OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 15 June 2000 *

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* Original language: English.

I — Introduction

1. Both of the present cases relate to the validity of European Parliament and Council Directive 98/43/EC of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [1] (hereinafter 'the Directive' or 'the Advertising Directive'). In the first case (hereinafter 'Case C-376/98' or '*Germany*'), Germany has brought proceedings for the annulment of the Advertising Directive pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC). In the second (hereinafter 'Case C-74/99' or '*Imperial Tobacco*'), a number of companies which manufacture tobacco products initiated proceedings in the United Kingdom, before the High Court of Justice, Queen's Bench Division (Crown Office) (hereinafter 'the national court'). They apply for judicial review of, *inter alia*, the intention and/or obligation of the United Kingdom Government to give effect to the requirements of the Directive. The national court considered that the applicants had raised arguable grounds for a ruling of invalidity and decided to refer a question to the Court of Justice.

2. As the national court observed, there is a significant (though not complete) overlap between the question referred by it and the grounds for the application in *Germany*. Its question posits concisely the grounds

1 — OJ 1998 L 213, p. 9.

invoked by the applicants: 'Is Council Directive 98/43 invalid, in whole or in part, by reason of:

(a) the inadequacy of Articles 57(2), 66 and 100A as a legal basis;

(b) infringement of the fundamental right to freedom of expression;

(c) infringement of the principle of proportionality;

(d) infringement of the principle of subsidiarity;

(e) infringement of the duty to give reasons;

(f) infringement of Article 222 [of the] EC [Treaty] and/or the fundamental right to property?'

An additional contention in *Germany* is that the Advertising Directive is contrary to Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

3. The issue of competence or legal basis is the most important issue in these cases. The challenge to the validity of the Directive for failure to respect the principles of proportionality or subsidiarity, the requirement to give reasons, or fundamental rights should be treated in the alternative, that is, only if the Court concludes that the proclaimed legal basis was the appropriate one for the Directive.

4. The legal basis invoked by the Advertising Directive relates to the internal market. The Community's internal-market competence is not limited, a priori, by any reserved domain of Member State power. It is a horizontal competence, whose exercise displaces national regulatory competence in the field addressed. Judicial review of the exercise of such a competence is a delicate and complex matter. On the one hand, unduly restrained judicial review might permit the Community institutions to enjoy, in effect, general or unlimited legislative power, contrary to the principle that the Community only enjoys those limited competences, however extensive, which have been conferred on it by the Treaty with a view to the attainment of specified objectives. This could permit the Community to encroach impermissibly on the powers of the Member States. On the other hand, the Court cannot, in principle, restrict the legitimate performance by the Community legislator of its task of remov-

ing barriers and distortions to trade in goods and services. It is the task of the Court, as the repository of the trust and confidence of the Community institutions, the Member States and the citizens of the Union, to perform this difficult function of upholding the constitutional division of powers between the Community and the Member States on the basis of objective criteria.

II — Legislative context and antecedents

(i) *Relevant Treaty provisions*

5. The dispute about the legal basis of the Advertising Directive turns on a limited number of Treaty provisions. They principally concern the internal market and the freedom to provide services.

6. Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), read with Article 66 of the EC Treaty (now Article 55 EC), provides that the Council, acting in accordance with the procedure referred to in Article 189B of the EC Treaty (now, after amendment, Article 251 EC, commonly known as co-decision), shall 'issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning taking-up and pursuit of activities as self-employed persons', including the freedom to provide services. [2]

7. Article 100A of the EC Treaty is now, after amendment, Article 95 EC. By way of derogation from Article 100 of the EC Treaty (now Article 94 EC) and save where otherwise provided in the Treaty, Article 100A(1) states that the Council, acting in accordance with the same procedure and after consulting the Economic and Social Committee, for the purpose of the achievement of the objectives set out in Article 7A of the EC Treaty (now, after amendment, Article 14 EC), shall 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

8. Article 100A(3) of the Treaty states that the Commission, 'in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection'. [3] Article 100A(4) permits a Member State, after the adoption of harmonisation measures by the Council acting by a qualified majority, to apply national

2 — In this Opinion, references to Article 57(2) of the Treaty should be understood as including reference to its extension to the freedom to provide services by virtue of Article 66 of the Treaty unless the contrary intention is apparent.

3 — The amended Article 95(3) EC adds: 'Within their respective powers, the European Parliament and the Council shall also seek to achieve this objective'. In my analysis, I treat this obligation as having been implicit from the outset in Article 100A(3) of the EC Treaty, despite its more limited reference to the Commission's proposals.

provisions on grounds, in particular, of major needs referred to in Article 36 of the EC Treaty (now, after amendment, Article 30 EC), subject to confirmation by the Commission and a special accelerated procedure for bringing any complaint before the Court.

9. The applicants have laid special emphasis on Article 129 of the EC Treaty (now, after amendment, Article 152 EC). Article 129(1) states that '[t]he Community shall contribute towards ensuring a high level of human health protection by encouraging cooperation between the Member States and, if necessary, lending support to their action' and that '[h]ealth protection requirements shall form a constituent part of the Community's other policies'. Article 129(4) provides for the Council to contribute to the achievement of the objectives of that article, acting in accordance with the co-decision procedure and after consulting the Economic and Social Committee and the Committee of the Regions, by adopting incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council may also adopt recommendations.

(ii) *Other legislation*

10. It is useful to advert to certain other relevant, pre-existing legislation in order to assess the lawfulness of the Advertising Directive. Before its enactment, the Community had already adopted a number of legislative provisions regarding the marketing of tobacco products on the basis either of Article 100A of the Treaty or of Article 57(2) of the Treaty read with Article 66. The most important is Article 13 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. [4] It is enough for present purposes to recall that it enjoins the prohibition of all forms of television advertising and teleshopping for cigarettes and other tobacco products. Article 2a(1) of Directive 89/552/EEC provides that, in general, 'Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive'.

11. Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products and the prohibition of the marketing of certain types of tobacco for oral use [5] requires all cigarette packets to carry indications of the tar and nicotine yields of the contents [6] and

4 — OJ 1989 L 298, p. 23, as amended by European Parliament and Council Directive 97/36/EC of 30 June 1997, OJ 1997 L 202, p. 60. Both measures were adopted on the basis of Articles 57(2) and 66 of the Treaty.

5 — OJ 1989 L 359, p. 1, as amended by Council Directive 92/41/EEC of 15 May 1992, OJ 1992 L 158, p. 30. Both measures were adopted on the basis of Article 100A of the Treaty.

6 — Article 3 of Directive 89/622/EEC.

both a general and a specific health warning.[7] The sale of products which comply may not be restricted by Member States for reasons of labelling.[8] Similarly, Member States may not restrict the sale of products which comply with Council Directive 90/239/EEC of 17 May 1990 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the maximum tar yield of cigarettes[9] 'for considerations of limitation of the tar yield of cigarettes'.[10] Both Directive 89/622/EEC and Directive 90/239/EEC were adopted by the Council at a meeting which was composed of Ministers for Health.

12. The Community has also legislated regarding other aspects of advertising. For example, Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading and comparative advertising[11] establishes minimum and objective criteria for determining whether advertising is misleading[12] and specifies circumstances in which comparative advertising is to be permitted.[13] The second recital in the preamble to the amending Directive 97/55/EC notes that 'advertising is a very important means of creating genuine outlets for all goods and services throughout the Community'.

13. Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use[14] prescribes a number of conditions for advertising of such products. For example, in media destined for the general public, it forbids the use of certain material or references to certain therapeutic indications and prohibits the advertisement of certain products.

(iii) *Legislative antecedents of the Advertising Directive*

14. The possibility of regulating tobacco advertising at Community level was first raised by the Commission in 1984 in a communication to the European Council regarding cooperation on health problems. The first 'Europe against Cancer' programme was adopted by a resolution of 7 July 1986 of the Council and of the representatives of the governments of the Member States meeting within the Council[15] and called for the examination of ways of reducing tobacco use, such as Community action in respect of advertising and sponsorship, in the framework of cooperation in health matters. The Commission responded with a Plan of Action

7 — Article 4 of Directive 89/622/EEC.

8 — Article 8(1) of Directive 89/622/EEC.

9 — OJ 1990 L 137, p. 36. This measure was adopted on the basis of Article 100A of the Treaty.

10 — Article 7(1) of Directive 90/239/EEC.

11 — OJ 1984 L 250, p. 17, as amended by European Parliament and Council Directive 97/55/EC of 6 October 1997, OJ 1997 L 290, p. 18. Directive 84/450/EEC was adopted on the basis of Article 100 of the Treaty. The amending directive was adopted on the basis of Article 100A of the Treaty.

12 — Articles 2(2) and 3 of Directive 84/450/EEC; see also the seventh recital in the preamble.

13 — Article 3a of Directive 84/450/EEC.

14 — OJ 1992 L 113, p. 13. This measure was adopted on the basis of Article 100A of the Treaty.

15 — OJ 1986 C 184, p. 19.

for the 1987–89 period. The Commission first made a proposal, based on Article 100A of the Treaty, for a Council Directive concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising of tobacco products in the press and by means of bills and posters [16] (hereinafter 'the first proposed Directive').

15. The first proposed Directive recited that advertising in the press and by means of bills and posters transcended the borders of the Member States and that the differences between national rules regarding tobacco advertising were likely to constitute barriers to trade and to distort competition. The necessary harmonised rules should take due account of public health protection, in particular in relation to young people. The recitals also referred to the 'Europe against Cancer' programme. The first proposed Directive would have required advertisements for cigarettes and other tobacco products, in the press and by means of bills and posters, to carry health warnings. [17] It would also have restricted the content of advertisements to information about the product and a presentation of its packaging, while prohibiting references to a trade mark, emblem, symbol or other distinctive feature mainly used in connection with tobacco products in advertising which did not directly mention a tobacco product. [18] All advertising for tobacco products was to be prohibited in publications mainly intended for people under the age of 18. [19] Article 5 of the first proposed Directive would have prevented the Member States from citing tobacco advertising as the reason for prohibiting or restricting the sale of publications or the display of bills which complied with the Directive.

16. Pursuant to the cooperation procedure, the European Parliament approved the first proposed Directive on 14 March 1990, subject to amendments aimed at a total ban on tobacco advertising on grounds of public health protection. [20] The Commission viewed a complete ban as premature in the light of the current state of national legislation, but amended its proposal to make clear that it would only harmonise the regulations of those Member States which permitted tobacco advertising. [21] It also added three new recitals drawing attention to the health protection aims of the Member States and to the vulnerability of young people to advertising.

17. This amended version of the first proposed Directive was discussed in Coreper under the heading 'Fight against Cancer' but agreement could not be reached either there or in the Council Health Working Group. The Commission

16 — COM(89) 163 final, submitted on 7 April 1989, OJ 1989 C 124, p. 5.

17 — Article 2 of the first proposed Directive.

18 — Article 3 of the first proposed Directive.

19 — Article 4 of the first proposed Directive.

20 — OJ 1990 C 96, p. 98.

21 — COM(90) 147 final, submitted on 19 April 1990, OJ 1990 C 116, p. 7.

withdrew it and submitted a revised proposal for a Council Directive on advertising for tobacco products (hereinafter 'the second proposed Directive') on 17 May 1991.[22] It recited for the first time the interdependence between the different forms of advertising and the fact that tobacco consumption constitutes an important death factor in the Community. The second proposed Directive would have prohibited all forms of advertising of tobacco products, advertising in other areas using brands or trademarks mainly associated with tobacco, the use of other trademarks or brands for new tobacco products, and any free distribution of such products.[23] Advertising within tobacco sales outlets could be authorised by Member States,[24] but the second proposed Directive would not have precluded the adoption of stricter measures by the Member States on health grounds.[25] Despite the expression of doubts on the issue in several quarters,[26] the European Parliament rejected a motion to change the legal basis of the proposal from Article 100A to Article 235 of the EC Treaty (now Article 308 EC) and adopted a legislative resolution on 11 February 1992 proposing, *inter alia*, a new recital justifying a ban on health grounds. The Commissioners for Employment, Industrial Relations and Social Affairs (including health) responsible for the proposal are reported to have made a number of speeches and statements emphasising its importance in the interest of public health.[27]

18. The Council adopted a resolution on 26 November 1996 on the reduction of smoking in the European Community[28] in which it considered that it was 'necessary to evaluate the impact on tobacco consumption of, on the one hand, measures to promote smoking and other promotional activities and, on the other hand, interventions and measures intended to reduce smoking' and called upon the Commission 'to carry out surveys of best practices conducted in the Member States towards reducing the prevalence of smoking, and the evaluation of their impact'.

19. The Council finally adopted a formal common position on the second proposed Directive on 12 February 1998,[29] on the basis of a revised draft submitted by the Commission on 11 December 1997.[30] This added Articles 57(2) and 66 of the Treaty to Article 100A as the legal basis and contained a number of new recitals

22 — COM(91) 111 final, OJ 1991 C 167, p. 3. A slightly amended version was submitted by the Commission on 30 April 1992, COM(92) 196 final, OJ 1992 C 129, p. 5.

23 — Article 2 of the second proposed Directive.

24 — Article 3 of the second proposed Directive.

25 — Article 5 of the second proposed Directive.

26 — By a number of delegations in the Council Health Working Group and by the European Parliament's Committee on Economic and Monetary Affairs and Industrial Policy. Similar doubts were reportedly expressed by the Council Legal Service in an opinion of 3 December 1993. See my comments at paragraph 76 below on the use of this legal opinion.

27 — Speeches to the European Parliament by Commissioner Papandreou, November 1991 and 16 January 1992; remarks of Commissioner Flynn at the Council of Health Ministers, 22 December 1994; speech by Commissioner Flynn to the European Conference on Tobacco and Health, 3 October 1996; speech by Commissioner Flynn in response to the agreement of a common position by the Council, 5 December 1997.

28 — OJ 1996 C 374, p. 4.

29 — OJ 1998 C 91, p. 34.

30 — SN4883/1/97.

designed to reflect the changed terms of the proposed prohibition as regards indirect advertising, the somewhat wider scope of the exception for point-of-sale advertising and its application to professional communications, and the extension of the ban to sponsorship of events or activities. [31] It also added recitals referring to other internal-market measures affecting either advertising or tobacco products — Directives 89/622/EEC, as amended, 90/239/EEC and 92/28/EEC. Most materially, at least in the view of those challenging the Directive, the common position omitted three recitals from the earlier drafts:

'Whereas the European Council held on 28 and 29 June 1985 in Milan stressed the importance of launching a European action programme against cancer;

Whereas the Council and the representatives of the Member States, meeting within the Council, in their resolution of 7 July 1986 on a programme of action of the European Communities against cancer set for this programme the objective of contributing to an improvement in the health and quality of life of citizens within the Community by reducing the number of illnesses due to cancer and, accordingly, regarded measures to counter the use of tobacco as their prime objective;

Whereas tobacco consumption constitutes a very important death factor each year in the Member States of the European Community.'

20. The common position was approved by the European Parliament on 13 May 1998 [32] and the Directive was adopted at a meeting of the Council composed of research ministers on 22 June 1998. Germany voted against its adoption.

(iv) *A summary of the Advertising Directive*

21. The following are the first four recitals in the preamble to the Directive, as adopted:

'(1) Whereas there are differences between the Member States' laws, regulations and administrative provisions on the advertising and sponsorship of tobacco

31 — See the discussion immediately below of the terms of the Directive.

32 — However, the Committee on Legal Affairs and Citizens' Rights of the European Parliament rejected the legal basis of the second proposed Directive, as revised, on 16 April 1998.

products; whereas such advertising and sponsorship transcend the borders of the Member States and the differences in question are likely to give rise to barriers to the movement between Member States of the products which serve as the media for such advertising and sponsorship and to freedom to provide services in this area, as well as distort competition, thereby impeding the functioning of the internal market;

(2) Whereas those barriers should be eliminated and, to this end, the rules relating to the advertising and sponsoring of tobacco products should be approximated, whilst leaving Member States the possibility of introducing, under certain conditions, such requirements as they consider necessary in order to guarantee the protection of the health of individuals;

(3) Whereas, in accordance with Article 100A(3) of the Treaty, the Commission is obliged, in its proposals under paragraph 1 concerning health, safety, environmental protection and consumer protection, to take as a base a high level of protection;

(4) Whereas this Directive must therefore take due account of the health protection of individuals, in particular in relation to young people, for whom advertising plays an important role in tobacco promotion.'

The fifth recital refers to the fact that Directives 89/622/EEC and 90/239/EEC had already been adopted on the basis of Article 100A. The sixth recital refers to Directive 92/28/EEC on advertising relating to medicinal products and says that advertising relating to products intended for use in overcoming addiction to tobacco does not fall within the scope of the Advertising Directive. The seventh recital refers to the various exceptions to the prohibition of advertising for tobacco products (Article 3(5)), and adds that 'it is for the Member States, where necessary, to take appropriate measures in these areas' (see also Article 5). The eighth and ninth recitals in the preamble to the Directive state, in part:

'(8) Whereas, given the interdependence between the various forms of advertising — oral, written, printed, on radio or television or at the cinema — and in order to prevent any risk of distorting competition or circumventing rules and regulations, this Directive must cover all forms and means of advertising apart from television advertising already covered by Council Directive 89/552/EEC ... .

(9) Whereas all forms of indirect advertising and sponsorship, and likewise free distribution, have the same effects as direct advertising, and whereas they should, without prejudice to the funda-

mental principle of freedom of expression, [33] be regulated, including indirect forms of advertising which, while not mentioning the tobacco product directly, use brand names, trade marks emblems or other distinctive features associated with tobacco products; whereas, however, Member States may defer application of these provisions to allow time for commercial practices to be adjusted and sponsorship of tobacco products to be replaced by other suitable forms of support.'

The tenth recital refers to the option (see Article 3(2)) to continue to permit, in certain circumstances, the use of a brand name also associated with tobacco products to advertise diversification products — non-tobacco products or services which bear a tobacco-related brand name, trade mark, emblem or other distinguishing feature — 'without prejudice to the regulation of the advertising of tobacco products'. [34] The 11th recital refers to the possibility for sponsorship to be phased out more gradually (see Article 6(3)), stating that such existing sponsorship 'should include all means of achieving the aims of sponsorship as defined in this Directive'.

33 — This reference to freedom of expression was added after the submission of the Commission's revised second proposed Directive on 11 December 1997.

34 — In the amended proposal submitted by the Commission on 11 December 1997, this clause referred to 'the *ban* on the advertising of tobacco products' (emphasis added).

22. Article 1 of the Directive states:

'The objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products.'

Article 2 of the Directive contains, *inter alia*, the following definitions:

'1. "tobacco products": all products intended to be smoked, sniffed, sucked or chewed inasmuch as they are made, even partly, of tobacco;

2. "advertising": any form of commercial communication with the aim or the direct or indirect effect of promoting a tobacco product, including advertising which, while not specifically mentioning the tobacco product, tries to circumvent the advertising ban by using brand names, trade marks, emblems or other distinctive features of tobacco products;

3. "sponsorship": any public or private contribution to an event or activity

with the aim or the direct or indirect effect of promoting a tobacco product.'

...

Article 3(1), (2) and (4) of the Directive provides:

'1. Without prejudice to Directive 89/552/EEC, all forms of advertising and sponsorship shall be banned in the Community.

2. Paragraph 1 shall not prevent the Member States from allowing a brand name already used in good faith both for tobacco products and for other goods or services traded or offered by a given undertaking or by different undertakings prior to 30 July 1998 to be used for the advertising of those other goods or services.

However, this brand name may not be used except in a manner clearly distinct from that used for the tobacco product, without any further distinguishing mark already used for a tobacco product.

4. Any free distribution having the purpose or the direct or indirect effect of promoting a tobacco product shall be banned.'

23. Like Article 3(2) of the Directive, paragraph 3(b) of that Article is also apparently concerned with the advertising of diversification products, but it is not a model of clarity. It states that the ban in paragraph 1 may not be circumvented, in respect of any product or service placed on the market as from 30 July 2001, by the use of brand names, trade marks, emblems or other distinguishing features already used for a tobacco product. It seems to be implicit in the reference to Article 3(1) that the ambiguous term 'use' refers to *use* of a brand name or other distinguishing feature *in the sense of advertising or sponsorship*. 'To this end', the distinguishing feature in question 'must be presented in a manner clearly distinct from that used for the tobacco product'. In the absence of further indications, I assume that this part of the provision also relates to advertising and sponsorship, and not to the presentation of the product or service itself. My initial doubts in this regard were resolved by the responses of the Council and the Parliament at the oral hearing.

Article 3(5) states that the Directive shall not apply to:

'— communications intended exclusively for professionals in the tobacco trade,

— the presentation of tobacco products offered for sale and the indication of their prices at tobacco sales outlets,

— advertising aimed at purchasers in establishments specialising in the sale of tobacco products and on their shop-fronts or, in the case of establishments selling a variety of articles or services, at locations reserved for the sale of tobacco products, and at sales outlets which, in Greece, are subject to a special system under which licences are granted for social reasons ("periptera"),

— the sale of publications containing advertising for tobacco products which are published and printed in third countries, where those publications are not principally intended for the Community market.'

24. Article 4 of the Directive relates to the means of ensuring and monitoring the implementation of national measures adopted pursuant to the Directive and has not been the subject of dispute in the pleadings.

Article 5 of the Directive states:

'This Directive shall not preclude Member States from laying down, in accordance with the Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals.'

25. Article 6(1) states that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive not later than 30 July 2001. Article 6(3) states, in part:

'Member States may defer the implementation of Article 3(1) for:

— one year in respect of the press,

— two years in respect of sponsorship.'

In exceptional cases and for duly justified reasons Member States may, subject to certain conditions which were not debated in these cases, continue to authorise the existing sponsorship of events or activities organised at world level for a further period of three years ending not later than 1 October 2006.

III — Admissibility

26. It is necessary, before discussing the substantive issues, to address two arguments raised by the Council, the Parliament and France in their observations in *Imperial Tobacco* regarding the admissibility of the reference by the national court.

27. In its observations in *Imperial Tobacco*, the Parliament referred to the submissions of the respondents in the main proceedings that the application was general or hypothetical in nature, as it related to a national implementing act which had not yet come into force and which was not, therefore, amenable to judicial review, and that it was only possible to address the validity of a Directive in national proceedings when this question arose as a collateral issue. The national court apparently took the view that it could be just and convenient, in accordance with Order 53, Rule 1(2) of the Rules of the Supreme Court, to grant declaratory relief in order to remove uncertainty. The case did not concern 'purely abstract questions', but 'future rights' in respect of which relief could be granted in *quia timet* proceedings. [35]

28. The Parliament referred to the obligation of the national court, in determining the need for a preliminary ruling in order to enable it to give judgment, to have regard to the fact that the Court of Justice does not deliver advisory opinions on general or hypothetical questions [36] and pointed out that, despite the admissibility of a reference in the context of not too dissimilar national proceedings in *Bosman*, that case 'concerned a perceived imminent threat to established, directly effective, legal rights flowing from the Treaty, where the threat emanated from a private party', rather than the expectation that a Member State would fulfil its Treaty obligations. The Parliament suggested that the possibility of a challenge to unimplemented Community acts of a general nature in national courts, resulting in a request for a preliminary ruling, might fall outside the system of judicial protection laid down by the Treaty because it would circumvent the requirement that the contested act be of direct and individual concern in the case of a direct action brought by an individual. The Council

35 — See the dictum of Diplock, L.J. in *Rediffusion (Hong Kong) Ltd.* v *Attorney General of Hong Kong* [1970] AC 1136, at p. 1158.

36 — Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921 (hereinafter '*Bosman*'), paragraphs 59 and 60.

(supported by France) made similar submissions regarding the hypothetical character of the proceedings [37] and the possibility that the criteria for standing directly to challenge the validity of Community measures under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) could be evaded through recourse to national proceedings.

29. The Parliament was correct, in my view, to refer to the similarities between the types of national proceedings which resulted in the references in *Bosman* and in *Imperial Tobacco*. Bosman's application for a declaration that rules regarding the nationality of professional football players were not applicable to him was deemed to be admissible before the Belgian courts on the basis of a provision of the Belgian Judicial Code permitting actions to prevent 'the infringement of a seriously threatened right' because he had adduced factual evidence that the apprehended damage, involving impediments to his career, would in fact occur. [38] Thus, although the main action only related to a declaratory remedy, and, having a preventive aim, was based on hypotheses which were, by their nature, uncertain, the fact that such actions were permitted under national law meant that the questions submitted by the national court met an objective need for the purpose of settling disputes properly brought before it. [39] The reference for a preliminary ruling was, therefore, admissible in that regard. The central point is that it was for the national court to determine, in accordance with national law, whether an action of the type in question was maintainable.

30. The national proceedings in *Imperial Tobacco* also relate to an apprehended danger to the future exercise of rights by the applicant tobacco companies. The national court's assessment of the possibility of granting a declaratory remedy must be presumed to be a correct statement of national law. The differences between the two cases referred to by the Parliament reinforce the argument for admissibility in this case. If one acts on the assumption that Member States will seek to comply with their obligations under the Treaty, the fact that they are required to bring into force the necessary measures to implement the Advertising Directive by 30 July 2001 at the latest and may, of course, do so earlier [40] gives, if anything, a more concrete character to the threat to the interests of the applicants in the main proceedings relative to that in *Bosman*. The possibility of postponing the application of certain aspects of the Directive until 1 October 2006 at the latest (in exceptional cases in respect of existing sponsorship) may render the threat, in some respects, temporally more remote but does not make it in any sense more hypothetical. [41] In the circumstances, therefore, there is no reason for the

37 — See Case C-83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871, paragraph 25.

38 — *Bosman*, op. cit., footnote 36 above, paragraphs 44 and 64.

39 — Ibid., paragraph 65.

40 — A directive has legal effect with respect to the Member States to which it is addressed from the moment of its notification; see Case C-129/96 *Inter-Environnement Wallonie* v *Région Wallonne* [1997] ECR I-7411, paragraphs 41 and 44.

41 — See the Opinion of Advocate General Lenz in *Bosman*, op. cit., footnote 36 above, paragraph 99.

Court to question the national court's determination of the need for a preliminary ruling on the question referred in order to enable it to deliver judgment. [42]

31. I now turn to the other submission, that a reference for a preliminary ruling on validity should not permit evasion of the rules regarding standing laid down in Article 173 of the Treaty. The Court has, indeed, ruled out the possibility of evasion, through a reference for a preliminary ruling on the validity of a Community measure, of the time-limit for initiating annulment proceedings under that provision by parties who could, 'without any doubt', have instituted such proceedings. [43] The Council, the Parliament and France apparently seek to extend the scope of that exceptional ruling so that persons who are neither the addressees of nor directly and individually concerned by a Community measure of general application would not be able to challenge its validity before the national courts, with a view to procuring a preliminary ruling on that question from the Court of Justice.

32. The Court observed in *Universität Hamburg* v *Hauptzollamt Hamburg-Kehrwieder* that a decision of a national authority was the only measure which the applicant in the main proceedings in that case could challenge in the courts 'without encountering any difficulty in demonstrating its interest in bringing proceedings', and stated that '[a]ccording to a general principle of law which finds its expression in Article 184 of the EEC Treaty, in proceedings brought under national law against the rejection of his application the applicant must be able to plead the illegality of the Commission's decision on which the national decision adopted in his regard is based'. [44] More generally, in *Les Verts* v *Parliament*, the Court stated that '[w]here implementation is a matter for the national authorities, [natural or legal] persons may plead the invalidity of *general* measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling'. [45] The Court observed that Article 177 of the EC Treaty (now Article 234 EC) forms part of 'a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions' and thus protects '[n]atural and legal persons... against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty'. [46]

42 — *Bosman*, ibid., paragraph 59.

43 — See Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraphs 24 and 25.

44 — Case 216/82 [1983] ECR 2771, paragraph 10.

45 — Case 294/83 [1986] ECR 1339, paragraph 23, emphasis added. It seems obvious to me from the reference in the previous sentence to direct and individual concern that this requirement did not apply, in the Court's view, to persons who instituted such national proceedings.

46 — Ibid. See further Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraph 33, and my comments thereon at paragraphs 71 to 74 of my Opinion in Case C-70/97 *Kruidvat* v *Commission* [1998] ECR I-7183; Case T-99/94 *Asocarne* [1994] ECR II-871, paragraph 17.

33. *Imperial Tobacco* is not, in my view, a case of a direct challenge to the Advertising Directive, although its validity is central to the outcome of the national proceedings. The applicant tobacco companies seek to restrain the competent members of the United Kingdom Government from executing their stated intention of implementing the Directive by regulations adopted under section 2(2) of the European Communities Act, 1972. It would appear that their entitlement to do this by means of delegated legislation turns on the validity of the Directive.[47] Thus, the validity of the Directive directly affects and is collateral to a question of United Kingdom constitutional law, viz. the *vires* of the respondents in the main proceedings to adopt the envisaged regulations. There is, thus, no basis to question the admissibility of the reference from the national court on the ground suggested by the Council, the Parliament and France.

IV — Observations before the Court

34. Written observations have been submitted to the Court in both *Germany* and *Imperial Tobacco* by the European Parliament, the Council of the European Union, the Federal Republic of Germany, the French Republic, the Republic of Finland, the United Kingdom of Great Britain and Northern Ireland and the Commission of the European Communities. Written observations were also presented in *Imperial Tobacco* by Imperial Tobacco Ltd and the other applicants in the main proceedings and by the Italian Republic. A common oral hearing was held for the two cases on 12 April 2000 at which all those who had submitted written observations were represented.

35. In the following summary of the arguments, Germany and the applicants in the main proceedings in *Imperial Tobacco* are referred to collectively as 'the applicants'. The Community institutions and the other Member States, who have submitted observations defending the validity of the Advertising Directive, are referred to collectively as 'the defendants'. To the extent that it seems necessary, I address the detailed factual and interpretative arguments of the two sides and the case-law and other material cited by them in my analysis. In the following summary, I set out the grounds invoked by the applicants in the order in which I propose to deal with them in my analysis.

(i) *Legal basis and competence*

36. The applicants submit that the Community was not competent to adopt the

47 — See the judgment of Lord Woolf MR in the Court of Appeal regarding the application for an interim injunction restraining the United Kingdom Government from implementing the Directive before the judgment of the Court in Case C-376/98: *R v Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd and Others* [2000] 1 All ER 572, at p. 575 ff.

Directive, and certainly not on the basis of the Treaty provisions actually relied upon by the legislator. Germany submits that the adoption of the Directive constitutes a misuse of power by the Community legislator. To find otherwise would ignore the principle of attribution of powers in Article 3B of the EC Treaty (now Article 5 EC). This ground is composed of two broad, interrelated arguments, the evidence for which is also relevant to the grounds of breach of the principles of proportionality and subsidiarity, of fundamental rights and of Article 30 of the Treaty.

37. The first argument is that the Directive is, in reality, a measure for the protection of public health, whose effect on the internal market, if any, is merely incidental to its principal aim — reflected in its content — of reducing smoking. Public health has been the chief factor in Community initiatives regarding tobacco advertising since the 'Europe against Cancer' programme was launched in 1985. That safeguarding public health is the principal objective of the Directive is evidenced by its current recitals and by those removed before its enactment, by the fact that the process of adoption was handled by ministers, Commissioners and officials responsible for public health and by a variety of statements by the responsible politicians. Judicial review is not confined to the statement of aims in the preamble to a measure, which is open to manipulation. As Article 129 of the Treaty expressly excludes harmonising measures from the measures whose adoption it envisages, the Community was not competent to adopt the Directive by recourse to a legal basis which was merely incidental to its true aim and content.

38. The second argument is that, in any event, the Directive is not a valid internal-market measure, for a number of reasons. First, there was no significant inter-state trade (or none at all) in either the advertising services or advertising media at issue, relative to trade within each Member State, with the result that varying national legislations posed only a negligible potential obstacle to such trade and did not cause an appreciable distortion of competition. For example, no Community newspaper or magazine sells more than 5% of its print-run outside its Member State of origin and none is in fact the subject of restrictions because it bears tobacco advertising. Any perceived barriers could have been removed by requiring free circulation of newspapers, regardless of advertising content. Secondly, the Directive effectively results in a total prohibition of tobacco advertising — about 98% of such advertising by value, including that with exclusively domestic effects — resulting in an impediment to

freedom to trade in advertising-related goods and services. Furthermore, tobacco advertising represents only a very small part of total advertising and widely varying tastes in different countries result in diverse national promotional strategies which are not the subject of trans-frontier provision of services or supply of goods. Thus, there are almost no truly international tobacco brands in the Community.

39. Although restrictions or prohibitions of certain products or services may be necessary as part of a general package of market opening, total restriction of an economic activity is not consistent with the achievement of the free movement of goods and provision of services. Here, the outcome is the elimination of competition. The prohibition is not offset by gains in other advertising sectors; even as regards the insignificant exceptions from the advertising prohibition, the Directive expressly permits the Member States to restrict these as well in the interests of public health, so that the claimed equal conditions of competition may, none the less, be distorted.

40. The Advertising Directive also has anti-competitive effects and contributes to market partitioning by making access by new tobacco brands — normally achieved through advertising — practically impossible. The Directive makes no claim to contribute to free movement for tobacco products. It also distorts competition as between Community media and those originating in third countries. Furthermore, it distorts competition, in a separate 'stand-alone' market, between non-tobacco products — clothes, toiletries, etc. — which bear tobacco-related brands (diversification products) and those which do not.

41. As a matter of principle, the applicants note the potential for abuse of Article 100A in order to remedy alleged distortions of competition and submit that its use in this regard should be confined to fields in which the Community also has competence *ratione materiae*. Otherwise, given the limited scope for judicial review, qualified majority voting in the Council could be used to undermine the division of powers between the Community and the Member States.

42. The defendants submit that tobacco advertising is the subject of some trans-frontier exchanges, both in services, through, for example, the commissioning by multinational companies of uniform brands, logos, images, slogans and themes for tobacco products, and in goods, through trade in goods which function as supports or media for advertising, such as newspapers, bills and posters, and publicity films for cinemas. Thus, there is, in some degree, international branding of products and promotional campaigns are conducted

across Member State frontiers. Quantification of the extent of the prohibition (for example, at 98%) cannot be undertaken solely on the basis of the advertising activity formerly permitted in a relatively liberal Member State such as Germany. Widely varying restrictions on tobacco advertising in the different Member States, ranging from total prohibitions in Finland, Italy and Portugal to relatively liberal regimes in Member States such as Germany, constituted barriers both to the provision of advertising services and to the free movement of goods. Some parties also suggested that these regulatory disparities affected the free movement of, and competition between, tobacco products themselves.

43. The necessary response to these barriers and to the attendant distortion of competition was to approximate the national measures in question. In doing so, a high standard of regulation was chosen as regards health protection, both because this took into account the existing, apparently proportionate but even stricter level of regulation in some Member States and because Article 100A(3) and, more generally, Article 129(1), third indent, require it. These two objectives were complementary; that regarding health did not detract from the internal-market objective, which was sufficient in order to support the legal bases cited. Article 100A of the Treaty did not require unchecked liberalisation of national rules. That provision also permits regulation of the market even when it does not liberalise. Furthermore, wide-ranging regulation was necessary in order to prevent avoidance (and distortion of competition) through deflection of increased advertising or sponsorship to media outside the scope of the Directive, even if some of these were not the subject of any appreciable trans-frontier trade. Even purely local media may provide services to non-domestic advertising agencies or tobacco producers. There are numerous cases of legislation imposing total prohibitions on certain goods or services or strictly regulating certain forms of advertising. None the less, the measure did not amount to a total prohibition of tobacco advertising, both because of the exceptions provided in Article 5, and the option given to Member States not to prohibit advertising for diversification products.

44. Thus, a level playing-field could be said to have been created for the remaining, permitted forms of advertising, allowing providers of advertising services and producers and distributors of advertising media to compete freely on the basis of common rules. There is no criterion of scale of benefits to the internal market, or of the prior scale of obstacles to trade, before harmonisation measures can be taken. In short, internal-market measures are not subject to a *de minimis* test. This is only relevant to the question of proportionality. Such harmonisation is permissible in

response to merely potential threats, even if they do not threaten to restrict trade or distort competition to an appreciable degree. Limiting access to certain advertising media does not threaten market penetration by new tobacco brands. The question whether distortions of competition are appreciable is only relevant to Article 100 of the Treaty.

45. The Directive is clearly an internal-market measure rather than one primarily concerned with health, so that Articles 57(2) and 66 (regarding services) and 100A of the Treaty constitute the correct legal basis. This emerges from its aim and content, as revealed, objectively, in its recitals and provisions. This cannot be contradicted by mere subjective evidence as to the legislators' convictions gleaned from the *travaux préparatoires*, which are simply part of the Directive's context. Factors such as the composition of the Council or the general brief of working groups are irrelevant. As a result, it cannot be said that the Directive's centre of gravity is located anywhere other than in the achievement of the internal market, or that its provisions have a merely incidental or ancillary relationship with its establishment and functioning. The exclusion of harmonising measures in Article 129(4) of the Treaty does not affect the scope of Article 100A, which is subject only to the express limits set out in Article 100A(2).

(ii) *Subsidiarity*

46. The applicants contend that, if the Community is competent to act on the legal bases invoked, *quod non*, its competence is shared with the Member States. The legislator did not respect the guidelines on subsidiarity adopted by the European Council at Edinburgh in 1992[48] or the inter-institutional agreement of 1993 between the Council, the Parliament and the Commission on procedures for implementing the principle of subsidiarity.[49] In particular, it did not refer to the principle of subsidiarity in the recitals in the preamble to the Directive. Furthermore, no qualitative or quantitative evidence was offered regarding the need for Community action. In the absence of a significant trans-frontier element and in the light of substantial national differences, the regulation of advertising should remain entrusted to the Member States. Non-application of the principle of subsidiarity to action adopted on the basis of Article 100A of the Treaty would reduce the significance of the principle to almost nothing.

47. The principal argument of the defendants is that the competence to coordinate or approximate laws which is conferred on the Community by Articles 57(2) and 100A of the Treaty is inherently exclusive in character so that subsidiarity, automatically, does not apply. In any event, if the

48 — Bull. EC, 12/92, p. 9.
49 — Bull. EC, 10/93, p. 129.

principle were to apply, it is clear that the Member States are unable to achieve the objectives of the Directive of removing distortions of competition and obstacles to trans-frontier trade in media and advertising services, so it was necessary for the Community to act. The legislator clearly assessed and reasoned the need for Community action in response to divergent national rules. Furthermore, the Directive leaves the Member States a considerable margin for manœuvre in many respects.

(iii) *Proportionality*

48. As regards the Directive's stated objective of serving the internal market, the applicants argue that the effects of a near-total ban will be either minimal or counter-productive for the reasons outlined above. The speculative character of the assessment of the market in the recitals failed to provide the evidence necessary to prove proportionality. It reduces trade without removing any real barriers or distortions, with the result that it is neither necessary nor appropriate. The legislator erred in considering that the Directive would result in a reduction of tobacco consumption, as advertising serves to establish brand market share rather than to increase the number of smokers. In fact, no specialised study was conducted regarding the likely effect on smoking of an advertising prohibition, even one as regards diversification products, despite a request to this effect by the Council. Claims that a total ban would reduce overall tobacco consumption were rejected by the Canadian Supreme Court and are contradicted by significant evidence presented before the national court in *Imperial Tobacco*. Other, less restrictive and more effective methods of achieving this aim are possible, such as information campaigns and restrictions on smoking. Harmonised rules on free movement of newspapers and other publications, or even blacking out of tobacco advertisements in publications traded across frontiers, would have been less restrictive of trade.

49. The defendants counter that the legislator enjoys a wide margin of discretion. Its legislative choice will not be reviewed in the absence of manifest error or of the imposition of disadvantages which are wholly disproportionate to the advantages to be derived from a measure. For the purposes of assessing whether or not the Directive is proportionate, both its principal internal-market objective and the complementary public health objective can be taken into account. Having regard to the importance of both objectives and to the level of existing national restrictions, the Community legislator achieved an appropriate balance between general and private interests. All traders were now on an equal footing. The loss of information to the public on, for example, low-tar cigarettes was outweighed by the prospect of reduced overall consumption. Furthermore, it was implausible to suggest that the Directive would not have such an effect, in the light of studies cited by the Council, the United Kingdom Government and France, as the function of advertising is to encourage

consumption. The defendants maintain, in addition, that the prohibition is not total (unlike that struck down in Canada) and results in a degree of liberalisation in some Member States. They also refer to the long transition periods in some cases, the option as regards non-prohibition in the case of certain diversification products and the fact that only one aspect of exercise of trade - mark rights is limited.

(iv) *Breach of Article 30*

50. Germany argues that, even when adopting harmonising measures, the Community legislator is bound by the terms of Article 30 of the Treaty. The Directive effectively prevents all trans-frontier trade in advertising media, a disproportionate restriction whose necessity has not been demonstrated scientifically and for which less restrictive alternatives were available.

51. The defendants state that Article 30 of the Treaty only applies in the absence of harmonisation measures. Even if that provision is applicable, it cannot lead to different results from those arising from the examination of competence under Article 100A of the Treaty and of the proportionality of the measure so adopted. The Directive actually removes obstacles to trade, while at the same time securing a high level of health protection.

(v) *The right to property and the right to pursue an economic activity*

52. The applicants refer to Article 222 of the EC Treaty (now Article 295 EC) and to Article 1 of the First Protocol to the European Convention on Human Rights. Article 3(1) of the Directive deprives tobacco companies, advertising agencies and media undertakings of existing contractual rights. The restrictions imposed on the use of trade marks goes to their specific subject-matter and constitutes an expropriation, contrary to Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 as well as to the fundamental rights cited, and is only partially attenuated by Article 3(2) of the Directive. Considerable losses will be occasioned to undertakings involved in marketing diversification products. These restrictions are disproportionate and, thus, unlawful.

53. The defendants consider that Article 222 of the Treaty is irrelevant as the

Directive does not affect the system of property ownership in the Member States. The rights invoked are not absolute and may be made the subject of proportionate restrictions in the general interest which do not affect the very substance of the rights. Regulation of use of trade marks does not amount to expropriation, as they can continue to be used on tobacco products themselves and in permitted forms of advertising. Furthermore, loss of profit does not constitute an attack on the rights of property or to pursue an economic activity.

(vi) *Freedom of expression*

54. The applicants rely, in particular, on Article 10 of the European Convention on Human Rights, which includes protection of commercial speech such as advertising by which undertakings can give the public useful information about their products, such as those which are low in tar. Such protection is recognised in Community law. Restrictions on speech about products which are themselves lawful are not acceptable. The applicants do not consider that the achievement of the internal market is a permissible ground for restricting this right. Invocation of the public health benefits of the prohibition is inconsistent with the legal basis of the Directive. Furthermore, there is no scientific evidence which convincingly establishes that such restrictions will result in a reduction in tobacco consumption. In fact, the resulting price competition between producers will probably result in increased consumption. There is no need for the Court of Justice to accord the Community legislator a wide margin of appreciation in this regard. The restriction imposed is therefore disproportionate. A total prohibition of advertising is a particularly grave interference with freedom of expression and with the choices of others. Such a conclusion is supported by Canadian, American and Austrian case-law.

55. The defendants respond that fundamental rights are not absolute and must be considered in the context of the Community legal order, including the securing of the fundamental economic freedoms. Article 10(2) of the Convention permits restrictions on freedom of expression in the interests of public health, an objective legitimately pursued by the Directive simultaneously with that relative to the internal market. Tobacco advertising encourages smoking, which poses significant health risks. Extensive restrictions on commercial speech in favour of such products are therefore proportionate, especially where its information content is negligible. A long transition period is allowed regarding arts and sports sponsorship in order to permit other sources of funding to be found.

(vii) *Reasoning*

56. The applicants submit that the reasoning given for the Directive is defective in a number of respects, contrary to Article 190 of the EC Treaty (now Article 253 EC). The preamble does not refer either to transfrontier aspects of tobacco advertising and sponsorship or to specific obstacles to trade or distortions of competition which could justify the adoption of a harmonising measure in the field of tobacco advertising, or indicate why advertising restrictions had to be extended to all media as well as to sponsorship, to free distributions, to advertising of diversification products and to aspects of the branding of tobacco products. Furthermore, the recitals do not fully reflect the fact that the true motive for the adoption of the Directive was the protection of public health. At the same time, they do not indicate how the Directive will improve health protection. The recitals also omit any reference to the principles of proportionality and subsidiarity.

57. The defendants respond that the recitals contain the essential elements of the legislator's reasoning regarding the internal market, which is more fully developed in the discussion of their defence to the first ground, summarised above, and regarding the need for a high level of health protection. Community law does not require technical details to be contained in the recitals in the preamble to a general measure. An indication of the general situation and of the objectives pursued is sufficient in such cases. The scope of the advertising restrictions imposed by the Directive is explained in the recitals by reference to the risk of circumvention of a more limited measure and to the need to regulate indirect forms of advertising. It is not necessary expressly to refer to principles such as subsidiarity, provided that, if such principles are applicable, material is furnished in the recitals which indicates compliance. In general, the reasoning provided is adequate to permit interested parties and the Court to consider the question of judicial review.

V — Analysis

(i) *Legal basis and competence*

Introduction

58. In this section, I examine the applicants' two broad arguments that the Advertising Directive was not validly adopted on the basis of Articles 57(2) and 100A of the Treaty either (i) because its 'centre of gravity' lies in health protection rather than the internal market — on which its effects are, therefore, incidental — or (ii) because it does not, as an essentially

prohibitory measure, comply in any event with the conditions imposed by those provisions. Very briefly, my analysis is as follows. Competence under Articles 57(2) and 100A is functionally defined by reference to internal-market objectives of broad horizontal application in fields otherwise governed, in many cases, by the Member States. Health protection must, in appropriate cases, be taken into account by the Community in the exercise of these competences. In the absence of a distinct Community harmonising competence in respect of health protection, and given the possibility of parallel pursuit of health protection and internal-market aims, the question of whether the Community has acted within its powers cannot be determined by reference to a measure's putative 'centre of gravity' as between these two incommensurable objectives. The issue of competence must instead be resolved by assessing the Directive's compliance with the objective requirements of the internal market, having regard, in particular, to the concrete internal-market benefits claimed for the measure. In the case of the Advertising Directive, such benefits are invoked by the Community legislator exclusively in respect of the tobacco advertising and sponsorship sector and the media employed in that sector. As the Directive imposes, effectively, a total ban on economic activity in that sector, and does not harmonise national rules governing those relatively minor areas where tobacco advertising is not prohibited, it cannot be said to facilitate the free movement of goods or the freedom to provide services, or to remove distortions of competition, in the sector in question. It is, therefore, invalid having regard to the requirements of the legal bases employed by the legislator.

The character of Community competence

59. In order to address the complaint made in both cases that the Community legislator has exceeded its Treaty powers and, in particular, that the Advertising Directive cannot be supported by its claimed legal basis, it is necessary to recall the nature of Community competence and the principles which govern the review by the Court of its exercise.

60. Competence is conferred on the Community by different Treaty provisions in order to achieve objectives particular to those provisions, read in the light of the general objectives of the Community, and the extent of Community competence must, therefore, be determined by reference to the scope of those objectives. Thus, the first indent of Article 3B of the Treaty states that '[t]he Community shall act within the limits of the powers conferred upon it by this Treaty *and of the objectives assigned to it therein*' (emphasis added). It follows from that provision that the Community 'only has those powers which have been

conferred upon it'.[50] It is the task of the Court, *inter alia*, to ensure the respect by the Community of the limits of those powers.

61. In that regard, the Court has stated that 'the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the object pursued'.[51] Instead, it has emphasised throughout a long line of cases that 'in the context of the organisation of the powers of the Community, the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure'.[52] Although the Court normally has occasion to restate this approach in cases involving a dispute as to which of two legal bases should be used to adopt a measure, this objective test applies equally in cases where the only alternative potential legal basis is Article 235 of the EC Treaty[53] and, in my view, in those where there is no apparent alternative.[54] In such circumstances, including those of the present cases, the Court is presented with a more or less stark dispute regarding the respective legislative powers of the Community and the Member States.[55]

62. The competence attributed to the Community by Article 100A(1) of the Treaty is horizontal in character. It is not limited in advance by reference to a particular subject-matter defined *ratione materiae*.[56] Instead, the Community is authorised to adopt approximation measures 'which have as their object the establishment and functioning of the internal market'. Thus, the scope of Community competence is defined 'by reference to a criterion of a *functional* nature, extending laterally to all measures designed to ensure the attainment of the single market'.[57] It 'leads to Community legislation touching the most diverse areas of national law',[58] provided this is relevant to the establishment and

50 — Opinion 2/94 *European Convention on Human Rights* [1996] ECR I-1759, paragraph 23. See also Article 4(1) of the EC Treaty (now Article 7(1) EC) and the first ground for annulment in Article 173 of the Treaty, second indent, viz. lack of competence.

51 — Case C-300/89 *Commission* v *Council* [1991] ECR I-2867 (hereinafter '*Titanium Dioxide*'), paragraph 10. Regarding the use of evidence of subjective convictions in the context of the present cases, see further paragraphs 74 to 77 below.

52 — Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405 (hereinafter '*Deposit Guarantees*'), paragraph 12. See, most recently, Case C-269/97 *Commission* v *Council* [2000] ECR I-2257 (hereinafter '*Bovine Labelling*'), paragraph 43.

53 — See, for example, *Deposit Guarantees*, ibid., paragraphs 10 and 11, immediately preceding the passage quoted above.

54 — The Court made clear in Opinion 2/94 *European Convention on Human Rights*, op. cit., footnote 50 above, paragraph 30, that Article 235 'cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole', which action would require an amendment of the Treaty.

55 — The question whether or not the Directive could have been adopted on the basis of Article 235 is not material to the present challenges to its validity, as Article 235 could not, in any event, be employed unless it were considered that the Community was not competent to adopt the Advertising Directive on the basis of Articles 57(2), 66 and 100A of the Treaty; see Opinion 2/94, *European Convention on Human Rights*, op. cit., footnote 50 above, paragraph 29; Case 45/86 *Commission* v *Council* [1987] ECR 1494, paragraph 13.

56 — Cf. provisions giving the Community varying degrees of competence in fields defined *ratione materiae*, such as agriculture (Articles 39 (now Article 33 EC), 40 (now, after amendment, Article 34 EC), 41 (now Article 35 EC), 42 (now Article 36 EC) and 43 (now, after amendment, Article 37 EC) of the EC Treaty) and environmental protection (Article 130S of the EC Treaty (now, after amendment, Article 175 EC)).

57 — *Titanium Dioxide*, op. cit., footnote 51 above, Opinion of Advocate General Tesauro, paragraph 10.

58 — Case C-350/92 *Spain* v *Council* [1995] ECR I-1985 (hereinafter '*Spain*'), Opinion of Advocate General Jacobs, paragraph 26. Spain sought the annulment of Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products, OJ 1992 L 182, p. 1, which was based on Article 100A of the Treaty.

functioning of the internal market. [59] In this way, the scope of competence under Article 100A is defined exclusively by reference to its stated objective, rather than its material subject-matter.

63. Article 57(2) of the Treaty also creates a functional competence of horizontal application, though of more specific or limited scope than that conferred on the Community by Article 100A: no area of Member State competence is excluded a priori from the reach of measures designed to address barriers to establishment or the freedom to provide services. Articles 57(2) and 66 of the Treaty are also cited as furnishing part of the legal basis of the Directive because the first and second recitals in its preamble indicate that it is concerned, in part, with barriers to freedom to provide services. As Articles 57(2) and 100A both concern, with greater or lesser degrees of specificity as regards their field of application, the attainment of internal-market objectives, and as the legislative procedures they prescribe are not incompatible, [60] it is not necessary, for present purposes, to attempt to determine the precise dividing line between them, for example as regards competence to remedy distortions of competition between service providers.

Community competence and national competence: different objectives

64. It is in the nature of competences conferred in order to achieve broadly drawn, functional objectives that their exercise will simultaneously affect matters which normally fall within the competence, defined *ratione materiae*, of the Member States and/or of the Community. If the condition of having as its object the establishment or functioning of the internal market, or that of addressing national provisions on the taking up or pursuit of activities as service providers, is satisfied, the content of an approximating or coordinating measure — the level of regulation, the type of scheme, etc. — must also, in principle, be influenced by substantive concerns such as public health. Furthermore, Article 100A(3) obliges the Commission to 'take as a base a high level of

59 — Two qualifications may be noted here: first, Article 100A(2) of the Treaty expressly excludes certain matters from the scope of application of the preceding paragraph; secondly, Article 100A(1) applies 'save where otherwise provided in this Treaty'. Among several examples: Article 57(2) of the Treaty, which is expressly referred to in Article 7A of the Treaty; provisions concerned with specific sectoral objectives, such as Articles 129B to 129D of the EC Treaty (now, after amendment, Articles 154 EC to 156 EC); more generally, the common agricultural policy, governed by Article 43 of the Treaty.

60 — Essentially the same legislative procedure is provided for in both provisions, as far as the Directive is concerned. The additional provision made in Article 100A(1) for consultation of the Economic and Social Committee has been respected in the present case and cannot be said to affect the substance of the procedure envisaged by Article 57(2), as the Council would have been free to consult it in any event; see *Titanium Dioxide*, op. cit., footnote 51 above, paragraph 18.

protection' when making any proposals for harmonisation in the fields of 'health, safety, environmental protection and consumer protection'. This is reinforced by the requirement expressed in Article 129(1), third indent, that 'health protection requirements shall form a consistent part of the Community's other policies'.

65. Even in the absence of provisions like Articles 100A(3) and 129(1), third indent, this would be perfectly natural, as the Community is not acting in a policy vacuum. In adopting approximating or coordinating measures, it substitutes Community-level rules for national rules which, whatever their restrictive effect on trade or distorting effect on competition, may have been motivated by entirely different substantive concerns such as health, consumer protection, environmental protection, and so on. [61] Thus, in adopting legislative acts, the Community stands in the place of the Member States and must give weight to national policy concerns which are not the subject of specific Community competence [62] — and, *a fortiori*, to those in respect of which an express recommendation of high levels of protection is made in the Treaty itself.

66. Thus, the obvious concern with public health which motivated the initial, disparate national advertising restrictions in some Member States, and the policy chosen by the Community legislator, evidently on the basis of similar concerns, [63] do not *per se* lead to any doubt, to my mind, about the competence of the Community to adopt an internal-market measure. That fact alone does not show either that the Community has invaded a domain reserved exclusively to the Member States or that the objective of the measure is health protection to the exclusion of all other aims. [64] The true point of distinction is whether or not a given measure can be deemed to have as its object the establishment and functioning of the internal market or the achievement of

61 — Such national measures might, indeed, have been justified by reference to such concerns for the purposes of Articles 30 and 59 of the Treaty.

62 — On the general obligation of the Community legislator to have regard to public health when legislating under legal bases such as Articles 43 and 100 of the Treaty, see Case 68/86 *United Kingdom* v *Council* [1988] ECR 855 (hereinafter '*Hormones*'), paragraphs 12 and 14. This case was decided *before* the insertion of Article 129 in the Treaty. See also *Deposit Guarantees*, op. cit., footnote 52 above, paragraph 17, and *Bovine Labelling*, op. cit., footnote 52 above, paragraph 46, although this statement clearly cannot be interpreted as meaning that Article 100A can be employed to adopt health protection measures without reference to the internal-market criteria expounded below. For a case of judicial review of compliance with a horizontal public interest provision, viz. Article 129A of the EC Treaty (now, after amendment, Article 153 EC), see *Deposit Guarantees*, op. cit., paragraphs 46 to 49.

63 — See the third and fourth recitals in the preamble to the Advertising Directive.

64 — See Case C-62/88 *Greece* v *Council* [1990] ECR I-1527 (hereinafter '*Greek Chernobyl*'), paragraph 20.

freedom to provide services. [65] It cannot be supposed that a higher level of health protection means a lower internal-market 'content'. Any substantive objective, regarding health or any other field of regulatory activity, which is also addressed is not so much competing or ancillary as simply of a different order and, thus, capable of being pursued simultaneously, or 'indissociably', [66] with as much intensity as the legislator wishes (or feels obliged) to provide for, provided that the operational objectives of the internal market are served by the measure adopted.

The 'centre of gravity' of the Advertising Directive

67. The applicants have argued to the contrary and have attached considerable importance to Article 129(4) of the Treaty. They submit, essentially, that the 'centre of gravity' of the Advertising Directive lies in the field of public health rather than the internal market, that Article 129 is the only Treaty provision devoted to that object and that Article 129(4) expressly excludes any harmonisation. Article 129(4) empowers the Council and Parliament to adopt by co-decision 'incentive measures' in order to contribute to the public health objectives of that article, but it expressly excludes 'any harmonisation of the laws and regulations of the Member States'.

68. It will be apparent from the foregoing discussion that I do not view it as appropriate to seek to determine the lawfulness of the Directive by reference to the question whether its 'centre of gravity' lies in the pursuit of health protection rather than of internal-market objectives. This approach is only relevant where there is a dispute as to whether a measure should have been adopted by reference to one or other of two possible legal bases. [67] Normally, where both aspects of a measure are equally essential both legal bases should be employed and the applicable legislative procedures respected. [68] It is only where these procedures are incompatible that a dual legal basis is impossible and a choice has to be made between them. [69] On the other hand, if a measure relates principally to one field of action, having only incidental effects on other policies, only the first legal basis should be used. [70] The concept of the 'centre of gravity' is sometimes referred to in this context, when assessing

65 — Even in cases where there are a number of 'competing' possible legal bases, it seems better to commence judicial review by examining whether or not the conditions for recourse to the legal basis actually cited were satisfied; see, for example, the structure of the judgment in *Greek Chernobyl*, ibid., paragraphs 13 to 16.

66 — *Titanium Dioxide*, op. cit., footnote 51 above, paragraph 13.

67 — The principles applicable in such circumstances are succinctly summarised by the Court in Joined Cases C-164/97 and C-165/97 *Parliament* v *Council* [1999] ECR I-1139 (hereinafter '*Forestry Protection*'), paragraph 14.

68 — Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraphs 6 to 13; Case 242/87 *Commission* v *Council* [1989] ECR 1425, paragraphs 33 to 37.

69 — *Titanium Dioxide*, op. cit., footnote 51 above, paragraphs 17 to 21.

70 — Case C-70/88 *Parliament* v *Council* [1991] ECR I-2041 (hereinafter '*Chernobyl*'); Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, paragraphs 32 and 33.

whether a measure's effects in one field are merely incidental or ancillary.

sing the relative intensity of this and the public health aspects of the measure. I have already taken some pains to demonstrate that these objectives are not mutually exclusive but, rather, of a different order and not in competition. The merely incidental or ancillary character of a measure's effects on the internal market should be determined by reference to criteria specific to that objective under the Treaty, as I seek to do below.

69. However, in the present cases, we are not presented with a choice between two possible legal bases. It is abundantly clear that Article 129(4) of the Treaty does not constitute an alternative legal basis for the Advertising Directive, by virtue of its exclusion of harmonising measures. Instead, the situation resembles, in part, that in *Titanium Dioxide*: [71] if, as in that case, one of two legal bases must necessarily be excluded or, as in the present cases, no alternative legal basis exists, the Community is competent by virtue of Article 100A (and, by extension of the Court's reasoning, Article 57(2)) to adopt measures which serve the internal market and, in parallel, another public interest aim, whether it be environmental protection or public health. The issue of competence will be resolved favourably provided the internal-market objective is indeed served; thus, in *Titanium Dioxide*, the Court examined the objective conditions for legislation on the basis of Article 100A without regard to the relative 'weight' of the internal market and environmental aspects of the legislative scheme. [72] Similarly, the question whether the effects of a measure on the internal market are merely incidental cannot be resolved, in these circumstances, by asses-

The scope of application of Article 129(4) of the Treaty

70. The applicants also cite Article 129(4) of the Treaty as limiting the scope of Community action *under Article 100A itself*. Both rely on a statement of Advocate General Jacobs in his Opinion in *Spain*. [73]

71. Although it is not contested that the Directive could not have been adopted on the basis of Article 129(4), it would be surprising (and inimical to legal certainty) if the authors of the Treaty on European Union had, when providing new Treaty powers in respect of public health, so severely restricted existing competence in a different field simply because it some-

71 — Op. cit., footnote 51 above, paragraphs 13, 16 and 21 to 24, especially paragraph 24.

72 — Ibid., paragraphs 14, 15 and 23.

73 — Op. cit., footnote 58 above, paragraph 27.

times has a bearing on health.[74] Articles 100A and 129 are not, in any respect, inconsistent. As we have seen, Articles 100A(3) and 129(1), third indent, combine to show that Article 100A may be used to adopt measures which aim at the better protection of health. The limitation expressed in Article 129(4) is not in conflict with these provisions. It affects, in its own terms, only the 'incentive measures' for which it provides.

73. In summary, I consider Article 129 of the Treaty to be irrelevant to the debate on legal basis with which these cases are concerned. The applicants' reliance upon it appears to flow from a false premiss. That patently false premiss is that, in the absence of the qualification in Article 129(4), the Community would have been competent to adopt harmonising measures 'in order to contribute to the achievement of the objectives referred to in [Article 129]', on the basis of *other* provisions of the Treaty, such as Article 100A, without regard to the objectives specific to those other legal bases.

72. Nor do I think that Advocate General Jacobs said anything different in the passage which has been cited both by the tobacco companies and Germany. He merely cited Article 129(4), with some other provisions, as examples of exclusions of Community legislative competence, so as to contrast those provisions with the absence of any similar limitation in relation to 'patent law, or ... intellectual property law in general'. He neither expressed, nor could he reasonably be taken to have implied, any view about the scope of that exclusion or, in particular, whether it limited legislative competence beyond its own specified context. In the context of 100A, any such exclusion would have been more easily accommodated by expanding the existing list in Article 100A(2) of matters expressly excluded *ratione materiae*.

Legislative history of the Directive

74. The applicants have also made extensive reference to the catalogue of events leading up to the enactment of the Advertising Directive, much of which I have summarised above (paragraphs 14 to 20). It is, of course, true that the Court occasionally has regard to legislative history as an aid to the interpretation of Community acts.[75] It has even referred to the rejection by the Council of an amendment proposed by the Parliament as confirmation of the former's wish to maintain the measure's

74 — It is clear, for example, from *Greek Chernobyl*, op. cit., footnote 64 above, paragraphs 19 and 20, that the addition of Article 130R of the EC Treaty (now, after amendment, Article 174 EC) left intact the competences the Community derives from other legal bases; see also Case C-405/92 *Mondiet* v *Armement Islais* [1993] ECR I-6133.

75 — See, for example, Case C-449/93 *Rockfon* [1995] ECR I-4291; Case C-6/98 *ARD* [1999] ECR I-7599.

'centre of gravity' as between two legal bases. [76] More generally, however, reference to the context in which a measure was adopted is irrelevant to determining the appropriate legal basis. [77]

75. The applicants cite the legislative history, not in order to construe some unclear provision of the Advertising Directive, but in order to demonstrate that it was in truth — both as to its contents and as to the intentions of its authors — a measure designed primarily to protect public health, by reducing the sales of tobacco products, and *by virtue of that fact* not truly an internal-market measure. However, it should be clear from my analysis above that it is of the essence of any internal-market measure that it pursues, quite legitimately, two objectives — one the removal of obstacles to trade or distortions of competition; the other (the means of achieving the first) the adoption of harmonised Community measures to replace national measures in the field in question. Thus, quite apart from the fact that the Treaty envisages only one Council composed simply of 'a representative of each Member State at ministerial level, authorised to commit the *government* of that Member State', [78] the conduct of the Council negotiations preceding the final adoption of the Directive by health ministers proves nothing. The same is true of the discussion of the proposal in a Council working group and a parliamentary committee concerned with public health. Furthermore, it is to be expected that those engaged at the political level in the promotion or enactment of these measures may be concerned and motivated — even principally motivated — by the second aspect rather than the first. Such priorities are entirely subjective and it is, therefore, inappropriate for the Court to take into account statements of political representatives in the course of the legislative process.

76. Similarly, even if legal opinions such as that attributed to the Legal Service of the Council could be admitted in evidence, [79] the fact that such views were expressed, the perceived failure to respond to them at the political level and their apparent contradiction of the Council's stance in the present cases are irrelevant to the Court's objective legal appreciation of the legislation. It remains the case that the Court's review of Community competence to adopt

76 — Case C-42/97 *Parliament* v *Council* [1999] ECR I-869, paragraph 54. See also the discussion of preparatory documents in Case 131/86 *United Kingdom* v *Council* [1988] ECR 905, paragraphs 26 and 27; the documents cited confirmed the Court's view of the aim and appropriate legal basis of the challenged measure and it may have discussed them simply because they were relied upon by the United Kingdom to the opposite effect.

77 — *Bovine Labelling*, op. cit., footnote 52 above, paragraph 44.

78 — Article 146 of the EC Treaty (now Article 203 EC), emphasis added; see also Article 4(1) of the Treaty.

79 — Even if such opinions do not enjoy the benefit of legal professional privilege, as recognised in Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, paragraph 18, I agree with the view expressed by Advocate General Jacobs in *Spain*, op. cit., footnote 58 above, at paragraph 35 of his Opinion, that such advice should not be invoked in proceedings before the Court without the relevant institution's authorisation.

such measures turns on whether or not the first-mentioned objective is served.

77. As regards legislative history in the narrow sense, the applicants placed considerable emphasis on the removal from the draft of the Directive at a very late stage of three recitals, quoted above (paragraph 19), which related to the public health concerns of the Community legislator. However, what is really relevant is the question whether the retention of those three draft recitals would have altered the character of the Advertising Directive. I do not see how it could have done so, unless the determination of the objective of Community legislation is to be reduced to a mathematical process of counting the references in the preamble to different policies. The excised recitals merely amplified points regarding the legislator's public health concerns which are already evident in the third and fourth recitals in the preamble and which were not, as such, illegitimate.

Misuse of power

78. I do not think that Germany's plea of misuse of power by the Community legislator is in any way supported by the legislative history of the Advertising Directive either. Misuse of power has been defined by the Court, in the context of legislative power, as 'the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case'. [80] As we have already seen, the Treaty prescribes no specific procedure for harmonising rules regarding the protection of public health *ratione materiae*; rather, such a competence is expressly discountenanced by Article 129(4), with the result that the second possible ground for a finding of misuse of power is not satisfied.

79. As regards the first possible ground for a finding of misuse of power, the parallel objective of health protection was clearly referred to in the third and fourth recitals in the preamble to the Directive and, as I have already said, the omission of other draft recitals in the same vein does not take away from the fact that pursuit of such an objective is not illegitimate in the framework of measures adopted on the basis of Articles 57(2) and 100A of the Treaty. Furthermore, I would recall that, rather than the pursuit of health protection and of internal-market objectives being mutually exclusive, the latter must, in appropriate cases, be accompanied by the former. Thus, the manifestations of interest by political representatives in the health benefits of the Advertising Directive are not, as I have already suggested, in any way surprising, or, I would now add, improper. Even their comparative silence about the claimed benefits for the internal market does not tend to establish that these were not, in

80 — Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755 (hereinafter '*Working Time*'), paragraph 69.

fact, envisaged or intended. Germany has furnished no positive evidence to the contrary. Furthermore, the other material before the Court does not disclose any evidence of misuse of power. Germany's plea of misuse of power should, therefore, be rejected. The question whether the internal-market aims invoked by the Community legislator are actually realised by the Directive is an objective one, going to competence. A negative answer to this question is not sufficient, in my view, to establish misuse of power on the part of the legislator.

80. Thus, the real issue in the present proceedings is not whether health protection figured prominently in the motivation of those promoting its adoption, but whether the *internal market* constitutes, on its own, a sustainable legal basis for the Directive. In the absence of an alternative legal basis, I will, therefore, be concerned in the remainder of my analysis of Community competence, first, with identifying the objective conditions for recourse to Articles 57(2) and 100A of the Treaty and, secondly, with determining whether or not the Advertising Directive complies with these conditions. As a preliminary matter, it is necessary briefly to advert to, and to reject, Germany's argument regarding the significance of the applicable Council voting procedure in identifying the conditions for the exercise of Community competence.

The significance of the Council voting procedure

81. Germany placed considerable emphasis, especially at the oral hearing, on the fact that Article 100A involves the use of qualified majority voting and argued that such a horizontal competence could, therefore, be used to excess, to encroach on areas of Member State competence. This has no bearing on the determination of the appropriate legal basis, if any, for a Community measure, which must follow the same objective principles irrespective of the legislative procedure involved. As I have already noted above, the Community must in every case act within the limits of its powers, including where the Council votes unanimously to enact a measure on the basis of the broad terms of Article 235 of the Treaty. [81] Additional considerations relating to the sovereignty of the Member States are irrelevant to the analysis of those powers. [82] In *Titanium Dioxide*, the Court preferred Article 100A as a legal basis to Article 130S even though the former entailed qualified majority voting in the Council and the latter unanimous voting. [83] In the light of my analysis of the horizontal character of Article 100A, it is difficult to accept that any a priori limits should be imposed on the crucially important Community competence to provide for the establishment and functioning of the internal market, *over and above those inherent*

81 — Opinion 2/94 *European Convention on Human Rights*, op. cit., footnote 50 above, paragraph 30.

82 — See paragraph 37 of the Opinion of Advocate General Jacobs in *Spain*, op. cit., footnote 58 above.

83 — Op. cit., footnote 51 above, paragraphs 18 and 19.

in that very objective, merely because it entails qualified majority voting. This is, after all, the very mechanism introduced by the Single European Act in order that market integration should not be subject to the veto of individual Member States. [84] The best protection, consistent with the Treaty, of Member State interests against abuse or overreach by the Community is judicial review by the Court of compliance by the Community legislator with the objective requirements of Article 100A or, as the case may be, Article 57(2). As I said in the immediately foregoing paragraph, this requires, first, that the conditions for recourse to those provisions be identified.

The internal market

82. Article 3 of the EC Treaty (now, after amendment, Article 3 EC) defines the activities of the Community as including, as provided in the Treaty:

'(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

...

(g) a system ensuring that competition in the internal market is not distorted;

(h) the approximation of the laws of the Member States to the extent required for the functioning of the common market.'

The second indent of Article 7A of the Treaty states:

'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

83. It is apparent from these provisions that the internal market is not a value-free synonym for general economic governance. This is a question of some importance in the light of the Council's argument that pursuit of internal-market objectives need not necessarily be liberalising but may be purely regulatory. I explain below why the internal market cannot be defined simplistically in terms of liberalisation or deregulation. None the less, the conferral of

84 — See the remarks of Advocate General Tesauro in *Titanium Dioxide*, op. cit., footnote 51 above, paragraph 13 of his Opinion. However, I would add, further to my comments in the main text, that the possibility of qualified majority voting in the Council under Article 100A of the Treaty is not, in itself, a reason to construe that provision more broadly than would otherwise be the case.

competence to pursue its establishment and functioning, under both Article 100A and more specific provisions such as Article 57(2), cannot, in my view, be equated with creation of a general Community regulatory power. These competences are conferred either to facilitate the exercise of the four freedoms or to equalise the conditions of competition.

84. As regards free movement, this point is borne out by reference to the two *Waste* cases. [85] In *Waste 1*, the Court observed that the aim of the contested directive [86] was to implement the principle that waste was to be disposed of as close as possible to the place where it was produced, in order to limit as far as possible the transport of waste, [87] and concluded that the directive in question could not be regarded as implementing the free movement of waste within the Community. [88] As Advocate General Tesauro observed, the contested measure 'aims to achieve, not a liberalisation of trade in waste, but, on the contrary, reduced movements of waste within the Community'. [89] Similarly, *Waste 2* concerned a regulation [90] which the Court interpreted as providing a harmonised set of procedures whereby movements of waste could be limited on environmental grounds and which it did not, therefore, regard as implementing the free movement of waste within the Community. [91] It may be noted that the Court implicitly rejected the argument that a measure could come within Article 100A of the Treaty if it *regulated* movements of goods between Member States, without it being necessary for it actually to *facilitate* such movements. [92]

85. It goes without saying that the foregoing case-law does not require Articles 7A, 57(2) and 100A of the Treaty to be interpreted as a kind of liberal charter, entailing harmonisation towards the lowest standard or even towards some sort of mean of the pre-existing national standards. First, I have already referred to the

85 — Case C-155/91 *Commission* v *Council* [1993] ECR I-940 (hereinafter '*Waste 1*'); Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857 (hereinafter '*Waste 2*'), paragraph 25. As regards the compatibility with the internal market of Community harmonising measures which impose restrictions or prohibitions on certain economic activities, see also *Spain*, op. cit., footnote 58 above, *Deposit Guarantees*, op. cit., footnote 52 above and Case C-359/92 *Germany* v *Council* [1994] ECR I-3681 (hereinafter '*Product Safety*'), all of which are discussed further below.

86 — Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste, OJ 1991 L 78, p. 32.

87 — *Waste 1*, op. cit., footnote 85 above, paragraphs 13 and 14.

88 — Ibid., paragraph 15.

89 — Ibid., at p. I-959 of his Opinion.

90 — Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, OJ 1993 L 30, p. 1.

91 — *Waste 2*, op. cit., footnote 85 above, paragraphs 23 and 26. See also paragraphs 44 and 45 of the Opinion of Advocate General Jacobs, which were cited with approval by the Court.

92 — This argument was attributed to the Parliament by Advocate General Jacobs at paragraph 38 of his Opinion. He countered that it should be asked 'whether the measure has the overall objective of promoting, rather than restricting, such movements [of goods]'; ibid., paragraph 43. The Court did not comment expressly on this suggested test.

Community's duty [93] to take into account public interest concerns and, thus, the degree of protection attained or pursued by the Member States.

86. Secondly, harmonisation measures which impose considerable restrictions in the public interest should not invariably be regarded as seeking to reduce trade in the sector concerned. The entitlement of the Community legislator to impose such restrictions, even to the point of prohibiting trade in certain products, in parallel pursuit of broader free movement goals and of some other public interest is illustrated by the *Product Safety* case. The Court reconciled these apparently competing objectives in relation to a measure enabling the Commission to require Member States to take temporary measures to prohibit the marketing of dangerous products: [94]

'The free movement of goods can be secured only if product safety requirements do not differ significantly from one Member State to another. A high level of protection can be achieved only if dangerous products are subject to appropriate measures in all the Member States.'

Thus, a uniform system for responding to dangerous products was properly understood as a measure facilitating the free movement of goods in general. The free movement of goods may well be facilitated by measures which prevent, restrict or burden the circulation of particular goods. [95]

In *Rewe-Zentrale* v *Landwirtschaftskammer Rheinland*, [96] the Court held that, '[a]lthough ... Articles 30 to 36 of the Treaty apply primarily to unilateral measures adopted by the Member States, the Community institutions themselves must also have due regard to freedom of trade within the Community, which is a fundamental principle of the common market'. It concluded, nevertheless, that the inspections required to be carried out by virtue of the directive challenged in that case [97] were 'not intended to *hinder* intra-Community trade'; the impugned directive sought, '[o]n

93 — For an example of judicial review of compliance with Article 100A(3), see *Deposit Guarantees*, op. cit., footnote 52 above, paragraph 48.

94 — *Product Safety*, op. cit., footnote 85 above, paragraph 34. See also the remarks of Advocate General Jacobs, at paragraph 33 of his Opinion in that case.

95 — See the Opinion of Advocate General Jacobs in *Waste 2*, op. cit., footnote 85 above, paragraph 44. He referred to Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances, OJ 1991 L 78, p. 38, and said that the prohibition of the sale of batteries containing more than a certain level of mercury was imposed in order that batteries without an excessive level of mercury could circulate freely within the internal market. See also, for example, Article 4 of Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, OJ 1976 L 262, p. 169, which requires Member States, in the interests of public health, to prohibit the marketing of cosmetic products containing a range of specified ingredients.

96 — Case 37/83 [1984] ECR 1229, paragraph 18.

97 — Council Directive No 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products, OJ 1977 L 26, p. 20, in particular Article 11(3) thereof.

the contrary ... to achieve the gradual abolition of measures which were adopted unilaterally by the Member States and were, at the time, justified in principle by Article 36 of the Treaty'. [98]

87. An example, more relevant to the present cases, is furnished by the prohibition of advertising for tobacco products on television by virtue of Article 13 of Directive 89/552/EEC. This and a number of other rules regarding the advertising content of broadcasts are designed partially to harmonise conditions for providing television broadcast services. In consequence, 'Member States are to ensure freedom of reception and are not to impede retransmission on their territory of television broadcasts coming from other Member States on grounds relating to television advertising and sponsorship'. [99] Similarly, Article 8(1) of Directive 89/622/EEC and Article 7(1) of Directive 90/239/EEC prohibit the Member States from impeding the sale of tobacco products which comply with the requirements imposed by those directives regarding labelling and maximum tar yields.

88. Thirdly, Article 100A of the Treaty is not exclusively concerned with removing *barriers* to the exercise of the four freedoms. 'In order to give effect to the four freedoms mentioned in Article 8A, harmonising measures are [also] necessary to deal with disparities between the laws of the Member States in areas where such disparities are liable to create or maintain distorted conditions of competition'. [100] Article 100A can, thus, be used to enact harmonising measures with a view to equalising conditions of competition in a particular industry regarding, for example, disposal of pollutant by-products while also pursuing, 'indissociably', a public interest objective such as a high level of environmental protection. Thus, the Court took the view that Article 100A was the appropriate legal basis for the measure at issue in *Titanium Dioxide*, which laid down a total prohibition on disposal in Community waters or the high seas of certain waste from establishments produced using particular processes and maximum values for harmful substances in other waste disposed of. [101] Article 1 of that directive stated expressly that it was 'intended to improve the conditions of competition in the titanium dioxide industry'. I would contend that the Community legislator may, therefore, impose burdensome requirements which are equally applicable to the relevant business activity throughout the internal market, including burdens which, on any view, are greater

98 — Op. cit., paragraph 19, emphasis added. As the reference to Article 36 of the Treaty makes clear, this case is also relevant to the point made immediately above about taking into account public interest concerns when legislating for the internal market.

99 — Joined Cases C-34/95 to C-36/95 *KO v De Agostini and TV-Shop* [1997] ECR I-3843 (hereinafter '*De Agostini*'), paragraph 33.

100 — *Titanium Dioxide*, op. cit., footnote 51 above, paragraph 15. Article 8A became Article 7A of the EC Treaty, before becoming, after amendment, Article 14 EC. Although the removal of distortions of competition is stated to be necessary in order to give effect to the four freedoms, it is convenient to address separately, in the analysis which follows, the issues of barriers to, or restrictions on, exercise of those freedoms, on the one hand, and, on the other, distortions of competition.

101 — Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry, OJ 1989 L 201, p. 56. See *Titanium Dioxide*, op. cit., footnote 51 above, paragraph 2.

than the sum or the mean of those imposed by the different national rules which preceded the Community measure.

89. None the less, the pursuit of equal conditions of competition does not give *carte blanche* to the Community legislator to harmonise any national rules that meet the eye, be it in a liberalising or restrictive fashion. Without, in any way, qualifying my rejection of Germany's argument based on the danger of expanding Community competence through qualified majority voting, I would say that it would risk transferring general Member State regulatory competence to the Community if recourse to Article 100A to adopt harmonising measures in the interests of undistorted competition were not subject to some test of the reality of the link between such measures and internal-market objectives. The silence of Articles 7A and 100A of the Treaty regarding equal conditions of competition furnishes an additional reason to avoid turning Article 100A into an instrument of general economic governance on this ground.

90. One possible test appears to have been suggested by the Court in *Titanium Dioxide*, in the nature of a precondition for recourse to Article 100A: that the distortion of competition to be remedied by a harmonising measure must be appreciable. [102] I would favour such a test, although it is not necessary for the purposes of my analysis below for me to take a definite view on this question.

91. Another condition, clearly identifiable in the case-law, and more immediately relevant for present purposes, relates to the character of the harmonising measure adopted under Article 100A of the Treaty. It is not an appropriate legal basis for a measure whose effect on the harmonisation of the conditions of competition is merely incidental. This is not a simple matter of determining which of a measure's apparent objectives is the principal one. The Court has stated, in categorical rather than merely relative terms, that 'the mere fact that the establishment or functioning of the internal market is affected is not sufficient for Article 100A to apply'. [103] I understand the Court's ruling to this effect in *Waste 1* [104] as indicating that the directive at issue in that case could not have been adopted under Article 100A even if Article 130S had not been available as an alternative legal basis. The Court distin-

102 — See *Titanium Dioxide*, ibid., paragraph 23; Case 91/79 *Commission* v *Italy* [1980] ECR 1099, paragraph 8; Case 92/79 *Commission* v *Italy* [1980] ECR 1115, paragraph 8. The Court did not expressly state in *Titanium Dioxide* that Article 100A of the Treaty could only be used to deal with *appreciable* distortions of competition arising from disparate national regulations, and it was submitted by the defendants in the present cases that, having regard to the earlier cases cited, this condition only related to use of the more narrowly circumscribed Article 100 of the Treaty. It is clear, however, from its application under Article 100 that the defendants' argument that this test is relevant only to the application of the Treaty competition rules to undertakings is unfounded.

103 — *Waste 1*, op. cit., footnote 85 above, paragraph 19; see also Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, paragraph 33.

104 — Op. cit., footnote 85 above, paragraphs 17 to 20, especially paragraph 19.

guished legislation which had as its main object the effective management of waste in the Community, regardless of its origin, and which had only ancillary effects on competition and trade, including production costs, from the directive which was the subject of *Titanium Dioxide*, which was 'intended to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating distortions of competition *in that sector*'.[105] I would conclude that the contribution by a given measure to the equalisation of conditions of competition in the sector which is supposed to benefit thereby should be specific to that sector, however widely drawn, and should not be merely incidental. It follows that Community rules whose sole effect in a given sector is to prohibit the relevant business activity cannot be said to equalise conditions of competition *in that sector*, whatever may be its effects on competition in some related field.

92. The applicants referred to another possible limit — that recourse to Article 100A of the Treaty to remedy distortions of competition should be confined to fields where the Community also enjoys express competence *ratione materiae*, such as environmental protection. I am not convinced by this argument. There is no apparent support for it in Article 100A or in the general provisions of the Treaty regarding the Community's objectives and activities and the definition of the internal market. It is inconsistent with the horizontal character of Article 100A. Furthermore, it raises at least as many problems as it purportedly resolves. The Community's materially defined areas of competence include fields where its powers range from the very extensive, as in the case of agriculture, to the relatively minor, as in the case of public health. Unless some further refinement is proposed, and given that, as I have already said, the exclusion of harmonisation in Article 129(4) cannot affect competence under Article 100A, this argument cannot be understood as excluding harmonisation of conditions of competition in a sector of considerable relevance to public health. However, for reasons which become apparent below, there is no need for me to take a final view on this argument.

Internal-market objectives — concrete assessment

93. In order to determine whether a Community measure pursues internal-market objectives, a two-stage enquiry is necessary. First, it must be ascertained whether the preconditions for harmonisation exist, that is, disparate national laws which either constitute barriers to the exercise of the four freedoms or distort conditions of

105 — Op. cit., footnote 51 above, paragraph 20, emphasis added.

competition in an economic sector. [106] Secondly, the concrete action actually taken by the Community must be consistent with the establishment and functioning of the internal market. This involves review of how the Community legislator attempted to reconcile the central requirement of provisions like Articles 57(2) and 100A that measures adopted thereunder facilitate free movement or equalise conditions of competition in a specific sector with its duty to take into account public-interest factors which may militate in favour of a highly restrictive approach to certain economic activities.

94. It has been suggested, especially by the Commission, that this essentially raises the question whether a measure is appropriate, or opportune, which is a question of proportionality rather than of competence. The Court should not, therefore, intervene at this stage. I do not agree. If the exercise of Community competence is to be amenable to judicial review, it is not enough to verify satisfaction of the conditions precedent to harmonisation, because Articles 57(2) and 100A of the Treaty do not confer a universal competence to harmonise for its own sake once those conditions are satisfied. The need for concrete review of the harmonising measure actually adopted is acknowledged in the Court's repeated statement that enquiries regarding competence should have regard, 'in particular, [to] the aim and content of the measure'. In cases such as the present, concrete analysis of Community competence must relate exclusively to determining that the measure pursues the internal-market objectives for which competence was conferred, while bearing in mind that this may be consistent with simultaneous achievement of other, complementary public-interest goals which cannot, on their own, justify recourse to Articles 57(2) and 100A of the Treaty.

95. The Court has undertaken a concrete review of this type in cases where Member States have challenged the Community's competence to act pursuant to Article 100A and Article 57(2), respectively, in *Spain* and *Deposit Guarantees*. [107] In *Spain*, the Court examined and rejected the argument that Regulation No 1768/92 [108] compartmentalised the Community market beyond the duration of basic national patents and prevented free competition with patent-holding undertakings by the generic medicines industry. [109] It held that the harmonised extension of the period of patent protection by the regulation forestalled the fragmentation of the market for

106 — These are the two grounds invoked in defence of the Advertising Directive in the present cases. I take no position on the question whether there are other grounds for action pursuant to the provisions at issue.

107 — Such a concrete review is also typical of the Court's inquiries into the applicability of one legal basis rather than another, as in *Titanium Dioxide*, op. cit., footnote 51 above, and the two *Waste* cases, discussed above.

108 — Op. cit., footnote 58 above.

109 — *Spain*, op. cit., footnote 58 above, paragraphs 30 and 31.

medicines by preventing the heterogeneous development of national laws, [110] even though such extended protection was unknown in most Member States. [111] The Court also examined the balance struck between the interests of patent-holding undertakings and those which manufacture generic medicines. [112] Although this is clearly relevant under the rubric of proportionality, the Court appears to have considered it in this case as a matter relating to competence, required by 'the objectives set out in [Article 7A of the Treaty]', [113] thus implying that the existence or severity of restrictions imposed upon economic activity (here, that of manufacturers of generic medicines) is potentially relevant to the question whether a harmonising measure can be said to pursue internal-market objectives. [114] My general approach in the present cases is also reinforced by the fact that, having satisfied itself regarding the internal-market objective of the contested regulation, the Court at no point referred to the relative weight in the legislative scheme of the complementary objective of promoting pharmaceutical research in the Community.

96. In *Deposit Guarantees*, the Court addressed the submission that the prohibition by the contested measure [115] of promotion by bank branches in other Member States of the benefit of national deposit guarantee schemes which were more protective of consumers than those provided for in the directive was inconsistent with the objective of Article 57(2) of the Treaty. The Court concluded that the maximum limit imposed on the deposit protection offered by branches in other Member States 'is much less onerous than the obligation to comply with different bodies of legislation on deposit-guarantee schemes in the various host Member States', with the result that even the establishment in other Member States of branches of German credit institutions could be said to have been facilitated by the directive at issue. [116]

97. This type of assessment is distinct from the assessment of proportionality. The question asked, with a view to establishing fulfilment of the conditions for recourse to a competence conferred for functional ends, is whether the measure pursues the internal-market objectives invoked, not whether it goes further than is necessary to achieve it. Furthermore, as I stated above, we are, at this stage, exclusively concerned with the achievement of those objectives, as this is the purpose for which the competence was conferred. When assessing proportionality, on the other hand, account must also be taken of the additional substantive objectives which must be pursued through internal-market measures,

110 — Ibid., paragraphs 35 and 36.

111 — Ibid., paragraph 34.

112 — Ibid., paragraphs 37 to 39.

113 — Ibid., paragraph 37.

114 — See the discussion above at paragraphs 83 to 87 of whether the adoption of trade-*reducing* measures is consistent with the pursuit of internal-market objectives.

115 — European Parliament and Council Directive 94/19/EC of 30 May 1994 on deposit-guarantee schemes, OJ 1994 L 135, p. 5.

116 — Ibid., paragraph 44.

including that of achieving a high level of health protection.

98. It is clear that, when engaging in concrete review of complex legislative choices affecting diverse economic and other interests, the Court must normally accept the assessment of the legislator that the effectiveness of a measure as regards the establishment or functioning of the internal market will justify the constraints created by it. [117] The Court may not substitute its judgment for that of the legislator, or question the expediency of a particular policy initiative. [118] Even though we are concerned with establishing the limits of Community legislative competence, the necessary concrete assessment of the relationship of the measure adopted with its professed objectives entails, in my view, recourse to the standard of review applied by the Court to the exercise by the institutions of broad legislative discretion. Where the institutions enjoy 'a wide measure of discretion, particularly as to the nature and extent of the measures which [they adopt], the Community judicature must, when reviewing such measures, restrict itself to examining whether the exercise of such discretion is vitiated by a manifest error or a misuse of powers or whether [the institutions] did not clearly exceed the bounds of [their] discretion'. [119]

99. None the less, the Court's task is easier in the case of legislation whose effects in the relevant sector are extreme, as in the case of a prohibition. There can be no presumption that the effective prohibition by the Community legislator of a particular economic activity is contrary to the objectives of the internal market. At the same time, the effects of such a prohibition, and the legal conclusions to be drawn from them, will be more easily identified by a judicial body, which would be much more deferential towards delicate balances struck by the legislator between different material interests. [120] This facilitates the assessment of whether there is the necessary concordance of the *content* of the measure imposing a prohibition with its internal-market *aim*, as set out, in particular, in the preamble to the measure and in any substantive provision (such as Article 1 of the Advertising Directive) which refers, expressly or by necessary implication, to its objectives. This concordance must ultimately be judged by reference to the discernible effects of the impugned measure. The precise internal-market objective pursued should be apparent from the measure itself and it cannot, in my view, be supplemented by reference to wider or different objectives at a later stage. [121] If the effects of the measure are not consistent with the internal-market objectives served by the legal bases employed *and actually invoked by the legislator*, then it must be concluded that the Community legislator

117 — See the Opinion of Advocate General Léger in *Deposit Guarantees*, op. cit., footnote 52 above, paragraph 113.

118 — See *Working Time*, op. cit., footnote 80 above, paragraph 23.

119 — Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265 (hereinafter '*BSE*'), paragraph 60; Case 98/78 *Racke* v *Hauptzollamt Mainz* [1979] ECR 69, paragraph 5. I would reiterate that, in my view, the plea of misuse of power has not been proven in the present cases.

120 — See, for example, *Spain*, op. cit., footnote 58 above, paragraphs 38 and 39.

121 — This is not the same as saying that the reasoning for the measure, including any relevant qualitative or quantitative information, must be set out in greater detail than usual in the measure itself. My present concern is not with the adequacy of the reasons provided in the Advertising Directive (discussed in section V(vii) below), but with fixing clearly the character of those reasons, and the objectives pursued, in order to undertake substantive review of the Directive by reference to its aim and content.

has committed a manifest error or exceeded its discretion.

The objective of the Advertising Directive

100. Article 1 of the Directive states that its objective is 'to approximate the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products'. The first recital in the preamble postulates that the pre-existing differences between national rules in this field were likely to give rise to barriers not just to the provision of services as regards the advertising and sponsorship of tobacco products but also to the movement between Member States of products which serve as the media for such advertising and sponsorship. These differences also distorted competition. This statement can only be understood as relating to competition between providers of the aforementioned services — advertising and sponsorship for tobacco products — and between producers and suppliers of the media for such advertising and sponsorship. In its context, it clearly does not relate to competition in the advertising and sponsorship sectors in general, which are nowhere mentioned in the Directive. Furthermore, nothing in this recital or elsewhere in the Advertising Directive suggests that it is concerned with barriers to trade in either tobacco or diversification products or with distortions of competition as between producers or distributors of such products, or as between producers or distributors of goods and services which bear tobacco-related brands and of equivalent goods and services which do not. The recital finishes by stating that the barriers and distortions of competition adverted to impede the functioning of the internal market.

101. The first recital may be understood as seeking to satisfy the condition precedent for Community harmonisation on the basis of Articles 57(2) and 100A of the Treaty. The second recital contains the most explicit statement of the linkage between the existing situation, the achievement of the objectives of the internal market — the ostensible *aim* of a measure adopted on the basis of Articles 57(2) and 100A — and the measure actually adopted — its *content*: [122]

'Whereas those barriers should be eliminated and, to this end, the rules relating to the advertising and sponsoring of tobacco products should be approximated ... .'

Imperial Tobacco submitted that the Directive does not include among its aims combating any distortion of competition

122 — I do not, of course, wish to make a rigid distinction between aim and content. It is possible to deduce the aim of a measure from its substantive provisions as well as its preamble — see, for example, *Forestry Protection*, op. cit., footnote 67 above, paragraph 13. In the present cases, however, no additional guidance is furnished by the other provisions of the Advertising Directive.

distinct from the trade barriers referred to in the second recital. I regard this reading as over-strict. The eighth recital refers to the interdependence between the various forms of advertising and states that the Directive must cover all forms of advertising (apart from television advertising) 'in order to prevent any risk of distorting competition'.

102. I will first examine the internal-market objectives of the Directive in terms of the removal of barriers to free trade in goods and services connected with the advertising and sponsorship of tobacco products. I will advert subsequently to the issue of equalisation of conditions of competition in the same specific business sectors.

Barriers to trade in goods and services relating to tobacco promotion

103. The question whether or not there exists any, or any materially significant, trans-frontier trade in goods and services relating to tobacco promotion, or any barrier thereto, was contested at length in the pleadings.

104. The Court has made clear that there is no *de minimis* rule regarding the Treaty prohibition of obstacles to trade arising from disparate national laws: in the context of the free movement of goods, for example, a national measure is deemed to constitute a restriction if it is capable of hindering directly or indirectly, actually or potentially, intra-Community trade, 'even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways'. [123] The fact that a national rule affects a tiny market, whether defined geographically or by reference to the amount of trans-frontier trade affected by the rule, is also irrelevant to the application of Article 30 of the Treaty. [124] The case-law on services suggests that the same principles apply in that field. [125] The Community is competent to remove obstacles to trade in goods and services through harmonising measures based upon Articles 57(2) and 100A of the Treaty, which take into account the general interest concerns which lead to the adoption of national rules in the first place. It does not follow that action of that sort is automatically justified by trivial ('*de minimis*') trade barriers. It is at least arguable that harmonising action should relate to national rules which have more than trivial effects on trade. This issue does not arise in this case, because disparate national rules, some of them highly restrictive, can clearly have direct and significant effects on trade in tobacco advertising services and media. The question whether levels of trans-frontier trade in the goods or services affected are significant either in absolute terms or in

123 — Joined Cases 177/82 and 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR 1797, paragraph 14. See also Case C-126/91 *Yves Rocher* [1993] ECR I-2361, paragraph 21.

124 — See Case C-67/97 *Bluhme* [1998] ECR I-8033, paragraphs 18 to 20 and 22, and paragraphs 18 and 19 of my Opinion in that case.

125 — See, for example, Case C-384/93 *Alpine Investments* [1995] ECR I-1141. It is obvious from the decision of the Court in *Bluhme*, ibid., paragraph 22, that the exclusion from the scope of application of the relevant Treaty provisions by cases such as Case C-379/92 *Peralta* [1994] ECR I-3453 of merely indirect or aleatory obstacles to trade in goods or services relates to the remoteness of their effects on trade, rather than the scale of those effects.

relation to purely internal exchanges is also potentially relevant. However, that question is not material to the analysis of competence so much as it is to the application of the principle of proportionality, in assessing whether the scope of a measure is too wide (for example, because it affects extensive domestic trade as well as relatively limited trans-frontier exchanges) and, thus, whether the measure's over-broad restrictive effects outweigh its benefits for the internal market.

105. I am not convinced by Germany's argument that there is effectively no trans-frontier provision of advertising and sponsorship services with a view to tobacco promotion [126] which might be adversely affected by differences in national regulation of such economic activity. [127] Such services may be provided, for example, by an international advertising agency established in a Member State for use throughout all or part of the Community [128] or by a local agency, for merely domestic use, on behalf of an international client (including, possibly, an international advertising agency) and may include the conception of brand names, advertising themes, slogans and campaigns; the commissioning of artwork, models or actors and others to create advertising images, films and so on; the placing of advertisements with different media and of sponsorship with various sporting, artistic or other organisations, venues or teams; and organising direct distribution of free gifts or advertising material to the public. The provision of such services for remuneration is obviously commercial in nature. Only the total prohibition of a particular service on public policy grounds in all Member States would take it outside the scope of the Treaty [129] and that is not the case with tobacco promotion. The sponsorship of teams or events, in return for acknowledgement of the sponsor's contribution or the display of promotional material (which may also feature in television or radio broadcasts of a sponsored event), also constitutes a remunerated provision of a service by the former to the latter. [130] It seems clear from the evidence before the Court that such activities are relatively commonplace.

126 — The promotion of diversification products governed by Article 3(3)(b) of the Directive — non-tobacco products which bear brand names, trade marks, emblems or other distinguishing features used for tobacco products — is regarded as an indirect form of tobacco promotion and is, therefore, included in the examination below of the promotion of tobacco products, save to the extent that it is singled out for special discussion.

127 — Regarding non-discriminatory restrictions on the provision of services, see Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 43; Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221, paragraph 12.

128 — A service provided in Member State B by an agency established in Member State A on behalf of a client established anywhere in the Community, including Member State A, comes within the scope of the Treaty provisions on services. See, for example, Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 9, regarding the activities of tourist guides.

129 — *Schindler*, op. cit., footnote 127 above, paragraph 32.

130 — See Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2594, paragraph 57.

106. Restrictions on services governed by Article 59 of the EC Treaty (now, after amendment, Article 49 EC) can arise where an advertising agency which lawfully provides services with a view to promoting tobacco products in one Member State is prevented from doing so in another by virtue of a more restrictive national approach to advertising and sponsorship of tobacco products. Similarly, the provision of services by, for example, sports teams, orchestras, travelling exhibitions or multi-venue sports competitions is restricted where sponsorship which they can lawfully accept and publicise in one Member State is prohibited or subjected to additional conditions in another. The cross-border provision of radio services could also be affected by national rules regarding the advertising content of such broadcasts. [131]

107. The category of goods in respect of which there may be barriers to trade which are material to the Advertising Directive seems to be rather less broad. To my mind, it can be limited to goods traded between Member States which do not serve exclusively as the media for tobacco advertising or sponsorship in any given case. The most obvious example is that of newspapers or magazines, which will normally have both other advertising content and substantive journalistic content, whose circulation in other Member States is hindered, actually or potentially, by the fact that tobacco advertisements which are lawful in the Member State of production are prohibited or subjected to different conditions in other Member States. One cannot, I think, discuss in the context of goods either cigarettes distributed free for promotional purposes (which are presumably provided by the producer) or mobile bearers of advertising or sponsorship, such as racing cars or team sports gear used in international events, as they are not, in these circumstances, the subject of intra-Community *trade* even if they cross borders. [132] None the less, the organisation of the distribution campaign or of the sponsorship scheme (as well as the acceptance of promotional sponsorship) may have trans-frontier aspects which are liable to be affected by disparate national rules. As regards items which function exclusively, in any given case, as the media for tobacco advertising — posters, brochures, flyers, etc. — it is probably better to examine them from the perspective of the promotional service of which they are the tangible expression, [133] even if they are in some sense the subject of trade in their own right (for example, supply of printed matter by a printer to an advertising agency).

131 — See the discussion above of Directive 89/552/EEC. Remunerated trans-frontier broadcast advertising constitutes provision of a service within the meaning of Article 59 of the Treaty: Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085.

132 — However, the Treaty provisions on free movement of goods would apply to the independent trade in replica sports gear, which often bears the same sponsorship slogans, and which could be construed as being 'products which serve as the media for such advertising and sponsorship'.

133 — See *Schindler*, op. cit., footnote 127 above, paragraph 22.

108. I am satisfied, therefore, that the preconditions for the Community to exercise its harmonising competence in respect of trade in goods and the provision of trans-frontier services were satisfied in the present case. It is necessary, therefore, to examine the approach adopted in the Advertising Directive to dealing with the foregoing non-discriminatory barriers to trade in goods and services.

The approximation effected by the Advertising Directive

109. The central element of the Advertising Directive is a wide-ranging prohibition of advertising, direct and indirect, and of sponsorship, on behalf of tobacco products. In fact, without prejudice to the existing ban on television advertising by virtue of Directive 89/552/EEC, the prohibition is couched in universal terms in Article 3(1) of the Advertising Directive, but the application of the Directive is then made subject to a number of express exceptions by Article 3(5).

110. There has been considerable debate about the economic and promotional significance of these exceptions relative to total tobacco advertising activity. The dispute as to whether, in the result, the Directive imposes a 'total ban' on tobacco advertising is a semantic one. In my view, in the context of tobacco advertising taken as a whole, the exceptions are minor. The ban can fairly be described as comprehensive. It prohibits all consumer-oriented advertising by Community operators away from the point of sale.

111. In the light of this comprehensive ban, one should seek to determine how the internal market is to benefit from the Advertising Directive. The important point, as was submitted, in particular, by Imperial Tobacco, is that the Directive makes no attempt to harmonise existing national rules regarding the limited forms of advertising which it does not itself prohibit. All other things being equal, it might have been arguable that trade in services and goods in the excepted fields was implicitly liberalised by the adoption of a measure which harmonised — by prohibiting — extensive aspects of the economic activity in question. But that is not what the Directive does. Article 5 makes it clear beyond dispute that the Directive is not intended to have any such liberalising effect, or even to permit such advertising subject to conditions, as it expressly leaves it open to the Member States to impose stricter requirements in the excepted fields on health protection grounds. Although such national measures remain subject to compliance with the Treaty, the Directive in no sense affects their continued applicability to aspects of tobacco advertising which fall outside its own wide-ranging harmonised prohibition.

112. In reaching this conclusion, I have not forgotten that, even if harmonised rules had been adopted in respect of the forms of

advertising not prohibited by the Directive, Member States would have been free to invoke Article 100A(4) of the Treaty in order to continue to apply more restrictive national measures on public health grounds. The first point to remember is that this procedure cannot apply to aspects of a measure which concern barriers to the provision of services, for which Article 57(2) of the Treaty, rather than Article 100A, provides the specific legal basis. In any event, the hypothetical situation to which I have just referred would be quite different from that which results from the non-approximation of national rules in the areas referred to by Article 3(5) of the Directive. First, recourse to Article 100A(4) is subject to a special confirmatory procedure, controlled by the Commission, whose decision is judicially reviewable at the suit of other Member States. [134] Member States cannot act unilaterally without Commission approval. [135] Refusal of confirmation by the Commission obliges the notifying Member State to seek the annulment of the Commission's decision before it can act. [136] If, in the absence of such confirmation, they do not implement a harmonising directive in time, it can have direct effect before the national courts. [137] In the light of all these factors, it cannot be suggested, without questioning the utility in many contexts of Community action under Article 100A of the Treaty, that any form of harmonised liberalisation, whether total or conditional, of the areas mentioned in Article 3(5) of the Directive would inevitably have resulted in an outcome similar in effect to that under the Directive.

113. It is apparent to me from the foregoing that the Advertising Directive cannot be regarded as removing barriers to, and thereby facilitating, trade in services whose content is exclusively devoted to the advertising or sponsorship of tobacco products, including both those services which find tangible expression in goods such as printed brochures, leaflets or posters and the service elements of free distribution of tobacco products. The Directive's *sole* effect, within its extensive sphere of application, is to prohibit trade in the services in question. There are no compensating gains for undertakings active in the production or provision of such services. Existing barriers arising from disparate national rules continue to subsist in areas not governed by the Directive. Although such an aim is not expressly stated, it is clear both from the content of the Directive and from its complementary aim of taking into account the health protection of individuals [138] that it is intended radically to reduce trade in the services in question, or, at the very least, that such an outcome is inevitable. As a matter of law, a measure whose sole effect is to prohibit an economic activity cannot, in my view, be said to constitute the removal of barriers to trade *affecting that activity*. I would conclude, therefore, that the Community legislator was manifestly in

134 — See Case C-41/93 *France* v *Commission* [1994] ECR I-1829.

135 — Case C-319/97 *Kortas* [1999] ECR I-3143, paragraphs 28 and 36.

136 — *Kortas*, ibid., paragraph 27. See, for example, Case C-512/99 *Germany* v *Commission* and Case C-3/00 *Denmark* v *Commission*, both pending.

137 — *Kortas*, op. cit., paragraph 22.

138 — See the fourth recital in the preamble to the Directive.

error, or manifestly exceeded its discretion, regarding its assessment of the benefits likely to accrue in fact to undertakings active in the affected field and to the establishment and functioning of the internal market.

114. The analysis would be different if the Advertising Directive only covered trade in those services and goods which, while they act as media for advertising and sponsorship, also have distinct functions and economic value. One such service is the cross-border provision of radio broadcasts. The rationale for prohibiting tobacco-related advertising or programme sponsorship on radio is exactly the same as that for its prior prohibition on television. Another is the sponsorship service provided by teams or by the sporting organisation itself in peripatetic sports such as Formula One motor racing. Two diverse examples of relevant goods, already mentioned, are newspapers and magazines, on the one hand, and replica sports gear, on the other. In all such cases, although the profitability of the activity may be affected by the Directive's prohibition of advertising and sponsorship for tobacco products, it is by no means manifest that the Community legislator erred or exceeded its discretion in concluding that their free movement or trans-frontier provision would be facilitated by uniform rules on advertising and sponsorship content which removed actual or potential restrictions arising from disparate national regimes. [139]

115. The same analysis applies *mutatis mutandis* to the prohibition, by virtue of Article 3(3)(b) of the Directive, of advertising and sponsorship on behalf of non-tobacco products which bear brand names, trade marks, emblems or other distinguishing features used for a tobacco product (diversification products). The situation is more complex regarding advertising of goods and services which had already been traded or offered in good faith prior to 30 July 1998 under a brand name also used for tobacco products. [140] Member States may, by virtue of Article 3(2) of the Advertising Directive, permit that brand name to be used for the advertising of those other goods or services. The result is that rules on the provision of advertising services in this area have not been fully harmonised. Certain conditions for the permissibility of such advertising are imposed — that the brand name be used in a manner clearly distinct from that used for the tobacco product, without any further distinguishing mark already used for a tobacco product — but this merely serves to prohibit all non-compliant types of promotion without in any way addressing disparities in national rules regarding those forms of advertising for the products and services in question which fall outside that prohibi-

139 — See, for example, Article 5 of the first proposed Directive which preceded the adoption of the Advertising Directive, which would have prohibited Member States from impeding trade in compliant publications.

140 — Article 3(2) of the Directive is silent regarding sponsorship.

tion. Thus, the provision results in a curious simultaneous combination of the preferences for either prohibition or non-harmonisation which characterise the legislative scheme as a whole. Furthermore, because Member States remain free either to allow or to prohibit advertising which complies with the abovementioned condition regarding brand differentiation, this provision does not even contribute to removing barriers to trans-frontier provision of services and trade in goods which are not exclusively tobacco advertising media, such as radio and newspapers. In addition, the fact that Article 3(2) creates an optional exception to a prohibition imposed by Community law probably means that the resulting disparities between national laws would escape scrutiny under Articles 30 and 59 of the Treaty. I conclude that the provision in no way contributes to the removal of barriers to trade in goods and services associated with tobacco advertising and that, as a result, Articles 57(2) and 100A of the Treaty did not constitute appropriate legal bases for its enactment.

116. The case of Article 3(3)(a) of the Advertising Directive also requires special attention. This provision requires Member States to ensure that no tobacco product bears the brand name, trade mark, emblem or other distinctive feature of any other product or service unless the tobacco product was already traded on that basis before 30 July 2001, the date on which the period for implementation of the Directive expires. The objective of this provision is not immediately apparent from the recitals in the preamble to the Directive, as there is no specific mention of any such initiative. Such branding of tobacco products does not, as such, even come within the generous definition of advertising in Article 2(2) of the Directive. At most, it can be suggested that Article 3(3)(a) is designed to prevent tobacco products from benefiting indirectly from unrestricted advertising for non-tobacco products whose brand they share by virtue of a form of reverse diversification. [141] This might be of relevance to the internal market in advertising services and media in general, if it were designed to counteract disparate national rules regarding the permissibility of advertising of non-tobacco products which share brands in this way, but no such aim is either recited by the Community legislator or otherwise apparent. The provision does not appear to have any immediate connection with the achievement of the internal market in services and goods associated with advertising and sponsorship of tobacco products, which economic activities are, as we have seen, prohibited, with very few exceptions, irrespective of the brand borne by the tobacco products in question. I conclude, therefore, that, having regard to the internal-market objectives invoked by the Community legislator, it was not competent to adopt Article 3(3)(a) of the Directive on the basis of Articles 57(2) and 100A of the Treaty.

141 — It also constitutes a harmonised product rule regarding product presentation which might be relevant to the free movement of tobacco products in the Community but, as we have seen, this does not feature among the Directive's objectives. Given the parallel public health objective of the Directive, as expressed, in particular, in the fourth recital, it is difficult to believe that it is designed to facilitate trade in tobacco products.

Distortion of competition

117. I now address the question whether the Directive can be considered to remove distortions of competition arising from the application of disparate national rules to tobacco promotion other than through non-exclusive advertising media. I do not refer further to the position of non-exclusive advertising media and bearers of sponsorship such as radio broadcasts, newspapers and 'mobile' sporting and artistic events and teams, orchestras and so on, having already concluded that the Community legislator would have been competent under Articles 57(2) and 100A of the Treaty to prohibit tobacco advertising and sponsorship in such cases, on the grounds invoked. I also confine my remarks to the effect of the central prohibition of advertising and sponsorship on behalf of tobacco products contained in Article 3(1) of the Directive. The effects of Article 3(2) and (3) can be assessed by extrapolation from this analysis, as I have already done myself as regards the removal of barriers to trade.

118. I would recall once more my conclusions, stated above, that Community competence under Article 100A of the Treaty to harmonise national rules in order to secure undistorted competition is confined to measures which concern, in a more than merely incidental way, conditions in a specific sector [142] and that the economic sector addressed by the Advertising Directive is that of advertising and sponsorship of tobacco products and related trade in media products. [143] In the event, it is not necessary to analyse whether, or how, competition was distorted in the sector under discussion, or whether any such distortions were appreciable or passed any other applicable threshold. In my view, the Directive simply cannot be regarded as contributing to the equalisation of conditions of competition in the sector addressed for the simple reason, already outlined above, that it eradicates, to a very great extent, the sector in question and, to the extent that it does not do so, fails to achieve any harmonisation of conditions.

119. I would reject any suggestion that even if Member States remain free to adopt divergent rules regarding the forms of advertising excepted from the prohibition by virtue of Article 3(5) of the Directive, competition in these fields is, none the less, greatly equalised by the fact that all advertisers are excluded from the prohibited fields. This argument invokes potential effects on competition in respect of the

142 — See the discussion of *Titanium Dioxide*, op. cit., footnote 51 above and *Waste I*, op. cit., footnote 85 above, at paragraph 91 above.

143 — See paragraphs 99 to 102 above.

excepted forms of advertising — the denial of economies of scale to any market participant by the exclusion of all from a large part of the market — which are, at best, indirect and remote. It is irrelevant to the actual providers of advertising space — trade publications, retailers and third-country publications — as they, in any event, have no necessary links with the prohibited media. As regards providers of general advertising services to the tobacco industry, such as advertising agencies, the equalisation of conditions in the remaining fields of activity simply by prohibiting large tracts of merely *collateral* activity is of very remote competitive benefit. It cannot, in my view, be compared with harmonised regulation (including through use of prohibitions) of the inputs, outputs or externalities of a specific sector which is intended to benefit from uniform competitive conditions, as in *Titanium Dioxide*. I would regard this as a clear case for the application of the dictum in *Waste 1* [144] distinguishing the former case on the basis that, although the legislation at issue affected the functioning of the internal market, that effect was not sufficient for Article 100A of the Treaty to apply where that effect is merely incidental. I have already suggested that that was a case where the effect of the measure on competitive conditions in the sectors concerned was too remote for it to be adopted on the basis of Article 100A even in the absence of an alternative legal basis. I take the same view in the present case, where, of course, Article 129 of the Treaty provides for no such alternative.

120. It follows that the Community legislator committed a manifest error, or manifestly exceeded its discretion, in purporting to adopt the Advertising Directive as a measure to secure undistorted competition in the tobacco advertising and sponsorship sector.

Consequences: Invalidity and severability

121. I have concluded that the Community legislator was not competent to adopt the Directive on either of the grounds invoked — removal of barriers to trade in goods and services or equalisation of conditions of competition — in so far as it relates to advertising in media which, in any given case, exclusively contain tobacco advertising. If the Court accepts that the Advertising Directive was not validly adopted on the legal basis cited for it, it follows from Article 174 of the EC Treaty (now Article 231 EC) that it will 'declare the act concerned to be void'.

122. On the other hand, the Community legislator would, in my view, have been competent, on the free movement grounds invoked in the Directive, to prohibit tobacco advertising and sponsorship through media which also have other independent content and in which there is a distinct service element or trade, such as newspapers and radio broadcasting. What are the consequences of this conclusion, if it

144 — Op. cit., footnote 85 above, paragraphs 18 and 19.

is accepted, for the Court's ruling in these cases? The Court may undoubtedly — as it frequently does — annul merely a part of a measure. The Court has not laid down any general guidelines on the question of the severability of the valid and invalid parts of a legislative measure. None the less, it seems to me that it has chosen the route of partial annulment where two conditions are satisfied: first, where a particular provision is discrete and, thus, severable without altering the remaining text; and, secondly, where the annulment of that provision does not affect the overall coherence of the legislative scheme of which it forms a part.

123. The judgment in *Working Time* [145] furnishes a useful example. The Court annulled the second sentence of Article 5 of Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [146] regarding the choice of Sunday as, in principle, the weekly rest day. It was annulled precisely because the Council had failed to indicate how rest on this day was more closely associated than on any other day of the week with the health and safety of workers — the objective of the impugned directive. The Court expressly stated that the sentence was severable and it is clear that it did not consider that its removal would disturb the legislative scheme, as the provision was unrelated to its objective.

124. The Court has also referred to the issue of partial annulment in non-legislative contexts. For example, in *Consten and Grundig* v *Commission*, the Court held that, in the circumstances of the case, the Commission had failed to give reasons in the contested decision for prohibiting an entire agreement between undertakings as anti-competitive rather than only certain severable parts, but it also stated that such a prohibition could apply 'to the agreement as a whole if those parts do not appear to be severable from the agreement itself'. [147] In *Transocean Marine Paint* v *Commission*, the Court annulled the sole provision of a wider Commission decision which had been challenged by the affected trade association, notwithstanding its importance, because it was capable of being severed from the other provisions and because the decision, taken as a whole, was favourable to the interests of the undertakings concerned. [148] This implies, in my view, that the Court was concerned with the coherence of the surviving provisions after opting for merely partial annulment.

125. I think useful guidance is also provided on the question of legislative coherence by the approach adopted in those jurisdictions where the courts exercise a power to

145 — Op. cit., footnote 80 above, paragraph 37.
146 — OJ 1993 L 307, p. 18.
147 — Joined Cases 56/64 and 58/64 [1966] ECR 299, at p. 344.
148 — Case 17/74 [1974] ECR 1063, paragraph 21.

declare laws invalid having regard to provisions of a written constitution.

126. The Irish Supreme Court has said:

'[T]here is a presumption that a statute or a statutory provision is not intended to be constitutionally operative only as an entirety. This presumption, however, may be rebutted... if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity. It is essentially a matter of interpreting the will of the legislature in the light of the relevant constitutional provisions ... . If the courts were to sever part of a statutory provision as unconstitutional and seek to give validity to what is left *so as to produce an effect at variance with legislative policy*, the Court would be invading a domain exclusive to the legislature and thus exceeding the court's competency.' [149]

Writing for the Supreme Court of the United States in *Lynch* v *US*, Brandeis J. said:

'It is true that a statute bad in part is not necessarily void in its entirety. A provision within the legislative power may be allowed to stand if it is separable from the bad. But no provision, however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall.' [150]

I would endorse the express adoption of a similar approach in Community law.

127. Neither of the conditions mentioned above is satisfied in the present cases. First, the potential legitimacy of an advertising ban in certain media does not coincide with any distinct and severable wording in the Advertising Directive. Article 2(1) and (2) of the Directive defines advertising and sponsorship in general terms and Article 3(1) imposes a general and comprehensive ban on all such advertising and sponsorship. No specific advertising or sponsorship media are mentioned other than those subject to exceptional treatment in Article 3(5). Thus any order of annulment, *pro tanto*, would involve the Court in creative re-writing of the measure by interpretation. No obviously severable provision offers

149 — *Maher* v *Attorney General* [1973] IR 140.

150 — 292 US 571 (1934). It appears that the US courts do not observe the first condition stated above, that is, that they may annul a generally applicable statute or statutory provision as regards some applications and not others. Their commitment to respecting the legislative intent applies *a fortiori* where a stricter approach is taken to the severability of legislative provisions.

itself to the clean cut of an order of annulment.

128. Secondly, the preserved parts would represent only part of the subject-matter of the ban which was clearly conceived of in global terms by the Community legislator. The Court would bring the axe to the tree but seek to allow some of the branches to survive, despite the fact that the eighth recital in the preamble to the Directive refers to the interdependence between various forms of advertising and to the risk of distorting competition between them. Whatever may be the merits of that assessment, it is clear, both from this recital and from Articles 2(2) and 3(1), that the Community legislator envisaged (subject to certain specified exceptions in Article 3(2) and (5)) a measure of general and undifferentiated application rather than one tailored to the specificities of particular advertising media or sponsorship services. Any attempt judicially to rewrite the Directive would also conflict with the objective of legal certainty: it would be extremely difficult to devise a suitable description — there being none in the Directive — for those parts of the advertising ban which should survive (presuming they are not condemned by reference to one of the other grounds for annulment raised in these cases).

129. As a result, I recommend that the Court annul the Advertising Directive in its entirety.

130. My treatment of the outstanding grounds of annulment invoked by the applicants is necessarily shorter than that of the main issue. I cannot make assumptions about the approach the Court will take in the event that it rejects my primary conclusion. This applies in particular to proportionality where many different alternative hypotheses might otherwise have to be considered.

(ii) *Subsidiarity*

131. Although there is a link between legal basis and subsidiarity, the question posed is different. It is not whether the Community was competent to adopt the contested measure, but rather, whether it should have exercised that competence. [151]

132. The principle of subsidiarity made its first appearance in the Treaty in the limited sphere of the new Community competence in respect of environment, inserted by the Single European Act. [152] It was introduced more generally in Article 3B of the EC

151 — For a similar, though not identical, analysis, see the Opinion of Advocate General Léger in *Working Time*, op. cit., footnote 80 above, paragraphs 126 and 127.

152 — Article 130R(4) of the EEC Treaty provided that the 'Community shall take action ... to the extent that the objectives ... can be attained better at Community level than at the level of the individual Member States'. This provision was removed by the Treaty on European Union upon its entry into force on 1 November 1993.

Treaty by the Treaty on European Union. The second indent of Article 3B states:

'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

133. The principle is concerned only with choices between Community and Member State action. For this reason, if there were no other, [153] it is at most a partial reflection of the aspiration, declared in the Preamble and Article A of the Treaty on European Union (now, after amendment, Article 1 EU), that 'decisions [be] taken as closely as possible to the citizen'. In the case of Member State action, the level of closeness to the citizen depends on the constitution and internal workings of the Member State concerned. For the same reason, it does not appear useful to discuss the content or application of the broader conclusion that it is wrong 'to assign to a greater and higher association what lesser and subordinate organisations can do'. [154] For these, and for one additional reason, my discussion of the principle of subsidiarity is quite narrow.

134. The present cases concern the legal scope and applicability of the principle as expressed in the EC Treaty. This is defined and limited by the opening expression in Article 3B, second indent: 'In areas which do not fall within its exclusive competence ...'.

135. The application of the principle in the present cases turns on the question whether harmonising action pursuant to Articles 57(2) and 100A of the Treaty falls within the exclusive competence of the Community. If that is the case, the principle does not apply. On the other hand, the applicants in both cases appear to presuppose that the legal basis upon which the Directive was adopted did not fall within the exclusive competence of the Community. If that assumption is incorrect, as I think it is, it is unnecessary to consider whether the principle was, in fact, respected.

153 — Article L of the Treaty on European Union (now, after amendment, Article 46 EU) does not include Article A or Article B of the Treaty on European Union (now, after amendment, Article 2 EU), which also require the Union to respect the principle of subsidiarity, among the provisions in respect of which the Court may exercise its powers.

154 — Papal Encyclical Letter, *Quadragesimo Anno* (1931), paragraph 79.

136. I start by commenting on the character of harmonisation of national rules. I agree with the argument, put with some force by the Parliament at the oral hearing, that the Member States simply cannot harmonise each other's laws, regulations or administrative action in fields which come within the scope of application of the Treaty. Individual action is excluded as a matter of logic and collective action by the 15 Member States (for example, by way of a treaty concluded under public international law) is excluded, in my view, as a matter of law, having regard, in particular, to the terms of Article 5 of the EC Treaty (now Article 10 EC). [155] Thus, in *Working Time*, the Court stated, in a dictum which I discuss further below, that, once harmonisation of conditions is necessary under Article 118A of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), this 'necessarily presupposes Community-wide action'. [156]

137. This does not mean that the principle of subsidiarity is inapplicable in the case of the exercise of Community harmonising competences conferred *ratione materiae*, whose objective is to achieve certain results in the field in question, such as preserving, protecting and improving the quality of the environment. [157] Although the Community is, in those fields, exclusively competent to adopt harmonising measures, such competence is not conferred with the distinct objective of achieving uniformity. [158] Rather, the enactment of uniform Community rules is provided for in order to achieve certain material objectives which are also pursued, in the exercise of their own competences, by the Member States. In this sense, the *material* competence of the Community and the Member States is concurrent. There is a choice between Community and Member State action in pursuit of the same ends. The principle of subsidiarity is applicable, but it will be satisfied, it seems, upon the establishment of the need for the adoption of common harmonised measures, an instrument which can only be employed at Community level.

138. Thus, in *Working Time*, the Court held that the second element of the test of compliance with the principle of subsidiarity set out in Article 3B of the Treaty, viz. that the objective in question would be better achieved at Community level than at

155 — I do not address here the legality of coordination in such fields among a smaller number of Member States, as that does not constitute an alternative to harmonisation at Community level for the whole Community; for a special case, see Article 233 of the EC Treaty (now Article 306 EC). By the same token, I do not advert to the question of external engagements by the Member States with third countries, which, in cases where the Community has not yet acted internally, may have to be judged in relation to the Community's more limited external competence.

156 — Op. cit., footnote 80 above, paragraph 47. See also Advocate General Léger's statement, at paragraph 129 of his Opinion in the same case, that harmonisation 'necessarily involves supranational action'.

157 — Article 130R(1), first indent, of the EC Treaty.

158 — I do not comment here on material competences which include the adoption of a common policy. The analysis below of the exclusive character of the Community's internal-market competences may be of greater relevance to them.

national level, was satisfied by the need for Community action. [159] It stated:

'In that respect, it should be noted that it is the responsibility of the Council, under Article 118a, to adopt minimum requirements so as to contribute, through harmonisation, to achieving the objective of raising the level of health and safety protection of workers which, in terms of Article 118a(1), is primarily the responsibility of the Member States. Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to the Member States.' [160]

139. The Court, in *Working Time*, was dealing with an area of shared competence and thus did not have to interpret the term 'exclusive competence'. The position is different and, in my view, clearer in the case of the exercise of the Community's competence to adopt harmonising measures in pursuit of the objectives of the internal market. I have already explained that Articles 57(2) and 100A of the Treaty create a general Community competence of a horizontal, functional character. [161] Where disparate national rules give rise either to obstacles to trade in goods or the provision of services or to distortions of competition, the Community has an interest in achieving uniformity of trading conditions which is quite distinct from its interest in the substantive content of the uniform rules adopted. The coordination or approximation of national rules which affect economic activity is the very essence of these competences, *provided* it serves the purposes of the internal market, and is not merely an instrument for achieving some separate, materially defined objective. It is clear that only the Community can adopt measures which satisfy these requirements. The Member States may attempt to remedy some of the effects of disparate laws, by enacting mutual recognition provisions, for example, but they cannot themselves achieve uniformity as such in the relevant field. The fact that the Member States are competent in a material domain that may be affected by internal-market measures, such as that of health protection, does not imply that the Community's internal-market competences are concurrent. Just as the

159 — Op. cit., footnote 80 above, paragraph 55. See also the Opinion of Advocate General Léger in the same case, paragraph 131. The applicant in that case created some confusion by not relying on the principle of subsidiarity as a ground of annulment while regularly invoking it in its arguments (see the Opinion of Advocate General Léger, paragraph 124, and paragraph 46 of the judgment); but the Court appears to have treated the issue as having been raised.

160 — Ibid., paragraph 47.

161 — See paragraphs 62 to 66 above.

objectives pursued are of a different order, [162] so too are the underlying competences. [163]

140. Advocate General Léger adopted a similar approach in *Deposit Guarantees*. He observed that Article 57 of the Treaty — the legal basis of the directive challenged in that case — refers at no point to the competence of the Member States and that that provision 'entrusts the Community alone with the responsibility for the coordination of national legislation in this field which shows that, *from the very outset*, the authors of the Treaty considered that, as regards the taking-up and pursuit of activities as self-employed persons, coordination was better achieved by action at Community level rather than national level'. [164] *Deposit Guarantees* is potentially, for this reason, more relevant for the present cases than *Working Time*, which concerned a shared material competence.

141. Germany has submitted that the Court, in so far as it expressed no view on the issue of exclusive competence, did not follow the Advocate General on this point. However, this view is based on a misreading of the judgment. The Court was careful to state that Germany's plea in that case was not that the contested directive violated the principle of subsidiarity but 'only that the Community legislature did not set out the grounds to substantiate the compatibility of its actions with that principle'. [165] In other words, the argument was not concerned with substantive observance of the principle but with the duty to give reasons. It is in this context that the judgment must be interpreted. Further, the Court prefaced its conclusion that the duty to give reasons had been observed with the words 'on any view'. [166] Thus the Court merely ruled that the reasons given were sufficient *whether or not* the principle of subsidiarity was applicable, and not, as is contended, that the principle *was* actually applicable. It was perfectly appropriate for the Court to abstain from ruling on a question of major constitutional significance which was raised, at most, tangentially in the pleadings. Its judgment cannot, therefore, be seen as prejudging the matter.

142. I conclude, therefore, that the exercise of Community competence under Articles 57(2) and 100A of the Treaty is exclusive in character and that the principle of subsidiarity is not applicable. There can

162 — See paragraph 69 above.

163 — Thus, the distinct competence of the Member States regarding health matters is not limited by the exclusive character of the Community's competence to adopt harmonising measures in pursuance of the objectives of the internal market. Leaving aside questions of compliance with provisions of the Treaty such as Articles 30 and 59, the exercise of national competence in a field such as health protection is only excluded to the extent that it might affect internal-market measures actually adopted. See the Opinion of Advocate General Léger in *Deposit Guarantees*, op. cit., footnote 52 above, paragraph 85, and the extensive case-law on pre-emption.

164 — Op. cit., footnote 52 above, paragraph 82. In paragraph 86 he said that the Community was 'not acting under subsidiary powers but in clear accordance with its exclusive powers ...'.

165 — Ibid., paragraph 24.

166 — Ibid., paragraph 28.

be no test of 'comparative efficiency' between potential Member State and Community action. If there were, even more difficult questions of principle would arise. How, in particular, does one weigh the comparative benefits of Community harmonising action in pursuit of the internal market with individual Member State rules in respect of entirely different national preoccupations of a substantive character?

143. Nothing in the Protocol on the application of the principles of subsidiarity and proportionality would, if it had been in force at the date of the adoption of the Advertising Directive, have altered the conclusion I have reached. In particular it is made clear that the 'principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty as interpreted by the Court of Justice'. [167] The Protocol repeats that it 'relate[s] to areas for which the Community does not have exclusive competence'.

144. It may indeed, as counsel for the applicants have submitted, seem surprising that subsidiarity should have no application in a field which so intrinsically implicates the Community in acting in areas otherwise falling within Member State competence. In *Deposit Guarantees*, Germany argued that acknowledgement of exclusive Community 'competence with regard to the internal market would be tantamount to entrusting the Community with exclusive competence in almost all fields of activity, provided that the measure in question removes obstacles to the internal market'. [168] Advocate General Léger rejected this argument and analysed in some detail the respects in which Member State action continues to be possible. Furthermore, as the necessity of assuring the establishment and functioning of the internal market is not itself in doubt, I would conclude that the judicial control of satisfaction of the objective criteria for adoption of measures using these legal bases will, to some extent, address the concerns regarding unnecessary Community action in fields where the Member States also enjoy competence which prompted the insertion of the principle of subsidiarity in the Treaty.

145. Since I have concluded that the principle of subsidiarity does not apply, I do not think it is necessary to analyse whether it was observed in this case. I would, therefore, reject this ground of invalidity.

(iii) *Proportionality*

(iv) *Breach of Article 30 of the Treaty*

(v) *Breach of economic rights*

146. I will deal with these three grounds together because my approach to all three

167 — Paragraph 3 of the Protocol.

168 — See paragraph 79 of the Opinion of Advocate General Léger, cited in footnote 52 above.

essentially turns on the effectiveness of the Community's pursuit of internal-market objectives.

147. Article 3B of the Treaty requires that 'action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'. The Court set out the following three-part test of proportionality in *BSE*:

'[T]he principle of proportionality... requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.' [169]

148. This test can be employed both to determine whether the Advertising Directive complies with the general principle of proportionality under Community law, which is my immediate concern in this section, and to assess whether it permissibly limits the exercise of fundamental rights such as freedom of expression. [170] However, this test will not necessarily lead to identical results in the two contexts because of the different factors placed in the balance.

149. It follows from my analysis above that it is perfectly legitimate for the Community legislator to pursue simultaneously internal market and public health objectives. Thus, no doubt is cast on the legal basis of the Advertising Directive if health protection plays a part in the analysis of the proportionality of that measure. [171] The theoretical possibility of adopting less restrictive internal-market measures, for example the obligatory lifting of national restrictions on tobacco promotion, cannot, therefore, be used to show that the Directive is not the least restrictive manner of achieving the legislator's objectives, because this would ignore its parallel health protection aim. On the other hand, it is also clear that health protection cannot function independently as an objective. Therefore, however great may be the health benefits of restricting most forms of advertising, even in exclusively domestic contexts, this will only satisfy the first condition of proportionality if the Directive contributes to achieving internal-market objectives; otherwise it must be condemned for failing to meet an essential objective which is also a condition of the exercise of competence in the first place. My discussion above of the legal basis of the Directive turns on what I

169 — Op. cit., footnote 119 above, paragraph 96; see also Case C-331/88 *Fedesa and Others* [1990] ECR I-4023 (hereinafter '*Fedesa*'), paragraph 13.

170 — See, for example, the analysis of Advocate General van Gerven in Case C-159/90 *Society for the Protection of Unborn Children Ireland* (hereinafter '*Grogan*') [1991] ECR I-4685, paragraph 35.

171 — See paragraph 97 above.

regard as the Community legislator's manifest error regarding the achievement of either free movement of goods and freedom to provide services or undistorted conditions of competition in the tobacco advertising and sponsorship sector. By the same token, I would regard the Directive as an ineffective means of achieving the objectives pursued, which fails, thus, to satisfy the first element of the test of proportionality. [172] Should the Court decide not to follow my recommendation on the issue of competence, whether it be on the basis of a different appreciation of the general rules governing competence or of their application, I would, none the less, rely upon my discussion of that issue to demonstrate, in the alternative, that the Directive is disproportionate in the wider sense of that term, in that it fails to satisfy the first of the three requirements of proportionality. [173] It is not useful to speculate further on the different potential approaches on the Court's part to the complex question of competence and on their implications for that of proportionality, as this could simply result in my working on the basis of hypothetical positions which may ultimately represent neither my own view of the issue of competence nor the Court's.

150. Germany's argument regarding Article 30 of the Treaty does not, in my view, add anything to the matters already discussed. I am not wholly convinced of the usefulness of the Court judging the compliance with Article 30 of individual provisions of Community internal-market measures [174] when, as we have seen, [175] the restrictions imposed by such measures may be a necessary feature of a trade-facilitating scheme which must, simultaneously, respect certain general interest requirements. [176] None the less, if it is to do so, its judgment in *Kieffer and Thill* [177] indicates that the analysis of the proportionality of an apparent restriction on trade in goods in the light of the internal market or other objective of the measure is identical to that outlined above, with the result that the Directive should also be annulled on this ground.

151. For the same reason, I would recommend to the Court that it annul the Directive for breach of the rights to property and to pursue a professional activity. Those rights, like all the general principles of Community law, 'are not absolute and

172 — To this extent, the examination of competence and proportionality overlaps; see paragraph 97 above.

173 — Thus, there is no need to address proportionality in its narrow sense of the balancing of interests, as required by the third stage of the text of proportionality outlined above.

174 — See, for example, Case C-51/93 *Meyhui* v *Schott Zwiesel Glaswerke* [1994] ECR I-3879, paragraphs 13 and 14.

175 — See paragraphs 86 and 87 above.

176 — Recourse to Article 30 may be useful if the economic activity allegedly affected by an internal-market measure is one other than that which is supposed to benefit from the measure. However, in the light of my conclusion both in section V(i) and in this section and given the still lively debate regarding the effect of highly restrictive national rules governing selling arrangements on access to the market, it is neither necessary nor useful to examine here the effect of the Directive on trade in tobacco products. See *De Agostini*, op. cit., footnote 99 above, paragraph 42; Case C-412/93 *Leclerc-Siplec* v *TF1 Publicité and M6 Publicité* [1995] ECR I-179, Opinion of Advocate General Jacobs, paragraphs 37 to 49; Case C-190/98 *Graf* [2000] ECR I-493, paragraph 23, and paragraphs 18 to 20 of my Opinion in that case.

177 — Case C-114/96 [1997] ECR I-3629, paragraphs 29 to 37.

must be viewed in relation to their social function'. [178] This permits the imposition of restrictions which correspond to Community objectives of general interest and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed. [179] The Directive does not, in my view, impose restrictions which correspond to the internal-market objectives which were necessary for its lawful adoption.

(vi) *Freedom of expression*

152. It is more useful, for two related reasons, to examine the consistency of the Advertising Directive with the principle of freedom of expression on the hypothesis that the Directive is, in other respects (and contrary to what I have concluded in sections V(i) and (iii) to (v) above), a lawful and proportionate means of pursuing internal-market objectives, having regard to the individual economic rights and interests affected by it. In reality, the defence of the Directive's intrusion on freedom of speech has been based almost exclusively on its pursuit of the objective of protection of public health, on which I have not yet made any substantive comment. I am also conscious of the potential implications of this issue as regards the justification of the restrictive effects on trade in goods and services of *national* rules which regulate tobacco promotion.

153. The fundamental rights protected as general principles of Community law include freedom of expression. [180] In determining the range of rights protected by Community law and the scope of the protection accorded to them, the European Convention on Human Rights has 'special significance' as a source of inspiration. [181] Article 10(1) of the Convention states, in relevant part:

'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ... .'

The case-law of the European Court of Human Rights indicates that all forms of expression merit protection by virtue of Article 10(1) of the Convention. This includes what is commonly known as commercial expression, [182] that is, the provision of information, expression of ideas

178 — Case C-200/96 *Metronome Musik* v *Music Point Hokamp* [1998] ECR I-1953, paragraph 21.

179 — Ibid.

180 — Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 44; Case C-368/95 *Familiapress* v *Bauer Verlag* [1997] ECR I-3689, paragraph 25.

181 — *ERT*, op. cit., paragraph 41; Case C-222/84 *Johnston* v *Chief Constable of the RUC* [1986] ECR 1651, paragraph 18.

182 — See, for example, *Markt Intern* v *Germany*, judgment of 20 November 1989, Series A, No 165, paragraphs 25 and 26; *Groppera* v *Switzerland*, judgment of 28 March 1990, Series A, No 173, paragraph 55; *Casado Coca* v *Spain*, judgment of 24 February 1994, Series A, No 285, paragraphs 35 and 36.

or communication of images as part of the promotion of a commercial activity and the concomitant right to receive such communications.

154. Commercial expression should also be protected in Community law. Commercial expression does not contribute in the same way as political, journalistic, literary or artistic expression do, in a liberal democratic society, to the achievement of social goods such as, for example, the enhancement of democratic debate and accountability or the questioning of current orthodoxies with a view to furthering tolerance or change. However, in my view, personal rights are recognised as being fundamental in character, not merely because of their instrumental, social functions, but also because they are necessary for the autonomy, dignity and personal development of individuals. [183] Thus, individuals' freedom to promote commercial activities derives not only from their right to engage in economic activities and the general commitment, in the Community context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on *any* topic, including the merits of the goods or services which they market or purchase.

155. On the other hand, it is clear that the exercise of freedom of expression, like that of other rights and freedoms, may be subject to proportionate restrictions in order to secure the enjoyment of rights by others or the achievement of certain objectives in the common good. The protection of health is one of the grounds on which Article 10(2) of the European Convention on Human Rights permits the imposition of restrictions on freedom of expression. This example should be followed in the Community legal order. Indeed, the Court has attributed primacy to the protection of human health among the public interests listed in Article 36 of the Treaty [184] and it also, of course, features prominently in the Community's own policies by virtue of Articles 3(o), 100A(3) and 129(1) of the Treaty.

156. None the less, given the fundamental character of freedom of expression, the public interest in limiting its exercise in specified circumstances or for specified purposes must be demonstrated by the public authority which proposes or enacts such a limitation. In particular, it must show compliance with the three-part test of proportionality set out in paragraphs 147 and 148 above. The case made for the Advertising Directive is that consumption of tobacco products is dangerous for the health of smokers, that advertising and sponsorship promote such consumption and that the comprehensive prohibition of those forms of expression will result in a reduction in tobacco consumption and, thus, improved public health. The damage

183 — For a reference to both the social and the personal functions of freedom of expression, see *Handyside* v *United Kingdom*, judgment of 7 December 1976, Series A, No 24 (hereinafter '*Handyside*'), paragraph 49.

184 — Case C-320/93 *Ortscheit* [1994] ECR I-5243, paragraph 16.

caused to health by smoking has not been disputed in the present cases and Germany underlined its own desire to reduce consumption. There has, however, been considerable debate over whether the prohibition of most forms of promotion of tobacco products will achieve its aim of reduction in consumption of tobacco, rather than simply affecting competition between tobacco brands.

157. As we have already seen, the role of the Court, when assessing the proportionality of legislative choices in complex fields, is normally to examine 'whether the exercise of such discretion is vitiated by a manifest error or a misuse of powers or whether [the institutions] did not clearly exceed the bounds of [their] discretion'. [185] There is no doubt that the assessment of the effects of advertising on the level of consumption of a product and of the likely effects thereon of the comprehensive prohibition of advertising is a complex matter. None the less, this is not, in my view, the appropriate standard of judicial review when examining restrictions on the exercise of a fundamental personal right such as freedom of expression. [186]

158. The European Court of Human Rights normally requires that Contracting Parties present *convincing evidence of a pressing social need* for a restriction on expression. [187] That Court has apparently adopted a different approach in the case of commercial expression: limits thereon are acceptable where the competent authorities, 'on *reasonable grounds*, had considered the restrictions to be necessary'. [188] Such a difference in treatment is justified, in my view, because of the different manner in which commercial expression and, for example, political expression interact with more general public interests. As I have already observed, political expression itself serves certain extremely important social interests; [189] beyond its role in promoting economic activity, in respect of which the legislator properly enjoys considerable discretion to impose public-interest restrictions, commercial speech does not normally perform a wider social function of the same significance.

159. I would advocate, therefore, that a similar approach be adopted in the Community legal order. Where it is established that a Community measure restricts freedom of commercial expression, as the Advertising Directive clearly does, the

185 — *BSE*, op. cit., footnote 119 above, paragraph 60, already quoted at paragraph 98 above.

186 — The position is different regarding economic rights such as the right to property or the freedom to pursue a trade or professional activity, not least because of the inevitable effects on the exercise of such rights of general economic policy, regarding which the legislator (or those to whom power is delegated) should enjoy considerable discretion. See Case C-44/94 *R* v *Minister for Agriculture, Fisheries and Food, ex parte Fishermen's Organisations and Others* [1995] ECR I-3115, paragraphs 57 to 61.

187 — See *Sunday Times* v *United Kingdom*, judgment of 26 April 1979, Series A, No 30; *Observer and Guardian* v *United Kingdom*, judgment of 26 November 1991, Series A, No 216, paragraph 59.

188 — *Markt Intern* v *Germany*, op. cit., footnote 182 above, paragraph 37; *Groppera* v *Switzerland*, op. cit., footnote 182 above, paragraph 73.

189 — See, for example, *Lingens* v *Austria*, judgment of 8 July 1986, Series A, No 103, paragraph 41, on the importance of a free press.

Community legislator should also be obliged to satisfy the Court that it had reasonable grounds for adopting the measure in question in the public interest. In concrete terms, it should supply coherent evidence that the measure will be effective in achieving the public interest objective invoked — in these cases, a reduction in tobacco consumption relative to the level which would otherwise have obtained — and that less restrictive measures would not have been equally effective.

160. The evidence required to justify a restriction will depend on the nature of the claim made. We are here largely concerned with the objective assessment of the likely effects of the Advertising Directive. The legislator should not enjoy as wide a margin of appreciation as in the case, for example, of the protection of morals. [190] However, the Community should not be prevented from acting in the public interest simply because justification of its action necessarily depends, not on 'hard' scientific studies, but on evidence of a social scientific character, which predicts, on the basis of past behaviour, the future responses of consumers to changes in their level of exposure to promotional material. [191] Furthermore, where the Community legislator can show that it acted upon the basis of reputable specialist studies in the field, the fact that other apparently reputable studies have reached a contrary conclusion does not, in itself, show that the legislator did not have reasonable grounds for acting. In the present cases, the legislator's assessment of the effects of tobacco advertising is consistent with the Court's own statement that '[i]t is in fact undeniable that advertising acts as an encouragement to consumption'. [192] Furthermore, most advertising cannot be so precisely focused that it addresses only existing smokers who wish to choose between brands, to the exclusion of others who might be incited either to begin smoking or to abandon plans to give up smoking.

161. Evidentiary requirements may be less strict where public health is at stake. The Court stated in *BSE* that '[w]here there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent'. [193] However, the present cases do not concern a prohibition of the marketing of tobacco products themselves, whose harmful effects on health have not been disputed, but rather a comprehensive ban on promotion of such products. The scientific debate at

190 — See *Handyside*, op. cit., footnote 183 above, paragraph 48; *Grogan*, op. cit., footnote 170 above, paragraph 37 of the Opinion of Advocate General van Gerven and paragraph 20 of the judgment.

191 — The distinction between these types of evidence is not, in any event, as clear as might be thought: scientific conclusions are normally reached by predicting, with greater or lesser degrees of probability, the continued occurrence in similar future circumstances of effects observed in certain circumstances in the past.

192 — Case 152/78 *Commission* v *France* [1980] ECR 2299, paragraph 17; see also Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151 (hereinafter '*Aragonesa*'), paragraph 17, where the Court held that it was not 'manifestly unreasonable' to impose restrictions on the advertising of drinks with an alcohol content above a certain threshold 'as part of a campaign against alcoholism'. However, the issue of freedom of expression was not raised in that case.

193 — Ibid., paragraph 99. See also *Fedesa*, op. cit., footnote 169 above, paragraph 9.

issue relates to the effects of such promotion on overall consumption levels (as opposed to the mere choice of brands by existing smokers), which is at one remove from the assessment of the health risks actually posed by such consumption. Furthermore, the ban at issue in *BSE* was temporary in nature and was subject to review after a further examination of the situation. [194] Differences of opinion regarding the effect of tobacco advertising are of long standing and are unlikely to be resolved quickly. The standard proposed in the immediately preceding paragraph - makes allowance for the lack of unanimity in scientific circles; it would, in my view, be insufficiently respectful of freedom of expression to go beyond that and to permit the legislator to restrict the exercise of that right without any clear evidence that such a restriction is likely to result in changes in behaviour which, in turn, were likely to benefit public health.

162. The Council submitted in evidence the conclusions of two reports, one prepared by the United States National Bureau of Economic Research ('NBER') [195] and the other commissioned from the Institut für Therapie- und Gesundheitforschung, Kiel, by the German Federal Ministry of Health. [196] Although the applicants in *Imperial Tobacco* presented evidence of studies with contrary findings before the national court, the United Kingdom also produced studies which have not been subjected to analysis in these proceedings. France also produced evidence of the effect of its national restrictions ('*la loi Évin*'). It suffices, in my view, to have regard to the studies upon which the institutions rely. The reports find a correlation both between tobacco advertising and the taking up of smoking, particularly among the young, and between the banning of advertising and reductions in average per capita tobacco consumption. The NBER report includes an estimate, based on regression analysis, of the likely effects of the Commission's revised 1997 version of the second proposed Directive, [197] which concludes that it would probably have reduced tobacco consumption by approximately 6.9% during the sample period. [198] Furthermore, it concludes that, while comprehensive bans have a clear effect in reducing tobacco use, limited bans are minimally effective in reducing the impact of advertising because they allow substitution of other media for those restricted and do not result in a reduction in total tobacco advertising expenditure or exposure. The possibility of circumventing a ban which does not cover all forms of advertising is referred to in the eighth recital in the preamble to the Advertising Directive. Interestingly, the institutions have been at pains to contest the totality of the ban, in order to defend it,

194 — Ibid., paragraph 101.

195 — H. Saffer and F. Chaloupka, 'Tobacco Advertising: Economic Theory and International Evidence', NBER Working Paper No 6958 (Cambridge, MA, 1999).

196 — R. Hanewinkel and J. Pohl, 'Advertising and tobacco consumption: Analysis of the effects, with particular reference to children and adolescents' (Kiel, 1998).

197 — See paragraph 19 above.

198 — The analysis was based on data from 11 Member States for the period from 1986 to 1992.

though their evidence is that a less than complete ban would be much less effective.

163. I conclude, on the basis of this evidence, that the Community legislator had reasonable grounds to believe that the comprehensive prohibition of tobacco promotion would result in a significant reduction in consumption levels and would, thus, contribute to the protection of public health.

164. As regards the requirement that restrictions imposed be no more burdensome than necessary, I would accept the point that a nearly total ban on advertising an economic activity is a particularly grave intrusion on the exercise of the right of free expression. [199] The more restrictive the effects, the greater is the onus on the legislator to show that a less burdensome measure would not have sufficed. However, I conclude that the legislator has discharged that onus in the present cases, by demonstrating that it had reasonable grounds to consider that limited restrictions on tobacco promotion are ineffective. The fact that other, positive measures, such as information campaigns, might also have an effect does not in itself show a comprehensive advertising ban to be over-restrictive, as (subject to the division of competence between the Community and the Member States) one option does not exclude the other and there is no evidence that their effects entirely overlap.

165. I now turn to the third stage of analysis, regarding whether or not the Advertising Directive imposes restrictions on freedom of commercial expression which are disproportionate having regard to the public interest gains envisaged, no matter how efficiently pursued. Given the massive role of tobacco consumption as a mortality factor and as a cause of grievous health problems in the Community, I consider that a potential reduction in consumption levels of 6.9% would be a significant gain for public health, probably corresponding to the saving of thousands of lives.

166. I would take the view that, in principle, where the requirements of effectiveness and minimal necessary burden are satisfied, rights such as freedom of commercial expression are not unacceptably impaired by a ban on the promotion of dangerous products, where exchanges of scientific and other information and of political views about the regulation of the trade in question remain unrestricted. Tobacco producers remain free to market their products, to which the expression rights invoked ultimately relate, and may even engage in point of sale advertising if national rules permit this.

199 — In *Aragonesa*, op. cit., footnote 192 above, paragraph 18, in the context of its analysis of the proportionality of an obstacle to the free movement of goods, the Court attributed some significance to the fact that the restrictions on advertising of alcoholic beverages under scrutiny were not total.

167. The fact that the Advertising Directive prohibits the promotion of products which are lawfully marketed in the Community is not conclusive, although it is not irrelevant either. The European Court of Human Rights observed in *Open Door Counselling* v *Ireland* that the contested national rules required 'careful scrutiny' because the prohibited information in that case related to an activity which was lawful in the place it was performed, [200] implying that the supply of information about lawful activities may be justifiably restricted in some circumstances. I suggest that the Court take judicial notice of the enforcement and other problems which could attend on banning outright an addictive activity such as smoking [201] (as well as the restriction of the personal freedom of smokers that this would entail). The lawfulness of an activity (and the impracticability of prohibiting it) does not, therefore, imply that it is without deleterious effects which the legislator may seek to control in the public interest. Moreover, it is not necessarily consistent with the requirement that the least restrictive means be used to achieve legitimate objectives to require that an activity itself be banned in order to permit restrictions to be placed on its promotion.

168. I cannot regard *Open Door*, whose relevance was so hotly debated at the oral hearing, in part because it putatively concerned a disproportionate *total* restriction on expression, as a helpful precedent for the present cases.

169. The European Court of Human Rights accepted the Irish Government's argument that 'the restriction [flowing from an order of the Supreme Court] ... pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect'. [202] It was, however, only the particular restriction imposed on the applicants in that case by a court order that it considered to be absolute in character. Indeed, it went on to point out that information on foreign abortion services was available from a range of other sources. [203]

170. The Court of Human Rights, in assessing the necessity and, hence, proportionality of that particular restriction, introduced into the balance the protection of the health of women, an obviously relevant consideration in that context, but one which complicates the straightforward balance between freedom of expression and a single pressing social need.

171. The Court of Human Rights was especially influenced by its view that, since

200 — Judgment of 29 October 1992, Series A, No 246 (hereinafter '*Open Door*'), paragraph 72.

201 — See, for example, the judgment of La Forest J. of the Supreme Court of Canada in *RJR MacDonald Inc.* v *Canada (Attorney General)* [1995] S.C.R. 199, paragraph 34.

202 — *Open Door*, op. cit., footnote 200 above, paragraph 63.

203 — Paragraphs 70 to 75.

there were some women who decided against having an abortion following the non-directive counselling at issue in the case, 'the link between the provision of information and the destruction of unborn life [was] not as definite as contended'. At the same time, 'the injunction had been largely ineffective ...' in view of the large number of Irish women continuing to have abortions in Great Britain.

172. In effect, the majority of the Court of Human Rights resolved the issue of proportionality by reference to its own view about the competing values of health of women (related to the right to receive information), freedom of expression and protection of unborn life. It does not appear to have attached any weight at all to what it implicitly accepted was a *partially effective* protection of the last-named value. If this analysis were transposed literally to the facts of the present case, it might be difficult to argue that the aim of a presumed mere 6.9% reduction in smoking could justify a comprehensive ban on advertising of tobacco products, despite the significant reduction in the absolute number of smokers (and likely smoking-related illnesses and deaths) it would represent.

173. In fact, in *Grogan*, when examining essentially the same issue in the context of Community law but also in the light of Article 10 of the Convention, Advocate General van Gerven found the restriction to be proportionate. [204]

174. In any event, I do not think it is possible to detach *Open Door* from its extremely difficult and sensitive context or to draw any definitive conclusions for the present cases. *Open Door* related to the non-directive supply of information rather than the commercial promotion of abortion; [205] we are concerned in the present cases with the restriction of direct and indirect *promotional* measures [206] and there is no suggestion that non-promotional information about lawful products will be restricted. [207]

175. I conclude, therefore, that the Advertising Directive does not constitute a disproportionate restriction on freedom of expression in so far as it imposes a

204 — Op. cit., footnote 170 above, paragraphs 32 to 38 of his Opinion. The Court did not reach this issue in its judgment. See also the dissenting Opinion of Judge Baka in *Open Door*, op. cit., footnote 200 above.

205 — Ibid., paragraph 75. For that reason, the Court of Human Rights does not appear to have regarded the case as relating to commercial expression.

206 — See the definitions of advertising and sponsorship in Article 2(2) and (3) of the Advertising Directive.

207 — For this reason, *inter alia*, I do not address here the issue of freedom to *receive* information, which might come into play if an existing or potential customer sought information about its products from a tobacco producer or distributor. The likelihood of consumer interest in receiving *promotional* material seems more remote.

comprehensive prohibition on the advertising of tobacco products. [208]

176. I do not, however, take the same view regarding the prohibition of the advertising of diversification products. It is by no means self-evident that the advertising of non-tobacco goods and services which bear brands or other distinguishing features associated with tobacco products has an effect on consumption levels of the latter products, *taken as a whole*. [209] No evidence has been presented on behalf of the Community legislator to suggest that such a link exists. In these circumstances, I conclude that it has not discharged the onus of showing that it had reasonable grounds to adopt the restrictions on such advertising contained in Article 3(3)(b) of the Directive and that that provision should be annulled. It is in no way excused by the possibility that its scope will be limited in practice by Member States taking advantage of the terms of Article 3(2) of the Directive. Similarly, no argument or evidence was offered to explain why Article 3(3)(a) prohibits tobacco products from bearing brand names or other distinguishing features already associated with other goods and services. In so far as the application of such a brand or mark to a product also constitutes an exercise of freedom of commercial expression, I conclude that Article 3(3)(a) of the Advertising Directive has not been shown to be a justified restriction on that freedom and should be annulled. Both parts of Article 3(3) of the Directive are severable, in my view, having regard to the criteria set out at paragraphs 122 to 126 above.

(vii) *Inadequate reasoning*

177. The Court has consistently held that the obligation under Article 190 of the Treaty to give reasons requires that the measures concerned should contain a statement of the reasons which led the relevant institutions to adopt them, so that the Court can exercise its power of review and so that the Member States and the nationals concerned may learn of the conditions under which the Community institutions have applied the Treaty. [210] At the same time, the level of detail required may vary with the nature of the act involved. In the case of a measure of general application, the preamble may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other. It is not necessary to set out the various facts taken into account by the legislator, which are often very numerous and complex, or that the measure contain a more or less complete evaluation of those facts. [211]

208 — It is not clear whether the NBER report includes sponsorship under the general rubric of advertising for the purposes of its calculation of the likely effects of the proposed Directive. In the absence of argument on this point before the Court and because I am discussing freedom of expression merely in the alternative to my main recommendation that the Directive be annulled in its entirety, I will not address the ban on sponsorship in this section.

209 — I am not concerned with the question of whether such advertising strengthens certain tobacco brands *vis-à-vis* others.

210 — Case C-41/93 *France* v *Commission*, op. cit., footnote 134 above, paragraph 34.

211 — Case 87/78 *Welding* v *Hauptzollamt Hamburg-Waltershof* [1978] ECR 2457, paragraph 11.

178. As should be clear from my analysis of the issue of competence, the statement of reasons in the preamble to the Advertising Directive is, in my view, sufficient to enable the Court to undertake judicial review. The basic internal-market thesis of the Community legislator is made quite clear by the first and second recitals, and their adequacy as a statement of reasons is not undermined by the failure of the Directive to achieve the objectives posited. It was not necessary for the legislator to include precise information regarding the studies of the effects of advertising on tobacco consumption or relative levels of cross-border trade in advertising services and media. I would recommend that the Directive as a whole be annulled for inadequate reasoning only if the Court envisaged holding that the Community was competent to adopt it by reference to its effects on the establishment or functioning of the internal market in economic sectors which are nowhere mentioned in the preamble, such as tobacco producers and distributors or the advertising industry in general. It is not permissible, in my view, to permit the legislator to proffer internal-market benefits previously unmentioned in circumstances where doubt is cast on its achievement of the objectives originally invoked.

179. I recommend, however, that Article 3(3)(a) of the Directive be annulled for inadequate reasoning. No reason is given for this exceptional provision on the use of brand names or other distinguishing features of other goods and services for tobacco products and, as I said in paragraph 116 above, it does not appear to have any connection with the Directive's stated objective of achieving the internal market in services and goods associated with advertising and sponsorship of tobacco products.

VI — Costs

180. By virtue of Article 69(2) of the Rules of Procedure of the Court of Justice, the Council and the Parliament should be ordered to pay Germany's costs in Case C-376/98. Since the proceedings in Case C-74/99 are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court. In neither case are the costs incurred by the Commission or by the other Member States which intervened or submitted observations before the Court recoverable. I do not make any recommendation as to liability for costs in the event that the Court accepts one of my alternative recommendations of partial annulment, or that it accepts none of them.

VII — Conclusion

181. In the light of the foregoing, I recommend that the Court:

— Annul European Parliament and Council Directive 98/43/EC of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, on the ground that the Community was not competent to enact it on the legal bases cited therein.

Should the Court not follow my recommendation, I recommend, in the alternative, that the Court:

— Annul Directive 98/43/EC on the grounds of breach of the general principle of proportionality, of breach of Article 30 of the EC Treaty (now, after amendment, Article 28 EC), of the right to property and of freedom to pursue a trade or professional activity.

In either case, I also recommend that the Court:

— Order the European Parliament and the Council of the European Union to pay the costs incurred by the Federal Republic of Germany in Case C-376/98.

I recommend, in the further alternative, that the Court:

— Annul Article 3(3) of Directive 98/43/EC on the ground of infringement of freedom of expression; and/or

— Annul Article 3(3)(a) of Directive 98/43/EC on the ground of failure to give reasons.