OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 14 January 1988 *

Mr President,
Members of the Court,

1. By means of an order of 30 October 1985 the First Chamber of the Gerechtshof (Regional Court of Appeal), The Hague, asked the Court whether the Netherlands legislation governing access by cable to television programmes from other Member States is compatible with the Community rules on freedom to provide services.

The facts are as follows. On 26 July 1984 the Netherlands Minister for Welfare, Health and Cultural Affairs issued the Kabelregeling, a decree governing the distribution by cable of radio and television programmes. Article 4 (1) of the Kabelregeling provides that:

'the use of an antenna system to relay radio and television programmes to the [Dutch] public shall be authorized [*inter alia*] in the case of . . .

(c) programmes supplied from abroad by cable, over the air or by satellite, by or on behalf of an organization or group of organizations distributing the programme in the country in which it is established by means of a transmitter or a cable network, provided that:

(i) the programme does not contain advertisements intended especially for the public in the Netherlands;

(ii) the programme does not contain subtitles in Dutch, unless authorization has been granted by the Minister'.

Consequently the importation of foreign television programmes into the Netherlands is subject to two prohibitions. The first, which is absolute, relates to advertising; the second, which may be overcome at administrative level, concerns the use of subtitles in Dutch. As will appear more clearly later those 'import conditions' apply above all to foreign television programmes propagated by telecommunication satellite and hence, to give a few examples, to the transmissions in English and French of networks such as Sky Channel, Super Channel and TV 5.

The Bond van Adverteerders (the Netherlands Advertisers' Association, hereinafter referred to as 'the advertisers') and a further 15 advertising agencies applied to the President of the Arrondissementsrechtbank (District Court), The Hague, for the provisional suspension of those prohibitions on the ground that the provision cited above constituted a barrier to the production of advertising aimed at the Dutch public. To that end, the applicants maintained that the prohibitions infringed Article 59 *et seq.* of the EEC Treaty and Article 10 of the European Convention on Human Rights.

* Translated from the Italian.

By an order of 7 June 1985 the President of the Arrondissementsrechtbank held that the ban on advertising was completely consistent with Community principles, but suspended the operation of the prohibition of subtitling. On appeal, the Gerechtshof maintained the decisions taken at first instance but considered that before it took its final decision it should submit to the Court for a preliminary ruling nine questions on various difficult aspects of the Kabelregeling as regards its compatibility with Community law. I would observe forthwith that those questions are hard reading and there would be no point in reproducing or summarizing them without having first examined how, in each of their respective spheres, Dutch and Community law resolve the manifold problems arising as a result of the development of cable television.

Finally, it came to my notice after this opinion was drafted that on 14 December 1987 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty against the Netherlands State for failing to fulfil its obligations under Article 59 of the Treaty by issuing rules prohibiting the free movement of advertising from other Member States intended for the Dutch public. The application has been registered as Case 370/87.

2. To describe the Netherlands' legislation governing the mass media other than the press would be a formidable undertaking. I recall that at an international conference held some years ago in Amsterdam the academic appointed to that task prefaced his endeavour to provide a bird's-eye view with a reference to the fairy tale of the Sleeping Beauty:

'A fantastic story, full of good and bad fairies, a castle where everyone is fast asleep, whilst outside everything is being overgrown by a thorn hedge with branches as thick as cables' (Arnolds, in *Cable television, media and copyright law aspects*, Deventer, 1983, p. 13).

For my part, I shall begin more prosaically by saying that when it drew up the framework law on radio and television (Omroepwet, Staatsblad 1967, p. 176) the Netherlands Parliament intended primarily to set up a non-commercial, pluralistic system such that the innumerable political, cultural and religious elements making up Dutch society — a vigorous organism but one of the most fragmentated in Europe — might have access to those fundamental means of communication. The rules governing advertising and the right to broadcast, or the right to air time, as it is called, are designed to achieve those objectives.

The right to broadcast is conferred first on the Nederlandse Omroepstichting (Netherlands Broadcasting Foundation), the 'NOS', a body governed by public law which is responsible for coordinating programmes (there are at present two national television networks in the Netherlands), making programmes of common interest (such as the television news) and representing broadcasting in the Netherlands abroad. However, Chapter II, Section 1 of the Omroepwet authorizes other broadcasting organizations as well (the so-called Omroeporganisaties), that is to say political parties represented in

parliament and — following authorization by the responsible minister — religious (churches and confessional organizations) and regional groups.

Under Articles 34 and 11 of the Omroepwet all the institutions which I have mentioned are free to choose the form and content of the programmes which they intend to broadcast, although there is one very specific constraint: their broadcasts must not contain advertising. Yet that prohibition does not signify that Dutch television is devoid of advertising, since under Article 50 of the Omroepwet responsibility therefor is conferred on the Stichting Etherreclame (Television and Radio Advertising Foundation, hereinafter referred to as the 'STER'), a public body completely independent of the organizations with the right to broadcast.

Obviously, the STER does not make the advertisements, it merely sells air time, over which it has a monopoly, to the agents of the companies making them. It can therefore be said that anyone has the right to transmit advertisements on the radio or television provided that he goes via the bottleneck constituted by the STER and complies with the strict conditions laid down in the Omroepwet (advertising is prohibited on Sundays and on religious festivals and is subject to time-limits; tobacco products may not be advertised; advertisements may not interrupt broadcasts, etc.). The STER's proceeds are collected by the State, which, in turn, distributes them in the form of subsidies to the organizations listed in Chapter II, Section 1 and allocates a small proportion of the money to the press.

As regards the economic resources of the system, 70% of the funding of the national and regional radio and television services is accounted for by the proceeds of a licence paid by users and 30% by the revenue of the STER. The collection of the licence fee is governed by a special law (Wet op de Omroepbijdragen, Staatsblad 1968, 687), whose acknowledged effectiveness is due to the extremely extensive use which Dutch viewers make of the cable television system. In other words, between Gröningen and Maastricht there are almost no television aerials left for the storks to perch on.

However, whilst this large distribution network is no friend to the storks it facilitates the unhampered entry of programmes from abroad. Everyone is aware that until a few years ago foreign television programmes could be seen, in the Netherlands as elsewhere, only by those in possession of a suitable aerial and hence by the inhabitants of frontier regions situated in the so-called 'natural' area of reception. With the advent of telecommunication satellites the possibility of receiving foreign transmissions has increased enormously, and it will increase even more when the direct broadcasting satellites are in operation. Today at all events it is sufficient to pipe the signals from a satellite to a cable distribution network for programmes broadcast even in very distant locations to be available immediately to all the network's subscribers. Indeed, it was because of that development that the Netherlands Government, anxious about losing control over the national television market, decided to issue the Kabelregeling.

According to the explanatory memorandum appended thereto, the Kabelregeling does not contain a general prohibition on the entry of foreign television programmes, its provisions being based on the premiss that the technology which I have just mentioned makes such a development inevitable. Instead, the decree is intended to prevent

'the indirect development in the Netherlands of a commercial cable television programme . . . [which might constitute] *unfair competition* for national broadcasting' (Section II, (c), my emphasis).

Consequently, that is the policy basis for Article 4 (1) of the Kabelregeling (cited above). However, for the purposes of the implementation of the prohibitions which it sets out, the Kabelregeling draws a distinction between foreign programmes transmitted over the air and those which may be received via telecommunication satellite. Although the former may be received, or received and retransmitted, by cable or, in the near future, by direct broadcasting satellite in the Netherlands, they are designed solely for the public in their country of origin where they are broadcast *inter alia* over the air. Consequently they do not contain advertising directed at the Dutch viewer. It follows that it is pointless to subject such programmes to restrictions, even if they are bristling with advertising. For example, there is nothing to prevent a possible cable operator from retransmitting and distributing in the Netherlands programmes transmitted in Italy by the RAI or Berlusconi's networks and in France by Antenne 2 and TF 1.

On the other hand, foreign programmes 'which cannot be received over the air' (see the aforementioned explanatory memorandum, Section I) may not be freely imported. Such programmes consist for the most part of transmissions propagated by telecommunication satellite by means of the so-called 'point-to-point' system. The point-to-point system can be described in a few words. A given programme is prepared at a television station situated in the territory of State A. However, the programme is not broadcast over the air but sent in the form of a signal directly to satellite X, which in turn transmits it to a cable operator in the territory of State B. The operator then feeds the programme into its distribution network and the programme appears on the screen of subscribers tuned in to the appropriate channel.

This form of communication is so simple, closed and self-contained as to evoke the image of Leibniz's monad. But it is for this very reason — in plain words, it is precisely because the point-to-point system enables transmissions intended for users of a language other than that of the country in which they are produced to be made, without the problems of simultaneous propagation — that the Kabelregeling makes the relaying of such transmissions subject to the two prohibitions laid down in Article 4. And it is for the same reason that the applicants in the main proceedings wish to use such transmissions as a vehicle for their advertising.

I shall conclude my appraisal of the Dutch system with an account of two legislative developments which, albeit dating from after the material facts, are certainly of interest. A ministerial decree of 4 October 1985 amended the Kabelregeling 'so as to permit the lawful distribution by Dutch . . . networks of the European programme in which, in addition to the NOS, a number of foreign public broadcasting organizations . . . participate' (see the explanatory memorandum appended to the decree). The programme in question, which is supplied by satellite link, has to satisfy the requirements laid down in Article 4 (1) (c) of the Kabelregeling but, unlike the programmes covered by that provision, need not necessarily be transmitted in the State (Switzerland) in which the association formed by the organizations promoting it has its headquarters. This derogation — according to the explanatory memorandum — reflects the particular nature of the association and of the programme itself, which is intended to 'serve as a medium for European thought and culture'.

Secondly, according to information provided by the Netherlands Government in the course of the proceedings, the Kabelregeling will shortly be replaced by the Mediawet (Law on the Media). The relevant draft proposes to remove the restrictions on subtitling and attenuate the present absolute prohibition on advertising. Foreign broadcasters will have a choice — they will either have to abstain from advertising specifically intended for the Dutch public or they will have to comply with the rules laid down by the law (for instance regarding the maximum duration of advertisments).

3. Let us now turn our attention to the Community rules, which consist in only two decisions of the Court: *Sacchi* and *Debauve*. Although the judgments in the two *Coditel* cases (the judgment of 18 March 1980 in Case 62/79 [1980] ECR 881, and the judgment of 6 October 1982 in Case 262/81 [1982] ECR 3381) do concern television, they cover an aspect — the protection of copyright — which falls outside the scope of these proceedings.

In the judgment in *Sacchi*'s case (judgment of 30 April 1974 in Case 155/73 [1974] ECR 409, paragraphs 6 and 7), the Court stated that 'in the absence of express provision ... in the Treaty ... the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules ... relating to services. On the other hand, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals is subject to the rules relating to freedom of movement for goods'. In order to appreciate the scope of this principle it is appropriate to point out that according to Article 60 of the Treaty 'services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration' and that, subject to the limits laid down in Article 56, Articles 59 and 62 prohibit restrictions on freedom to provide services in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The judgment in the *Debauve* case constituted a step towards the free movement of television programmes (judgment of 18 March 1980 in Case 52/79 *Procureur du Roi* v *Debauve and Others* [1980] ECR 833, paragraphs 8 and 9). That case concerned the legality of Belgian rules prohibiting the retransmission of foreign advertisements by national cable operators while regarding as lawful the direct reception of such advertisements in frontier areas; in order to resolve the issue, it had first to be established whether Article 59 *et seq.* of the Treaty also applied to programmes transmitted by cable. The Court held that there was no reason 'to treat the transmission of ... signals by cable television any differently'; however, it added that the provisions on freedom to provide services 'cannot apply to activities whose *relevant elements* are confined within a single Member State' (my emphasis).

What are the reasons for that stipulation? It is impossible to understand them without referring to the discussion to which the question put to the Court gave rise in the course of the proceedings. The Government of the Federal Republic of Germany argued that 'The Treaty does not prohibit Member States from resisting the broadcasting within the territory coming under their sovereignty of advertising material ... by radio waves or cable, even when it is still possible to receive such advertising material broadcast by foreign stations in the territory in question'. Indeed, if 'the crossing of a frontier by a broadcast is ... the unavoidable ... effect of

a broadcast directed at the national territory alone, then one cannot speak of the provision of services intended for 'nationals of another Member State' and Article 59 does not apply.

The representative of the Luxembourg Government considered that argument to be unacceptable because it excluded from the application of the principle of free movement programmes coming from or entering small countries which were therefore 'bound' to cross national frontiers. For its part, the Belgian television organization argued that the service supplied by a cable television distributor is technically different from that provided by the broadcaster and consists 'in receiving the [foreign] broadcast and then transmitting it to television viewers.' Now, it is obvious that if the viewers are within the 'natural zone' of the broadcasting station's transmitter and receive its broadcast direct, the intervention of the distributor has no effect on the circulation of the advertisement. On the other hand, if the viewers are not living in the natural zone the service provided by the broadcasting station can be said to be 'naturally' exhausted and there is no longer any ground for invoking Article 59 in connection therewith. The service provided by the distributor thus becomes a 'new *service* ... [which] is specific and identifiable ... because it involves remuneration paid by the television viewer' (my emphasis).

Consequently the passage from the Court's judgment which I have cited constitutes a reply to those arguments. It cannot definitely be said that in formulating that reply the Court took account of all the relevant data and in particular of the objections put by the Luxembourg Government; but as we shall see later, albeit in connection with an entirely different issue, the Court was soon to adopt a much more flexible and liberal interpretation of Article 59.

As regards legislation, Community law can only offer a proposal for a Council directive (Official Journal C 179 of 17 July 1986, p. 4) which utilizes the contents of 'Television without frontiers', a green paper published by the Commission on 23 May 1984. The object of the proposed directive is to guarantee the free movement of all broadcasts which comply with the law of the Member State in which they originate. To that end, Article 21 (1) defines the term 'broadcasting' so as to include the initial transmission or retransmission by wire or over the air, including transmission by satellite, in unencoded or encoded form, of radio and television programmes intended for reception by the public. Broadcasts are divided into two categories, 'internal broadcasts' or 'initial transmissions by public or private undertakings engaged in broadcasting on the territory of a Member State, including transmissions exclusively intended for reception in other Member States' and 'cross-frontier broadcasts' or 'internal transmissions that can be received directly by the public in another Member State or by way of retransmission even where they are retransmitted by an undertaking established in the territory of that other Member State'.

4. Having thus clarified the national and Community legislative background to the case, it is possible to decipher the questions submitted by the Gerechtshof. The original nine questions may be reduced to the following six:

(a) Whether foreign television programmes not capable of being received over the air which are distributed by cable in the national territory can be said to be a provision of a service or services whose relevant elements are not confined within a single Member State?

(b) If the first question is answered in the affirmative, whether national rules which subject such transmission of programmes supplied from abroad to requirements that they should not contain advertising or subtitles in the language of the Member State concerned are compatible with Article 59 of the Treaty when such requirements do not apply, or do not apply in an identical manner, to similar programmes supplied within that Member State?

(c) Whether it is relevant for the purpose of answering that question thatadvertisements contained in programmes supplied within that State may only be broadcast subject to the supervision of a public organization which has a statutory monopoly of television advertising time and whose revenue goes almost entirely to finance the activities of domestic broadcasting organizations and to the press?

(d) Whether in order to be compatible with Article 59 *et seq.* of the Treaty the said national rules must not only be non-discriminatory but also proportional to their objectives and justified on grounds relating to the public interest?

(e) Whether in that connection the following requirements may be regarded as being valid justification: (1) protecting the pluralistic and non-commercial character of a broadcasting system; (2) preventing domestic television programmes from being subject to unfair competition from foreign programmes?

(f) Whether in such a case the principle of proportionality and the fundamental rights enshrined in the Community legal order (in particular freedom of expression and freedom to receive information) are directly binding on the Member States?

5. In the course of the proceedings before the Court written observations were submitted by the applicants in the main proceedings, the Governments of the Netherlands, France and the Federal Republic of Germany and the Commission of the European Communities. Only the French representative did not take part in the hearing. It is worth pointing out straight away that, with the exception of the French and Netherlands Governments, the interveners consider the prohibitions laid down in the provision at issue to be discriminatory in intention. However, the Government of the Federal Republic of Germany considers that the restrictions in question are capable of being justified on the ground of the public interest in safeguarding the pluralism and non-commercial nature of the national television system. The Commission takes the opposite view.

Let us now consider the first question. The national court asks whether the transmission by cable in another Member State of television programmes not capable of being received over the air constitutes the provision of a service or services whose relevant elements are not confined within a single Member State. Obviously, the emphasis falls on the words 'relevant elements' which the Court used in the judgment in the *Debauve* case as the criterion for distinguishing domestic from cross-frontier activities or, to put it another way, as the marker showing the boundary between the area not covered by the provisions on free movement of services and the area to which those provisions apply.

The objective of the question does not seem to have been understood by the French Government. After stating that it is for the national court to ascertain whether the relevant elements of a given activity 'are confined *within* a single Member State', it points out that Article 4 is directed at 'programmes supplied from abroad . . . [containing] advertisements intended especially for the public in the Netherlands' and considers therefore that the Netherlands court has found a relevant element which is *outside* the Netherlands and hence justifies the application of Article 59. If that were the case, it would be unclear why the Gerechtshof had referred the matter to the Court. In any event, it is clear that, in this connection at least, the national court's interest is not focused on the fact that advertising from abroad is intended for viewers in the Netherlands; what it wishes to establish is whether foreign television programmes, with or without a commercial content, transmitted by the point-to-point system constitute the provision of a service for the purposes of Community law.

In contrast, the views expressed by the other interveners address the issue even though they differ substantially as between themselves. Accordingly, the advertisers consider that the prohibitions laid down in the Kabelregeling are directed against at least three services, all of which satisfy the requirements laid down in Articles 59 and 60 of the Treaty. The first two are provided by the foreign broadcaster, the beneficiary of the one being the cable television company in another Member State (broadcasting of television signals generally), the beneficiary of the other the Netherlands advertiser (broadcasting of foreign advertisments). The third service is provided by the cable operator, who distributes the programme and advertising from abroad to the public in the Netherlands (distribution of foreign programmes).

The Government of the Federal Republic of Germany takes a narrower view: it considers that signals transmitted over a point-to-point system break down into only two services, one supplied by the foreign broadcaster, the other by the operator of the cable television network. Only the first service is of a transnational nature, although it is obvious that its free movement may be undermined by any restrictions imposed on the second service. The Commission starts from similar premisses but reaches fundamentally different findings. In principle there are two services: the service — all of whose elements are carried out within a single country — that the distributor provides to its subscribers and the service provided by the foreign broadcaster. However, the service carried out by the latter consists in making a programme for viewers in another Member State: it can therefore be said that that service absorbs the activity of the cable operator and that, as a result, a single service is involved. That service is manifestly a transnational one because it is extended 'by the broadcaster to the subscriber'.

The Netherlands Government disagrees all along the line. In its opinion, there is indeed only one service, but it consists of the activity of the cable operator, which, being carried out wholly in the national territory, falls outside the provisions of the Treaty. The Kabelregeling is solely concerned with cable distribution and the prohibitions set out in Article 4 thereof apply in particular to signals which the public receive by cable since they cannot be received over the air. Consequently, the situation to which Article 4 applies is one in which the distributor operates, not as an intermediary in transmitting a programme which has already been broadcast, but as a broadcaster offering that programme for the first time; and as a result of that situation the way in

which the signal is supplied to the distributor — via telecommunication satellite or, another possibility, by the delivery of a sealed video cassette containing a recording of the programme to be broadcast — is of little or of no importance to it.

Those observations are borne out by an *a contrario* argument. Supposing that in a certain area of the national territory affected by the foreign programme there are no distributors or, if there are distributors, they have no more channels available. Noone would claim — although logically the view taken by the Federal Republic of Germany would require one so to argue — that in such a situation the supply of services by the foreign broadcaster is to a greater or lesser extent lawfully 'restricted'; rather it would be considered that the supply of services is impeded by a state of affairs peculiar to that sector of the market.

The Netherlands Government goes on to argue that in the light of those observations it is completely unreal to maintain that there is a single cross-frontier supply of services extending from the broadcaster to the subscriber. From the technical point of view that argument overlooks the fact that, were it not for the intervention of the cable operator, the programme transmitted by a telecommunication satellite would be incapable of being seen. Furthermore, from the economic angle, that intervention is plainly separate from the activity of the broadcaster, as can be seen from the fact that the operator can distribute the programme only with the agreement of the persons to whom the copyright belongs. Lastly, from the legal point of view there are manifestly no legal relations, not even indirect relations, between the broadcaster and the subscriber. Indeed, the subscriber pays a fee to the distributor alone and the broadcaster receives no sum from the subscriber.

Academic writers have expressed arguments very similar to those put forward by the Commission with regard to the point-to-point (re)transmission of signals by cable. For instance, for Ivo Schwartz the only significant factor from the point of view of Community law in this field is that the broadcast should originate in a Member State and be received in another country belonging to the EEC. The way in which the signals cross the frontier between the two States is of no significance; in particular, the work of the distributor, who does not alter the content of the initial broadcast but merely distributes it, constitutes merely an ancillary 'extension' of the broadcast.

In the final analysis it can be said that the service provided by a broadcaster to subscribers of a distributor in another Member State constitutes a supply of services capable of satisfying the requirements set out in Articles 59 and 60 of the Treaty because it is a single, trans-frontier service provided for remuneration. Schwartz goes on to argue that as regards the last-mentioned aspect the fact that the subscribers make payment to the local cable operator only may give rise to some perplexity. But the doubts disappear given that (a) Article 60 does not require the remuneration to be transnational and does not require the service to be paid for by all its recipients and (b) the broadcaster in any event receives payment from the viewers in the State in which it is established ('Radiodiffusion et traité CEE', in *Revue du Marché commun* 1986, p. 387).

6. None of these arguments appears convincing to me. As it will become clear later, they are flawed *ab initio* because they fail to put the proper emphasis on the nature of the television signal and on the impact which recently developed technology in this sector has had on the concept of transmission.

I concede that the Netherlands Government bases itself on data and arguments which

cast light on several aspects of the problem before the Court. For instance, it is true that in order for the Kabelregeling to apply it is not foreign programmes as such which must be intended for Dutch viewers but any advertising contained therein; it is also true that those programmes are distributed to Dutch viewers not over the air but by cable by a Dutch operator who receives them via satellite; therefore it is true that those programmes do not appear on television screens in the Netherlands after having necessarily been seen and paid for by the public in the Member State of origin. Accordingly the Netherlands Government's criticisms of the theory of the extended service and of the single transfrontier supply of services are on target. Indeed, that theory presupposes that although the broadcast is paid for by viewers nationally, it is intended for a foreign public, and, for the sake of consistency, defines the activity of the distributor as ancillary. Now, it has just been stated that the assumptions with regard to the intended audience and payment of the programme are not always correct in practice; and there is no doubt, at least in the case of broadcasts received via telecommunications satellite, that the work of the distributor is as indispensable for the real target of the programme, that is to say the subscriber, as the service supplied by the broadcaster.

But it is not only the Commission which seems to come off badly against the argument adopted by the Netherlands Government. The argument put forward by the advertisers, who should be recommended to make use of Occam's razor (*entia non sunt multiplicanda praeter necessitatem*), and that the German Government, which adopts the so-called 'interpenetration' theory put forward by Waelbroeck at the hearing in the *Debauve* case and in the first *Coditel* case, also appear weaker than that of the Netherlands Government. In fact, that overlooks the logical step which the is at the heart of the reasoning of the Netherlands Government; to say that the role played by the distributor amounts to a *totally* internal service is equivalent to arguing that the distributor is not an intermediary engaged in retransmission but a genuine broadcaster. Now, a prohibition on advertising designed as a restriction on *broadcasting* can obviously only be applied uniformly, that is to say irrespective of the national origin of the programme distributed by the distributor; and that prevents it from being regarded as an obstacle capable of unlawfully affecting the service provided by the foreign broadcaster.

Moreover, the contrary view championed by the French Government is no less weak. To rely on the wording of Article 4 ('programmes supplied from abroad') in order to claim that the distributor is engaged in a transfrontier activity avoids the contradiction to which the Government of the Federal Republic of Germany has fallen victim, but at the price of failing to take account of the fact that *vis-à-vis* the intended recipient of the programme the distributor merely acts as a distributor. In other words, in addition to misunderstanding the question referred by the Gerechtshof, the French Government is no more successful than the Commission and the Federal Republic of Germany in translating the *whole* reality of the transaction under consideration into legally telling terms.

Must the Gerechtshof therefore be answered in the terms proposed by the Government of the Netherlands? I have already said that it should not. Although shrewdly argued, the proposition that there is only one domestic supply of services is open to three types of criticism:

(1) it treats as incidental the fact that the cable operator distributes a signal which

has been received, as the actual expression 'point-to-point' proves, across one or more frontiers;

(2) it conflicts with the new Article 4 (1) (d) of the Kabelregeling which, by way of derogation from Article 4 (1) (c), authorizes a European programme to be broadcast from and to the Netherlands by telecommunication satellite and hence acknowledges that that programme is intrinsically, that is to say apart from the intervention of the distributor, transfrontier in nature;

(3) it denies to broadcasts transmitted via telecommunication satellite — and hence to the type of signal which is now prevalent in a large part of Europe — that freedom of movement which, albeit subject to limitations due to the absence of Community harmonization, the Court has guaranteed to television programmes in general since 1974.

7. What is the solution then? I consider that there is no other solution than to return to the question put by the Gerechtshof and consider as a preliminary step whether for the purposes of Articles 59 and 60 of the Treaty a television signal is a single activity or whether it can be broken down into two or more independent supplies of services. Let us first clear the ground of a number of possible misunderstandings. As I pointed out in Section 3 above, Case 52/79 was concerned with television programmes distributed by cable to viewers living outside the 'natural area' of the broadcaster. However, since the programmes concerned had originally been broadcast over the air, they could have been received by the public at large; and it was for that very reason that the Court considered it right to treat cable television in the same way as normal television transmission. In contrast, in this case programmes are transmitted via telecommunication satellite and are not capable of being received over the air; as a result, it is not possible blindly to apply *Debauve*'s case.

Secondly, as regards the criterion based on the 'relevant elements', it is true, as the French Government states, that the Court left it to the national court to ascertain the facts relating to the place and way in which the service is carried out. However, determining the elements of which a service consists or, to be more precise, when that concept applies to an activity which is a composite one in point of its structure and participants is quite another problem. It may be, for instance, that a given activity will be deemed to be a single one even though it is made up of several overlapping identical (or different) services and it can be carried out in the territory of several States: the shipment of a newspaper from its printers in London to news-stands in Amsterdam may be viewed as a single service even though at least three carriers in two different Member States collaborate in order to carry it out. Yet it is equally possible to regard that activity as an aggregation of services which are similar but, precisely because they are carried out by several persons and in several places, mutually independent.

Now, the task of choosing between the first and second of those two approaches — and between the substantially divergent legal consequences of those approaches — is bound to fall to the Court. In the case of the example which I have just given, the Court would probably hold that the service by means of which the London newspaper arrives in Amsterdam is an indivisible one (see moreover Article 34 of the Geneva Convention of 15 May 1956 on the contract for the international carriage of goods by road (CMR)). What is the position in the case of television broadcasting?

There are two definitions of broadcasting, both set out in instruments concerning copyright: the International Telecommunications Union Convention (1947), which defines it in the following terms 'transmissions to be received directly by the general public' and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), which defines it as 'transmission by wireless means for public reception'. However, as regards point-to-point broadcasts — which are not received by the public but by cable operators — those definitions appear inadequate. Indeed, it is not by chance that academics considering intellectual property rights are exercised by the question as to whether the author has to be paid by the station in which the signal originates or by the network which distributes that signal to viewers (see Cohen Jehoram, 'Legal issues of satellite television in Europe', in *Revue internationale du droit d'auteur*, 1984, p. 146 *et seq.*). On top of this, since international copyright law is governed by the principle of territoriality, its various categories cannot be applied directly in the field with which we are concerned here.

In contrast, paragraphs 6 and 8 of the Court's judgment in the *Sacchi* case afford a sound starting point for the research which I intend to carry out. There the Court stated that 'a television signal must, by reason of its nature, be regarded as a provision of services' and hence 'the transmission of television signals . . . comes, as such, within the rules of the Treaty'. The statement seems trivial; in reality, analysed, so to speak, in slow motion, it proves to be full of significance.

The signal is by *reason of its nature* a provision of services. Very good, but what are those services and, above all, what is the nature of the provision? We shall start by observing that intrinsically the content, or perhaps better the essence, of the phenomenon is the contemporaneous remote broadcast of pictures and sounds, which, moreover, cannot be broken down into segments, each with a value proportional to the whole. Consequently, from that point of view the signal is a single and indivisible supply of services. However, a service is not pure essence; as the word suggests it must serve, that is to say it must have utility. Now, the signal is useful in so far as it is propagated; and transmission, the process by which it is propagated, is bound to partake of the singleness and the indivisibility which intrinsically characterize the signal. Furthermore, on this view the technical means which make that process possible (radio waves yesterday, telecommunication satellites linked to cable operators today, direct broadcasting satellites tomorrow) and the number of persons involved have no importance. All that matters is that the process should be fully implemented, that is to say that the signal should deploy all its utility by reaching its natural addressees: television viewers. Hence, broadcasting and transmission are followed by reception; that does not change the terms of the problem except to add to singleness and indivisibility the characteristic of being transnational where the viewers reside in a State other than that in which the signal was broadcast.

The conclusion which emerges from these observations comes close to those reached by the Commission and the learned articles. However, it avoids those aspects which the Netherlands Government has rightly criticized: that is to say the assumption that the programme is deliberately aimed at an audience on the other side of the frontier

and the conception of the role played by the distributor as an 'ancillary' component of the point-to-point transmission. I could therefore stop at this point. However, I believe that the problem deserves a solution which is both more Community-minded and capable of taking into account not only the present but also the future, a future, as I have already said, in which direct broadcasting satellites will be the dominant or even the sole means of transmission.

8. In order for Articles 59 and 60 of the EEC Treaty to apply, the supply of services must be effected across borders and 'normally' provided for remuneration. Consequently, the second condition is not categoric. Indeed as far as television signals are concerned the Court made no mention of it in its decisions. For instance, in the judgment in the *Debauve* case, the Court drew the national court's attention to the fact that the supply of the service should not take place solely within one single State, but did not ask it to check whether the service gave rise to payment on the part of the recipient. However, in making these observations it is not my intention to deny that the participants in the broadcasting, transmission and reception of a signal — the broadcaster, the advertiser, the owner of the satellite, the cable operator, the viewer — pursue an economic interest or, in other words, that the supply of the service has an economic aspect. I simply wish to point out that, precisely because manifold interests are at stake, the supply of services does not cease to be economic in nature where, as in this case, no transfer of money takes place between the broadcaster and the viewer. Indeed, in my opinion, the supply of the service may still be economic in nature even where there is no remuneration at all (as in the case of charitable programmes in which well-known sportsmen or actors take part; however, for the opposite view see Schwartz, op. cit, p. 394 and Advocate General Warner's Opinion in the *Debauve* case).

The requirement of transnationality demands more complex discussion. As I pointed out in Section 3 above, following the reference made in the *Debauve* case to the requirement that the activity should be carried out at least in part outside a single country, the Court formulated a concept of the supply of services which is no longer rigidly dependent on the crossing of frontiers but is geared to the intrinsic content of the service as an activity which is useful also for citizens of Member States other than the Member State in which the supplier of the service resides. I am thinking of course of the judgment of 31 January 1984 in Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377). It is stated in that judgment that in order to enable services to be provided 'the person providing the service may go to the Member State where the person for whom it is provided is established or else the latter may go to the State in which the person providing the service is established. Whilst the former case is expressly mentioned [in Articles 59 and 60] . . . the latter case is the necessary corollary thereof, which fulfils the objective of liberalizing *all gainful activity* not covered by the free movement of goods, persons and capital' (paragraph 10, my emphasis).

It appears to me that in so deciding the Court recognized that, in order for Article 59 *et seq.* to apply, the provision of services need not necessarily cross a frontier and may well be carried out in all its elements within the frontiers of a single Member State. In my Opinion in that case I argued with particular regard to tourism, medical treatment and education that the provisions on freedom of movement are addressed not only to providers of services but also to users. Now, the aim which the Court was pursuing in that case — that of liberalizing

the movements of *all* activities falling outside the sphere of Articles 30, 48 and 67 — is bound also to affect television signals. Compared with the activities which I have just mentioned, television is different only in so far as neither the provider or the user is compelled to move. It is different in that regard only because, owing to its indivisible nature and its ability to be enjoyed at increasing distances from the State in which the programmes are broadcast, it is a provision of services which is neither domestic or transfrontier but — and this is the definitive outcome of my research — *a provision of services which is without frontiers.*

That which for the Commission (I refer to the Green Paper of 23 May 1984) is in the nature of a draft or a slogan is therefore, in my opinion, a fact already today which is clear for everyone to see. The consequences are obvious. In order to enjoy the protection of Community law, television signals must fulfil one requirement only: they must have been broadcast in a Member State of the Community in accordance with its rules. It is not possible to make them subject to additional conditions. In the same way that a newspaper or a magazine produced in France (for instance, *Le Monde* or *Le Canard enchaîné*) or an Italian worker (for instance, the trade unionist Rutili) can move freely throughout the territory of the Community, a television signal originating in the United Kingdom (for instance, the ITN News on Super Channel) must be entitled to circulate without hindrance between London and Las Palmas or Iraklion, whatever the means of transport selected by its producer.

Moreover, the proposal for a directive which I mentioned in Section 3 also takes this approach, since its main objective is to guarantee the free movement within the Community of all broadcasts which comply with the law of the Member State in which they originate. It may be objected in some quarters that Article 21 distinguishes between 'internal broadcasts' and 'cross-frontier broadcasts'; but that circumstance — although it may be open to criticism on account of its potential capacity to cause confusion — is of little importance if it is true that the definitions relate substantially to internal broadcasts only and are relevant solely with regard to the rules on advertising and the protection of copyright (see in any event Amendments Nos 63 and 64 moved by the Legal Affairs Committee of the European Parliament, Report of Mr Barzanti, MEP, 8 December 1987, session documents 1987-1988, No A2-0246/87).

A final consideration. I consider that the finding which I have reached is not only consistent with the technical and legal reality of television broadcasts, it is also more consistent than any other with the philosophy on which the Community edifice and, above all, recognition of the 'four great freedoms' are based. As far as this point is concerned I would cite Martin Seidel, the General Rapporteur to the Congress of the Fédération internationale pour le droit européen (FIDE) held in 1984. He gave the following answer to proponents of the view that Article 56 of the Treaty authorizes the Member States to prohibit the distribution of foreign programmes if they fear that their proliferation might prejudice the fulfilment of the tasks consigned to national broadcasting: 'the access of Community citizens to cultural programmes of other Member States is not restricted . . . to cases in which citizens make use of their . . . freedom of movement and go to the Member State whose broadcasting organization makes a cultural service available. It corresponds to the aims of the Community that national cultural features available, no matter by

what organization they are supplied, should be accessible to everyone in the whole Community. If interpenetration and integration of national cultures by means of trade in goods (books, periodicals, films, fashions), tourism and freedom of movement for creative artists . . . do not arouse concern the position cannot be any different for broadcasting as a cultural medium' (FIDE, *Europe and the media*, The Hague, 1984, p. 20).

I must therefore answer the first question as follows: for the purposes of Articles 59 and 60 of the Treaty, a programme broadcast in a Member State by the authorized television organization or organizations must be regarded as a single provision of services even if that programme is supplied to viewers in another Member State by satellite or is distributed by cable.

9. In questions (b) to (e) the Gerechtshof wishes to establish, firstly, whether where there is a monopoly such as that administered by the STER the prohibitions on advertising and subtitling laid down by the Kabelregeling as regards foreign television programmes are compatible with the principle of non-discrimination; and, secondly, if those prohibitions are held to be compatible with that principle, must they be regarded as proportional to the objective to be achieved or, in any event, justified on grounds relating to the public interest, such as the protection of domestic programmes against unfair foreign competition and the safeguarding of the non-commercial and pluralistic nature of the television system in the Netherlands.

Obviously the Netherlands Government proposes that those questions should be answered in the affirmative. Since by law *no* domestic or foreign organization may advertise except via the STER, the relevant prohibition is applied indiscriminately and, if anything, offsets a situation which is decidedly unfavourable to the Netherlands' organizations. As a rule, the foreign broadcasters whose programmes are distributed in the Netherlands via telecommunication satellites are private undertakings and, far from having to fulfil requirements of a public nature, seek to make a profit. In contrast, in order to safeguard the non-commercial and pluralistic character of the Netherlands system, the Omgroeporganisaties and groups assimilated thereto may not receive commercial revenue but are financed by the State, which to that end draws *inter alia* on the proceeds of the STER. Consequently, if the contested prohibition did not exist, foreign broadcasters would be able to broadcast all the advertising they wanted and freely dispose of the revenue therefrom while national organizations would continue to operate in a non-commercial environment subject to rigid controls.

Neither can it be said that it is the STER's monopoly which introduces discriminatory factors; whilst it is true that *all* — and hence even foreign broadcasters — must apply to the STER in order to broadcast advertising over the air, it cannot be seen how the application of that rule to 'programmes supplied from abroad by satellite to Netherlands cable operators for distribution . . . via national networks' can give rise to unfair treatment. Neither is the rule on subtitling discriminatory. Rather, the authorization of the competent minister is intended to prevent evasion of the prohibition on advertising; in other words by laying down that provision the legislature took account of the possibility that advertising not aimed at the public in the

Netherlands might be made comprehensible to it and end up by being aimed at it as a result of its being inserted in programmes subtitled in Dutch.

Having dismissed the charge of discrimination, the Netherlands Government goes on to argue, the prohibitions laid down in the Kabelregeling have no need to be scrutinized further. However, *ad abundantiam* it can be stressed that the measure was designed in order to guarantee Dutch citizens broadcasting which is accessible to all the elements of Dutch society and that its provisions contain nothing excessive when measured against the importance of that public interest; indeed, in the judgment of 11 July 1985 (in Joined Cases 60 and 61/84 *Cinéthèque SA and Others* v *Fédération nationale des cinémas français* [1985] ECR 2605), the Court held that cultural-policy objectives pursued by the Member States constituted appropriate justification for restrictive measures, even if those measures were coupled with economic and financial procedures. The Netherlands Government adds that the Kabelregeling is anything but designed to impede competition; on the contrary, competition would be distorted if Dutch distributors were able to broadcast programmes from abroad without being subject to the limitations imposed on national broadcasters with regard to advertising.

I have already discussed the other interveners' arguments in Section 5. Whilst the French Government associates itself with the arguments put forward by the Netherlands Government, the advertisers and the Commission consider that the prohibitions in question are discriminatory, out of proportion with the interests which they claim to protect and, in any event, unjustifiable on the basis of those interests. The Government of the Federal Republic of Germany takes up what might be called an intermediate position. To it the provisions of the Kabelregeling seem discriminatory; however, in general terms it argues that restrictions designed to ensure that a variety of opinions are represented in the world of television must be regarded as being protected by the public-policy provision or in any event, as having been lawfully adopted in the public interest. The Federal Republic of Germany also observes that no Member State leaves the organization of its television system exposed to the free play of market forces.

10. Let us begin by examining questions (b) and (c). According to the established case-law of the Court, Articles 59 and 60 of the Treaty are directly applicable and prohibit any sort of discrimination. Therefore, they cover not only overt discrimination based on the nationality of the person providing the service in question and on the place where the provider of the service is established but also covert discrimination which is based on criteria which appear to be neutral (judgment of 17 December 1981 in Case 279/80 *Webb* [1981] ECR 3305, paragraph 14; judgment of 3 February 1982 in Joined Cases 62 and 63/81 *Seco* v *Evi* [1982] ECR 223, paragraph 8; judgment of 4 December 1986 in Case 205/84 *Commission* v *Federal Republic of Germany* [1986] ECR 3755, paragraph 25).

It appears to me that the legislation at issue constitutes a paradigm of covert discrimination. According to Article 4 (1) (c) of the Kabelregeling the prohibitions on 'advertisements intended especially for the public in the Netherlands' and 'subtitles in Dutch' apply to 'programmes supplied from abroad' by telecommunication satellite which viewers in the Netherlands can receive only by cable; however, no such restrictions are provided for or, in any event, imposed with regard to the programmes of the domestic television organizations. Admittedly, the latter are under a duty not to broadcast

advertisements on their own initiative, but since it is equally true that broadcasts of the two national networks contain advertisements, that requirement and the fact that the broadcasting of advertisements is entrusted to a public body with a monopoly appear clearly irrelevant.

They are irrelevant, of course, for the purposes of the freedom to supply services, and it is not difficult to appreciate why. The prohibitions in question do not concern the activities of the various broadcasters or the ways in which they are financed, but are designed to keep off Dutch television screens a substantial part of the audiovisual material which can be brought there by new technology. In other words, by prohibiting the reception of advertisements intended for consumers in the Netherlands or translated for them by means of subtitles, the provisions of the Kabelregeling *also* prevent them from watching and listening to programmes provided from abroad by satellite. Moreover, the Netherlands legislature itself admits this; according to the explanatory memorandum appended to the Kabelregeling 'generally, [the prohibitions set out in Article 4 seek to avoid] the setting-up by indirect means in the Netherlands of a *commercial cable television programme* ... [such as to constitute] unfair competition to ... *national broadcasting*' (section 2, my emphasis).

Although carefully concealed there is discrimination here. However, as we have seen, this does not yet signify that Article 4 of the Kabelregeling conflicts with Community law. As a result of the reference made in Article 66 of the Treaty, 'foreign nationals' may be subjected to 'special treatment' on grounds of public policy (Article 56 (1)); and there is no doubt that that general clause is in principle broad enough to cover safeguarding a pluralistic, non-commercial television system through the financing of broadcasting organizations. Does this mean, therefore, that the Federal Republic of Germany has taken the correct view? I do not think so. I do not take that view because Article 56 refers to discrimination *vis-à-vis* foreign nationals whilst in this case it is a service which is subjected to different rules. Admittedly, the Court has not yet established (and it could have in the *Debauve* case) whether the provision can be read as referring to the service rather than to the provider of the service; but the Commission and the best academic authority (Shwartz, op. cit., p. 398; Tizzano, Regolamentazione radiotelevisiva italiana e diritto comunitario, in *Foro italiano*, 1986, V, p. 464, No 8) favour that interpretation, which, although straining somewhat the wording of the provision, is without doubt more consonant with the *ratio legis* and more consistent with the interests at stake.

I have another reason for rejecting the German Government's argument and it lies precisely in the extreme strictness with which the Court has come to interpret the concept of public policy after a long and difficult process of development. I refer in particular to the judgment in *Bouchereau*'s case (judgment of 27 October 1977 in Case 30/77, [1977] ECR 1999, paragraph 35) and the case of *Adoui and Cornuaille* (judgment of 18 May 1982 in Joined Cases 115 and 116/81 [1982] ECR 1665, paragraph 9). In the judgment in *Bouchereau*'s case the Court stated that that public policy could be invoked in order to justify restrictions on the free movement of persons only where there was 'a genuine and sufficiently serious threat ... affecting one of the fundamental interests of society'. In the judgment in the *Adoui and Cornuaille* case the Court added that conduct on the part of a Community national in the territory of another Member State may not be considered as being of a sufficiently

serious nature to justify restrictions on his right to reside there where that Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures of comparable effect.

In the light of that dual criterion, it does not seem to me to be necessary to ascertain and subject to critical analysis the political and social values which the contested provision claims to protect on public-policy grounds. I have already repeatedly pointed out that Dutch television is not free of advertising. On the contrary, the programmes broadcast by the national networks are subject to frequent commercial breaks consisting of advertisements broadcast through the STER, although there is no interruption of programmes by advertisements; and it certainly cannot be said that Dutch programmes lack subtitles because they are prohibited by a specific provision. To employ the terminology of the judgment in the *Adoui and Cornuaille* case, the advertising contained in transmissions made by satellite or cable is therefore 'repressed' by means of measures which the Netherlands does not adopt with respect to advertisements of domestic origin. It is clear, in fact, that the constraints laid down by the Omroepwet — although they are many in number and, it is correct to say, strict — are not as radical as the prohibitions laid down in the Kabelregeling.

But it will be objected that to say this is to overlook that, in order to ensure that the television system achieves its desired pluralism, the Omroepwet itself provides for the public funding of authorized broadcasting organizations, and that the relevant resources are drawn from a source of income to which foreign broadcasters and cable operators do not contribute. That is correct. However, that argument in turn overlooks the fact that, as we have seen in Section 2, those resources — and hence the proceeds obtained by the STER from the sale of advertising time — subsidize the broadcasting organizations to the extent of 25 to 30%: hence the subsidy is too small to appear to be genuinely indispensable in order to protect their independence.

To return to the Kabelregeling, it seems to me therefore reasonable to conclude that the link between its restrictions and safeguarding pluralism in broadcasting is extremely thin or, in the course of disappearing. No matter what the Netherlands Government says, we now know definitely that the restrictions are designed to a very considerable extent to protect domestic programmes from competition from 'Dutch' programmes coming from abroad; and it is that eminently economic objective which, in the final analysis, precludes the application of the derogation provided for in Article 56. As the judgment in the *Sacchi* case states, the Member States may protect their television transmissions from foreign competition *inter alia* by setting up a monopoly but, in every case and only, 'for considerations . . . of a *non-economic* nature' (paragraph 14, my emphasis).

11. Since questions (d) and (e) assume that the prohibitions set out in the Kabelregeling are not discriminatory — which in my view is untenable — I shall consider them solely in order to comply with the practice that the Advocate General considers all the aspects of the case with which he is dealing. The Gerechtshof wishes to know whether national rules limiting advertising must be proportional to the objectives of the relevant legislation and justified on grounds related to the public interest. The latter coincide in part with those which the Government of the Federal Republic of Germany considers from the different point of view of public policy as justifying the restrictions in question: safeguarding the pluralistic and

non-commercial nature of the television system and protecting domestic programmes against unfair competition from foreign broadcasters.

The answer to the questions which have just been summarized assumes two types of premiss. The first is general and can be formulated as follows: although the applicability of Article 59 *et seq.* of the Treaty does not depend on the harmonization of national rules governing the subject-matter in question, the absence of uniform rules and the particular nature of certain activities may cause a law which subjects a provider of services to restrictions to be be regarded as being compatible with Community law. However, the derogation is possible *only* if the national provisions are applied 'to all persons or undertakings' operating within the territory of the State in which the service is provided and if they are justified by the 'general good'; the latter interest, in turn, must not already be 'safeguarded by the provisions to which the provider of a service is subject in the Member State of his establishment' and must not be capable of being protected by means of 'less restrictive rules' (see most recently the judgment of 4 December 1986 in Case 205/84, cited above, paragraph 27, and the references made therein to the earlier case-law).

The second premiss concerns those particular services, television programmes. That they are free to move within the area of the Community was acknowledged as early as 1974, and I have argued in Section 8 that that right is unaffected by the means used to transmit them. However, it is stated in the judgment in the *Debauve* case that 'the television broadcasting of advertisements is subject to widely divergent systems of law in the various Member States, passing from almost total prohibition . . . to systems affording broad . . . freedom. In the absence of any approximation of national laws . . . [it] falls within the residual power of each Member State to regulate, restrict or even totally prohibit television advertising *on its territory* on grounds of *general interest.* The position is not altered by the fact that such restrictions or prohibitions extend to television advertising *originating in other Member States* in so far as they are actually applied on the same terms to national television organizations' (paragraphs 13 and 15, my emphasis).

The *Debauve* case goes back to 1980. Has there been a change in the situation described in the first part of the passage quoted? To some extent, yes; and not only because of the technical advances which have made it possible for foreign television programmes to be watched in almost all the countries of the Community. In the last seven years, for example, a number of systems which were once based on a rigid public monopoly have opened themselves up to competition from private companies which, in turn, (as in the very well-known case of the French television channel 'La 5') do not preclude shareholdings on the part of undertakings established in other Member States. Furthermore, in the advertising sector those and other systems have adopted codes of conduct or will do so in coming years on the basis of Recommendation No R(84)3 adopted on 23 February 1984 by the Committee of Ministers of the Council of Europe. But the fact remains that those processes of deregulation and self-regulation are still marginal (the only national markets to be substantially affected are the Italian and, for some time now, the French). Bearing in mind that it was only last year that a proposal for a directive was promised, it will presumably be a very long

time before we have common rules on television.

In other words, the observations which the Court made in paragraph 13 of the *Debauve* case are still valid in many respects. Accordingly, it seems clear to me that the guidelines set out in paragraph 15 and in the judgment of 4 December 1986 are still applicable. National legislation which governs domestic television advertising and, in that connection, submits the broadcasting of commercial advertising from other Member States to specific conditions must therefore be regarded as being compatible with Articles 59 and 60 of the Treaty if (a) it sets out to protect a general (or public) interest; (b) it treats equally all services in the sector, irrespective of their origin or nationality and of the place of establishment of the relevant providers of the service; and (c) it pursues its objective by means of rules which are commensurate therewith. Now, if the 'general interest' is construed as meaning the nexus of ethical and political principles on which a national community is based, it is impossible not to hold that the protection of the non-commercial and pluralistic nature of a television system by means of measures applied in a non-discriminatory, but restrictive, way falls within that concept; or, rather, it falls within that concept *in principle*, as in principle (apart from the requirement that it should be applied indiscriminately) it is covered by the related concept of public policy (*supra*, Section 10).

What is the reason for adding that qualification? Since its scope is practically unbounded, the clause relating to the general interest lends itself to all kinds of abuse. As can be seen from the judgments which I have mentioned, the Court therefore tends to make very cautious use of it and, in particular, to allow it to operate as a derogation only when the difference between the rules to which a given service is subject in the several Member States is so great as to make it appear premature — and hence counterproductive for the general interest of the Community — to have absolute freedom of movement. But if that is correct, I consider that there is a reliable criterion which can be used where there are doubts as to whether reliance made on the general interest as justifying certain restrictive rules is legitimate; that is to say, to check whether the rules are based at least in part on economic considerations. If they are they certainly conflict with the Community's economic order, of which the free movement of services is a cornerstone (see paragraph 14 of the judgment in the *Sacchi* case, which is quoted at the end of the previous paragraph in a not dissimilar connection).

These comments fit the case of the Kabelregeling perfectly. Admittedly its objectives include, albeit in a very subordinate position, safeguarding a pluralistic television system; but it is also true that, precisely because they are targeted at competition from 'Dutch' programmes made abroad, the prohibitions set out in Article 4 of the Kabelregeling are based on national public interests of an economic nature and, as such, are incompatible with the rules of the Treaty. The situation is unaffected by the fact that that competition is, as the Netherlands Government maintains, 'unfair'. It is doubtless unfair in so far as the advertisements contained in those programmes do not comply with the rules which apply to domestic advertisements. However, it is not permissible to react against that danger by issuing prohibitions; the only acceptable remedies are administrative supervision and the stipulation of effective pecuniary sanctions.

12. The last question seeks to ascertain whether the principle of proportionality and the fundamental rights recognized by the Community legal order (in particular freedom of expression and the right to receive information) are directly binding on the Member States. With regard to the first point I refer back to what I have already stated; Member States which intend to restrict the exercise of certain activities on grounds of public interest must refrain from taking measures which are not strictly necessary in order to protect that interest (judgment of 26 November 1975 in Case 39/75 *Coenen* v *Sociaal-Economische Raad* [1975] ECR 1547, paragraphs 11 and 12, and judgment of 4 December 1986, cited above, paragraph 29).

Different considerations apply as regards fundamental rights. With reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms or the values common to the constitutions of the various Member States, the Court ensures 'observance of . . . [such] rights in the field of Community law' but has no power of review as regards the compatibility therewith of 'legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator' (judgment of 11 July 1985, cited above, paragraph 26, and *Tizzano*, op. cit., p. 468 *et seq.*). In this regard, as a well-known German jurist has stated, one can only trust that there will be a 'dialectical development' by which the legal orders of the Member States will be influenced by the Court's case-law, since Community law is directly applicable in the domestic sphere it is unlikely that national courts will fall behind the 'standards' established by the Court of Justice when interpreting domestic laws in the light of a fundamental freedom (Frowein, 'Fundamental human rights as a vehicle of legal integration in Europe', in Cappelletti-Seccombe-Weiler, *Integration through law, Europe and the American federal experience*, Vol I, Book 3, Berlin-New York, 1986, p. 302).

13. In view of the foregoing considerations I propose that the Court should answer the questions referred for a preliminary ruling by the Gerechtshof, The Hague, by order of 30 October 1985 in the proceedings pending before it between the Bond van Adverteerders and Others and the State of the Netherlands in the following terms:

'For the purposes of Articles 59 and 60 of the Treaty, broadcasts of television programmes in one Member State by the authorized television organization or organizations must be regarded as being, by reason of their nature, a single and indivisible provision of services even if the broadcasts are received by viewers in another Member State via a cable linked to a telecommunication satellite;

It is contrary to the Treaty provisions on freedom to supply services for the legislation of a Member State to make the distribution of programmes supplied from abroad as described above subject to the requirements that they should not contain advertising or subtitles in the language of that State when such conditions are not laid down, or are not laid down with equal effectiveness, with regard to similar domestic programmes;

The fact that advertising contained in domestic programmes can be broadcast solely subject to the supervision of a public organization with a legal monopoly over advertising time and that the revenue of that organization goes almost entirely to finance the activities of domestic broadcasting organizations and the press does not change or attenuate the incompatibility of that legislation with the Treaty provisions relating to freedom to provide services.'