within the Community, particular trade channels or particular commercial operators in relation to others.

3. Article 37 of the Treaty refers to trade in goods and cannot relate to a monopoly in the provision of services.

4. The fact that an undertaking to which a Member State grants exclusive rights within the meaning of Article 90, or extends such rights following further intervention by such States, has a monopoly, is not as such incompatible with Article 86 of the Treaty.

5. Even within the framework of Article 90, the prohibitions of Article 86 have a direct effect and confer on interested parties rights which the national courts must safeguard.

6. The grant of the exclusive right to transmit television signals does not as such constitute a breach of Article 7 of the Treaty. Discrimination by undertakings enjoying such exclusive rights against nationals of Member States by reason of their nationality is however incompatible with this provision.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court at Luxembourg on 30 April 1974

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 20 MARCH 1974 [1]

Mr President,
Members of the Court,

Mr Sacchi, the defendant in the national proceedings which have led to the reference which has to be dealt with today, is the owner and director of an undertaking, which for short is called 'TELEBIELLA'. This undertaking was launched in September 1972; its business

1 — Translated from the German.

is the transmission of programmes which it produces itself or receives by cable-television. It maintains certain television apparatus in public places for use for such cable reception.

Under the Italian Decree Law No 246 of 21 February 1938 (as later amended) persons who maintain apparatus for the reception of radio transmissions are required to pay a licence fee. A penalty is provided for non-payment.

Since Mr Sacchi did not pay this licence fee for the abovementioned television receivers set up by TELEBIELLA, criminal proceedings were started against him on the basis of the aforesaid Law.

Mr Sacchi defended himself in these proceedings by saying that the licence fee served to finance the company RAI and provided a lump sum payment for the services of RAI. The said society had however only an exclusive right to transmit television over the air; consequently, this fee could not be demanded, if apparatus, as in the case of TELEBIELLA, were installed solely for the reception of television by cable. If the exclusive right of RAI extended to cable transmission, then this would infringe the provisions of the EEC Treaty on free movement of goods and free competition, namely Articles 2, 3 (f), 5, 37, 86 and 90, which were directly applicable and had precedence. From this it followed that such exclusive right could not exist under Community law and therefore a fee which served to protect such a right was not exigible.

Having regard to these arguments the Tribunale of Biella stayed the proceedings by Order dated 6 July 1973 and referred a series of questions on the interpretation of Community law for a preliminary ruling under Article 177 of the EEC Treaty.

I will not now read the considerable list of questions, but refer in that respect to the report for the hearing.

Permit me, before I examine the questions, to make some remarks on the relevant Italian law.

Under the Codice Postale e delle Telecomunicazioni, approved by Royal Decree No 645 of 27 February 1936, the telecommunications services, (i.e. telegraphs, telephones, radio and the like) come under the exclusive control of the State. The administration can grant concessions over these services which still leave it certain powers of control. This legal position was confirmed by Presidential Decree No 156 of 29 March 1973, which contains the Codice Postale with subsequent amendments. Article 195 of the Decree of 1973 makes it clear moreover, that television undertakings are to be regarded as radio establishments within the meaning of the Law even if they transmit by means of cable.

On the basis of these provisions the Minister of Posts and Telecommunications concluded an Agreement on 26 January 1952 with the aforesaid company RAI, which is controlled by the State holding company IRI and this Agreement was approved by Presidential Decree No 180 on the same day. According to this RAI has the exclusive right to make television transmissions. It is also laid down in the Agreement that the State shall be represented in the organs of RAI and that it has powers of control and intervention in RAI. Further it is provided that the necessary income for television shall be raised from licence fees of subscribers and by advertising. Shortly before its expiration this Agreement was renewed until 30 April 1974 by a supplementary Agreement of 15 December 1972. Under this the obligation was imposed on RAI to arrange the television network so that foreign broadcasts could be transmitted in certain areas and it was provided in relation to advertising that it should be conducted either by RAI direct or by the intermediary of another company. Accordingly, since 1972 television advertising is taken care of by the company SIPRA, which is under the complete control of RAI.

Finally, there was an Agreement on 12 August 1972 between the Minister and the telephone company SIP, which is likewise controlled by the State holding company IRI, according to which SIP is required to provide and administer the necessary infra-structure for television transmissions by cable. No special concession for cable television has, according to the Italian Government so far been granted.

Against the background of these provisions the questions referred to us may now be examined.

I — First, an objection by the Italian Government must be dealt with.

The Italian Government is of the opinion that the court making the reference must first clarify under the national law whether a licence fee is required for the possession of apparatus with which only television transmissions by cable are received. If it becomes apparent that in such a case a licence fee is not due, the national proceedings can be concluded without it being necessary to clarify questions of Community law. Seen thus, the reference is accordingly premature.

The Italian Government argues in this way that the questions referred are not necessary for the decision.

Such objections have repeatedly been made in proceedings for a preliminary ruling. From the way they have been dealt with it has become apparent in this field that this Court acts with the greatest reservation. It has in particular made it clear that it is willing to go into questions of relevance to a decision only if there can be said to be a patently erroneous reference to the provisions of Community law, the interpretation of which is sought.

In the present case such does not appear to me to be the position.

The impression may be obtained that the court making the reference inclines to the view that a licence fee is also due for the possession of apparatus for the reception of television transmissions by cable, which would mean that it regards the preliminary question of national law as resolved in a particular sense. After all, it must not be forgotton that the Law of 1973 expressly mentions cable television.

Even if this interpretation is not correct, it can scarcely be taken that a national court is prevented from leaving open a disputed question of national law *pro tem* and referring questions of Community law to this Court, if it is of the opinion that a solution of the case may be forthcoming in this way (in the present case, that under Community law the licence fee in question may be invalid). I am certainly not of the opinion that in such circumstances it can be said that the reference to Community law is patently wrong.

I consequently do not propose that the Court should refuse to answer the questions put on the ground that considerations of national law could possibly make an answer to the questions of Community law unnecessary. I regard it as much more reasonable to undertake the required interpretation of Community law right away and I will therefore go on to an examination of the actual questions of substance in the proceedings without further discussion of the admissibility of the reference.

II — To answer the individual questions:

1. The defendant in the main proceedings objects to the fact that television can be transmitted in Italy only by the RAI and that private cable television is not allowed there. According to him this rules out re-transmitting by means of cable television foreign television programmes which can be received. Likewise it is not possible to transmit to an Italian audience television films and advertisements from other Member States. Mr Sacchi regards this in the first place as an obstacle to free movement of goods, that

is as making it more difficult to sell products from other Member States, since there can be no unrestricted television advertising in respect of them. It can also be said that imports are made more difficult if television programmes as such, as intangible assets, are equated with goods, or if the material which carries the programmes (tapes and films) is considered, the full utilization of which runs into difficulties in view of the monopoly of RAI.

This is the basis of the first group of questions which had been referred to the Court apparently at the instigation of Mr Sacchi.

(a) Let us then look first at those questions by which the court making the reference, and referring in particular to Articles 2, 3 (f) and 5 of the EEC Treaty, seeks to know whether the principle of free movement of goods in the Common Market gives rise to subjective rights in favour of individuals which must be respected by the national courts.

In so far as these provisions are concerned the answer to the questions put is not difficult, since as regards Article 5, decided cases have already made it clear that on account of its general wording it is not directly applicable in the sense of giving rise to subjective rights in favour of individuals. The judgment in Case 78/70 (*Deutsche Grammophon Gesellschaft v Metro,* Rec. 1971, p. 498) stresses that Article 5 gives rise only to a general obligation on Member States, the substance of which depends in the individual case on the provisions of the Treaty or the rules which arise from the general system of the Treaty. Further, there is for me no doubt that the two other provisions mentioned must, in view of their wording — it is noteworthy that Article 3 (f) clearly refers to other provisions of the Treaty — be regarded in the same way. One should not be led astray by certain observations in the judgment in Case 6/72 *(Europemballage and Continental Can v Commission, [1973]* ECR (215)). They only stress the great significance of Articles 2 and 3 with regard to the interpretation of another principle of the Treaty (Article 86), which is in fact directly applicable. In no way can the conclusion be drawn from this judgment that the introductory articles of the Treaty contain in themselves sufficiently specific legal principles to give rise on their own to subjective rights in favour of individuals.

In the absence of establishment of clear principles and in the absence of the statement of clear legal consequences it must therefore be maintained that it appears out of the question that Article 2, 3 (f) and 5 of the Treaty, either alone or jointly, can have a legal character which is of significance in dealing with proceedings in national courts.

As regards the principle of the free movement of goods, which is at the centre of the first question, it may certainly be said that it has basic significance for the Common Market and that it expresses a fundamental concern of the Community. This already follows from Article 3 (a), according to which the activities of the Community include 'the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect'. Support is also provided for this by the fact that Title I of Part Two of the Treaty, 'Foundations of the Community', has the heading 'Free Movement of Goods'.

Nevertheless, the observation which the Italian and German Governments and likewise the Commission make, that the said principle is not so clearly expressed and defined that it can be treated as a legal rule to which specific legal consequences attach, must be regarded as correct. The expression of what, as Mr Sacchi significantly says, has to be established under the Treaty is terms of 'relationships similar to those of a domestic market' must rather be derived

in detail from the specific provisions of the Treaty.

It is therefore significant that Article 9 provides that the Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect. Further, Articles 12 *et seq.*, which regulate in detail the abolition of customs duties between Member States, are also significant, and so too are Articles 30 *et seq.*, which deal in detail with the abolition of quantitative restrictions between Member States. These detailed provisions can, at least since the end of the transitional period, be described as directly applicable rules, giving rise to subjective rights in favour of individuals. Reference must therefore be made to them if it has to be determined what obstacles to free movement of goods are inadmissible under the Treaty. Moreover, Articles 85 *et seq.*, which likewise mention affecting trade between States, come into consideration, as does Article 92 (but it must not be overlooked that the latter is not appropriate for direct application within the meaning of the relevant case law).

Accordingly, to summarize in respect of the first question, it must be stated that the principles of free movement of goods is not rooted in the Treaty in such a way that subjective rights in favour of individuals which could over-rise national rules could be derived from it alone.

There is, moreover — it may be said for the sake of completeness — nothing decisive against this view even in the judgment in Case 78/70. It is true it is stated in it (Rec. 1971, p. 499) that the exercise of industrial property rights may not infringe the rules on free movement of goods in the Common Market. But it should not be forgotton that the only function of the principle of free movement of goods in this connexion is to assist in determining the limits of a definite exempting provision, namely Article 36. Regarded strictly, the same attitude was adopted here as in Case 6/72, in which the principles of Articles 2 and 3 were referred to for the interpretation of Article 86. In no way can it be said against this that Judgment 78/70 affords an independent significance to the principle referred to, and this is a manner which would allow subjective rights in favour of individuals.

(b) In view of the above conclusion it is not necessary to go into the second question, since it arises only in the event of the first question being answered in the affirmative.

On the other hand, a few remarks seem to be appropriate in this connexion with regard to the point referred to under (b) of the second question, i.e. with regard to the mention of the 'ban on television advertisements (treated as necessary instruments for the promotion of trade) being broadcast for the purpose of advertising given products at regional or local centres within the territory concerned . . .'.

This obviously means the effects of the television monopoly on the movement of goods in the true sense, (i.e. leaving aside the problem of whether television programmes as such represent 'goods' within the meaning of the Treaty, which is still to be dealt with in a later connexion). This part of the question is to be seen in the light of the view voiced by Mr Sacchi according to which foreign products are particularly affected by the television monopoly, in particular the monopoly of television advertising, for which only a limited time is available. Their sales opportunities are on a par with those of domestic products only if additional advertising possibilities, such as those afforded by private cable television, are made available, either by direct advertising by this means or by the transmission of foreign television advertising by means of the so-called Rediffusion.

Accordingly, there must be an examination of whether there is an

infringement of the prohibition on the maintenance of measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 30 *et seq*. In particular it must be considered whether the Commission Directive of 22 December 1969 on the abolition of measures having equivalent effect to quantitative restrictions on imports is significant in this respect, since publicity is specifically mentioned in Article 2 (3) (m) thereof.

It is apparent however that there is nothing relevant to the present case in the said Article 2, according to which certain measures have to be abolished. As appears from paragraph 1, Article 2 covers only measures which are not applicable equally to domestic or imported products, 'including measures which make importation more difficult or costly than the disposal of domestic production'.

In this connexion it must be stated that the restriction on television advertising arising as a result of RAI's television monopoly applies equally to domestic and to foreign products. Further, if it is said that foreign products are handicapped and therefore particularly need additional publicity in the interests of equal treatment, it must not be overlooked that substantial improvement, so far as the requirement of equal treatment is concerned, could not be achieved by private cable television. This too would have to be open to domestic products in the same way, that is, the situation would not be different from the present system. Article 2 of the Commission Directive can therefore certainly be disregarded in the present proceedings.

In so far as Mr Sacchi goes beyond this and refers to Article 3 of the Commission Directive, which states that the Directive also covers 'measures governing the marketing of products which deal, in particular, with shape, size, weights, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products, where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules', the following may be said.

The very wording of this article makes it highly dubious whether it includes measures which limit publicity in general.

Apart from this and assuming Article 3 applies to the present facts, it is nevertheless difficult to follow Mr Sacchi when he says that the exclusion of private commercial television is not indispensable, as is required by the second paragraph of Article 3 of the Commission Directive; the Italian legislator is essentially concerned only with the control of information and this objective can be obtained by other means which are of a hindrance to trade. The most important point here is that purely commercial television does not seem conceivable; an entertaining or instructive accompanying programme is indispensable. However, the general structure of television programmes, i.e. the selection of what will be transmitted over this effective means of mass-communication, can, according to the proper view, not be left to private groups. Rather, it is a public task, which in the interests of the maintenance of the freedom of radio reporting can be dealt with only in a way which ensures the appropriate participation of all social groups. Looked at in this light, the exclusion of purely private groups, even in the context of commercial television, does not indeed go beyond what is indispensable for the purpose of properly providing for the matter, and to bring into play Article 3 of the Commission Directive, and the principle of proportionality enshrined in it, in connexion with RAI's monopoly of commercial television, is for this reason unthinkable.

If it is at all necessary, then, this is the attitude that should be adopted to the

consequence referred to in Question 2 (b).

(c) Departing from the order of questions adopted by the court making the reference, it appears to me right, in view of the connexion with the principle of free movement of goods, to deal immediately with those questions which relate to Article 37 (the provisions on State monopolies of a commercial character). On this topic, in connexion with the point just dealt with, it remains to observe that the Commission Directive, according to Article 5 thereof, does not apply to measures which fall under Article 37 (1) of the EEC Treaty.

We must first examine — Questions 6 to 10 are to be understood thus — whether Article 37 applies in the case of a company on which the exclusive right to transmit televisions broadcasts has been conferred, whether such a monopoly had to be so adjusted by the end of the transitional period that the exclusive right (in relation to all broadcasts) *vis-à-vis* other Member States lapsed by 1 January 1970 at the latest, and whether an extensive widening of an exclusive right to broadcast can be regarded as a new measure within the meaning of Article 37 (2).

(aa) A preliminary observation can be made without any difficulty on this series of questions:

As is known, Article 37 applies only to State monopolies, to monopolies delegated by the State to other bodies, and to any institution through which a Member State controls, etc., imports or exports between Member States.

In so far as the term 'State' is important in this connexion there should be indeed no hesitation in contemplating companies such as RAI. This may be said quite simply because the exclusive right of transmission has been granted it by a sovereign act of a State and because the company — as we saw at the beginning — is also under State control.

(bb) Much more difficult, on the other hand, is the examination of the question what meaning is to be attributed to the adjective 'commercial' and whether it is to be understood in the restrictive sense that Article 37 applies only to monopolies which relate to the production and sale of goods in the conventional sense, or whether it also includes a monopoly of services.

On this it must certainly be said that there are good grounds in favour of a wide interpretation, as is occasionally used in the literature on the subject. Reference may be made — the Commission has done so in an objective way — to the wide interpretation of the term 'goods' in Article 85 (3); further, to the increasing significance that services have in economic life, or to the necessity to apply the same rules to cases which have the same economic effects on the movement of goods and of services. This may support the view that 'goods' means everything which can be the subject of a commercial transaction.

If, however, the established rules of interpretation on the application of the Treaty are not completely disregarded, then on the other hand it will have to be recognized that a series of weighty arguments cogently suggest a narrower interpretation.

First the place of the provision in the Treaty must not be overlooked: it is part of the Chapter on the elimination of quantitative restrictions between Member States. This Chapter relates, as clearly appears from Article 30 *et seq.*, to goods, and is part of Title I on the free movement of goods, in which the significant Article 9 appears. Services, on the other hand, are provided for in Title III of the Treaty.

The arrangement of Article 37 itself is also significant.

Paragraph 1 — and this appears basic — speaks of 'the conditions under which goods are procured and marketed'. This doubltess conjures up 'products' in the conventional meaning, and trade in such products. Paragraph 2 refers to the scope of the Articles dealing with the abolition of customs duties and quantitative

restrictions. Paragraph 3 requires that the measures referred to shall be harmonized with those which are provided for in Articles 30 to 34 dealing with the abolition of quantitative restrictions, that is, a parallel development is laid down, as appears reasonable primarily if similar goods are envisaged. Finally, it is significant that the second paragraph of Article 37 (3) refers expressly to products which are subject to a monopoly of a commercial character.

From this in my view the conclusion may be drawn that the so-called monopoly of services does not come under Article 37.

Nor can any different conclusion be derived from the previous case-law, in particular from Case 6/64 *Costa/Enel,* Rec. 1964, p. 1167), which relates to the nationalization of the Italian electricity industry. According to this, it is true, for the purposes of Article 37 it must be determined whether a monopoly is concerned with the procuring and marketing of goods in respect of which competition and trade between Member States is possible; this depends on whether its activity is indeed important in relation to trade, and whether the economic activity concerns goods which are important in import and export. It must not however be forgotton that it is likewise stressed in the judgment that Article 37 must be considered in the context of the Chapter in which it appears (namely in that on the elimination of quantitative restrictions). Moreover, the accent in the judgment was decisively placed upon 'goods'. Although, it was admittedly not ruled out that electricity too could come under it, this is no doubt only because such a view is in accordance with the view taken of trade.

Accordingly, there is nothing to be derived from this judgment which is relevant to the question at present being investigated (Article 37 and monopolies of services).

(cc) Now Mr Sacchi has endeavoured to show that television programmes are to be regarded as goods. He bases his proposition on the suggestion that they are intangible assests, and he also refers to the fact that the articles which carry the programmes (tapes and films) must in any case be regarded as goods.

On this it must be first of all be made quite clear that it is not at all a question of the monopolistic *import* of such goods, with which restrictive effects are associated. Italian law places no obstacle on import either of television programmes as such or of the material which carries such programmes. Rather, the decisive point is that the holder of the national television monopoly is alone entitled to re-transmit such programmes (television relay) and to make use of the material (films and tapes), that is, to show their contents.

If this is clearly understood, then it is obvious that there is little substance in Mr Sacchi's reference to the fact that television programmes are transmitted by means of electric energy and that this is to be regarded as goods according to the case law (Judgment 6/64). It is not a question of electric energy (which moreover in our case cannot be utilized as such by the receiver, as it can in the case of supply by electricity undertakings), but rather of the broadcasting of information, for which the electric energy represents only the technical means.

Much more significant, therefore is what the Commission has said on the exchange of films, that is cinema films between Member States, and the solution of this question under Community law from the standpoint of the abolition of possible obstacles. There is no doubt that this is an extraordinarily complex question. In the last analysis, however, the fact which has been recognized as crucial to its proper comprehension is that the main objective of films lies in their projection and it is mainly a question of the exercise of commercial copyright. On this ground, and also having regard to the fact that under Article 106 (3) of the EEC Treaty

the abolition of restrictions on transfers connected with the invisible transactions listed in Annex III (authors' royalities, too are mentioned here) had to be effected in accordance with the provisions of Articles 63 to 65, a Directive was issued for the film industry, which Directive was based on Article 62 of the EEC Treaty, that is on a provision on freedom to provide services, and thus a solution of the question was not sought by reference to the provisions on the free movement of goods.

It is but a short step to treat in the same way television transmissions, in the context in which we are concerned with them here (namely the re-transmission of a broadcast for a foreign broadcaster or the transmission of a broadcast for the possessor of apparatus who pays a fee for the service), not least because here, questions of copyright are generally paramount.

It accordingly seems proper to include the activity of television undertakings in the category of services, in view of the focal point of the activity in question and also in view of the fact that the abolition of obstacles in the sphere of television services is provided for in the general programme on services. The possibility is therefore ruled out of including a State television monopoly under Article 37 of the EEC Treaty.

(dd) This conclusion by itself would make it unnecessary to go into further questions in connexion with Article 37, namely those on the direct application of this provision as from a particular date, those relating to the requirements to adjust commercial monopolies within the meaning of Article 37 and the question as to the scope of the standstill provision of Article 37 (2) (i.e. whether it is relevant — in the sphere of television — to a prolongation and extension of the exclusive rights granted to RAI).

I will however make at least two observations (although disregarding the question of direct application, on which authority already exists).

Article 37 does not prescribe the abolition of the monopolies, but only their adjustment so that no possibility of discrimination against products from other Member States shall any longer exist.

If the matter is seen in this light, it must appear doubtful whether Article 37, assuming it applies to television, necessarily requires the abolition of the exclusive right of transmission granted to an institution, at least in relation to other Member States. Certainly it must not be overlooked that the fact that the monopoly undertaking itself or a company controlled by it produces advertisements, and that close associations of the monopoly undertaking exist with other commercial undertakings via the State holding company IRI, can lead to a tendency to give preference in the transmission of advertisements, and that it is therefore possible to speak of the inherent danger of discrimination against foreign products. However, with an undertaking whose whole activity is subject to public control, other ways of neutralizing the danger and excluding the possibility of discrimination are conceivable, such as — considering only advertising, in which Mr Sacchi is particularly interested — by carefully separating the preparation of advertisements from broadcasting undertakings and by ensuring a clear separation of the broadcasting undertaking from other commercial undertakings. As the Commission has rightly observed, this requires careful examination in the individual case; on the other hand it cannot at all be said *a priori* that adjustment of the monopoly is conceivable only in such a way that exclusive rights of transmission, with which the main proceedings are basically concerned, are abolished.

On the other hand, as far as the prolongation of the exclusive rights beyond 1972 and the extension of the monopoly to cable television, that is the

application of Article 37 (2), are concerned, it appears to me highly questionable, with regard to the extension, whether this can indeed be described as such, if the text of the law of 1936 (which already mentions television) is compared with that of 1973 (in which cable television is expressly mentioned). In addition, Article 37 does not prohibit the creation of new monopolies or the extension of existing monopolies. All that is prohibited are measures which infringe the principle of Article 37 (1), that is, care must be taken that no possibility of discrimination exists. It therefore appears highly questionable whether Article 37 (2) has any relevance to the facts in the main action.

With this everything has been said on Article 37 which could be of significance in judging the national proceedings.

2. A second group of questions relates to the competition rules of the Treaty (Articles 86 and 90).

In this connexion clarification is sought as to whether the establishment of a dominant position in a substantial part of the Common Market is illegal if all forms of competition in the particular field in the Member State are eliminated; investigation is required as to whether a limited company which has been granted the exclusive right to make television transmission in a Member State, holds within that territory a dominant position which, having regard to certain viewpoints, is prohibited by Article 86, and a declaration is sought as to whether in this event individuals have subjective rights to have such exclusive rights abolished.

(a) First of all it can be recognized that it is probably not possible completely to exclude the application of the competition rules to television. In this connexion it must remain an open question whether it is possible to go as far as the Commission seeks to go when it says that radio and television bodies are to be regarded as undertakings within the meaning of Article 85 in respect of their whole activity. In this respect it relies on the fact that the receipt of transmissions must be paid for, that broadcasting leads to the establishment of an important branch of the economy and that private broadcasting companies exist in a number of countries, which companies are conducted in a commercial manner. Television advertising at least must be regarded as an economic activity, for advertising is certainly a branch of commerce with commercial services and it is closely associated with the sale of products.

To this extent at least it is scarcely possible to deny the application of the rules of competition.

(b) It is therefore not possible to say, as the Italian Government has done, that television represents a natural monopoly and is not affected by Article 86.

Such a limitation cannot be derived from Article 86. In the present case it is moreover important that it is a question of cable television. The limited number of channels plays no part here and therefore there can be no question of a natural monopoly.

(c) Moreover, as far as the interpretation of Article 86 is concerned, it must also be immediately recognized that dominant positions are not *per se* prohibited by it. The dissolution of every kind of monopolistic structure cannot therefore be required by reliance on Article 86.

Rather, certain types of behaviour in connexion with dominant positions are prohibited, types of behaviour such as are mentioned by way of illustration in Article 86 (2). Seen in this light Article 86 can indeed be of importance in connexion with the facts referred to in Question 4 (i.e. in respect of the imposition of inordinate prices on television commercials, the arbitrary restriction of television commercials for certain products, preferential treatment for certain groups of undertakings in the broadcasting of television commercials,

certain package deals in connexion with the production of commercials or the arbitrary and discriminatory allocation of broadcasting times). The national court has to investigate whether these facts obtain and to draw the appropriate conclusions. As already stated, however this can in no way lie in the elimination of the dominant position as such, that is — as regards the present case — in the abolition of the excluisve right of RAI. The facts mentioned are therefore of little consequence for the purpose of deciding the main action.

The questions arising in the main action bring to mind the principles developed in Judgment 6/72, that is the considerations according to which in certain circumstances it is possible to influence the structure of a dominant undertaking by means of Article 86. According to the said judgment even strengthening of a dominant position is to be regarded as abuse within the meaning of Article 86. In the light of the said judgment the extension of RAI's television monopoly to cable television, i.e. the exclusion of any competition in this field, could be significant and it could be thought that for this reason the exclusive right should be declared partially invalid and that its abolititon should be required.

Whether this is possible depends on two things.

First, an objection which the Italian Government has made is important. According to this in Italy the services of all television communications have been for a long time reserved to the State, that is well before the EEC Treaty came into force. RAI has been granted a concession for television only over the air. There has so far been no question of the extension of this concession to cable television. In this respect there has so far been only an agreement with the telephone company SIP on the laying of cables. It is at present quite open who will later be granted a concession in respect of cable television. If this is indeed so, and the court making the reference must inquire into it, there can doubtless be no question of strengthening RAI's dominant position, and the application in the case of RAI of the principles developed in connexion with Article 86 can be ruled out.

If, however, it is assumed that RAI has been granted exclusive rights in respect of cable television, that is that there has been a strengthening of its position, then it is important as regards Article 86 — at least the concept of abuse within the meaning of the judgment in the *Continental Can* case so requires — that behaviour on the part of the dominant undertaking was the cause of it. In the present case this is certainly wanting. For if there has been a strengthening of RAI's position then this has not been of RAI's doing, but results from an extension of the exclusive rights by State measures (the grant of a more extensive Concession).

Article 86 on its own, therefore, even having regard to the judgment in the *Continental Can* case, does not enable the conclusion to be drawn that any exclusive rights to transmit television broadcasts by cable in possession of RAI are invalid and therefore to be disregarded.

(d) It still remains to be investigated in the present connexion whether reference to Article 90 is of use in judging the main action.

First, it cannot be ruled out that RAI, too, comes under Article 90 (1), because it has been granted rights by the State, because it is dependent on the State (indeed the State is able to determine the economic direction of the undertaking) and because it is at least partially engaged in commerce.

Before conclusions may be drawn, however, as to the validity of the extension of RAI's television rights to cable television or the validity of the grant of certain rights of cable television to another company likewise dependent on the State (the telephone company SIP), several observations must be

made, in part independant of Article 86 of the Treaty.

First, doubts may be entertained whether Article 90 (1) is directly applicable so that a national court may rely on it against national measures. It is true that the duty to refrain on the part of the Member States, contained in this paragraph, so far as it concerns Article 86, is as clear as the latter and therefore capable of being directly applicable. It must not however be overlooked that Article 90 (3) contains a duty of surveillance on the part of the Commission and the power to address decisions to Member States. It is of importance in respect of Article 90 (2), which is scarcely appropriate for direct application; it may however also be assumed that it is likewise provided in respect of the considerable difficulties which are conceivable in drawing the line between paragraphs 1 and 2. If this explanation is correct, Article 90 (1) cannot be taken to be directly applicable, since its execution is dependent on the issue of a Community act.

It is also significant that Article 90 obviously presupposes the possibility of conferring exclusive rights on certain undertakings, that is, where appropriate, creating complete monopolies. If the matter is seen in this light it is possible to hold the opinion, particularly in view of the principle of Article 222, that a Member State is allowed under Article 90 to strengthen the market position of such an undertaking, something which is not permitted to dominant undertakings themselves. This would however mean that no argument can be derived from Article 90 against the validity of extending RAI's monopoly to cable television.

Finally, Article 90 (2) is of interest. This provides that the rules of the Treaty, including the rules on competition, shall have only limited application in respect of undertakings entrusted with the operation of services of general economic interest.

In respect of Article 90 (2) the submissions of the German and Italian Governments on the characteristics of television, in which they cite judgments of their highest constitutional courts, are important, and this brings me back to a previous observation.

Television is without doubt a means of mass-communication of great cultural and educational significance, an instrument which, on account of the intensity of its effect, is particularly capable of influencing public opinion. In the Federal Republic of Germany, therefore, television is regarded as a matter of general interest and as a task for the Public Administration. Having regard to the freedom of radio reporting enshrined in the Basic Law, television is organized under public law within the framework of monopolies with respect to each Land in such a way that all social groups have a voice. The compositions of the control bodies of the institutions of public law, and the terms of the binding principles to be observed in selecting programmes, seek to ensure that no one-sided influence, either by the Government or by private groups, is possible in respect of television.

Similar necessities are recognized in most other Member States and have led to similar basic attitudes, even if institutional freedom in relation to the organs of Government has perhaps not been secured everywhere with equal success. On this I shall disregard what is known from the proceedings as to the legal position in Italy and refer to the detailed statements of the Commission on the organization of television in Belgium, France, the United Kingdom and Denmark (where State monopolies and public bodies are the order of the day). It is interesting that even where experiments are allowed on a regional level, as in Denmark, they are not governed purely by private law.

The observations made are likewise not without significance for commercial television, the sphere with which we are particularly concerned. Even in this

connexion there exists the possibility of influencing public opinion and therefore the necessity for a control from various points of view (health policy, ethical and similar). Moreover it must not be forgotten that it is not possible to have advertisements on their own but that a surrounding programme is needed. Because of this association advertising is drawn into the sphere of television as a public task, and purely private establishments of this kind are not regarded as tolerable in the Member States referred to.

It is not possible to escape this fact in judging RAI in the light of Article 90.

In my opinion it is not strictly necessary to decide whether television bodies are to be regarded as undertakings within the meaning of Article 90 (2) or whether this, that is the recognition of a general economic interest in their activity, applies only to commercial television. I regard it as decisive that the basic concept of Article 90 (2), a concept which is found on other forms (reservations in favour of the public administration) in other Articles in the Treaty (Articles 48, 55 and 56), is the only one appropriate for dealing with the matter of 'television'.

From this it necessarily follows that even if one proceeds from the basis that Article 86 and the prohibition to be derived from it against eliminating all competition also applies to public undertakings, on which the State has conferred exclusive rights, the application of such a rule to public undertakings of the nature of telvision establishments is excluded by reason of Article 90 (2), at least in so far as it is a question, as in the main action, of whether private forms of competition (relay television and the broadcasting of private television programmes) are permissible.

It will be possible moreover to agree to this all the more readily since trade between Member States is not affected by television communications in a manner which conflicts with the interests of the Community. This may be said, since, even without private television, sufficiently effective advertising can be carried on either over the State television or by other means and since, last but not least, private television undertakings such as TELEBIELLA obviously have only a limited regional significance.

To sum up, therefore, I can conclude that with regard to the series of questions which I have just dealt with, it does not seem possible to me to undermine the exclusive television rights granted to RAI, and their possible extension to the sphere of cable television, by means of the Treaty provisions on competition such as may be derived from Article 86 and 90.

3. Only the last question remains, whether it is a breach of Article 7 of the Treaty to reserve for a limited company in a Member State the exclusive right to transmit television advertisements over the whole territory of that Member State.

On this it may be observed that the fact that television advertisements are reserved to RAI does not necessarily entail discrimination on grounds of nationality since domestic undertakings are subject in a similar way to this limitation on publicity. Even Article 7 is probably not to be understood as meaning that having regard to the handicap of foreign undertakings, namely their different needs for advertising, provision should be made in their favour to increase publicity by opening up a private television service. Nor must it be forgotten that any such consequence need not necessarily mean an improvement of the position of foreign undertakings and their being placed on an equal footing with domestic undertakings, for to allow a private television service would obviously benefit domestic as well as foreign undertakings.

I therefore do not see how Article 7 of the Treaty and its application to the RAI could be of any interest to the main action.

III — Summary

All this brings me to propose the following answers to the questions raised:

1. The principle of the free movement of goods within the Common Market does not as such, that is without recourse to the particular provisions laid down for its implementation, give rise to subjective rights in favour of individuals which could be invoked before national courts.

2. The fact that a limited company has been granted the exclusive right to transmit television broadcasts, including television advertising, in a Member State (exclusive television right) does not, as regards products which are affected by the television advertising, infringe the Commission Directive on the abolition of measures having effect equivalent to quantitative restrictions on imports.

3. Article 37 of the EEC Treaty applies to monopolies of a commercial character and not to monopolies of services. The grant of exclusive television rights to a private law company is not affected by this provision.

4. Under Article 86 of the EEC Treaty the existence of a dominant position is not prohibited as such, but only its abuse by the dominant undertaking itself.

5. The grant of exclusive television rights by a Member State to a private law limited company and the extension of these rights to the sphere of cable television does not infringe Article 90 taken in conjunction with Article 86 of the EEC Treaty.

6. It is not a breach of Article 7 of the EEC Treaty to reserve for a limited company in a Member State the exclusive right to transmit television advertisements over the whole territory of that Member State.