Article 60 where it is provided privately and paid for by the person for whom it is intended. Conversely, it is not a service within the meaning of the Treaty when it is provided by a Member State in fulfilment of its social objectives and is paid for wholly or in large part by the taxpayer.

Since the order for reference does not state whether women travelling to another Member State to obtain an abortion seek to have access there to a service provided free of charge by the State or go to private

clinics where they have to pay for the operation, the reply to the first question must take into account both possibilities. The Commission therefore proposes that the reply to the first question should be that

'the activity of performing abortions is a service within the meaning of Article 60 (EEC) unless it is carried out by a public authority in fulfilment of its duties in the health sector and is funded from the public purse.'

That reply is not affected by the particular nature of the service in question, since the Court has already stated that the special nature of certain services does not remove them from the ambit of the rules on freedom to provide services (judgments of 3 December 1974 in Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299 and of 17 December 1981 in Case 279/80 *Webb* [1981] ECR 3305).

3. *The second and third questions*

SPUC argues first of all that Ireland may rely on the public policy exception in Community law to prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another Member State where medical terminations of pregnancy are carried out.

The public policy exception has been considered in the judgments of the Court of 4 December 1974 in Case 41/74 (*Van Duyn* v *Home Office* [1974] ECR 1337) and of 27 October 1977 in Case 30/77 (*Regina* v *Bouchereau* [1977] ECR 1999) in the context of freedom of movement for workers. The Court stated *inter alia* that although the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, recourse by a national authority to that concept presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.

SPUC considers that a genuine and serious threat to the requirements of Irish public policy which affects one of the fundamental interests of Irish society exists in the case of activities which are not only contrary to Irish law but involve the destruction of the most fundamental of all human rights, namely the right to life, which is explicitly recognized and acknowledged in the Irish Constitution. Under Article 56 in conjunction with Article 66 of the Treaty, the Member States retain the power to provide by way of laws, regulations or administrative action for the special treatment of foreign nationals as regards the freedom to provide services within the Community. It is implicit in that derogation from the general principle prohibiting discrimination that a Member State retains the power to adopt non-discriminatory measures on grounds of public policy, public security or public health (see the judgment in Case 52/79, *Debauve*, cited above). Such an interpretation is confirmed by the judgment in Case 33/74, *Van Binsbergen*, cited above, in which the Court held that taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of

professional rules justified by the general good. Furthermore, the third paragraph of Article 60 of the Treaty allows each Member State to impose on persons established in other Member States who temporarily pursue their activities in the State where the service is provided the same conditions as are imposed by that State on its own nationals.

If the right contended for by the defendants were upheld, the public policy exception provided for in Articles 36, 48(3), 56(1), 66 and 100a of the Treaty would be effectively abolished. The same would be true of the exceptions concerning public morality and the protection of the health and life of humans, animals and plants in Articles 36 and 100a.

Secondly, SPUC admits that in the absence of any measures for the approximation of the laws of the Member States in regard to abortion, the Member States are free to prohibit the distribution of the information at issue in the main proceedings. In its judgment in *Debauve* the Court held that in the absence of any harmonization of the relevant rules, a prohibition on television advertising fell within the residual power of each Member State in that regard. That is true even if the prohibition covers television advertising originating in other Member States, on condition that it is actually applied on the same terms to national organizations. According to SPUC, the same principle applies to the prohibition on the provision of the information at issue in this case.

Under Article 100a(4), inserted in the Treaty by the Single European Act, the Member States are given what amounts to a permanent right of derogation from any harmonization provision adopted by a majority vote *inter alia* on grounds of public morality, public policy, public security or the health and life of humans and animals. That provision was introduced at the instance of the governments of Ireland and the United Kingdom; the Irish Government's purpose was to dispel any doubt which might have arisen regarding the application of Article 100a to the medical termination of pregnancy.

Thirdly, SPUC argues that no alleged right granted by Community law can destroy a fundamental human right guaranteed by the constitution of a Member State.

A person who wishes to travel to another Member State in order to obtain a service which is lawfully provided there cannot be considered to have a right to obtain specific information in Ireland about that service when the activity is prohibited under both the Constitution and criminal law of Ireland. The right to provide such information can exist only as a corollary to a corresponding obligation to give such information and only in so far as it is a necessary element of the right to obtain the service. If the information in question is necessary in order to obtain an abortion, it must follow that the deliberate provision of such information amounts to positive assistance within the meaning of the order of the Irish Supreme Court in *Attorney General at the relation of SPUC* v *Open Door Counselling Ltd and Dublin Wellwoman Centre Ltd*,

because without such information an abortion would not be possible. If, conversely, the information is not necessary, the defendants in the main proceedings cannot show any obligation on their part to provide that information. Consequently, the right claimed in that respect cannot be conferred by Irish law or by Community law.

In the light of those observations, the judgment in *Luisi and Carbone*, cited above, is of no assistance to the defendants in the main proceedings. In so far as there may be a right to travel to a Member State to receive a service, that does not of itself give rise to a right to obtain that service in any Member State. It cannot be argued that a prohibition on assisting a person to obtain a service which is unlawful in one Member State can amount to a restriction on that person lawfully obtaining the same service in another Member State.

With regard to the compatibility of the Irish law at question with fundamental rights, SPUC refers to the opinion of Advocate General Warner in *IRCA* v *Amministrazione delle Finanze dello Stato* (Case 7/76 [1976] ECR 1213), according to which a fundamental right recognized and protected by the constitution of any Member State must be recognized and protected also in Community law. The reason for that is that Community law owes its very existence to a partial transfer of sovereignty by each of the Member States to the Community. No Member State can be held to have included in that transfer power for the Community to legislate in infringement of rights protected by its own constitution.

The fundamental right at stake here, namely the right to life, is recognized and acknowledged by the Irish Constitution, prior to 1983 implicitly and since then explicitly. The people of Ireland have no power to diminish a fundamental human right acknowledged and recognized by the Irish Constitution. In adopting the third amendment to the Constitution, which permitted Ireland to become a member of the European Communities, they could not transfer a power which they did not themselves possess. Consequently, the Communities and their institutions cannot act in a manner that would entail the destruction of a fundamental right so protected and acknowledged, and were they to adopt measures having that consequence no Irish court could give effect to them.

In this case the Court has no jurisdiction to decide any issue relating to the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is clear from the judgment of 11 July 1985 in Joined Cases 60 and 61/84 (*Cinéthèque* v *Fédération Nationale des Cinémas Français* [1985] ECR 2605) that it is not for the Court to examine the compatibility with the European Convention of national legislation concerning an area which falls within the jurisdiction of the national legislator. Consequently the issue whether the constitutional protection of the right to life of the unborn and the prohibition on abortion may offend certain provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms cannot arise for determination before this Court.

SPUC therefore submits that, if required, the Court should answer the second and third questions heard by the High Court of Ireland as follows:

'In the absence of any measures providing for the approximation of the laws of the Member States concerning the organized activity or process of carrying out an abortion or the medical termination of pregnancy, a Member State may prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another Member State where abortions are performed.

There is no right at Community law in a person in Member State A to distribute specific information about the identity, location and means of communication with a specified clinic or clinics in Member State B where abortions are performed, where the provision of abortion is prohibited under both the constitution and criminal law of Member State A but is lawful under certain conditions in Member B.'

Mr Grogan and the other defendants submit that a Member State which seeks to prohibit the distribution of the information in question is acting contrary to Articles 59 and/or 62 of the Treaty, interpreted in the light of Article 3(c). Such a prohibition is an obstacle to the exercise by a woman in one Member State of her right to go to another Member State and receive a service lawfully provided there. It is clear from the Court's case-law (judgments of 31 January 1984 in *Luisi and Carbone*, referred to above, and of 2 February 1989 in Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195) that the freedom to provide services includes the freedom for the recipients of services to go to another Member State without being obstructed by restrictions and that in particular persons receiving medical treatment are to be regarded as recipients of services. The Court has also held that Article 59 has direct effect and may be relied on by nationals of Member States in their national courts without the need for implementing legislation.

Applying these principles to the present case, a national of one Member State has a right to travel to another Member State to receive the medical service of termination of pregnancy or abortion, lawfully provided in that Member State, without being obstructed by restrictions. Ireland does not seek directly to prohibit or prevent a pregnant woman from exercising that right, but obstructs its exercise through restrictions on the distribution of relevant information. According to a scientific report, the effect of that obstruction has been that pregnant women residing in Ireland have continued to travel to the United Kingdom in order to obtain an abortion but have been doing so at a later stage of their pregnancy, which places their health at greater risk.

In order to exercise the right to travel and receive a medical service in another Member State, a pregnant woman in Ireland should be able to obtain specific information regarding the availability of that service, in particular information about the identity, location and means of communication with clinics where abortions are carried out in another Member State. Otherwise it would be impossible for the pregnant woman to make the necessary arrangements to obtain the medical service in question in another

Member State, and the rights of recipients of services under Community law would be rendered nugatory and deprived of any real effect.

Inasmuch as there is a right under Article 59, which can be relied on before national courts, to receive in a Member State information about a service lawfully provided in another Member State, there must be an ancillary right at Community law for persons in the first Member State to impart such information. Otherwise the right to receive information and, indirectly, the right to obtain services in another Member State would be rendered meaningless and deprived of any real effect.

The absence of any measures providing for the approximation of the laws of the Member States concerning the medical termination of pregnancy is not material. Since Article 59 has direct effect, the exercise of the rights which it grants do not depend upon any approximation measure or any supplementing legislation.

Mr Grogan and the other defendants refer also to Article 62 of the Treaty, according to which Member States may not introduce any new restrictions on the freedom to provide services which had in fact been attained at the date of entry into force of the Treaty. The national courts have relied upon the 1983 amendment to the Irish Constitution as justifying the prohibition on the distribution of the information in question. However, that constitutional provision must not be interpreted in such a way as to amount to a new restriction on the freedom to provide services in relation to the situation existing at the time of the accession of Ireland to the Communities, that is to say 1 January 1973. On the contrary, the principle of the primacy of Community law, expressed in the judgment of 9 March 1978 in Case 106/77 (*Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629), requires national courts to apply Community law in its entirety and so construe any new provision which uses a phrase such as 'as far as practicable' as meaning 'in so far as is compatible with obligations under Community law'.

Article 62 of the Treaty should be interpreted as having direct effect, in accordance with what the Court has held in relation to the comparable standstill provision in Article 53, relating to the right of establishment (judgment of 15 July 1964 in Case 6/64 *Costa* v *ENEL* [1964] ECR 585). Like that provision, Article 62 is subject neither to any conditions nor, as regards its execution or effect, to the adoption of any national or Community measure. Consequently, it is contrary to Article 62 for national courts to construe a recently introduced amendment of the constitution as constituting a new restriction on the freedom to provide services.

Mr Grogan and the other defendants go on to submit that the term 'restriction' in Article 62 must be interpreted in the light of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court has repeatedly held, since the judgment of 17 December 1970 in Case 11/70 (*Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125) that respect for fundamental rights forms an integral part of the general principles of law protected by the

Court of Justice. In that context it has identified the sources to be taken into account as including the constitutional traditions common to the Member States and international treaties for the protection of human rights on which the Member States have collaborated or to which they have acceded. The European Convention for the Protection of Human Rights and Fundamental Freedoms is of particular significance, and the Court has referred to specific provisions of the Convention on several occasions.

The Supreme Court injunction constitutes an unjustified interference with the right to provide information and is contrary to Article 10 of the Convention. Such interference is not prescribed by a law within the meaning of that article, since it could not have been foreseeably derived from Article 40.3.3 of the Constitution. Furthermore, the interference is disproportionate to the aims pursued, since there are no restrictions on pregnant women travelling to another Member State in order to obtain an abortion and the number of Irish women having such operations in Great Britain has not decreased.

The fundamental rights to receive and impart information must be protected and secured by the Court, since the exercise of rights under Community law to travel in order to receive medical services would otherwise be set at nought and deprived of any effect.

In conclusion, Mr Grogan and the other defendants submit that the Court should reply in the negative to the second question and in the affirmative to the third question.

In the opinion of the *Irish Government*, it is clear that the provision of a particular service may be lawful in one Member State and unlawful in another. The provisions of the treaty relating to services, in particular, Article 65, are aimed at preventing any discrimination on the basis of nationality or residence or any other discrimination against the nationals of a Member State in relation to the terms and conditions under which services may be provided in another Member State. In so far as the Irish law at issue applies to all persons coming within the jurisdiction of its courts, it does not in any way discriminate between Irish nationals and other persons in Ireland. The treaty and secondary legislation entitle a Member State to restrict the freedom to provide services within its jurisdiction in a non-discriminatory way on grounds of public policy, public security or public health.

A prohibition on the distribution to persons resident in a Member State of specific information designed to promote activities which are contrary to the legitimate public policy of that State if performed there may be applied even where the information invites persons to make use of those activities in another Member State, where the likely or intended result of the provision of such information is to undermine that public policy.

The prohibition at issue in this case is necessary in order to prevent the constitutional safeguard of the right to life of the unborn from being undermined. The courts, as part of the machinery of the State, have a duty to restrain activity which they consider to be unlawful and representing an attack on that right guaranteed by the constitution.

The prohibition in question is necessary in order to effectively defend and vindicate the right to life, which would otherwise be set at nought and circumvented. The prohibition is accordingly justified in relation to the treaty.

The decisions of the Irish courts show that the causal link between the dissemination of the information referred to and the termination of human life is beyond dispute. The constitutional protection established by the Irish people following a referendum would be negated if such information could be disseminated.

The combined provisions of Articles 56 and 66 of the Treaty allow the Member States to restrict the freedom to provide services on grounds of public policy by providing for special treatment for foreign nationals and, *a fortiori*, applying non-discriminatory rules. A parallel can be drawn between this case and Case 52/79, *Debauve*, cited above, in which the Court held that in the absence of any harmonization measures Articles 59 and 60 of the Treaty did not prevent a non-discriminatory prohibition of television advertising.

The Irish Government refers to the Court's case-law on public policy (Case 41/74, *Van Duyn*, and Case 30/77, *Bouchereau*, referred to above) and to indications in that case-law that Article 36 of the Treaty applies by analogy to the chapter relating to the provision of services (judgment of 6 October 1982 in Case 262/81 *Coditel* v *Ciné-Vog Films* [1982] ECR 3381, and the Opinion of Advocate General Warner in Case 52/79, *Debauve*, referred to above). For the purposes of that case-law, the activity of distributing the information in question represents a genuine and sufficiently serious threat affecting a fundamental interest of society in Ireland.

It is true that according to the judgment in *Luisi and Carbone* the freedom to provide services includes the freedom to go to another Member State to receive a service there. However, recourse may be had to the concept of public policy in order to restrict the freedom to provide information concerning services available in another Member State, given the direct causal link between such information and the destruction of the life of the unborn, which is subject to a criminal and constitutional ban in Ireland.

The prohibition in question complies with the criteria set out by the Court in its judgment of 18 May 1982 in Joined Cases 115 and 116/81 (*Adoui and Cornouaille* v *Belgium* [1982] ECR 1665), that is to say that a State which considers certain conduct to be contrary to public policy should take repressive measures or other genuine and effective measures intended to combat that conduct on the part of its own nationals. The relevant Irish law applies to all persons within the jurisdiction of the State and the measures sought by the plaintiff in the main proceedings will apply to all persons concerned without distinction on the basis of nationality.

The answer to the second question must therefore be that a Member State may prohibit the distribution of information of the kind in question where that prohibition is justified having regard to the requirements of public policy. In the event

that it is necessary to reply to the third question, the reply should be in the negative.

The *Commission* considers that a right such as that referred to in the questions of the national court, if it were to exist, could be the corollary of a right on the part of a potential recipient of the service to receive the information in question, which in turn would derive from a right to receive the service itself. It cannot, on the other hand, be argued that the information itself constitutes a service within the meaning of Article 60 of the Treaty, since it is neither provided for remuneration or transnational in character. It is therefore necessary to examine first the question of the existence of a right to receive the service of medical termination of pregnancy and then that of the existence of a right to receive information which would derive therefrom. If both those rights exist, the question arises whether there is also a right to distribute information, and the reply to that question may depend on the identity of the persons distributing the information. In the present case those persons are strangers to the relationship between the potential suppliers and potential recipients of the service.

The first question which arises is whether Articles 59 and 60 can apply to a case where the provision of services occurs outside the territory of the Member State whose legislation is in issue. As the Court stated in its judgment in *Luisi and Carbone*, it makes no difference in that respect whether the provider of the service travels to another Member State in order to pursue his activity there or the recipient of the service travels to the Member State where the service is provided. In either case the economic result is the same: the importation of the service to the Member State of the recipient. Since this case concerns pregnant women travelling from Ireland to Great Britain to receive services the condition that the provision of services should have a transnational element is fulfilled.

Secondly, it must be determined whether the right under the Treaty to receive a service necessarily implies a right to receive information about it. There are few indications in the case file as to whether the absence of the information in question would in fact impede Irish women from having access to the service of voluntary termination of pregnancy. Even though one judge of the Supreme Court considered it unlikely that restraining the activities of the defendants would save the life of a single unborn child, the injunction granted by that court is clearly based on the conclusion that the information in question could assist women in Ireland to obtain an abortion in another Member State.

It must be concluded that the absence of that information would be an impediment to some women in obtaining access to the services in question, especially since the interpretation of Irish law which is being used in this case has already been used against women's counselling services and may be used in other cases in future. The result could be to stifle all information in this respect, which would lead to a diminution in the number of Irish women obtaining an abortion in another Member State. The Court adopted analogous reasoning with regard to the advertising of goods in the judgments of 15 December

1982 in Case 286/81 (*Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575) and of 7 March 1990 in Case 362/88 (*GB-Inno-BM* v *Confédération du Commerce Luxembourgeois* [1990] ECR 667).

Thirdly, if it is accepted that the right to receive information about a service is a corollary to a right to receive the service itself, it remains to be determined whether the latter right exists. Unlike the situation in *Luisi and Carbone*, where the obstacles only concerned services to be received in another Member State, this case is concerned with a total prohibition on the provision of the service in Irish territory, which goes far beyond the difficulties placed in the way of those who wish to obtain the same service in another Member State.

As is clear from the judgments of 3 February 1982 in Joined Cases 62 and 63/81 (*Seco* v *EVI* [1982] ECR 223) and 25 February 1988 in Case 427/85 (*Commission* v *Federal Republic of Germany* [1988] ECR 1123), Articles 59 and 60 of the Treaty apply not only to national measures restricting the activities of persons providing services who are established in other Member States but also to legislation which is applicable without distinction, wherever the person providing services is established. On the other hand, the Court has never interpreted Articles 59 and 60 as prohibiting national provisions containing a total prohibition: see in that regard the judgment of 24 October 1978 in Case 15/78 (*Société Générale Alsacienne de Banque* v *Koestler* [1978] ECR 1971), which concerned legislation barring legal proceedings arising out of certain speculative stock exchange transactions, and the judgment in *Debauve*, cited above, which concerned a total prohibition on television advertising.

The difference between those types of case may be explained in the following manner: in the cases where a provision of national law has been held to be incompatible with Articles 59 and 60, an apparently neutral rule in fact caused greater difficulties for the provider of services established outside the Member State whose legislation was in issue. Conversely, in the cases concerning a total prohibition, the Court has held that the legislation was compatible with Articles 59 and 60 because there was no discriminatory effect to the detriment of providers of services established in another Member State.

The present case concerns a total prohibition of abortion on Irish territory, which extends to any acts done on its territory which may adversely affect the right to life of a foetus, even if that damage can take place only outside Ireland. It is clear that the aim pursued is in the domain of morality and not of economics and that the measure in question has no protectionist effect, since a doctor established in another Member State will meet no greater obstacle than a doctor established in Ireland and no Irish hospital can benefit from the obstacles placed in the path of women wishing to seek an abortion abroad. The Irish law is therefore compatible with Articles 59 and 60. Whatever its merits, the objective of preventing abortions belongs to the moral sphere, in relation to which Member States remain free to pursue their own policies so long as these do not entail discrimination.

In the event that the issue of the public policy exception provided for by the combined provisions of Articles 56 and 66 of the Treaty does nevertheless arise, the

policy pursued by Ireland with regard to abortion falls within that concept. Furthermore, in a society which places an absolute value on the life of a foetus, giving it the rank of a human life, any conduct which threatens that life may be considered to affect the fundamental interest of society and thus, according to the judgment in *Bouchereau*, justifies recourse to the concept of public policy.

In closing, the Commission observes that the questions are framed generally and refer to Community law as a whole. Regard could therefore be had to the fundamental rights incorporated in the Court's case-law, in particular the right to freedom of information guaranteed by Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. However, the question of the compatibility with the European Convention of national legislation which lies outside the scope of Community law is not a matter within the jurisdiction of the Court (judgments of 11 July 1985 in *Cinéthèque*, cited above, and of 30 September 1987 in Case 12/86 *Demirel* v *Stadt Schwäbisch Gmünd* [1987] ECR 3719).

The Commission therefore proposes the following answer to the second and third questions:

'Articles 59 and 60 of the EEC Treaty do not prevent a Member State which prohibits abortion on its territory from also prohibiting distribution of information which could assist persons on its territory to obtain an abortion in another Member State where it is lawful.'

G. F. Mancini
Judge-Rapporteur