COMMISSION OF THE EUROPEAN COMMUNITIES

COM(84) 300 final

Brussels, 14th June 1984

TELEVISION WITHOUT FRONTIERS

GREEN PAPER ON THE ESTABLISHMENT OF THE COMMON MARKET FOR BROADCASTING, ESPECIALLY BY SATELLITE AND CABLE

(Communication from the Commission to the Council)

Part Five

Pages 105-208

PART FIVE

FREEDOM TO PROVIDE SERVICES

A. Free movement in broadcasting

I. "Services" (Paragraphs 1 and 2 of Article 60)

The EEC Treaty does not just cover goods but also services. It devotes a whole chapter, Chapter 3, to "Services", from Article 59 to 66 of Part Two of the Treaty entitled "Foundations of the Community".

Paragraph 1 of Article 60 of the Treaty defines the concept of "services" as follows: "services shall be considered to be "services" within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons".

Two questions have to be answered in the light of this definition: is broadcasting a good or a service? If it is a service, is it a service provided for remuneration?

1. Good or service?

In the Sacchi case, the latter argued[1] that a television signal was a good, both as a form of energy (similar to electrical energy) and as the product of intellectual activity (intangible asset). It had monetary value and could be the object of trade. Transmission of advertisements was an accessory to the broadcast products and promoted their marketing.

However a broadcast is not a material, tangible asset but a set of activities. As a result it is not a product but the provision of services. It also does not comprise any transaction or movement involving goods.

The Court came to the same conclusion:[2] "In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services." For this reason, after having accepted that the service was remunerated, the Court rules that:[3] "The transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services. However,

---

[1] 155/73 [1974] 409, at 421 to 425.
[2] Sacchi at 428, ground 6.
[3] Sacchi at 432, operative part, para. 1.

trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals is subject to the rules relating to freedom of movement for goods."

In the Debauve case, the Court confirmed its opinion and added:[1] "There is no reason to treat the transmission of such signals /television broadcasts/ by cable television any differently."

The same is true for the transmission of television signals via satellite. It is not the means of transmission which is important, but its aim which is to provide a service.

2. Service for remuneration

Paragraph 1 of Article 60 defines services as follows: "Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration". Paragraph 2 goes on to clarify this as follows: "Services" shall in particular include: (a) activities of an industrial character, (b) activities of a commercial character, (c) activities of craftsmen, (d) activities of the professions." These four types of activity are therefore examples of services which are normally provided for remuneration.

It follows from the word "in particular" that there are activities other than those of an industrial or commercial character, provided by craftsmen or by the professions which are normally for remuneration and that the EEC Treaty also wishes to include them. The Danish, Dutch, English, French and Italian versions of paragraph 2 stress this fact by adding to the term "in particular" the following verbs "omfatter", "omvatten", "include", "comprennent", and "comprendono", whereas the German version using the verb "gelten" is open to several interpretations. The broad or main concept is therefore that "services are normally provided for remuneration". The Treaty thereby wishes to include all activities performed on an independent basis for remuneration regardless of whether or not they are considered for the purposes of the law of one or more Member States and/or Community law as of an industrial or commercial character, provided by craftsmen or the professions.

One can therefore disregard whether and to what extent broadcasting should be viewed as an activity of an industrial or commercial character and/or as an activity of the professions. However, the express inclusion of the latter type of activity has a dual significance. Firstly, that this type of activity should also be viewed as a service performed for remuneration, in which the aim is indeed to obtain income but not however to make the largest possible profit. The concept of remuneration does not necessarily also include the notion of profit or any like intention.

Secondly, the emphasizing of the activities of the professions shows that the EEC Treaty does not just want to cover economic activities but also independent activities of all types of professions, which notably means those in the health, legal counselling, education, arts and science, the press and broadcasting spheres. This also includes journalism and cultural activities. Therefore, persons exercising these activities should enjoy freedom to provide their services (together with the freedom of establishment or, if they are employed, freedom of movement).

120

[1] Case 52/79 /1980/ 833, at 855, ground 8.

Pursuant to paragraph 1 of Article 60 the sphere to which the services performed belong - whether for all broadcasts or a specific broadcast - is unimportant, as is the purpose for which they are provided. As for paragraph 2 of Article 52, it is unimportant whether this purpose or field is of a commercial, social, cultural or other character or whether it covers all these areas, whether the content of a broadcast is informative, editorial, educative, entertaining or for advertising purposes. The only decisive factor is whether broadcasting activity is normally provided as a service for remuneration.

A service is provided for remuneration when it is paid for. According to paragraph 1 of Article 60 it is of no significance whether the recipient of the service pays the provider of the service directly, or indirectly through a third party or whether a third party pays for the service and in return receives a further service for that payment. There is no need for there to be any legal relationship between the provider and recipient of the service. Even in economic terms there is no need for a relationship of service and counter-service to exist between them.

Paragraph 1 of Article 60 does not deal with what form the payment should take, i.e. in fulfilment of a contract, as a contribution by a member of an association, as a fee, as a levy assimilated to a tax, as a transfer from public funds corresponding to the levies or fees raised on the recipients of the service. Remuneration can therefore in this sense be public in character, based on public law, or private and based on private law. It may be provided for a private, profit-making service or activity or for one that is public and based on public law.

Finally, according to the provisions of paragraph 1 of Article 60, it is sufficient for the service to be "normally" provided for remuneration. Therefore, exceptions, such as the exemption or non-coverage of specific categories of recipients of the service or lump sum payment of the remuneration, do not in any way affect the inclusion of services under the requirement for free movement.

In order to ascertain whether broadcasting is provided for remuneration within the meaning of paragraph 1 of Article 60, reference must be made to national provisions. The following is a summary of those provisions, further details may be found in Part Four.

In Luxembourg and, with respect to the IBA, in the United Kingdom, broadcasting is first and foremost paid for with the proceeds from the granting of broadcasting time to the advertising industry (Part Four, A and E). In the Netherlands, approximately 75% of broadcasts are provided in return for broadcasting fees levied by the State and contributions by members of private associations and organizations and approximately 25% are financed by advertising revenue (C). In Italy, RAI broadcasts are mainly provided in return for subscription fees levied by the organization itself and in addition paid for with revenue from the granting of airtime for advertising. Cable broadcasting is similarly provided for remuneration (B). In Greece, ERT 1 provides its broadcasts mainly in return for fees and the company is also financed, for approximately 20%, by revenue from advertising (K). The German "Land" broadcasting authorities' primary means of remuneration is the levying of broadcasting fees on their audience. Their second means of financing their broadcasting activities is via advertising (more than 30% for ARD, and approximately 40% for ZDF, see H above).

In Denmark, DR's broadcasts are provided in return for a tax levied on the use of radio and television sets (I). The BBC's television programmes in Britain are paid for with funds from the national

budget. These funds correspond to the countervalue of the fees collected by the Post Office from owners of television sets in order to license their use (E). In Ireland, approximately 50% of the RTE's broadcasts are financed in a similar way as the BBC's and the other 50% from advertising revenue. Cable television is also provided for remuneration (F). In France less than 50% of television broadcasting is paid for by the transfer and dividing up of the funds obtained from the tax levied by the State on owners of television sets for the right to use them and more than 50% is financed from television advertising (G). In Belgium, 90% of broadcasting is provided in return for funds from the budgets of the three linguistic communities, the source for which is the fees levied by a State administration (RTT) on the receiving apparatus. The remaining 10% comes from the various commercial activities of the broadcasting authorities. Cable broadcasts are provided in return for subscription fees (D).

This all goes to show that television programmes are remunerated in all Member States. They are provided, either directly or indirectly, in return for payments made by citizens, accepting the services supplied by the broadcasting organization(s) and receiving broadcasts using the appropriate apparatus, or in return for payments from the advertisers, or in return for both types of remuneration. Paragraph 1 of Article 60 does not concern itself with who pays the remuneration, whether it is the end-user (broadcast audience), the broadcasting organizations themselves, the sponsors of programmes (e.g. an advertising company) or the relayers of broadcasts (e.g. a cable company), or a combination of several of the above. It is also unimportant whether all the recipients pay or only those who receive the service in the country in which it is provided. It is therefore of no consequence for example if the broadcasting audience is not confined to receiving broadcasts for which it pays fees. It is sufficient that the service is "normally" provided for remuneration.

Even in Member States in which the broadcasting fee takes the form of a licence fee or tax on the use of reception apparatus, this represents in actual fact a legally based service provided by the recipients of broadcasts to the broadcasting authorities, in remuneration for the broadcasts. The concept of remuneration for the purposes of paragraph 1 of Article 60 includes all types of revenue from broadcasting. It therefore includes State revenue from fees or taxes on viewers and listeners and private income from subscriptions or individual payments or from the granting of airtime for advertising. Whether the programme is actually heard and/or seen by the recipient, has as little effect on the fact that the fee or tax is in the nature of a remuneration as it would for a private subscription. Similarly, the fact that the fees or taxes are in the main determined by the State, that this decision is not devoid of political considerations and that they are very frequently brought together into a lump sum, does not preclude them from constituting remuneration for the broadcasts provided.

For all these reasons broadcasts are services or activities provided for remuneration and thus services within the meaning of the EEC Treaty. The Court reached the same conclusion in the Sacchi case:[1] "In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services. Although it is not ruled out that services normally provided for remuneration may come under the provisions relating to free movement of goods, such is however the case, as appears from Article 60, only in so far as they are governed by

[1] Case 155/73 [1974] 409, at 427 ground 6, (emphasis added).

such provisions. It follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services."

II. Establishment of the provider of the service in a Member State other than that in which the recipient is established (Article 59(1))

Article 59 calls for the abolition of "restrictions on freedom to provide services within the Community ... in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended". Whereas the definition of a service given in paragraphs 1 and 2 of Article 60 does not contain any transfrontier component - neither with regard to the service or activity or the remuneration - and consequently covers all services in the Community regardless of whether they are provided and received in one and the same or in differing Member States, paragraph 1 of Article 59 forbids restrictions only on internal or transfrontier services covered by Article 60 which involve the provider of a service who is established in a Member State other than that of the recipient.

Therefore, restrictions on broadcasts, both the provider and recipient of which are established in the same Member State, do not come under Article 59. At least a small proportion of potential recipients of broadcasts must be established in another Member State. It must therefore be possible to receive the broadcasts there.

In the event of broadcasting over the air waves, this is often the case. This primarily applies to areas along intra-Community borders, i.e. between Belgium and Luxembourg and the Netherlands, between the latter and Germany and France, between Germany and France, France and Italy, Denmark and Germany and Ireland and the United Kingdom. Planned satellite broadcasting will considerably extend the transfrontier dissemination areas (see Part 1, Section III B).

On the other hand difficulties are caused when it comes to deciding whether programmes broadcast from another country and then relayed by cable internally are covered by Articles 59 and 60. The customary and most common case in practice is that of programmes being broadcast over the airwaves by a broadcasting company in another Member State being picked up by a cable company with the aid of a special antenna, amplified and simultaneously relayed unaltered in their entirety by cable to the cable company's subscribers. The question is whether this procedure can be viewed as a whole and is thus covered by paragraph 1 of Article 59 and paragraphs 1 and 2 of Article 60, or whether it should be broken up into different services, each of which must meet the requirements of both sets of provisions, in order for the liberalizing requirements of Article 59 to be applicable to the whole case.

1. Relay by transmitter and relay via cable as two separate services

This latter argument was put forward by several participants in Debauve[1] and Coditel/Ciné Vog.[2] The relevant service performed by the foreign broadcasting organization is the broadcasting of the programme. This comes to an end at the limits of the natural reception zone of the transmitter. This service remains totally unaffected by any of the restrictions on the additional service provided by the national cable company. This is because the service of the original broadcasting organization can be provided only to the extent made possible by technical constraints. The cable company's service consists of picking up the broadcasts and relaying them to its indigenous viewers. Since the viewers were situated outside the natural reception zone of the foreign broadcaster, the fact that the foreign transmitter was insufficiently powerful to reach them made this a new service.

The relationship between the national cable company and national cable subscribers amounted to the provision of a service for remuneration (Article 60(1)). The provider and recipient of the service were, however, established in the same Member State and therefore the provisions of paragraph 1 of Article 59 did not apply.

The requirement for establishment in two different Member States (Article 59(1)) did exist in the relationship between the foreign broadcasting organization and the national cable company. However, there was neither a legal nor commercial relationship between the provider and recipient of this service. One-way services could be considered as services within the meaning of Article 59. But the provider of the service would then have to apply a user-specific treatment, viz. his broadcast would have to achieve the aim of appealing to viewers on the other side of the frontier. This is not the case here. In addition and above all, no service is provided for remuneration between the broadcasting organization and the cable company and therefore paragraph 1 of Article 60 does not apply.

Where programmes of an advertising nature were involved, services within the meaning of Articles 59 and 60 were provided in the relationship between the foreign broadcasting organization (provider of the service) and the national sponsor of the advertisements (recipient of the service). In this case services between persons in differing Member States were being performed for remuneration.

2. Relay by transmitter and relay via cable as a single service

The first argument, according to which the relationship between the foreign broadcasting organization and the national cable subscribers constituted for the purposes of the Treaty a single service, was put forward by other participants in both of these cases.[3] According to them Article 59 did not confine itself only to services between persons established in differing Member States. The purpose of Article 59 was the freedom to provide services even across intra-Community borders, not just freedom for providers of services

---

[1] Case 52/79 [1980] 833, 838 to 848.
[2] Case 62/79 [1980] 881, 886 to 889.
[3] Debauve and Coditel/Ciné Vog.

to carry on their activities. This only actually came into application if the foreign broadcasts were also intended for national viewers. Any national restrictions on the broadcasting activities of foreign broadcasters were covered by Article 59. These provisions also covered any national restrictions on the activities of foreign sponsors of advertisements by foreign broadcasters. In addition the wording of Article 59 meant that a restriction on the activities of the provider of a service established in another Member State did not necessarily have to be involved. It was sufficient for the restriction to have an effect "on" a national of one of the Member States established in another Member State. It was sufficient for the substance of the service - the foreign broadcast - to originate from another Member State.

The Court contented itself with stating that:[1] "It should be observed that the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State. Whether that is the case depends on findings of fact which are for the national court to establish."

The Commission restated the following opinion:[2] "Television signals broadcast by bodies exercising a non-gratuitous economic activity constitute the provision of services within the meaning of Article 59 of the Treaty where those signals are transmitted and picked up in the form of radio waves outside the territorial limits of the country where the broadcasting station is situated, there being no need for remuneration to be paid directly to the provider of the service by the recipients (cable television distributors and television viewers) located outside those limits."

(a) Provider, recipient, remuneration

The grounds for the above opinion are as follows.[3] Following the judgment in the Sacchi case[4] no doubt remains that a television broadcast is a service for the purposes of Article 59 and paragraph 1 of Article 60. In the case in question the relevant service is the television communication (programme) provided by the broadcasting organization. The recipients of the service are first and foremost those in the country of the broadcasting organization, which is therefore established in the same country as its viewers. In this respect paragraph 1 of Article 59 does not apply. The viewers do however provide remuneration. Paragraph 1 of Article 60 is therefore fulfilled. This is because there is no requirement in this paragraph for the service to be transfrontier. A service is being provided for remuneration. Secondly, there are recipients of the service who are cable viewers established in another Member State. This means that the requirements of Article 59 are met. They also provide remuneration, but to the cable company. In this respect, therefore, paragraph 1 of Article 60 does not apply. However, it is sufficient, within the meaning of paragraph 1 of Article 60, for the provider of the television broadcast - the foreign broadcasting organization - "normally" to be remunerated for its service, in this case by

---

[1] [2] Debauve, 52/79 [1980] 833, at 855, ground 9.
[3] Coditel/Ciné Vog, 62/79 [1980] 881, at 890.
[4] See part of the Commission's observations in Coditel/Ciné Vog at 889.
155/73 [1974] 409, at 428, ground 6.

the viewers established in its own country. Thirdly, the national cable company is also the recipient of the foreign broadcast. In this respect it comes under the provisions of Article 59. However, the cable company often makes no payment to the broadcasting organization. But then paragraph 1 of Article 60 does not require transfrontier remuneration nor remuneration from each recipient of the service. It is sufficient for payments to be made by viewers in the country in which the broadcasting organization is located.

In the words of Mr Advocate-General Warner:[1] "The purpose of the definition of "services" in that Article is to identify the kinds of services to which the Treaty applies and in particular to exclude those that are normally provided gratuitously. Television broadcasting is financed in different ways ... /some/ .... out of fees /some out of/ advertising revenue; and /some/ .... partly /from/ the one and partly /from/ the other. The question here is whether television broadcasting as such is a service of a kind to which the Treaty applies. The method of financing particular broadcasting organizations or particular broadcasts cannot be relevant to the answer to that question. The decisive fact is that television broadcasting is normally paid for, i.e. remunerated, in one way or another. The conclusion must therefore be that it is a service of a kind to which the Treaty applies, no matter from whom in any particular case payment may come or may not come." It is therefore irrelevant whether the fact that the service crosses a frontier is remunerated, what is relevant is whether the broadcasting organization concerned is basically remunerated for its broadcasting service.

(b) The basic nature of broadcasting

In conclusion, the basic nature of television (and radio) broadcasting argues in favour of considering the relationship between a foreign broadcasting organization and national cable viewers as a service within the meaning of Articles 59 and 60. Whilst normally services are provided and received at one and the same place - the provider visits the recipient or vice versa - or at all events in two specified locations, that of the provider of the service and that of the recipient (for example in insurance by correspondence or telephone advisory services), broadcasting is by definition not bilateral and localized, but of a multilateral nature, covering large surfaces and travelling over wide areas.

It does not have one single, but many recipients. These receive the broadcast irrespective of whether it is intended for them. A broadcast may be picked up regardless of the intentions of the broadcasting organization. The fact that broadcasts may be received over a wide area is not an unavoidable side effect but a natural and technically inevitable offshoot of broadcasting, particularly with satellite broadcasting.

Broadcasting from ground-based or airborne transmitters is, for these reasons, to be considered as being provided for any person who is able to pick it up, either directly through an individual aerial or community antenna, or indirectly via a central antenna and cable company network.

---

[1] Opinion of Mr Advocate-General Warner delivered on 13 December 1979 in Debauve /1980/ 860, at 876.

In addition broadcasting is not local but regional in nature. A broadcast, as a result of the very techniques used to propagate it, has a natural reception zone. When broadcasting is via ground-based transmitters, this zone is small but with satellites it is significantly larger. Since a broadcast is propagated through the air, it cannot follow country frontiers for both technical reasons and because of natural laws. The signals spill over frontiers. By its very nature, therefore, broadcasting is a transfrontier activity.

Its international nature is a major factor in overcoming obstacles to the freedom to provide services or broadcasts between Member States which is one of the main aims of the Community (Article 3(c)). This aim of Community activity ought not to be forgotten when interpreting Articles 59 and 60: reception of broadcasts on the other side of a frontier on an aerial and relaying them over cable does not alter the international nature of the service, nor interrupt it, but on the contrary reinforce it. The cable network represents an extension of the receiving aerial and therefore remains an accessory to it. It is used to relay one and the same original broadcast without alteration. In so far as the cable network company does not diffuse its own programmes, but only provides a technical service, the legal position is unaffected. This continues to apply for as long as cable relay is only a substitute for normal reception with a domestic TV aerial.

For all the above reasons the whole process of broadcasting by a foreign broadcasting organization to a national viewer comes under Articles 59 and 60 and should be regarded as a liberalizing service within the meaning of the Treaty.

3. Transmission by microwave link, long-distance cable or telecommunications satellite and relay through cable as a single service

What was said in the last paragraph also applies where the cable operator receives with his equipment the wireless broadcast intended for the public, not in the form of signals broadcast via a ground-based or airborne transmitter, but as signals broadcast via a terrestrial microwave link, a telecommunications satellite or a long-distance cable.

The cable operator makes use of such technical means mainly in cases where it is only in this way that he can receive (either at all or in the necessary quality) the broadcasting organization's programme at the place where his receiving equipment is situated, i.e. in cases where the receiving equipment is beyond the range of the signals broadcast by the relevant broadcaster. However, the cable operator also receives off-air by aerial the signals directed to him by microwave link or telecommunications satellite. Only in the case of long-distance cable does he not receive them off-air by aerial.

A slightly different type of arrangement, but one which must also be included under this heading, involves those not uncommon cases in which the aerial of the cable operator's receiving equipment is set up at a (considerable) distance from his cable network and the signals are transmitted from there to the cable network by long-distance cable or off-air by microwave link.

From the point of view of Community law, it makes no difference how the cable operator receives the broadcast and relays it to his subcribers. It is not a question of concepts, distinctions and value judgments laid down in broadcasting and telcommunications law. Under Articles 59 and 62, protection is afforded to the free cross-frontier movement of the broadcast as such, once it is broadcast and its reception is technically possible on the other side of the internal frontier. The decisive factor is the origin of the broadcast in one Member State and its reception in another. How the signals cross the internal frontier within the Community or are fed into the cable system in the country of reception is irrelevant.

Whether the broadcast is brought from the broadcaster to the cable distributor via transmitter and/or by long-distance cable, microwave link or point-to-point satellite and distributed through the cable network to the recipients, it is not a different broadcast or one that has been changed along the way, but one and the same service which has merely been transported in a different manner. Its free movement from provider to recipient is protected by Community law irrespective of how it is conveyed.

Articles 59 and 62 both guarantee freedom to provide services to the extent that such provision is possible on the basis of the technological state of the art, that is to say, in this context, to the extent that broadcasts from other Member States have become receivable by one or more means of transmission.

For these reasons, it does not matter for the purposes of Community law whether the final recipients live in the broadcaster's service area or at least within his "natural" reception area, that is to say whether they can receive the broadcast off-air with an individual aerial, whether weak or powerful. If any such criterion were applied, it would mean relegating cable transmission to the level of a substitute for individual reception and robbing it of its main function, which is to make the broadcasts accessible to additional groups of recipients living at some distance away. Articles 59 and 62 provide as comprehensive territorial and personal protection as is technically possible for the free cross-frontier provision of broadcasting services and accordingly they also protect the individual right of the provider of the broadcasting service to provide it for all recipients who can be reached using the technology available.

4. Consent to the cable relay of copyright domestic programmes abroad as a further service

The situation existing at the time of the Debauve and Coditel/Ciné Vog cases, in which there were no proper legal relationships between the non-Belgian broadcasting organizations on the one hand and the Belgian cable companies on the other (see the third paragraph of (1) above) has changed since 1 July 1983. Now, the Belgian cable companies pay eight German, British, French, Luxembourg and Dutch broadcasting organizations remuneration for their consent to the relay of the copyright programmes broadcast outside Belgium and picked up in Belgium. This relationship between a foreign broadcasting organization and a domestic cable company, this granting of performing rights for remuneration, involves a further service within the meaning of the first paragraph of Article 59 and the first paragraph (and subparagraph (b) of the second paragraph) of Article 60, one which is additional to the service dealt with under (2).

The new facts are as follows. After it was finally established that the distribution of foreign programmes in Belgium through cable networks raises questions of copyright, the Union Professionnelle de la Radio et de la Télédistribution (RTD, association of Belgian cable companies) on the one hand and the holders of the copyright and performers' rights (SABAM;[1] the broadcasting organizations BRT, RTBF, NOS, TF 1, A 2, FR 3, ARD, ZDF, RTL and BBC; BELFITEL[2] and AGICOA[3]) on the other concluded an agreement on 29 September 1983 on a fixed remuneration for the rights to distribute by cable 14 foreign programmes (Nederland 1 and 2, TF 1, A 2, FR 3, ARD (three channels), ZDF, RTL, BBC 1 and BBC 2 and ITCA (two channels))[4] and the four Belgian channels. Under the agreement, the Belgian cable companies must pay a remuneration calculated in accordance with the number of subscribers and the amount of the subscription fee (see Part Four, section D in fine). The holders of the rights or the undertakings representing them grant the rights to which they are respectively entitled to the cable companies for the purposes of cable distribution. In so far as they are not entitled to the rights necessary for this purpose, they undertake to relieve the cable companies of any financial liabilities.

---

[1] The Belgian collecting society Belgische Vereniging der Auteurs, Componisten en Uitgevers/Société belge des auteurs, compositeurs et éditeurs.

[2] BELFITEL is the full name of a Belgian company registered as a "Société civile à forme coopérative pour la gestion collective des droits de télédistribution".

[3] International Association for the Collective Management of Cable Distribution of Motion Pictures and Filmed Television Programmes.

[4] ITCA stands for Independent Television Companies Association.

B. Restrictions discriminating against non-nationals (Articles 59(1) and 62)

Article 62 states: "Save as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of this Treaty /1 January 1958, or 1 January 1973 for Denmark, Ireland and the United Kingdom, and 1 January 1980 for Greece/." What is meant by restrictions under this standstill obligation?

With regard to restrictions in existence before the Treaty entered into force, Article 59(1) stipulates: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period /until 31 December 1969/ in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended." The question once more is what is meant by restrictions?

According to Court of Justice decisions and unanimous academic opinion the term "restrictions" covers first of all any kind of discrimination against "the freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom these services are intended" (Article 59(1)). The service provided by the non-national must not be discriminated against in respect of the service provided nationally.

In the Debauve case, the Court of Justice defined this principle, initially without reference to broadcasting, in the following terms:[1] "The strict requirements of that provision /Article 59(1)/ involve the abolition of all discrimination against a provider of services on the grounds of his nationality or of the fact that he is established in a Member State other than that where the service is to be provided."

With reference to broadcasting the Court then rules in the same case:[2] "Articles 59 and 60 of the EEC Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television - as they prohibit the broadcasting of advertisements by television - if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is establsihed."

Under Articles 59 and 62, therefore, cases where a Member State subjects broadcasts from a different Member State - including those relayed by satellite - and their transmission by cable to more stringent conditions than the broadcasting and cable transmission of national programmes, or where it forbids or in any other way prevents or hinders the former compared with the latter, will always constitute a discriminatory restriction. In such cases the Member State treats the foreign broadcast worse than the national one and through this discrimination restricts the provision of services by nationals of a different Member State.

If, for example, a Member State stops, forbids, or hinders the broadcasting or transmission by a broadcaster established in another Member State of a programme intended entirely or partly for the national population - for instance by technical measures which interfere with reception; by banning the inclusion of such programmes or parts thereof in national cable systems; by other provisions on the recording or performance of broadcasting and transmission which only apply to foreign programmes; by direct measures against the other Member State, in order to protect national broadcasters from mass media, artistic or economic competition (loss in ratings or income from advertising) or from "excessive infiltration" of foreign culture although the foreign programme does not contravene national provisions on programme content, e.g. non-discriminatory prohibition of advertisements, that State is discriminating against the provider on the grounds of the origin of the programme, the nationality of the provider and the place where he is established.

The very aim of Articles 59 and 62 is to facilitate and encourage these services which are especially tailored to the needs of recipients in another Member State, i.e. not just to eliminate barriers to foreign services intended mainly for recipients in the country where the foreign provider of the service is established, and hence often of little interest to audiences in the receiving country. It should therefore be possible to supplement the

---

[1] Case 52/79 /1980/ - 833, ground 11 and 856.
[2] Debauve at 859, operative part, para. 1.

range of programmes provided nationally for nationals by nationals with a parallel range of programmes from other Member States. If programmes from another Member State were permitted to be broadcast, or retransmitted by cable, only in the language(s) of the transmitting country, and not in the language of the receiving country, this would amount to discrimination of the kind forbidden under Articles 59 and 62.

If, on the other hand, a Member State treats the foreign broadcast better than the national one, i.e. it imposes less stringent requirements on retransmission of foreign broadcasts than on domestic broadcasting, or exempts retransmission from such requirements, this constitutes discrimination against its own broadcasts and broadcasters, but not a restriction on the cross-frontier provision of services within the meaning of Articles 59 and 62. If, for example, a Member State chooses to subject national advertisements, but not the retransmission of foreign advertisements, to certain restrictions or prohibitions, it is free to do so.

In the opposite case, however, this would infringe the right of the foreign broadcaster to provide international services. One example is Article 40(1) of the Italian Broadcasting Act. Under this Act the ministerial licence allowing a person to operate equipment for the reception and wireless retransmission of foreign radio and television programmes obliges the applicant to eliminate all parts from the foreign programmes which, regardless of the form it takes, have the nature of advertising. National programmes, however, are not subject to an advertising ban (see Part Four, B above).

The right of the broadcaster to transmit his programmes to recipients in all Member States would also be infringed if the broadcasting and transmission of all or some of his programmes were prevented or hindered not by a ban, but by other legal and/or technical means; or if they were made dependent upon prior arrangement, authorization, consultation or notification and national programmes were not; or if bans or technical measures causing interference or special conditions were imposed on recipients only in respect of such foreign programmes.

In other words, Articles 59 and 62 cover "any kind of discrimination" (Debauve) on the grounds of origin of broadcast, nationality of the provider of the programme and place where he is established. "The rules regarding the quality of treatment ... forbid not only overt discrimination by reason of nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result. This interpretation ... [is] necessary to ensure the effective working of one of the fundamental principles of the Community ...".[1] It is therefore quite possible that differences, such as the cultural background of the broadcasts, their provider or participants, or the language in which programmes are broadcast amount, in their actual effect, to discrimination by way of nationality, which is forbidden by the EEC Treaty.

---

[1] E.g. Sotgiu, Case 152/73 [1974] 153, at 164 ground 11; Seco/Evi, Cases 62 and 63/81 [1982] 223, at 235 ground 8.

I. Cable distribution of foreign broadcast programmes

Aerial technology (amplification, conversion of signals) is improving. As a result, the scope for receiving broadcast programmes from other Member States is also improving. In addition, the development of telecommunications is opening up the possibility of delivering broadcast programmes from other Member States via microwave links, long-distance cable or telecommunications satellites and distributing them through domestic cable networks. As has already been explained, the EEC Treaty guarantees freedom to provide the broadcasting services transmitted in these various ways (A II 3).

This means that the national legislative bodies and authorities are faced with the question of how they can draft the provisions and organize administrative practice regarding the carrying of programmes via the cable network in such a way that programmes from other Member States are not discriminated against. Are there any criteria that can be applied here? What ranking should govern the carrying of programmes if the capacity of the cable system is not sufficient? This is often the case. Subscribers' receiving equipment is also limited in its capacity, so that in many cases it has to be decided which channels are to be occupied by which programmes.

This Green Paper cannot provide any detailed answer to these questions. However, a number of guidelines and pointers may be set out.

For example, if the only stipulation is that, first, the broadcast programmes specified by law for the broadcasting area and, secondly, those receivable at a given minimum field strength in the cable system's service area or with its receiving facilities at its announced location must be carried,[1] such a requirement must be extended to include the programmes legally specified by other Member States for the broadcasting area and similarly receivable. For example, account would have to be taken of the relevant foreign radio programmes broadcast in the language of the country by stations such as Deutschlandfunk, Deutsche Welle, Radio France internationale, RTL, Radio Nederland Wereldomroep, the BBC External Services, etc.

If, for example, it is also permitted to carry broadcast programmes receivable in this way and not specified by law for the broadcasting area, this permission must apply in a similar manner to programmes receivable as specified from other Member States without any quota being laid down.

---

[1] See, for example, Heads of the State and Senate Chancelleries of the Länder of the Federal Republic of Germany, Report on the distribution of broadcast programmes (radio and television) through cable systems, presented to the Conference of the Prime Ministers of the Länder on 4 February 1983 in Bonn, Funk-Korrespondenz No 7 of 17 February 1983, Annex, p. D 1-2.

If there is further possibility of feeding into the cable system the other broadcast programmes receivable, this must also apply to all programmes from other Member States receivable in this way.

In cases where the capacity of the cable system is not sufficient, a selection criterion must be provided which is objective, is as neutral as possible from a Community point of view and discriminates as little as possible against broadcasts from other Member States. For example, it may be stipulated that the programmes must be included in the order of their reception field strength - the field strength of the signals at the receiver site. Rules are not permissible which stipulate, for example, that the domestic programmes must be included first and those from other Member States afterwards, or that such a foreign programme may be displaced from the cable system in favour of a new domestic programme (e.g. by withdrawing the authorization).

Domestic legislation framed in the manner set out above will neither itself make a selection impermissible in the light of the freedom to provide broadcasting services within the Community, nor will it enable an authority or the cable company to do so.

Provisions are also needed which are adapted to the technological state of the art, i.e. which do not de facto, by applying technically outdated definitions, artificially exclude broadcasts from other Member States which it has become technically possible to carry. It is therefore particularly important, for example, to ensure that it is permitted to carry not only programmes receivable at a normal quality level using average individual aerials in the service area of the cable system (which gives programmes from other Member States a chance only in frontier areas), but also those programmes which can be picked up with the help of new technical facilities (such as advanced reception equipment) and have a given strength.

Since it is possible today for programmes to be transmitted by the broadcaster to the cable system's receiving equipment by long-distance cable, terrestrial microwave links or telecommunications satellite, this should also be permitted.[1]

Where this is the case, statutory and official discrimination against the relaying of foreign programmes using these three methods of delivering broadcasts is also prohibited under Articles 59 and 62. The freedom to provide services within

[1] See the supplement to the report referred to in the previous footnote, which was noted by the Conference of Prime Ministers of the German Länder in Stuttgart on 21 October 1983, Funk-Korrespondenz No 43 of 28 October 1983, Annex, pp. D 1-3.

the Community and the right of nationals of the Member States to provide their services without any discriminatory restrictions to recipients resident in other Member States means that foreign broadcasting services may be provided within the country in these three ways, as well as in others and that they have an equal right to be included in the domestic cable system. However, individuals have no claim to have such programmes made available.

Thus, for example, broadcast programmes from programme suppliers in other Member States which, like the domestic broadcasts, are addressed specifically to viewers within the country and do not offend against domestic legislative provisions, must not be excluded from being delivered and fed into the domestic cable systems, for example in order to prevent competition or in order to reserve revenue from television advertising for the domestic economy, domestic broadcasting or the domestic press, or because the programme was not made wholly or partly within the country.

The rules governing the order in which programmes delivered by microwave link, long-distance cable or telecommunications satellite are fed into the cable system where it has limited capacity must similarly not discriminate, either formally or de facto, against programmes from other Member States. Here too, criteria that are neutral from a Community point of view must be established and applied.

The problems discussed in this section are taking on growing importance: the more the individual citizen is or becomes dependent on a cable network in order to receive foreign programmes, and the longer he has to wait for DBS reception, the greater is the temptation to misuse cable in order to curtail by means of discriminatory rules and practices the freedom to provide cross-frontier broadcasting guaranteed by Articles 59 and 62. Freedom of broadcasting cannot tolerate any protectionist restrictions on the providers and recipients of services. It requires, as a correlative to the dependence on cable, the guarantee that foreign programmes will be receivable via the cable.

II. Coverage of other Member States by satellite broadcasting

According to the Court of Justice,[1] the existence of national natural reception zones cannot therefore be seen as discrimination which is prohibited by the Treaty in regard to foreign broadcasters in that their geographical location allows them to broadcast their signals only in the natural reception zone. Such differences - the Court says[2] - due to the limits of technology "and to natural phenomena cannot be described as 'discrimination' within the meaning of the Treaty; the latter regards only differences in treatment arriving from human activity, and especially from measures taken by public authorities as discrimination".

A measure of this kind, which does not hold back the natural limits of transmission technology, but restricts international usage by artificial means, is the provision under § 2 A, ground 428A, laid down in 1971 in Article 7 of the Executive Order for the International Telecommunication Union, Radio Regulations which takes the form of an agreement under international law and reads as follows:[3] "In devising the characteristics of a space station in the broadcasting satellite service, all technical means available shall be used to reduce, to a maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries".

The provision makes no exceptions for the territory of the Community, and thus the Member States have committed themselves in this provision to action which considerably restricts intra-Community as opposed to national broadcasting by satellite and accordingly takes away the basis of the free provison of services provided for in the EEC Treaty. This therefore undermines one of the equalities and freedoms which make the Community. The ban on discrimination against cross-frontier radiation within the Community (Articles 59 and 62) must therefore be taken into account by the authorities in the Member States. The same goes for the clause whereby radiation over other Member States beyond the avoidable minimum requires prior consent. The prior consent principle leaves the right to the free provision of services at the discretion of the Member States. It seems thus likewise not consistent with the EEC Treaty.

---

[1] Debauve at 860, last phrase of operative part.
[2] Debauve, ground 21 at 858.
[3] Now No 6222 of the World Administrative Radio Conference (WARC) 1979, United Nations (UN) Doc. A/AC. 105/271, Annex I, p. 4, of 10.4.1980.

At the World Administrative Radio Conference (WARC) held in Geneva in 1977,[1] apart from three groups of African and Arab states (see Part One B.III), only the Nordic countries made an express request for extensive footprints or services areas for common use. They obtained a common satellite position and, in addition to national footprints, two regional footprints for cross-frontier satellite broadcasts. Denmark, Sweden, Norway and Finland can use eight channels jointly, and Iceland, the Faroe Islands and Greenland, five.

The Community Member States acted differently and sometimes in a contradictory manner. The six original members requested and received the same orbit position in order to facilitate reciprocal satellite reception. Consequently, a broadcast from the other country can be received in spillover areas without altering the direction of the reception aerial. But there were to be no regional footprints covering these Member States. In fact, for technical reasons or political and economic objections, which were legally pushed through by means of refusing the prior consent called for by Article 7, ground 428A, of the Executive Order for the International Telecommunication Union, they settled for service areas for the individual satellites which, as far as possible, were based on their own territories. Germany, for example, refused Luxembourg permission to radiate over its territory because German broadcasters would have lost advertising income and the commercial slant of RTL would have had a negative effect on programmes in Germany (danger of a channel geared to popular taste). Belgium acted similarly.

This Regulation adopted at the Geneva Conference on national satellites regarding Community Member States - service area with minimum spillover - is as inconsistent with the objectives and spirit of the EEC Treaty as the provision of Article 7, No 428A, ofthe Executive Order for the International Telecommunications Union, which is put into concrete form by the footprint regulation and made a considerable contribution to its acceptance. The main aims of the EEC Treaty include "the abolition, as between Member States, of obstacles to freedom of movement for services" Article 3(c) and Articles 7 and 59 to 66), "the establishment of a common market" for all services (Article 2) and "the promotion throughout the Community of closer relations between the states belonging to it" (Article 2). The Member States "shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty" (Article 5(2)). This condition of Community law is hardly met by the Geneva Conferences of 1971 and 1977.

---

[1] International Telecommunication Union, Final Acts of the World Administrative Radio Conference for the Planning of the Broadcasting Satellite Service ... Geneva 1977, Geneva RE III/1982.

The Final Act of the Conference was signed on 13 February 1977; it is attached to the plan for the distribution of frequencies and orbit positions for satellite broadcasting. This plan entered into force on 1 January 1979 and will be valid until 31 December 1993.

Despite efforts to achieve, where possible, national broadcasting lobes with the satellites, considerable spillover in the Community territory could not in some cases be avoided for scientific and technical reasons since electromagnetic waves expand conically even when they are bunched. Depending on the angle of radiation, they reach the earth's surface in circular or elliptical form, which does not correspond with the state borders.

Under Annex 8, para. 1 of the Final Act of the Geneva Satellite Conference of 1977,[1] in conjunction with No 428A of the 1971 Radio Regulations, however, the coverage area must be the smallest area with a constant given power flux density of 103 dBW/m^2 which encompasses the service area. Service area is "The area on the surface of the Earth in which the administration responsible for the service has the right to demand that the agreed protection conditions be provided".

The right of the respective administration to interference-free reception exists, therefore, only for its own national territory. Outside that the administrations of neighbouring states have the right to use the same frequency channels for their own earth communication services. They are therefore not obliged to protect the spillover frequencies of other states. Each Member State could therefore, within its territory with its own earth communication services, use frequencies and channels allotted to it on which satellite broadcasts from another Member State are transmitted at the same time. This would impair or eliminate the reception of satellite broadcasts.

Under international telecommunications law each Member State would therefore be in a position to invalidate the national part of the spillover from a foreign satellite. It would be able to discriminate against a broadcaster established in another Member State providing programmes by foreign satellitefor national recipients compared with a national broadcaster who provides his programme through a national satellite to recipients in the same national territory. In comparison with programmes beamed nationally by satellite to the same reception area, programmes transmitted by satellite from other Member States could be jammed or blotted out. Accordingly, the relevant regulation in the Final Act of the Geneva Conference is, in respect of Member States, a discriminating restriction of the free provision of services within the Community, as provided for in Article 62.

[1] ITV, Final Acts, loc. cit., pp. 90 - 91.

Although international cooperation and compliance with international obligations are basic conditions for efficient international broadcasting, this cooperation may not go so far as to restrict the equality and freedom of intra-Community services guaranteed by the EEC Treaty.[1]

For these reasons the Member States are obliged to use their terrestrial services in such a way that there is no interference with the reception of programmes from other Member States.

III. Foreign broadcasting programmes and domestic public policy

1. Applicability of special provisions for foreign nationals (Article 56(1))

(a) Scope of the exception

By virtue of Article 56(1) and 66, the chapters on the right of establishment and on services do "not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health".

Taking the wording of this provision and the relevant case law of the Court of Justice, the exception contained in Article 56(1) is not to be regarded as a precondition for the acquisition of the right to supply a service or the right of establishment, "but as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the Treaty".[2] It is for the descriminating Member State to justify discrimination against

[1] As already pointed out by the Commission in its Decision 82/861/EEC of 10.12.1982 regarding British Telecommunications, JO L 360 of 21.12.1982, p.36 (42, at 43).

[2] Case 48/75 Royer (1976) ECR 497, at 512, ground 29.

foreign nationals involving the application in individual cases of provisions relating to the rights of aliens. Reasons other than the three listed are no justification for discriminating against nationals from other Member States.

Public security includes inter alia protection of the general public and of the individual against threats to the continued existence of the State and its institutions and to the life, freedom, honour and property of the individual.

Public order includes inter alia protection against threats to the prosperous human and civic community even and especially when this is guaranteed by unwritten rules on the conduct of individuals in public and this guarantee is a sine qua non for an orderly society.

Since the economic order is the very subject matter of the provisions of the EEC Treaty, it cannot form part of public policy within the meaning of Article 56(1). Otherwise, the two freedoms and equalities of treatment would be a matter for national legislation. This provision does not, therefore, permit any protective measures of an economic nature or with an economic objective. Witness also Articles 108, 109 and 226. Practice and doctrine are in agreement on this point. Where the rights of entry and residence are concerned, Council Directive 64/221/EEC,[1] issued pursuant to Article 56(2), bears out these points. Under Article 2(2) of that Directive, grounds of public policy may not be involved to service economic ends. And so, pursuant to Article 56(1) also, national provisions are inapplicable which discriminate against foreign broadcasting organizations in respect of advertisements transmitted by them to the country in question, the purpose of such provisions being to reserve advertising and advertising revenue for national broadcasters, to strengthen their economic base, to shield them from outside competition, etc.

As to the scope of this exception and in connection with the monitoring of the recourse had to it in individual cases, the Court of Justice has ruled as followed in two cases:[2] "The concept of public policy must, in the Community context and where, in particular, it is used as a justification for derogating from /a fundamental principle/ of Community law, be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community."

Thus, for example, "restrictions cannot be imposed on the right of a national of any Member State to enter the territory of another Member State, to stay there and to move within it unless his presence or conduct constitutes a genuine and sufficiently serious threat to public policy".[3] " ... recourse by a national authority to the concept of public policy presupposes ... the existence, in addition to the perturbation to the social order

---

[1] Directive of 25 February 1964, OJ No L 56 of 4 April 1964, p. 850.
[2] Case 36/75 Rutili [1975] ECR 1219, at 1231, ground 27;
[3] Case 41/74 Van Duyn [1974] ECR 1337, at 1350, ground 18.
Rutili at 1231, ground 28.

which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society."[1] "Although Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy, it should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct."[2]

In accordance with these principles established by the Court of Justice with regard to Article 56(1), the freedom of nationals of other Member States to transmit from such other Member States broadcasts which can (also) be received within the country in question cannot be restricted even by way of exception (see also C V 1). The reception of such broadcasts within the country and/or their distribution within the country may be restricted, but only if and to the extent that there is a genuine and sufficiently serious threat to a fundamental interest of society recognized by the Community.

(b) Respect for the fundamental rights laid down in the Convention on Human Rights

The Court of Justice has ruled that, taken as a whole, restrictions which are placed on the powers of Member States in respect of control of aliens and which are imposed on account of the limitation to the three exceptions contained in Articles 48(3) and 56(1) and their formulation in the Council provisions adopted pursuant to Articles 49 and 56(2), "are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all the Member States, and in Article 2 of Protocol No 4 of the same Convention, signed in Strasbourg on 16 September 1963, which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests 'in a democratic society'".[3]

Three things transpire from the above rulings and the case law summarized at (a): first, it is for the Member States to determine, according to their own political and ethical criteria, the legitimate requirements of public policy, public security and public health in their territory; second, however, use of this discretionary power is subject to both substantive and procedural restrictions under Community law; third, Member States can, therefore, also be required in the name of Community law to respect the freedoms enshrined in the EEC Treaty and in the Convention on Human Rights.

---

[1] Case 30/77 Bouchereau [1977] ECR 1999, at 2015, operative part, para. 1;
[2] Joined Cases 115 and 116/81 Adoui [1982] ECR 1665, at 1707, ground 8.
[3] Adoui at 1708, ground 8.
Rutili at 1232, ground 32.

The Court of Justice has thus established the link between the freedoms provided for in the EEC Treaty and the fundamental rights laid down in the European Convention on Human Rights. In interpreting and applying the EEC Treaty, the Court of Justice generally ensures that "the law is observed" (Article 164) and hence that the substantive provisions of the Convention are also observed. Since the latter are applicable in all Member States, they form part of the legal order in force in the Community. Community law is to be interpreted and applied in the light of those fundamental rights in so far as it does not afford wider protection. Those rights are in addition to the legal positions conferred and guaranteed by it and, under the system of Community law, have to be observed by the institutions of the Community and of the Member States as minimum provisions common to all of them.

(c) Free flow of information across frontiers (Article 10 of the European Convention on Human Rights)

The foregoing observations set out in (b) apply also to the freedom, guaranteed under Community law, to supply services within the Community as manifested in the freedom of cross-frontier broadcasting, on the one hand, and to the fundamental right, enshrined in the Convention on Human Rights, to the freedom of expression regardless of frontiers as manifested in the free flow of broadcasts, on the other.

Article 10 of the Convention on Human Rights reads as follows:

"1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 10 guarantees a single, but fundamental right, namely the right to freedom of expression (liberté d'expression, freie Meinungsäusserung, first sentence of paragraph 1).Under the second sentence of paragraph 1, this right includes the freedom to hold opinions (and to express them, cf. the first sentence of paragraph 1), the freedom to receive information and ideas, the freedom to impart information and ideas and the freedom to receive and impart information and ideas, without interference by public authority and regardless of frontiers (free flow of information and ideas).

Any interference by public authority, namely a law, administrative act or court judgment, entails a violation of Article 10 of the Convention if it does not fall within one of the exceptions provided for in paragraph 2.[1]

The European Commission of Human Rights took the view that commercial advertisements should be treated as "commercial speech" (cf. sentence 1, "freedom of expression"), that they should also be subsumed as commercial "ideas" under sentence 2 and that they were protected by paragraph 1.[2] However, they merited less protection than that accorded to the expression of "political" ideas in the broadest sense. Consequently, the test of what is "necessary" within the second paragraph of Article 10 regarding restrictions of the freedom to impart commercial "ideas" and for restrictions of the free flow of commercial "ideas" was less strict than in other cases. In accordance with Article 10(1) of the Convention, it is therefore immaterial for what purpose (commercial or non-commercial) a person feels impelled to use his freedom of expression.

The European Commission of Human Rights interpreted the freedom to broadcast information and ideas as follows[3]: "It is evident that the freedom to 'impart information and ideas' included in the right to freedom of expression under Article 10 of the Convention, cannot be taken to include a general and unfettered right for any private citizen or organization to have access to broadcasting time on radio and television in order to forward its opinion. On

---

[1] European Court of Human Rights 7.12.1976 - Handyside - Publications of the European Court of Human Rights, Series A No 24 (1976) p. 21, § 43; European Court of Human Rights 26.4.1979 - Sunday Times - cyclostyled version, p. 21, § 45.

[2] European Commission of Human Rights 5.9.1979 - X v. Sweden, 7805/77 - Council of Europe, European Commission of Human Rights, Decisions and Reports 16 (1979) 68 (73).

[3] European Commission of Human Rights 12.7.1971 - X and Z/United Kingdom, 4515/70 - Yearbook of the European Convention on Human Rights 14 (1971) 538 (544, 546).

the other hand, the Commission considers that the denial of broadcasting time to one or more specific groups or persons may, in particular circumstances, raise an issue under Art. 10 alone or in conjunction with Art. 14 /which prohibits discrimination/ of the Convention. Such an issue would, in principle, arise, for instance, if one political party was excluded from broadcasting facilities at election time while other parties were given broadcasting time".

Article 10 of the Convention also guarantees the abovementioned freedoms to broadcasting and television enterprises; however, in States with a licensing procedure, the freedoms apply only if the broadcasting and television enterprises are licensed (third sentence of paragraph 1), i.e. the freedoms are not guaranteed for "everyone", which is the principle put forward in the first sentence. In other words, access to the freedoms established in Article 10 may be restricted in the case of broadcasting and television enterprises.

If a State has authorized a broadcasting or television enterprise (or has not introduced a licensing requirement), the enterprise has the individual right under the first and second sentences of paragraph 1 to transmit in that State (broadcasting State) broadcasts intended for domestic or foreign audiences. It enjoys freedom of broadcasting ("without interference by public authority", in so far as such interference is not by way of exception permitted under paragraph 2) and freedom of circulation for broadcasts ("regardless of frontiers").

The possibility of requiring licensing in accordance with the third sentence relates only to enterprises which are established within the territory of the relevant State, the broadcasting State. As the receiving State, a country can neither issue nor refuse broadcasting licences, and it can therefore neither permit nor prevent foreign broadcasts.

The European Commission of Human Rights has interpreted the expression "licensing" in a number of decisions. In the last mentioned case, the European Commission of Human Rights stated the following[1]: "The Commission considers that the notion of licensing implies that in granting a licence, the State may subject radio and television broadcasting to certain regulations. ... the Commission finds that the provisions of Art. 10(1) should be interpreted as permitting the State in granting a licence, to exclude, as in the present case, certain specified categories of advertisements." The advertisements in question were advertisements of a political nature.

In 1968, the European Commission of Human Rights ruled "that the term licensing mentioned in the Convention cannot be understood as excluding in any way a public television monopoly as such".[2]

In reliance on this decision, the European Commission of Human Rights decided in 1972 that the third sentence of Article 10(1) "should be interpreted as permitting the United Kingdom Government Authorities to ban private broadcasting within the United Kingdom".[3]

---

[1] loc. cit. 546.

[2] European Commission of Human Rights 7.2.1968 - X v. Sweden, 3071/67 - Yearbook 11 (1968) 456 (464).

[3] European Commission of Human Rights 20.3.1972 - X v. United Kingdom, 4750/71 - Council of Europe, Collection of Decisions of the European Commission of Human Rights 40, 29 (30).

In 1976, referring to its abovementioned 1968 decision, the European Commission of Human Rights stated: "Notwithstanding this precedent, the Commission would not now be prepared purely and simply to maintain this point of view without further consideration. In the case in point, however, this issue can remain open."[1]

One of the issues in this case was the freedom of a firm to broadcast its own television programmes by multi-channel cable,[2] i.e. "active" cable television. The European Commission of Human Rights evidently started from the fact that on the one hand the guarantees afforded by the first and second sentences of Article 10(1) also applied to this activity, but that on the other hand "active" cable television companies are also "television enterprises" within the meaning of the third sentence and that consequently they may be subject to "licensing" before they are eligible for the rights provided for in the first and second sentences.[3]

A question which has not yet been decided is whether the third sentence also applies to "passive" cable television, i.e. whether it is applicable to firms which with the help of technical equipment receive programmes broadcast by broadcasters and distribute them through cable networks. Since the concepts contained in the Convention - in this instance the words "broadcasting /and/ television enterprises" - are autonomous and separate from national definitions (such as those laid down in telecommunications or broadcasting legislation), and in view of practice in the countries parties to the Convention, it would appear that the question must be answered in the affirmative.

At any rate, what may be regarded as certain is that "passive" cable companies also qualify for the freedoms laid down in the first and second sentences of Article 10(1) in receiving and distributing radio and television programmes broadcast by others.

In their case too, accordingly, legal, official or judicial "interference" in the "exercise of these freedoms" is under the terms of paragraph 2 permitted only by way of exception and provided that three conditions are fulfilled: the restriction must be prescribed by law, it must be necessary to preserve one of the interests listed in paragraph 2 and it must be so in a democratic society. The criteria for such need are therefore not only the requirements of attaining certain legitimate national objectives, but also the requirements of "a" democratic society, and therefore not just of one's own democratic society.

The relevant main activity of an "active" cable company in accordance with Article 10 is to "impart" its programme (information, ideas, opinions (second sentence), and other expressions of views (first sentence)) to its customers; it is the provider and distributor of communications. The "passive"

---

[1] European Commission of Human Rights 12.3.1976 - Sacchi v Italy, 6452/74 - Council of Europe, European Commission of Human Rights, Decisions and Reports 5 (1976) 43 (50).

[2] loc. cit. 49.

[3] loc. cit. 50 No 4 paragraphs 1-3.

cable company's primary activity is to "receive" on behalf of its customers programmes broadcast by others; it is a recipient and distributor of communications.

The latter is objectively quite clear so long as the cable company distributes the receivable programme to its subscribers without any change of contents, in an unabridged form and simultaneously.

By contrast, if it changes the contents of the programme, it is not imparting the "information" received, but other information. While it remains the recipient of the original "information", it also becomes the provider and distributor of its own "information" within the meaning of the second sentence of Article 10(1) of the Convention. The "passive" cable company becomes an "active" one as well.

If the company distributes the programme received without any change in its contents, but does not distribute it in complete form and/or simultaneously, this will probably not as a rule constitute different "information" of its own, but, where the programme is distributed incomplete, it will probably involve partly the original "information" and partly no "information" at all, and, where there is a time lag in the distribution, it will probably amount to the old "information" which is merely distributed at a different time. If the cable company goes further and compiles its own programme from one or more programmes received, this will probably constitute new "information". The "passive" recipient then also becomes an "active" provider.

The fact that the main activity of "passive" cable companies that is relevant under Article 10 is to "receive" programmes and not to "impart" them is also quite clear in geographical terms so long as the cable network is situated in an area in which the subscribers can also receive the programme direct off-air at an (average or slightly limited) level of quality using (average or high performance) individual or community aerials. The cable system simply enables the programmes to be "received" in a different technical form (and possibly in an improved or cheaper form). To the extent that programmes are broadcast via direct broadcasting satellite and are receivable by means of individual and community aerials, these "natural" reception areas grow so as to extend far beyond the intra-Community frontiers of the Member States.

In the other areas, in which direct individual reception is not possible, although the cable system is not a substitute for the individual or community aerial, what is involved here too is the "reception" of information etc. For this "reception" is the mirror image of the "imparting" of programmes by the broadcasting organizations, and the programmes "imparted" are distributed to the subscribers without any change of contents.

A further point is that, as worded, the second sentence of Article 10(1) deals only with the "freedom .... to receive" "without interference by public authority". The provision does not therefore make any distinction as to the technical means by which reception and hence freedom to receive are made possible or, where the delivery of programmes is prohibited, made impossible.

Quite apart from this, Article 10 of the Convention should be interpreted in the light of technical developments since 1950.

If these conclusions are correct, there is "reception" of information etc. not only where the cable company picks up by means of an aerial broadcasts transmitted via terrestrial transmitter or via broadcasting satellite, but also in cases where it picks up by means of an aerial broadcasts transmitted terrestrially by microwave link or by telecommunications satellite, or where it is enabled to receive them by long distance cable. The second sentence of Article 10(1) protects the "freedom ... to receive ... information and ideas without interference by public authority and regardless of frontiers" and thus protects the free cross- frontier flow of expressions of opinion etc. regardless of the means by which they are conveyed.

If has not yet been decided whether the licensing permitted under the third sentence of paragraph 1 for broadcasting and television enterprises (including "active" and probably "passive" cable companies) must be restricted to authorization of the taking-up of the relevant activity. Is it limited to the technical (telecommunications) conditions and to the conditions relating to the enterprise itself (e.g. authorization of private television companies, granting of a monopoly, requirements as to the reliability of the founders, legal form, organization, composition of the bodies, broadcasting times, financing, accounting and responsibility)? Or can licensing extend to the exercise of the activity, providing, for example, for prior monitoring of all or certain programmes (problem of censorship), or prohibiting or restricing the distribution of broadcasts of a given type (e.g. commercial), broadcasts of a given origin (e.g. foreign) or broadcasts intended for a given audience (e.g. the public within the country)?

Some commentators take the view that the broadcasting State is entitled, on the basis of the third sentence, to lay down freely, i.e. without regard for the rights and freedoms provided for in the first and second sentences, rules governing the nature, scope and substance of the activity of broadcasting and television enterprises. Others take the view that this is permitted only within the limits laid down in paragraph 2.

According to this view, the "exercise" of the freedoms provided for in paragraph 1 may in fact be made subject only to such conditions, restrictions or sanctions as are prescribed by law and are necessary in a democratic society for the protection of quite specific interests listed in paragraph 2.

The first and second sentences of Article 10(1) of the Convention do not merely guarantee freedom of broadcasting and freedom of circulation of broadcasts for broadcasting and television enterprises (licensed in the broadcasting State), including "active" cable companies. Similarly, they do not merely guarantee freedom of reception, including freedom of distribution for "passive" cable companies (licensed in the receiving State). Rather, as far as the recipients are concerned, the individual (or as the first sentence

puts it "everyone") has also at least the individual right to receive the domestic and foreign broadcasts which he would like to receive and which he is actually able to receive.

This freedom of reception also applies to broadcasts which reach him via direct broadcasting satellite and/or by cable. Article 10 of the Convention confers the right to reception whatever the means which make such reception possible. There is nothing to suggest that the guarantees it affords should apply only to the technical means of receiving and imparting information that existed in 1950.

In the case of direct reception via ground stations or satellites, the extent of the individual's freedom of reception depends on the reception strength of his aerial, while in the case of reception via cable it depends on what programmes are relayed by the cable network to which he is connected. Each of the two reception methods may involve extensions and (potentially) restrictions of the extent of his freedom of reception. They are not mutually exclusive, but in many respects are complementary in providing maximum and optimum freedom of reception.

It is an open question whether from the individual right to reception there may in certain circumstances also arise a right to require the receiving State to promote reception. Such promotion could in particular consist in making it possible to feed broadcasts of other broadcasting organizations into a cable network, particularly where the necessary technical facilities are already available.

It follows from the freedom of reception that the receiving State may neither prohibit nor otherwise in principle exclude the reception of the broadcasts of a foreign broadcasting organization within the country. Only if the conditions laid down in Article 10(2) of the Convention are fulfilled may the receiving State seek, if necessary, to jam direct reception of the relevant broadcast within the country or restrict (partial blacking-out) or prohibit its distribution through cable. It would surely be only in exceptional circumstances that any such prohibition, any such demand for partial blacking-out, or the use of jamming stations could, in accordance with paragraph 2, be regarded as necessary in a democratic society, for example where the democratic order of the receiving State was in jeopardy.

It follows from the freedoms provided for in the second sentence of Article 10(1) of the Convention that the receiving State cannot demand of the broadcasting State or of its broadcasting organizations that broadcast programmes which can be received on its territory should have its prior approval. Information or ideas do not flow freely if they may be broadcast only after the receiving State has given its consent.

The reasons permitted under Article 10(2) of the Convention for restricting the freedoms enshrined in paragraph 1, and the requirement that any such State interference must be necessary in a democratic society, are discussed in detail elsewhere (C VI 1(b), (c) and (d) below). However, for the purposes of interpreting Article 56(1), under which such special treatment by Member States for foreign nationals as is necessary "on grounds of public policy, public security or public health" may continue, the following points should be made here.

In the only two language versions which are authentic, Article 10(2) of the Convention does not, like Article 56(1) of the Treaty, refer to "public policy" or "ordre public", but to "prevention of disorder" or "défense de l'ordre".

The concept used in the Convention is therefore narrower. What is meant is order in the police-related sense, particularly in the sense of keeping the peace.

The plea of "prevention of disorder"/"défense de l'ordre" cannot be used to impose restrictions on grounds of the social and cultural order of a country, whether generally or in specific areas such as the press or broadcasting.

Nor can the plea of "prevention of disorder"/"défense de l'ordre" be used to impose restrictions on grounds of the economic order of a State or of individual sectors, or on the grounds of specific public interests of an economic or financial nature. This can be seen from a comparison with Article 8(2) of the Convention. In that provision, "the economic well-being of the country"/"bien-être économique du pays" is acknowledged "alongside the "prevention of disorder"/"défense de l'ordre" as grounds for restricting the freedoms provided for in Article 8(1) (which safeguards private and family life). By contrast, Article 10(2) of the Convention does not contain this (or any similar) ground for exception.

If one not only compares the meaning of "public policy"/"ordre public" and "prevention of disorder"/"défense de l'ordre", but also includes those interests listed in Article 10(2) of the Convention which may be understood as specific instances of "public policy"/"ordre public", one can arrive at a definition of "public policy"/"ordre public" in Article 56(1) which, apart from order in the police related sense also includes "the prevention of crime", the protection of "morals", the prevention of the "disclosure of information received in confidence" and the maintenance of the "authority and impartiality of the judiciary".

In accordance with what was said above under (b) and at the beginning of (c), Article 56(1) must be interpreted and applied within the limits drawn by Article 10(2) of the Convention. It must therefore not be understood as an all-embracing, comprehensive "public order" clause. Otherwise, the door would be left wide open to the erosion of the European rights to equality and freedom guaranteed by Articles 52 to 66 of the Treaty and by Article 10 of the Convention. The exception could become the rule.

The overriding nature of Article 10(2) of the Convention for the purposes of interpreting Article 56(1) in cases where both provisions are relevant can be substantiated by the following arguments in addition to the Court's arguments already set out.

When the EEC Treaty was concluded in 1957, all the Member States had already signed the European Convention on Human Rights. In five of the States, Article 10 also applied under both international and national law, and in the sixth it has applied since 3 May 1974. Five of the then six Member States were therefore not free, in respect of subject matter which simultaneously comes under Article 10 of the Convention, to extend the three reserved rights which they included in the EEC Treaty (Article 56(1)) beyond the corresponding reserved rights contained in Article 10(2) of the Convention.

Nor is there any evidence that the Member States wished to do so. On the contrary, since the Community is the closer association, it can be assumed that the Member States regarded the substantive guarantees provided for in the Convention as a common minimum even in the overlapping area of the rights and freedom provided for in the EEC Treaty and, conversely, that they regarded the scope for restricting these guarantees as a maximum which they preferred not to apply to the full in the Community which they had established.

In the area of broadcasting and telecommunications law, therefore, the three reserved rights provided for in Article 56(1) apply within the upper limits which the corresponding reserved rights provided for in Article 10(2) of the Convention set for them. Furthermore, the application of national provisions adopted to protect one of these three interests thus defined are justified under Article 56(1) only where such application is "necessary in a democratic society" (Article 10(2) of the Convention; see the judgment in Rutili under (b) above and the remarks made under C VI 1 (c) below).

(d) Discriminatory restrictions on foreign broadcasting programmes?

It is not clear from the foregoing under what circumstances restrictions that do not apply to domestic broadcasting could be imposed on the transmission of programmes from other Member States. In other words, the significance, discussed above, of the exception in respect of public policy is that only seldom does it permit a Member State to prohibit, prevent or otherwise place at a disadvantage vis-à-vis national broadcasts the transmission for reception in its territory of programmes relayed from another Member State under the latter's law and by its nationals.

This is so regardless of the persons for whom the foreign broadcasts are intended in the first place: for those resident in the other Member State, for national residents, for nationals of more than one Member State, etc. Transmissions by broadcasting organizations providing external services, such as the Deutsche Welle, the Deutschlandfunk, Radio-France Internationale, the Société de Radiodiffusion et de Télévision pour l'Outre-mer, Europe 1, RTL and programmes intended for transmission abroad by organizations providing primarily domestic broadcasting services, such as the BBC, must not be subjected to special treatment in other Member States on the ground, say, that they did not form part of the national public broadcasting system, that they would compete with the latter in terms of advertising, intellectually or economically, or that there was a danger of national public opinion or culture coming under undue foreign influence.

Special treatment in one Member State for transmissions broadcast to it from another Member State could not be justified either on the grounds that they concerned, affected or influenced economic, social, cultural or political life in that country. For this is their precise purpose as endorsed in the EEC Treaty and in the European Convention on Human Rights and recognized under Community law. The dialogue between different cultures and their interpenetration and cross-fertilization, nurtured as they are by radio and television, do not pose a threat to a country's public policy but preserve it from isolation, one-sidedness and nationalism by imparting a European dimension.

Examples of the "special treatment for foreign nationals" not justified by virtue of Article 56(1) are: prior approval, consultation or notification of the receiving country; monitoring of transmission by the latter; agreement that the government of the country from which the transmissions are broadcast is responsible for those transmissions; the condition of reciprocity for transmissions received; the requirement that transmissions broadcast from other Member States must not be instrumental in the forming of "public opinion", etc.

Nor can such special treatment be justified on the ground that broadcasting within a country is a service in the public interest that could not be performed at all, or only under discriminatory conditions, by nationals of other Member States. For one thing, a service in the public interest is not coterminous with, say, a service in the State interest. For another, there can be no denying that programmes broadcast from other Member States are one factor in the forming of public opinion in the receiving Member State and thus impinge on the task of national broadcasting organizations. Even so, such programmes, even if broadcast in the national language, are recognizable by the audience as foreign broadcasts and are identifiable as a factor in the forming of public opinion. Foreign broadcasting is additional to domestic broadcasting but does not prevent it from performing its services in the public interest. It is not evident to what extent this additional source of information, opinions, ideas, culture, entertainment, etc., from other Member States could constitute a threat to national public policy in the manner described.

What is more, the imposition of requirements which, although applicable also to nationals, concerned the right of establishment, and not the free movement of services, could not be justified within the meaning of Articles 66 and 56(1) on grounds of national public policy. For example, a Member State could not rely on the argument that a de jure or de facto monopoly or oligopoly of one or more broadcasters existed in its territory that excluded the reception and relaying of transmissions from other Member States or made it subject to authorization. This is because the effect of a national broadcasting monopoly is confined to preventing third parties (nationals and foreigners) from setting up broadcasting stations in the country and transmitting signals from those stations. The inclusion of foreign transmissions, and their reception and relay, would not only nullify the freedom of establishment but also render impossible the achievement of a common market in broadcasting.

The same would be true of a requirement to the effect that a foreign broadcaster must be organized in the same way as a national broadcaster and/or must transmit a programme that satisfied the requirements laid down for national programmes. Such requirements would not, it is true, constitute de jure discrimination against broadcasters in other Member States, but the latter would be exposed to de facto discrimination as they would not normally be in a position to satisfy simultaneously the institutional and/or programme-content requirements imposed by all or only some Member States. In the final analysis, therefore, they would be prevented from broadcasting to that other Member State. They would be treated in the same way as broadcasters established there. The free movement of transmissions within the Community would be impossible. As mentioned above, however, the exception contained in Article 56(1) and justified on grounds of national public policy does not allow the relaying of programmes from other Member States to be judged by the same criteria as those applying to the national broadcasting set-up and to be made conditional on compliance with those criteria.

2. Approximation of special provisions for foreign nationals (Article 56(2)

Pursuant to Articles 56(2) and 66, "the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, issue directives for the coordination of the aforementioned provisions laid down by law, regulation or administrative action", that is to say those provisions that provide for special treatment of foreign nationals and are justified on grounds of public policy, public security or public health. Whereas all other forms of discrimination in respect of foreign nationals are prohibited per se (Articles 52, 53, 59 and 62), the cases in which discrimination is justified should be harmonized and thereby reduced to what is strictly necessary. Such coordination should, in particular, "protect /nationals from other Member States/ from any exercise of the powers resulting from the exception relating to limitations justified on grounds of public policy, public security or public health, which might go beyond the requirements justifying an exception to the basic principle of free movement of persons"[1] or, in this instance, the freedom to supply services and the freedom of establishment.

Since no special treatment for foreign nationals has as yet been introduced in the broadcasting field on grounds of public policy and since such treatment would, as we have already seen, be difficult to justify, the question of its harmonization probably does not arise at this juncture. The Commission can confine itself for the time being to ensuring, where necessary, that Article 56(1) is complied with (first indent of Article 155, and Article 169).

[1] Case 30/77 Bouchereau / 1977/ECR 1999, at 2010, ground 15; likewise, Case 67/74 Bonsignore / 1975/ECR 297, at 306, ground 5.

C. Restrictions affecting nationals and non-nationals without distinction (Articles 59 to 66 EEC)

The question whether steps need to be taken to approximate national laws on broadcasting and copyright, and if so what these measures should be, will depend to a large extent on how broad the prohibition on restrictions of the freedom to provide services contained in Articles 59 and 62 is considered to be (for the exact wording see the beginning of Section B above). If the national regulations which are claimed to affect the reception and retransmission of broadcasts from other Member States are no longer permitted under either Article 59 or Article 62, and must hence be rescinded, the approximation of laws which govern the taking up and pursuit of activities as a self-employed person - including broadcasting and the making of programmes - called for in Article 66 in conjunction with Article 57(2) will tend to become irrelevant. The purpose of such an approximation, namely "to make it easier for persons to take up and pursue activities as self-employed persons" (Article 57(2) in conjunction with Article 57(1)), will remain a requirement of the Treaty, but the legal barriers to an exchange of broadcasting services among the Member States should already have been removed under directly applicable Community law, which takes precedence over contrary national law. On the other hand, if the legal obstacles to the reception and retransmission of broadcasts from other Member States are not deemed to fall under the prohibition in the Treaty, an approximation of law will become necessary. Indeed, it will be imperative.

I. The provisions of the Treaty

Article 59 requires that restrictions on the freedom to provide services within the Community be abolished, while Article 62 prohibits the introduction of new restrictions; together they cover in principle not only all discrimination on the grounds of nationality or place of residence but all other obstacles to a free exchange of services between Member States.

1. Terms employed in the Treaty

The above considerations follow from the terms used in the relevant provisions of the Treaty. Articles 59, 62 and 63 do not refer to discrimination but to "restrictions". This is the term used when the aim is simply to prevent discrimination.

Thus Article 65 provides: "As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 59." Article 65, in banning any discrimination on the grounds of nationality or place of residence in respect of all other and not just individual Member States in the period before all restrictions are lifted under Article 59, implies that there are other kinds of restriction which will need to be abolished.

Further examples of the use of the narrower concept of discrimination when it alone is meant are Article 7 (prohibition of "any discrimination on grounds of nationality"), Article 37 (progressive adjustment of State monopolies of a commercial character), Article 68(2) (provisions on capital and credit). Article 67 (movement of capital) uses both terms, and in doing so confirms that "restrictions" are measures which apply without distinction to nationals and non-nationals. Finally, Article 3(c) calls for the abolition of "obstacles" to the free movement of services, in other words not just discrimination against non-nationals from other Member States.

2. Article 60, third paragraph

The second justification for this line of reasoning is contained in the third paragraph of Article 60, which states that the "person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided under the same conditions as are imposed by that State on its own nationals".

This provision can only mean that such regulations should have no effect or only a marginal one if a provider of a service does not pursue his activity in the State where the service is provided.

The third paragraph of Article 60 does not constitute a definition of the term "restrictions" as used in Article 59, nor does it establish a principle applying to all cross-frontier services. It

merely gives a special rule applying to a clearly defined subset of cases. It does not provide sufficient reason, as far as all other cases are concerned, not to apply the more general wording of Article 59, which calls for the abolition of restrictions and not just of discrimination. This is all the more relevant where a provider of a service not only does not pursue his activity in another State but also does not render the service in another State, but his own.

3. Objectives and conception of the Treaty

That Articles 59 - 66 are not confined to restrictions on non-nationals but also cover restrictions affecting nationals and non-nationals equally, follows, thirdly, from the objectives of these Articles and the general aims of the Treaty. One of the main tasks of the Community in pursuit of its primary economic, social and political objectives as stated in the Preamble and Article 2 is "establishing a common market" (Article 2). This entails creating within the Community conditions similar to those existing in a national market (cf. Article 43(3)(b)). This common market is to embrace not only labour, capital and goods but services as well. "For the purposes set out in Article 2, the activities of the Community shall include", according to Article 3, "the abolition, as between Member States, of obstacles to freedom of movement of ... services (Article 3(c))."

If it were a question simply of removing discrimination, the prohibition contained in Article 7 would be sufficient. Instead, the Contracting Parties have included a separate Chapter 3 under Title III of Part Two of the Treaty to regulate the free movement of services as one of the six "foundations of the Community", and provides for the creation of a common market in services, that is the removal of all obstacles to intra-Community exchanges of services with the aim of welding the national markets in services into a single market in which the conditions are as close as possible to those of a genuine internal market.

The Treaty is hence designed to prohibit any discrimination and restriction on the free movement of services between Member States (existing obstacles were to be abolished during the transitional period under Article 63, since when the first paragraph of Article 59 and Article 62 are directly applicable) in order to open national markets to services originating in other Member States. Differences between the national provisions regulating individual activities are to be removed by approximation under Article 66 in conjunction with Article 57 so that the national markets, once opened, become one common European market. In addition, there is to be an approximation of laws to remove discrimination on the grounds of public order, safety and health, such latter regulations remaining in force until they are harmonized (Article 66 in conjunction with Article 56).

II. Application of the Treaty by the Commission and the Council

1. Explanatory Memorandum to the General Programme

The Commission stressed in its Explanatory Memorandum[1] to the General Programme for the abolition of restrictions on freedom to provide service, adopted by the Council on 18 December 1961,[2] that "The rule of equal treatment with residents does not have the same general significance in this case as in the Chapter on freedom of establishment. It is only referred to here to cover cases in which providers of services established in one country travel to another to pursue their activities there on a temporary basis" (third paragraph of Article 60). Where recipients move to the supplier of a service, or where the service does not entail a change of location by the suppliers, "the freeing of services has an absolute character which contrasts with the relative character of the freedom of establishment. As in the case of free movement of goods and capital, the aim is the abolition of all restrictions and not only of those that are discriminatory".

The reason for this is that simply prohibiting discrimination is not sufficient in itself to allow the exercise in practice of the right to free circulation of services, capital and goods; it is sufficient for the exercise of right of establishment and free movement of labour. In the latter case, the persons concerned are moving from one State to another, with a change in the law to which they are subject. This is not true in the first case, where it is the service which passes from one State to another as it "circulates" across an internal frontier. The law to which the provider of the service is subject remains the same. He is still governed by the law of the country in which he is established and from which he supplies the service. The extent to which he is able to provide his service in another country depends in large measure on how far foreign regulations restricting the free circulation of services, capital or goods apply to him in addition to national law in his own country. For the supplier of the service, it is unimportant whether these regulations discriminate against him as a non-national or apply equally to nationals. If they are not the same as the law in his own country, it may be impossible for him to provide the service or he may make himself liable to sanctions.

This is why Articles 59 and 62 prohibit all "restrictions" on the free exchange of services and not merely discrimination, just as Articles 30 and 32 prohibit both restrictions on imports of goods (discrimination) and "all measures having equivalent effect", and more particularly restrictions which apply equally to imported and domestic goods. The latter restrictions have only a remote connection with the idea of discrimination against non-nationals. Finally, Article 67 dealing with the closely related field of capital movements specifically prohibits all discrimination and all restrictions.

---

[1] Commission document III/COM(60)92 final of 28 July 1960, p. 22 (paragraph 14) and 23. (The quotations in the text are an ad hoc translation in English for the purposes of this document but see Bull. EC 6/7-1960 for a summary in English).

[2] OJ No 2, 15.1.1962, p. 32.

It is clear, therefore, that free exchange of services, free movement of goods and the circulation of capital belong together by their nature and function just as free movement of labour and right of establishment are inter-related. Article 59 does not contain any provisions corresponding to Article 48 or the second paragraph of Article 52, while the third paragraph of Article 60 does not define what restrictions are; it only makes a non-national provider of a service subject to local law if he temporarily pursues his activity in another country where the service is supplied, in other words if he temporarily takes up residence there. In all other cases (a non-national supplier of a service pursuing his activity in his own country) the service may not be restricted by the law in another country where it is being received (first paragraph of Article 59 and Article 62).

For all the reasons set out above and under I, Articles 59 and 62 must be regarded as more than an application to services of the general prohibition of "discrimination on grounds of nationality" (first paragraph of Article 7). As well as establishing equality, the two Articles cited are intended to guarantee the "freedom to provide services" (Article 62) from all "restrictions" both as an individual right and as an institutionalized part of the Community. By this is meant that the "liberalization" of services (Articles 61(2), 63 and 64), which is to say the "abolition as between Member States of obstacles to freedom of movement of services" (Article 3(c)), is a primary objective and "foundation of the Community" (title of Part Two of the Treaty); it is a contributory element in the common market and as such is something which the organs of the Community are duty-bound to establish for all kinds of service.

2. The General Programme and broadcasting

In line with what has been said above in 1, the restrictions to be abolished under Article 59 are defined in Title III B of the Council's General Programme as "Any prohibition of, or hindrance to, the movement of the item to be supplied in the course of the service or of the materials comprising such item or of the ... equipment ... to be employed in the provision of the service".[1] This is in addition to measures of the type referred to in A which hinder the person providing services "by treating him differently from nationals of the State concerned". All these restrictions are to be eliminated "whether they affect the person providing the services directly, or indirectly through the recipient of the service or through the service itself" (introductory sentence to Title III).

The subject of the present paper is the broadcasting and/or transmission of sound and television programmes. The "materials" comprising the service are sound and picture signals, while the "equipment" would be, for example, directional beams, cables and wires. This would mean that bans and restrictions both de jure and de facto on broadcasts and/or transmissions of programmes across national borders are covered by Title III B of the General Programme.

This is confirmed by the Commission's Explanatory Memorandum,[2] which defines services provided without the supplier or the recipient having to leave their own countries as services which do not occasion "direct contact between" the parties. This applies particularly to services which are "purely intellectual / immaterial_/ in character" or "technical".

[1] Loc. cit., p. 33.
[2] COM(60)92 final, p. 48 (paragraph 28) and p. 49 under (a).

The restrictions on such services (which must be abolished) include, according to the Memorandum,[1] "obstacles arising from regulations and practices in the country of the recipient / that / are liable to limit the use of a service originating in another Member State. This applies aprticularly to films. The basic problem relates to the commercial exploitation of copyright and similar rights connected with a film, that is the problem of exchanges of services in the field of cinematographic films." Copyright in cinema or television films or other broadcasts are valid for everyone, that is they do not depend on the nationality of the providers of the services incorporated in a performance, broadcast or transmission or on their place of residence. Other restrictions applying without such discrimination include broadcasting regulations and practices in the country of a recipient which prevent or impede the movement or reception of a broadcast service supplied from another Member State.

3. The Commission's position in the cases of Coditel v Ciné Vog and Debauve

In accordance with its interpretation of Article 59 and the third paragraph of Article 60, the Commission considered in the case of Coditel v Ciné Vog[2] that a rule applying without distinction to all persons resident in Belgium was a restriction on the free provision of a service and as such was prohibited under Article 59, since it gave the author of or owner of the rights in works of literature and art (in this case a cinematographic film) the exclusive right to permit the broadcast of a work and its retransmission either by wire or through the ether and hence to forbid unauthorized third parties from doing the same, in as far as the rule affected the retransmission of programmes broadcast in another Member State.

Similarly, in the case of Coditel v Debauve,[3] the Commission considered that a ban on the retransmission of domestic and foreign programmes containing advertising which was applied to all cable television companies established in Belgium constituted a restriction prohibited under Article 59, in as far as the rule affected advertising broadcast in another Member State.

Finally, the Commission took the view that Article 59 was directly applicable to these and all other non-discriminatory restrictions on the freedom to provide services.[4]

---

[1] Loc. cit., p. 51.
[2] Case 62/79 / 1980 / ECR 3, p. 881 (pp. 884, 897-8).
[3] Case 52/79 / 1980 / ECR 833 (849-50).
[4] Debauve at 852 and Opinion of Mr Advocate-General Warner at 860 (873-4).

III. Interpretation of the Treaty by the Court of Justice

1. "Restrictions" covered by Articles 59 and 62

The Court of Justice has acknowledged in a number of judgments not concerned with broadcasting that the restrictions whose abolition is provided for by the first paragraph of Article 59 include not only all overt or covert,[1] de jure or de facto discrimination against the person providing a service on grounds of his nationality or the place in which he is established, but also "all requirements ... which may prevent or otherwise obstruct the activities of the person providing the service."[2]

In the Debauve judgment, the Court simply held, however, that the first paragraph of Article 59 involves "the abolition of all discrimination against a provider of services on the grounds of his nationality or of the fact that he is established in a Member State other than that where the service is to be provided."[3]

And in Coditel v Ciné Vog,[4] the Court held, ultimately in line with the above judgment, that "whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits /limitations, restrictions/ upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property ... ." "The provisions of the Treaty relating to the freedom to provide services do not" therefore "preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right."

---

[1] i.e. "Forms of discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result" as "overt discrimination based on the nationality of the person providing a service". Joined Cases 62 and 63/81 Seco v Evi /1982/ ECR 223, 235, ground 8.

[2] Case 33/74 van Binsbergen /1974/ ECR 1299, 1309, ground 10; Case 39/75 Coenen /1975/ ECR 1547, 1555, ground 6; Case 279/80 Webb /1981/ ECR 3305, 3324, grounds 15/16; likewise, for example, Case 37/74 Walrave /1974/ ECR 405, 1420, ground 31 "inter alia", ground 34 "in any event in so far as "; Case 13/76 Donà /1976/ ECR 1333, 1341, ground 20 "at least in so far as". According to Joined Cases 110 and 111/78 van Wesemael and Follachio /1979/ ECR 35, 52, ground 27, see also grounds 29/30, Webb, at 3324, ground 14 and Seco v Evi at 235, ground 8 the provisions of Article 59 "entail" the abolition of all discrimination and hence are not exhausted therein.

[3] Debauve at 856, ground 11. According to Case 15/78 Koestler /1978/ ECR 1971, 1980, ground 4, 1981, ground 5, Article 59 covers only discrimination.

[4] Coditel v Ciné Vog at 903, ground 15, and at 905, operative part.

Although in the passages quoted from both judgments the Court appears to limit the scope of Article 59 to discrimination, and hence it was an established fact that Article 59 did not encompass both sets of circumstances because the relevant provisions of broadcasting and copyright law do not distinguish according to the nationality of the person providing the service or the place in which he is established, in Debauve[1] it also applies an exception to Article 59 designed to limit, not the prohibition on discrimination, but the prohibition on restrictions, applicable without distinction, to the movement of services:[2] "In veiw of the particular nature of certain services such as the broadcasting and transmission of television signals, specific requirements imposed upon providers of services which are founded upon the application of rules regulating certain types of activity and which are justified by the general interest and apply to all persons and undertakings established within the territory of the said Member State cannot be said to be incompatible with the Treaty to the extent to which a provider of services established in another Member State is not subject to similar regulations there."

According to this passage there are, therefore, restrictions applicable without distinction which are prohibited by the first paragraph of Article 59 and Article 62: firstly, the application of national rules justified by the general interest "similar" to foreign rules (second half of sentence quoted above);[3] and secondly, the application of national rules not justified by the general interest. Even within the latter category, however, an important area is, according to the judgment in Coditel v Ciné Vog, excluded in principle from the prohibition provided for in Article 59, namely the exercise of rights in the transmission of broadcasts.

The question as to which rules may be regarded as justified by the general interest will be examined separately at IV and VI.

2. Inapplicability of "similar" national rules

What is meant by "similar" national rules can be answered only in the light of the particular circumstances. Since under the EEC Treaty freedom of movement for services is the rule and not the exception, the requirement of similarity between the foreign and the national rule must be interpreted broadly.

Similar means neither identical nor equivalent but "comparable".[4] According to their purpose and content the rules must be comparable to each other and resemble one another. Differences which are not materially or qualitatively significant do not justify the application of national law.

[1] This is apparent from the end of the sentence quoted below, and is even more clear from van Binsbergen at 1309, grounds 10/12.
[2] Debauve at 856, ground 12.
[3] The Court gave a ruling to this effect for the first time in van Wesemael and Follachio at 52, end of ground 28.
[4] The Court uses this term repeatedly in van Wesemael and Follachio at 53, ground 30, 54, ground 39, 55, operative part, para. 3.

The survey given in Part Four shows that, from the point of view of conception and organizational and legal form, the broadcasting rules of the Member States partly resemble one another and partly differ from one another to a greater or lesser degree. General comparisons do not suffice, however, for the similarity or substitution test. What is needed is a specific comparison of the relevant provisions of the two sets of broadcasting regulations in a given case.

Part Six contains a great many specific details concerning advertising rights and copyright in broadcasting. They indicate that the individual problems are solved in a "similar" manner only in the minority of cases. Even between Member States which have relatively homogeneous ideas about values and rules, divergences have a habit of promptly appearing when it is a question of recognizing specific rules as similar. The approximation of advertising and copyright restrictions cannot at all events be dispensed with even with the help of a large-scale non-application of national rules in favour of similar foreign rules.

3. Range of the applicable laws or international scope of public advertising law

According to the Debauve judgment, the first paragraph of Article 59 and Article 62 prohibit restrictions applicable without distinction which are not justified by the general interest. Before examining which these are (IV, VI below), it must be established which legal orders are, in the light of the judgment, to be included in the examination. In proceedings, this is invariably the lex fori. Outside of courts and authorities, broadcasting undertakings must know, however, which laws of the Member States they have to observe if they are to avoid litigation and penalties, or whether Community law limits the applicability of one or other such set of national broadcasting regulations. In other words, must a broadcasting undertaking observe the restrictions justified in the general interest of all the Member States in whose territory its broadcasts can be received directly? Or does the freedom of movement for services between Member States allow it to observe only the rules of that State in which it provides its service and is active? If so, is it nevertheless de facto obliged to observe also the rules of those Member States to whose territory it wishes its broadcasts to be relayed by cable television distribution undertakings established there?

(a) Applicability only of the law of the place where the broadcast is produced?

In its judgments before and after Debauve, the Court granted the benefit of the unwritten exception it had created to the first paragraph of Article 59 and Article 62 - the applicability of restrictions justified by the general interest - exclusively to the Member State "where the service is given"[1] and which the provider of the service had regularly visited in order to give the service.[2] With one exception, the facts

[1] Van Binsbergen at 1309, grounds 10/12; Coenen at 1554, grounds 6/7, van Wesemael and Follachio at 44, 52, grounds 27/28; Webb at 3324, ground 16, 3325, ground 17.

[2] Van Binsbergen at 1308, grounds 2/5; Coenen at 1554, ground 2, 1555, ground 9; Webb at 3321, ground 5.

therefore constituted cases covered by the third paragraph of Article 60 (wording at I 2) or closely related to it.

(b) Additional applicability of the laws of the places of reception and relaying of the broadcast by cable television distribution undertakings?

In Debauve, on the other hand, the providers of the service - the broadcasting German, French and Luxembourg television undertakings - were neither active in the country of the Belgian recipients of the service nor had they given their services - the broadcasting of commercial advertisements - in Belgium, but only in Germany, France or Luxembourg.[1] The situation in Ciné Vog v Coditel was analagous: the film was broadcast in Germany, so the service was given there and not in Belgium.

To justify the extensive restriction of freedom of movement for television advertising, the Court refers to the widely divergent rules governing the broadcasting of advertisements and the absence of any approximation of laws. It goes on to say:[2] "It must be stressed that the prohibition on the transmission of advertisements by cable television ... cannot be examined in isolation. A review of all the Belgian legislation on broadcasting shows that prohibition is the corollary of the ban on the broadcasting of commercial advertisements imposed on the Belgian broadcasting organizations. ... In the absence of any harmonization of the relevant rules, a prohibition ... / of the retransmission of commercial advertisements/ falls within the residual power of each Member State to regulate television advertising on its territory on grounds of general interest. The position is not altered by the fact that such restrictions or prohibitions extend to television advertising originating in other Member States in so far as they are actually applied on the same terms to national television organizations."

The Court thereby exempts from the prohibition provided for in Articles 59 and 62, pending the approximation of national laws, also those restrictions to the free movement of commercial advertising which make their claim to validity subject, not to the pursuit of an activity in the national territory by the provider of a service established abroad or at least to the provision of the service in the national territory or, like the third paragraph of Article 60, to both, but solely to national effects of foreign broadcasts, or more precisely to the direct receivability of the broadcast in the national territory and the activity in the national territory of third parties (the cable television undertakings) based thereon. The restrictions admissible under Articles 59 and 62 include, not only rules concerning television advertising, but also, according to Coditel v Ciné Vog, rules concerning the protection of the owner of rights in the presentation of broadcasts.

---

[1] The service provided by the Belgian cable television company Coditel to its subscribers - the reception of foreign broadcasts and their retransmission by cable - is a service provided in Belgium alone by a Belgian for Belgian residents and is therefore strictly speaking not a service to which Article 59 would be applicable. This relaying of foreign programmes does not, however, deprive their emission by the foreign broadcasting undertakings of their transnational nature vis-à-vis those who receive Belgian cable television (cf. A II 2 above).

[2] Debauve at 857, grounds 14 and 15 (emphasis added).

Hence the transnational provision of the service is subject not only to the law governing its provider but also to all laws in whose fields of application the broadcast is picked up and retransmitted.

This simultaneous applicability of the rules of several Member States to the same facts leads in practice to considerable uncertainty in the law and creates serious difficulties. The observance or enforcement of contradictory rules renders in many cases the free movement of broadcasting between Member States impossible. From being the rule, the free movement of services becomes an exception. This makes the harmonization of such advertising and copyright rules imperative and a matter of urgency. The Court's reference to the approximation of laws is therefore quite unambiguous.

(c) Additional applicability of the laws of the places where the broadcast is received directly?

May a Member State, in order to safeguard its prohibition or restrictions on advertising under Articles 59 and 62, ban or restrict not only the retransmission of foreign television advertising in its territory, but also the beaming of foreign advertising even by the foreign broadcasting undertaking and direct reception in its own territory? May it, in order to enforce such a prohibition directed at foreign territory, take measures in its own territory restricting direct reception?

The facts and the grounds of the judgment in the Debauve case - in particular the sentences quoted above - should not provide a basis for answering these questions in the affirmative. The Court was fully conversant with the issues involved. Mr Advocate-General Warner stated, for example, in his Opinion[1] that it was not a question of a prohibition, directed by Belgium at other Member States, of the beaming of television advertising into Belgium, but only of the prohibition, directed at cable television companies in Belgium, of their retransmission in Belgium. Belgian law acknowledged the existence of zones of natural reception of foreign broadcasting stations in Belgium and did not seek to interfere with the freedom of viewers living within those zones to receive directly the programmes broadcast by those stations. "Clearly the purpose of those rules is not, and it could not be, to exclude altogether the viewing of that material /commercial advertising/ on Belgian territory. Their purpose is only to exclude the active spreading of it beyond, in the case of each programme, the circle of those able to receive it directly." Since the Belgian rules had only that limited purpose, Community law could not invalidate them.

In fact, a more far-reaching prohibition of the beaming of foreign broadcasts or parts of programmes which have an effect only in the national territory, i.e. can be received directly, ought not to be compatible with Articles 59 and 62. Such an extension of the claim to validity of national rules to the activity of broadcasting undertakings in other Member States would not just restrict the freedom of movement of the broadcasts in question from other Member States, but would remove it. Articles 59 and 62 require, not that nationals of other Member States be enabled to provide in a country's territory services which are denied to nationals of that country, but that the nationals of other Member States be allowed to provide such services in

[1] Debauve at 869, right-hand column.

their own countries abroad even where and in so far as they have effect in the territory of the country concerned. This requirement that divergent foreign rules be accepted and complied with in so far as their observance abroad has effect only at home, or the requirement that no effects be conferred on national provisions beyond the Community's internal frontiers follows not only from the liberalization requirement of Article 59 but also from the requirement of the establishment of a common market for services (Articles 2 and 3(c)) and from the integration of the Member States into a Community (Articles 1 and 2).

IV. National general interest and foreign commercial advertising

1. Applicability of national law on television advertising to commercial advertising from abroad

(a) "Rules justified on grounds of general interest" (Debauve judgment)

The Court held first of all that restrictive national rules governing the broadcasting of television advertising in the national territory - including its prohibition - are justified by the general interest. After stressing that those rules were "widely divergent", it stated:[1] "In the absence of any approximation of national laws and taking into account the considerations of general interest underlying the restrictive rules in this area, the application of the laws in question cannot be regarded as a restriction upon freedom to provide services so long as those laws treat all such services identically whatever their origin or the nationality of place of establishment of the persons providing them."

The same must be true of prohibitions on the retransmission of advertisements by cable television. The Belgian prohibition was intended to maintain conformity with the scheme imposed on the national broadcasting organizations.[2] "In the absence of any harmonization of the relevant rules, a prohibition of this type falls within the residual power of each Member State to regulate, restrict or even totally prohibit television advertising on its territory on grounds of general interest."[3]

The Court thereby applied to restriction on television advertising an unwritten reservation under Community law which it had created earlier in

---

[1] Debauve at 856, ground 13.

[2] Debauve at 857, ground 14.

[3] Debauve at 857, ground 15.

favour of national restrictions to the free movement of services justified by the general interest.[1] The reason for this exception is brief and general:[2] "In view of the particular nature of certain services such as the broadcasting and transmission of television signals". The Court simply takes the phrase used earlier in connection with all services "Taking into account the particular nature of the services to be provided"[3] and applies it to television. What this particular nature is - in general and in specific areas - still has to be settled.

Likewise, the Court of Justice does not say what is to be understood by "general interest", what the "considerations" are which "underlie" the restrictive rules on advertising or under what circumstances they are "justified" and when not. It directs its attention solely to substantive Belgian law with its prohibition of television advertising, enacted "on grounds of the general interest". Accordingly, it does not consider whether and to what extent the prohibitions are "justified" from the standpoint of Community law - in particular, of freedom of movement of services as evinced in the free flow of opinions and information.

(b) Provisions that are justified "on grounds of public policy, public security or public health" and which are enforced (Article 56(1), by analogy)

The Advocate-General,[4] the Commission[5] and the Federal Republic of Germany[6] did not regard this far-reaching judicial derogation from Article 59 to be applicable, but the right reserved under the Treaty in favour of provisions that are justified on grounds of public policy, security or health.

If Article 56(1) allows the Member States to take on those three grounds measures providing for special treatment for foreign nationals, "the Member States must a fortiori be allowed to take on those grounds measures applying indiscriminately to foreign nationals and to their own nationals".[7] The Advocate-General was in "no doubt that the control of television advertising falls fairly and squarely within the scope of public policy".[8] The latter, however, depends not only on the applicable law but also on the enforcement of that law.

---

[1] van Binsbergen at 1309, ground 12; van Wesemael, Follachio at 52, ground 28.

[2] Debauve at 856, ground 12.

[3] van Binsbergen at 1309, ground 12 (activities of persons whose functions are to assist the administration of justice). Since Coenen at 1555, ground 9, it is still only: "In the light of the special nature of certain services" (in this case the activity of insurance brokers). Likewise van Wesemael, Follachio at 52, ground 28 (placing of entertainers in employment) and - after Debauve - Webb at 3325, ground 17 (provision of manpower).

[4] Advocate-General Warner in Debauve at 877, 878.

[5] Debauve at 850.

[6] Debauve at 847.

[7] Advocate-General Warner in Debauve at 877.

[8] Ibid.

In fact, the Belgian prohibition of the retransmission of advertising by cable of 1966 had at no time been enforced by the various governments and administrative authorities. Although it had been complied with, at the beginning, by some cable companies, the blotting out of advertising had given rise to major technical, practical and economic problems and had, in addition, raised questions concerning the permissibility of such "censorship" and of such alterations and disruptions (interruptions) of broadcasts. Successive Belgian governments had recognized this. The criminal prosecution of 1978/79 which underlay the Debauve case was the first prosecution and it was not brought by the government.[1] It remained an exception. In the Debauve case, France insisted that no changes could be made to broadcasts (blotting out, substitute material). This would lead to indirect discrimination against foreign broadcasts, prohibited under the EEC Treaty.[2] Moreover, from the time of the Debauve case up until now, programmes from Germany, France, Luxembourg and the Netherlands received by the Belgian cable companies have been retransmitted simultaneously, unaltered and have included the advertising material.

2. Approximation of laws governing broadcast advertising

As far as that area of broadcasting law is concerned which governs television advertising, according to the Debauve judgment (see above under 1a), Articles 59(1) and 62 prohibit only discrimination (different treatment) based on the domestic or foreign origin of the advertising, the nationality of the person providing the services or his place of establishment. In so far as restrictions on television advertising apply not only to national programmes but also to the retransmission of broadcasts from other Member States, they are to be eliminated not by implementing the directly enforceable prohibitions contained in the Treaty but its injunctions to approximate national laws.

This, then, produces a substantive and a temporal shift; while the Commission, the Advocate-General[3] and others involved in the proceedings took the view that the freedom to provide services directly guaranteed by the Treaty (Articles 59, 62) covered both the prohibition on subjecting foreign broadcast advertising to more stringent restrictions than domestic broadcast advertising as well as the prohibition on applying the same treatment or restrictions to foreign broadcast advertising as are applied to domestic advertising and that the task of the approximation of laws, for which provision is also made, is to establish, starting from the national markets with their differing legal frameworks which would then be opened up to one another, a common market in television advertising with the same outline conditions, the Court of Justice also assigns the task of opening up the national markets - that is to say the abolition of the restrictions on advertising coming from abroad - to the approximation of laws.

Thus, abolition of the said restrictions now becomes their equalization at Community level, their prohibition under the Treaty now becomes an injunction that they be approximated by the Community institutions. Immediate elimination

---

[1] For details on the above see Debauve at 838-840; 845, 854, ground 5, 864-865.

[2] Debauve at 845

[3] Advocate-General Warner in Debauve at 870-873.

of the restrictions, with nothing to take their place, now becomes harmonization, deferred for the future. The "general interest" must first be safeguarded by the approximation of laws. This then renders superfluous the abolition of those aspects of the restrictions on advertising applied equally to domestic and foreign broadcasts, that relate to other countries. In the view of the Court of Justice, the disparities between the national laws on television advertising are so great that free movement of televised advertising which is, in fact, required and guaranteed by the EEC Treaty cannot be secured under Community law until they are levelled out.

The Court of Justice reached this conclusion even though the derogation laid down in Articles 57(3) and 66 provides for approximation of national laws prior to the abolition of restrictions on freedom of movement of services and the right of establishment only in respect of activities relating to the health of individuals, that is to say not in respect of activities relating to other public property.[1] The rule shows that laws that differ from Member State to Member State and resultant social conditions should not, in principle, preclude the abolition of restrictions on the cross-frontier movement of services but can be accepted until they are approximated.

(a) Competence, need, urgency

By what it has to say on the disparities between the national provisions on advertising and the connection between their lack of harmonization and the scope of the prohibition laid down in Article 59,[2] the Court of Justice simultaneously affirms the competence of the Community in regard to the approximation of the relevant laws on broadcasting, the need for such approximation and its urgency. Without such approximation, neither the liberalization prescribed in the Treaty in respect of advertising nor, moreover, the common market in that field could be brought into being.

In addition, according to the EEC Treaty itself, "priority shall be given to those services the liberalization of which helps to promote trade in goods." (Article 63(3)). The latter applies indisputably to broadcast advertising.

The Sixth Part (paragraphs A I, II and III(a) to (c)), deals in detail with the disparities between the Member States' rules on advertising, the negative effects of those disparities on freedom of broadcasting in the common market and thus the need for approximation of laws in this field. Reference can be made to those paragraphs here.

Certain points have already been made regarding the economic need for approximation of the laws governing broadcast advertising (Third Part A II in fine, B II2, D in fine, E in fine). This need is particularly marked in

[1] Article 57(3) states 'in the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States".

[2] Debauve at 856, ground 13, 857, ground 15.

the case of advertising direct satellite broadcasts and their financing through advertising revenue.

Satellite broadcasting is attractive to advertisers because it enables savings to be made that are not possible at present. Instead of having to advertise in a number of countries, the advertiser needs to operate only from a single location. However, if the differences between the national rules on advertising are not eliminated, the attraction that results from such economies of scale can be lost because advertising must continue to comply nationally with the differing requirements of the national laws. The anticipated earnings of the broadcasting organizations can accordingly not be fully secured nor can they even be secured to the extent that is necessary.

As far as retransmission by cable is concerned, it is improbable that cable companies are capable or prepared either to blot out advertising which infringes their own particular legislation or to replace it with advertising of their own ("active" cable broadcasting). Even if they had the latter capability, it is improbable that the foreign broadcasting organizations would grant them the right to alter their transmissions.

It is, accordingly, necessary, on financial as well as on practical grounds, to find a solution which will enable broadcasting satellites to exploit their capabilities to the optimum extent. The Debauve judgment has made it clear that this solution lies in approximation of the laws governing broadcast advertising.

(b) Applicability of Article 57(2)

In assigning the task of liberalizing advertising to the approximation of laws, the Court of Justice clearly has in mind Article 57(2). For Article 59(1) states that the restrictions on freedom to provide services "shall be progressively abolished within the framework of the provisions set out below". One of those provisions is Article 66: "the provisions of Articles 55 to 58 shall apply to the matters covered by this Chapter" - that is to say Article 57(2) also.

That provision states: "For the same purpose /namely "to make it easier for persons to take up and pursue activities as self-employed persons", paragraph 1/ the Council shall, before the end of the transitional period, acting on a proposal from the Commission and after consulting the Assembly, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons. Unanimity shall be required on matters which are the subject of legislation in at least one Member State ...".

The view is generally taken that "coordination" means the same as approximation, harmonization - expressions used in the Treaty in different places to cover the same task.

"Activities as self-employed persons" also includes the organization (operation) of broadcasting, or, more precisely, all the different activities of the organizers of broadcasting such as planning, production, coordination, transmission, reception and retransmission and exploitation of broadcasts of all kinds.

The provisions concerning the restrictions on broadcast advertising (admissibility, limits, form, content, monitoring) are also included among the "provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit" of activities as self-employed persons. These provisions form part of the law governing the broadcasting activities of self-employed persons. According to Article 57(2), therefore, they must be coordinated.

(c) The purpose of approximation

The purpose of such coordination is laid down by Article 57(2) itself. Firstly, it is necessary to make it easier to "take up" broadcasting activities, that is to say, primarily, establishment and authorization. Secondly, it must be made easier to "pursue" such activities as are included among the activities of organizers of broadcasting as self-employed persons, that is to say, in particular, the provision of the different broadcasting services.

"Making it easier" does not mean that approximation may not lead to the introduction of stricter rules in a Member State, that is to say alignment on the most liberal legislation at any particular time. The concept nevertheless indicates the liberalizing direction which coordination must take; the founding of independent entities and undertakings and the carrying on of their activities is to be made possible and encouraged through the approximation of laws, not rendered more difficult.

In particular, "making it easier" means eliminating difficulties which arise from legal disparities, it means "making such safeguards equivalent" (see Article 54(3)(g)) in order to make possible and to promote the taking up and pursuit of the relevant activities as self-employed persons throughout the Community under equivalent conditions.

The task of harmonizing or levelling out the disparities in the laws governing advertising assigned in the Debauve judgment to the approximation of laws corresponds to this. In this way, not only will the national markets be opened up to one another but the common market in part of the field in question - in broadcast advertising - that has to be established will be brought into being. This European market cannot function if the nationals of Member State A in Member State B simply enjoy the same rights as the nationals of Member State B in Member State B but only if the nationals of country A in country B enjoy the same rights as the nationals of country B in country A.

The approximation of laws accordingly encompasses not only cross-frontier movement of services but also movement of services at national level, not only establishment in another Member State but also in one's own country. The wording of Article 57 corresponds to this conception of the EEC Treaty and its interpretation by the Court of Justice. Article 3 does not simply prescribe "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital" (subpara.(c)) - that is to say, the opening of internal frontiers - but also "the institution of a system ensuring that competition in the common market is not distorted" (subpara.(f)), and "the approximation of the laws of Member States to the extent required for the proper functioning of the common market" (subpara.(h)) - that is to say equivalence of the legal conditions. The Community aspires to these main objectives and activities "as provided in this Treaty" (Article 3), that is to

say primarily under Articles 52 and 59 on the one hand and Articles 57(2) and 66 on the other.

The broadcasting and retransmission of advertising under conditions of freedom and equivalence is the first objective to be striven for. This follows not only from the legal grounds that have been set out and from the Debauve judgment but from the major economic importance of broadcast advertising to production, marketing and the free movement of advertised goods and services within the Community, that is to say for important sections of trade and industry and for consumers, and, in addition, for the advertising industry and for broadcasting organizations themselves (see also the Sixth Part A1).

V. National general interest and international coverage of the rules on the taking-up and pursuit of broadcasting activity

Consideration still has to be given to the significance which the reservation concerning the applicability of the national rules that are justified in the general interest has beyond the law on broadcast advertising. The exemption - which is tantamount to an approximation of the relevant legal provisions - from the prohibitions on restricting freedom to provide services (Articles 59 and 62) was couched by the Court of Justice in general terms and it did not restrict it to requirements regarding advertising.[1]

However, before discussing the material scope of the reservation (at VI), it is necessary to define its international coverage and the regulations which it thereby comprises. To what extent does the national reservation therefore include cases where frontiers are crossed and to what extent does it not?

First of all it is necessary to clarify the nature of the legal provisions on broadcasting and telecommunications. In accordance with the distinction in the EEC Treaty between rules on the taking-up and pursuit of activities of self-employed persons (the second paragraph of Article 52, Article 57(1), (2) and (3), and Article 66), they may be classified into two categories.

The taking-up of broadcasting activity is affected particularly by the rules on the following: the (exclusive) assignment of the activity to certain sponsors, the establishment of broadcasting organizations, their licensing pursuant to laws on telecommunications and/or broadcasting (e.g. in accordance with the extent to which they represent certain groups or movements in the population (number of members and so on), their legal form, their structure (type, task and composition of bodies, representation of socially significant categories), the responsibility of the corporation, its articles of association and financing.

The pursuit of broadcasting activity is affected particularly by the rules on programmes, i.e. certain requirements as to their objectives (e.g. the injunction not to serve private or commercial purposes), orientation (e.g. representation of a specific social trend), quality and content (e.g. comprehensive information faithful to the facts), the composition of programmes as a whole (e.g. regard for all points of view, sufficient news and educational programmes), and on management, responsibility and liability, and supervision.

---

[1] See under III 1 above Debauve at 856, ground 5.

The answer to the question about the international coverage of these rules and of the reservation bringing about their application is not that in the event of broadcasts from foreign countries there may be no interference in the transmission process, since it is not physical, and even less so may action be taken against an organization established in a foreign country. On the one hand, the claim to recognition, i.e. the predetermined field of application of a rule, cannot be equated with the possibility of its being enforced. Without violating certain bounds drawn by general international law, statutory prohibitions or injunctions may in principle be directed at foreigners in foreign countries whose actions have consequences in another country where legal action may readily be taken against them in the said country. On the other, the transmission process may be interrupted in the country concerned if public agencies own or supervise the reception equipment, e.g. small relay transmitters, master aerials, community aerials, community reception facilities.

1. Limitation by Articles 59 and 62

It has already been explained (at III 3 c above) that and why Articles 59 and 62 preclude extending the law of the country of reception to the transmission of (advertising) broadcasts in another Member State. National law on broadcasting may not, therefore, lay down specific conditions for the taking-up and/or pursuit of broadcasting activity in another Member State on account of the transmission of broadcasts into its area of jusrisdiction, for instance by requiring a licence for its territory or prior consent, consultation or notification, or by imposing particular requirements with respect to the organization of the foreign broadcasting corporation or the programmes broadcast there.

Accordingly, the national reservation concerning the general interest (and that concerning public order, safety and health, at B III 1 above) of the country of reception does not extend so far that it covers the provision of a service (the transmission of a broadcast) in the country of transmission, nor can it prohibit, restrict or otherwise regulate this broadcasting. The principle of the freedom to provide services within the Community (Article 3(c)) and the individual right of nationals of the Member States to provide services for persons established in another Member State also presuppose freedom to broadcast beyond frontiers.

Possible national restrictions may therefore be directed only against the rediffusion (and of course transmission) of foreign broadcasts within the country. Broadcasts from other Member States into one's own country cannot be regulated by national reserved rights. Their field of application can extend no further than that of the national law whose application they ensure.

The reservation, and accordingly national law, is therefore applicable only when the foreign broadcast has "crossed" the frontier and is "within reach", i.e. when it is received in the country concerned. Only then, whether the broadcast is received direct or relayed by a transmitter or cable service, may national law have recourse to a reservation.

If national requirements could be imposed on foreign broadcasts before they reached receivers in the country concerned (and therefore also before they reached receivers in the country of transmission), there would be no freedom of cross-frontier provision of broadcasting services and hence no free flow of opinions, information and ideas "regardless of frontiers". For even before this movement, this flow, has started in a foreign country it could be prohibited, restricted or affected by law, or indeed be prevented.

Nevertheless, the freedom of nationals of other Member States to transmit broadcasts to another country, or to relay them in any manner (above, A II 3), and their freedom to express opinions, information and ideas in these broadcasts may not be restricted, even where similar restrictions are applied to broadcasters or programmes within the country. Only the reception and rediffusion of foreign broadcasts at home may be restricted, should such restriction be justified on grounds o the general interest (below, VI).

If the broadcasting corporations of each Member State which also transmit programmes to other Member States not only complied with the broadcasting legislation of their own country, but also with that of other countries, not only would broadcasting no longer be free and unaltered, in many cases it would be unfeasible. This could also result from conflicting requirements as to the legal form, organization or composition of the bodies of broadcasting organizations, or as to the form, type, content and composition of programmes. Even where regulations are merely different it is often impossible to comply with all of them. There are numerous examples of this.

2. Practice and law in the Member States

The practice of the Member States takes account of the actual situation and conforms to what has been said earlier. They have always affirmed and put into effect freedom to transmit territorial broadcasts, including those beyond their own frontiers. They have special radio programmes broadcast to foreign countries. Television programmes are increasingly broadcast beyond frontiers. Conversely, the Member States do not impede broadcasts from other countries and direct reception at home. Certain Governments have expressly acknowledged the principle that national law on broadcasting can only cover and regulate the rediffusion of foreign broadcasts at home.[1,2]

[1] See for example "Memorandum on policy regarding the relaying of foreign broadcasts via Dutch cable networks" presented to the Dutch Parliament by the Minister for Cultural Affairs, Leisure and Social Affairs of 29.11.1980, p. 12 (cyclostyled English translation), Notitie "Doorgifte van buitenlandse omroepprogramma's via Nederlandse kabelnetten", Kamerstukken II, zitting 1980/81, 16494, No 2; explanations given by the French Minister for Communications to the National Assembly in spring 1982, cited above Part Four, G, in limine.

[2] Also the German Expertenkommission Neue Medien - EKM, Baden-Württemberg, Abschlussbericht, Bd. I: Bericht und Projektempfehlungen, Stuttgart 1981, 182, No 8.10.5 and 159, No 8.4.2.2.

The Member States' laws on broadcasting and telecommunications accordingly apply only to the broadcasting organizations operating at home (above, Part Four). No Member State requires prior approval, consultation or notification of broadcasting intended for its territory. The law of the Member States contains neither prohibitions or injunctions imposed on broadcasting corporations established abroad broadcasting (also) to their particular country nor requirements as to their programmes.

For example, the German Federal Constitutional Court has removed from the constitution the obligation to ensure by means of suitable precautions that the entire range of programmes genuinely corresponds to actual diversity of opinion. However, it added the adjective "national" to the word "programmes"[1] and thereby made it clear that the task of subjecting foreign programmes which may be received in Germany to the national requirements regarding balance cannot fall to the German legislator.

Where national rules on broadcasts transmitted from abroad do exist they apply to rediffusion systems established in the country concerned.[2] There are no national rules concerning direct domestic receivers of foreign broadcasts which regulate reception or authorize interference therewith. The foregoing applies also to direct reception via satellite.

3. Scope of broadcasting monopolies

In the light of the foregoing (Sections 1 and III 3(c)) it would, for example, be incompatible with Articles 59 and 62 if a Member State, which has assigned and reserved broadcasting on its territory to and for one or more broadcasters so that no other broadcaster is allowed to transmit programmes on this territory, were to extend this prohibition to broadcasters in other Member States transmitting programmes in these Member States which can also be received in the Member State in question if this Member State were generally to prohibit or prevent direct reception of these foreign programmes.

If the transmission of programmes from other Member States were prohibited this would create a Community-wide broadcasting monopoly in respect of the territory in question. It would lead to the segregation and isolation of this Member State from the rest of the Community while the national undertaking on which a monopoly has been conferred would be able to freely transmit its programmes in Member States in which no monopoly exists or in which there is a monopoly solely in respect of the broadcasting of programmes on the territory of these Member States.

Not only the right of establishment for foreign television and radio broadcasters but also the freedom to provide services in respect of their programmes would be abolished as institutions and individual rights. It would be impossible to create a common market for radio and television. Radio and television broadcasters would have no access to the territory in question and receivers would have no access to foreign programmes.

---

[1] BVerfG (Federal Consitutional Court) 16.6.1981, Entscheidungen des BVerfG 57, 295, (325).

[2] See for example the French regulation, Part Four, G, in limine.

This would also be incompatible with Article 10(1) of the European Convention on Human Rights (ECHR). If a State accepts that there should be a free flow of opinions, information and ideas it does not relinquish - in respect of its territory - its broadcasting monopoly but it does forego the right to determine the information which its citizens may receive. It cannot have both: a free flow of information across borders and the blocking of foreign programmes. In this respect foreign programmes are bound to encroach upon national radio and television systems. The purpose of the free flow of information (Article 10 of the ECHR) and the free movement of programmes (Articles 59 and 62 of the Treaty) is to open up to each other national systems which had been previously closed from each other.

This conclusion is confirmed by Article 90(1) and the case law already established on this point. According to this case law the effect of a national radio and television monopoly within the Community is no more than an exclusion of others (nationals and foreigners) from setting up radio and television stations in the country concerned and from broadcasting programmes there. It does not extend to the abolition of the right to cross-frontier programmes granted by Articles 59 and 62.

The Court of Justice confirmed in the Sacchi case that Article 90(1) permits Member States to grant television organizations the exclusive right to conduct radio and television transmissions, including cable transmissions.[1] Such privileged television organizations are therefore, irrespective of their legal form and purpose, undertakings within the meaning of Article 90(1) and of the other provisions of the EEC Treaty, to all of which paragraph 1 refers. The Treaty therefore claims to apply to such privileged television undertakings. As far as they are concerned, Member States must comply with all the prohibitions and injunctions contained in the Treaty.

The grant of an exclusive or special right does not, however, as such infringe those other provisions of the EEC Treaty, because Article 90(1) expressly leaves such a measure untouched. In the Sacchi case, the Court made three findings: "The fact that an undertaking to which a Member State grants exclusive rights within the meaning of Article 90, or extends such rights following further intervention by such State, has a monopoly, is not as such incompatible with Article 86 of the Treaty",[2] / prohibition on monopolization /. "The grant of the exclusive right to transmit television signals does not as such constitute a breach of Article 7 of the Treaty."[3] / Prohibition on any discrimination on grounds of nationality. / "The fact that an undertaking of a Member State has the exclusive right to transmit advertisements by television is not as such incompatible with the free movement of products, the marketing of which such advertisements are intended to promote."[4]

---

[1] Sacchi at 409, ground 14.
[2] Sacchi at 432, operative part, paragraph 4.
[3] Sacchi at 433, operative part, paragraph 6.
[4] Sacchi at 432, operative part, para. 2, first sentence.

With regard to this last exclusive right the Court also specified the limits to Community law resulting from Article 90(1), i.e. the kind of measures Member States may under the Treaty neither enact nor maintain in force in relation to television undertakings. It held that:[1] "It would however be different if the exclusive rights were used to favour, within the Community, particular trade channels or particular commercial operators in relation to others." According to the grounds of the judgment[2] the Court includes therein "measures governing the marketing of products where the restrictive effect exceeds the effects intrinsic to trade rules ... . Such is the case, in particular, where the restrictive effects are out of proportion to their purpose, in the present case the organization, according to the law of a Member State, of television as a service in the public interest".

If these limits applicable to the conferment of an exclusive right for television advertisements are transferred to the grant of an exclusive right for television broadcasts in general, i.e. having regard, not to the free movement of goods, but solely to the free movement of services, the following emerges.

The exclusive right may not be used to promote within the Community certain patterns of services - specific programme traffic - or certain television undertakings compared with others. A restriction of the movement of services at variance with the Treaty can be seen in measures to prevent the transmission or unhampered reception of programmes from other Member States, the restrictive effects of which exceed the framework of the effects specific to such rules on services.

The effect specific to the exclusive or special right to provide services consists in the fact that, apart from the favoured undertaking or undertakings, no other undertaking at home may transmit broadcasts for domestic or foreign consumption.

This effect would be exceeded if undertakings which transmit broadcasts, not from home for foreign consumption but from abroad for foreign consumption were also included in the rule because their transmissions are also beamed at domestic territory (just as, conversely, the transmissions of the favoured domestic undertaking or undertakings are beamed from home also to foreign territory). For in this case the exclusive or special right to beam television programmes from home for the domestic territory and the territory of other Member States would be used to limit the exercise of the same right granted by another Member State to beam transmissions from its territory. This would favour transmissions from home and the domestic broadcasting undertakings or undertakings compared with transmissions from other Member States and their broadcasting undertakings.

---

[1] Sacchi at 432, operative part, para. 2, second sentence.

[2] Sacchi at 429, ground 8.

These restricting effects which are not inherent in the exclusive or special right granted at home are out of proportion to the desired goal of the organization of television as a public service under the law of a Member State. The reasons for this are fourfold. First, such a goal may be pursued legitimately only in the case of a country's own domestic television. Secondly, transmissions from other Member States do not prevent such organization. Experience in the field of radio has long borne this out. Thirdly, television is, as stated in Part Four, in all Member States a function or public function or special public service governed in detail by special law, charters, concessions, licences, clauses and conditions, etc. It involves, with the possible exception of Luxembourg, related systems of public law based on similar convictions. The organization of television as a special category of undertaking, as a public function, as a service in the public interest in each of these States can therefore scarcely be jeopardized by cross-frontier television traffic between those States. Fourthly, completely isolating the domestic market would be tantamount to denying the existence of the Community and the common market. For its establishment a minimum of mutual opening-up of the Member States is essential also in the field of the exclusive and special rights conferred by them. Such rights may continue to produce effects inwards, but not at the Community's internal frontiers. This is clearly expressed by Article 90(1).

This is in keeping with the laws and practices of the Member States. Their radio and television laws do no more than grant monopoly and oligopoly rights for national broadcasting and, as a corollary, prohibit nationals and foreigners alike from setting up in the country concerned and from broadcasting radio or television programmes. These rules do not therefore prevent listeners and viewers within the territory covered by the broadcasting monopoly from being allowed to receive and from receiving foreign programmes. There is no obligation to use the national programmes available which excludes de jure or de facto competitive services from other countries. (See Part Four.) In some cases foreign programmes are even received and retransmitted by national monopolies.

4. Establishment on the territory of one country?

Could a Member State require broadcasting companies established in another Member State broadcasting programmes in this country which can also be picked up in the Member State concerned to set up a subsidiary,branch or agency in this Member State to assume legal responsibility and liability for the foreign programme or to at least appoint an authorized agent in this Member State for this purpose?

Such a legal obligation imposed on foreigners in their own countries would have to be interpreted under Community law as being equivalent to other obligations requiring foreigners in their own countries to take or to refrain from certain action as regards their organization or programmes (see Section III 3(c) and 1).

If a foreign provider of a service was required to have an establishment on the territory of the host country, he could be prevented from providing his service, under the provisions of Community law on the freedom to provide services, simply in compliance with the law of his own country. This would be the case if establishment were made compulsory to ensure that the provider of the service established in another country did not have to be treated legally as such but could be treated as if he had set up in the Member State concerned and broadcast his programmes in this country of his own will. Once he was actually established, national law could also be applied to his services - broadcasting of radio and television programmes - on this basis, even though these services are not provided in the country concerned and the provider of the services does not pursue any activity in this country for the purposes of providing such services, i.e. even though the conditions laid down in the third paragraph of Article 60 (see Section I 2) do not exist. The freedom to provide services across the internal borders of the Community under the legal conditions of the State in which programmes are broadcast would be replaced by the obligation to make use of the right of establishment laid down in the EEC Treaty and, on the basis of these rules, to also comply with the law concerning the rights of aliens of the State in which the provider of the service is established. This would be incompatible with Articles 59 and 62.

This conclusion is in keeping with the case law established by the Court of Justice. The Court has been asked in two cases whether a Member State should be able to require the person providing the service to have an habitual residence in this State in order to be able to be covered by its professional rules relating to organization, qualifications, professional ethics, supervision and liability. In the van Binsbergen case, a Dutch legal adviser had transferred his residence from the Netherlands to Belgium in the course of a case and was prevented from acting in the case on those grounds.[1] In the Coenen case, a Dutch insurance broker residing in Belgium, on the other hand, appealed against the ban imposed on him from exercising his profession in the Netherlands despite the fact that he had an office there.[2]

The Court stated that the condition of permanent establishment for professional purposes itself may, according to the circumstances, have the result of depriving Article 59 of any effect.[3] On the other hand this requirement could by way of exception be considered compatible

[1] Van Binsbergen at 1307 and 1308, grounds 2, 3, 4 and 5.
[2] Coenen at 1554, grounds 2, 3 and 5.
[3] Van Binsbergen at 1309, ground 11; Coenen at 1554, ground 6.

with Articles 59 and 60 if it is objectively justified by the need to ensure observance of or to prevent circumvention of professional rules of conduct justified by the general good.[1]

The Court accepted such a requirement of residence but only "within the territory of the State in which the service is to be provided",[2] i.e. in which the activity in question is exercised. In the cases quoted the service was provided in the State in which the beneficiaries of the service resided. The persons providing the service carried out their activities temporarily, in the van Binsbergen case, and habitually, in the Coenen case on this territory, for the purposes of providing these services. In the van Binsbergen case the third paragraph of Article 60 (Section I 2) applied. In the Coenen case this provision applied not because a permanent office was maintained in the country of the beneficiaries but because this was a case of establishment.

The Court has thus allowed Member States to make the provision of services conditional by way of exception on a residence requirement but solely in cases where the services in question have been provided on their territory by virtue of activities pursued there, i.e. on the grounds that the territories of the two countries are concerned, to impose an establishment injunction on a foreigner resident in another country which restricts or abolishes his freedom to provide services in another country.

---

[1] Van Binsbergen at 1309, grounds 12, 13, 14; Coenen at 1555, grounds 9 and 12. The more recent decision by the Court of 10 February 1982 (Case No 76/81 Transporoute (1982) at 417, 427-428, ground 14) shows that these are very rare exceptions. In this case the principle of the freedom to provide services in respect of public work contracts is affirmed and the "scheme of the Treaty provisions concerning the provision of services" is defined as follows: "to make the provision of services in one Member State by a contractor established in another Member State conditional upon the possession of an establishment permit in the first State would be to deprive Article 59 of the Treaty of all effectiveness the purpose of that Article being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided".

[2] Van Binsbergen at 1309, grounds 10, 11, 12, 13 (the Court mentions this requirement five times); Coenen at 1554, grounds 6 and 7; at 1555, grounds 9, 10, 11 (this clause is repeated six times in the grounds).

The situation is quite different as regards the broadcasting of cross-frontier radio and television programmes in other countries. This service is not provided in the country of the national receiver - listener or viewer - but in the country of the person providing the service - the broadcaster. The latter does not exercise his activities for the purpose of providing his service - the broadcasting of programmes - temporarily in the country of the national receiver. This is hence not a situation somewhere between the freedom to provide services and establishment but a simple case of the movement of services across frontiers where the person providing the services has not changed his place of residence.

The fundamental difference between the Community rules on establishment and those on the freedom to provide services is evident here. This difference is as follows: an independent operator who has set up in another Member State to that of his own is, by virtue of this act, also subject to the law of the country in which he has settled and this country may apply the same conditions to him as those it applies to its own citizens whereas the person providing a service continues to be subject to the law of the Member State in which he is resident, in which he provides his service and in which sole country he carried out his activities and consequently is not subject to the rules concerning the exercise of activities of the Member States in which there are also beneficiaries of the service he provides. If this were not so, the freedom to provide services within the Community would be reduced to the various national possibilities offered - if at all - by the right of establishment in each Member State and would hence be little more than an illusion. The right of establishment and the freedom to provide services are complementary, i.e. they both contribute to the establishment of the common market for independent activities. They have different functions in the integration of the Member States into a Community. They complement rather than preclude each other.

On all these grounds radio and television companies of other Member States which broadcast programmes which can be received in a country are not required by the legislator of that country to be established in that country so as to be made subject to the provisions of its national radio and television law - particularly as regards programme requirements. Only if the branch in the country concerned receives the programmes of its parent company and rebroadcasts or redistributes them by cable may national radio and television law apply, i.e. make the branch and its foreign programmes subject to its provisions where its application is justified by the general good (see Section VI).

5. Authorization in a country?

The foregoing also applies mutatis mutandis to the extension of an authorization procedure for national radio and television companies to broadcasters residing in another Member State which broadcast programmes in this Member State because or if these can also be received in the country in question. Such a requirement would be incompatible with Articles 59 and 62.

Here too this is in keeping with case law. The Webb case[1] revolved around the issue whether Article 59 precludes a Member State which requires a licence for the provision of manpower from making a company established in another Member State hold a licence for the provision of manpower on the territory of the first Member State. The Court rules that it did not, subject to a number of reservations, but clearly repeated, as it had done in the van Binsbergen and Coenen cases, that a licence could be required by the Member State "in which the service is to be provided"[2] and in which the person providing the service temporarily exercised his activities for the purposes of providing his services (Article 60, third paragraph).[3] What has already been said in relation to the van Binsbergen and Coenen cases (see Section 4) also applies to this judgment.

VI. National general interest and retransmission of programmes from other countries

Sections V and III 3 c explained that Articles 59 and 62 preclude imposing the national prohibitions and injunctions applied to broadcasting stations and programmes at home on broadcasting stations and programmes from other countries even on grounds of the national general interest. Even this type of exceptional extension of national broadcasting legislation to stations in other Member States and/or to programmes which foreign stations broadcast in their own country conflicts with the Debauve judgment and with the freedom of broadcasting within the Community derived from Article 10 of the ECHR. Nor is it in keeping with the legislation and practice in the Member States. Instead in the Debauve case the Court of Justice interpreted Articles 59 and 62 as allowing the authorities to enforce only those national provisions which apply to the citizens of the Member State concerned, govern the retransmission of broadcasts from abroad in that Member State and are justified by the general interest.

Where this is the case that leaves the question, therefore, of the substantive scope of this exemption, established by case law, from the prohibition on restricting the freedom of broadcasting (see Articles 59 and 62). More precisely: what action may Member States take under the Community legal system in respect of persons who exercise their freedom to provide services - one of the freedoms safeguarded by Community legislation - by receiving broadcasts from other Member States and

[1] Webb at 3305 (3309). See also van Wesemael at 52, grounds 29, 54 and 39.
[2] Webb at 3325, grounds 19, 20, 21.
[3] Webb at 3321, ground 5; at 3323, ground 12; at 3325, grounds 17, 19, 21.

retransmitting them unchanged at the same time (see Section A II 2 and 3), in other words who help foreign broadcasters exercise their right to provide their service not only to those viewers and listeners in frontier regions who can pick them up directly?

1. Applicability of national rules "justified by the general interest" on programmes or on the protection of youth and of reputation

No matter what the content of the programmes broadcasting is a service within the meaning of the EEC Treaty (see Article 60(1) and Section A I), and Articles 59 and 62 confer the freedom to provide services. Accordingly, it is both admissible and desirable to broadcast programmes across national frontiers - irrespective of whether they are intended primarily for home or foreign audiences. Since freedom of broadcasting is one form of the freedom to provide services guaranteed by the EEC Treaty there is no need to justify moves to exercise it; instead, the justification is required for the Member States' plans or provisions to restrict it. The only question is whether the restrictions imposed on Community-wide broadcasting, if any, are themselves admissible.

Thought must therefore be given to the implications which this reserved right to apply provisions justified by the general interest has both for the national broadcasting legislation and for the demands made on programmes. After all, the Debauve judgment empowers the Member States to invoke general interest at the cost of freedom to provide services as a general rule not only in connection with advertising broadcasts.[1]

(a) Basic principles of case law on which the interpretation is based

This section is based closely on the case law which the Court of Justice has established in respect of restrictions imposed on the freedom to provide services by rules adopted on grounds of general interest and applied indiscriminately to nationals and foreigners and of restrictions placed on the free movement of persons and on their right of establishment by providing for special treatment for foreign nationals on grounds of public policy, public security or public health (Article 56(1); see also Section B III 1 - though no further reference is made to the judgments cited in this Section here). The following broad lines have emerged:

Since the general good justifies exceptions from one of the "fundamental principles of the Treaty"[2] the concept must be interpreted strictly.

For the same reason it cannot be left to each Member State to decide the scope of the term for itself without review by Community institutions. Of course, it is for the Member States to assess the legitimate requirements of the general interest on their territory, applying their

[1] Debauve at 856, ground 12.
[2] Webb at 3325, ground 17.

own political, legal, social and cultural standards. However, Community case law restricts their right to exercise this freedom of discretion - in the case in point, in matters concerning retransmission of broadcasts from other Member States: any decision which they take to invoke the general interest criterion must also be "justified" from the viewpoint of Community law.[1]

When is this the case? The justification clause has both formal and substantive implications.

Formally, according to the established case law it implies that the reservation concerning general interest entitles Member States to impose only those restrictions which are in keeping with the requirements of the law, and of Community law in particular, on their own citizens and on nationals of other Member States.

Given the requirement that justification must be given for any interference at national level with the freedom to provide services, the criterion of proportionality must be applied to identify excessive, and hence unjustified, restrictions of the freedom of broadcasting and to maintain the prohibition imposed on them by Articles 59 and 62. The Debauve judgment sets out from the premise that this principle applies equally to broadcasting.[2]

In line with this proportionality criterion the rights of the individual - in this case his freedom to receive and retransmit broadcasts from other countries - may not be restricted more than necessary to achieve the objectives sought. The disadvantages for the individual must be in reasonable proportion to the advantages for the general public. Proportionality implies that the methods used - in this case the rule restricting freedom - are an appropriate means of attaining the objective sought (principle of appropriateness)[3] and are essential in order to do so, in other words that the objective cannot be achieved by less restrictive means, i.e. by rules which impose less severe restrictions on freedom (principle of necessity, objective justification or prohibition of excess).[4] Consequently, this reserved right may not be applied to restrict these safeguarded freedoms to a degree out of proportion to the objectives sought and the means employed, and certainly not to abolish them. Both would be tantamount to abuse of this reserved right.

Substantively, the justification clause allows and calls for interpretation and application of the general interest criterion which respect the limits that the European Convention on Human Rights sets to interference with rights and freedoms enshrined in the Convention and equivalent to rights and freedoms conferred by Community law.

---

[1] Seco v Evi at 236, ground 10, at 237, ground 15 and at 238, operative part.

[2] Debauve at 859, ground 22, at 859 and 860, operative part, para. 2,

[3] at 837 (left-hand column), 840, 841 and 847.

[4] Seco v Evi at 237, ground 14.

van Binsbergen at 1309, ground 14; Coenen at 1555, ground 9; van Wesemael, Follachio at 52 and 53, grounds 29 and 30.

In the context discussed in this paper the restrictions which Articles 59 and 66 impose on the Member States' powers to deal with broadcasting and telecommunications - which are now limited to reservations based on the national general interest - are one particular form of a general principle enshrined in Article 10(2) of the ECHR. Under Article 10(2) the freedoms conferred by Article 10(1) may be restricted only by law and to protect the interests listed in Article 10(2) and even then no further than necessary in a democratic society (see Section B III 1(c)).

Since Article 10 of the ECHR was already binding on five of the six Member States when the EEC Treaty was concluded and the Member States were neither willing to extend the rights reserved in Article 10(2) by the reservation concerning general interest implicit in Articles 59 and 62 of the EEC Treaty - bearing in mind that the Community is by far the closer association - nor able to without infringing the Convention, the limits placed on this reserved right by Article 10(2) of the ECHR still apply. It therefore follows that at most the interests listed in Article 10(2) and corresponding to that reserved right may be recognized as "grounds of general interest" by Community law. Similarly, provisions to safeguard them are "justified" only if they are necessary in a democratic society.

(b) Grounds of general interest

Article 10(2) of the ECHR lists the following possible justifications for restricting the free flow of information regardless of frontiers:

(i) national security;
(ii) territorial integrity;
(iii) public safety;
(iv) prevention of disorder;
(v) prevention of crime;
(vi) protection of health;
(vii) protection of morals;
(viii) protection of the reputation or rights of others;
(ix) prevention of the disclosure of information received in confidence;
(x) maintaining the authority and impartiality of the judiciary.

This list lays down in clear terms the maximum extent of "grounds of general interest" for the purposes of Community law, apart from the cases where the list refers to grounds of individual interest (protection of the reputation of rights of others). It is worth repeating that in the EEC Treaty the Member States were neither willing nor able to make it possible to subject the rights guaranteed by the Treaty to restrictions which went beyond those allowed by the ECHR and - de facto at least - therefore also curbed the corresponding freedoms conferred by the Convention.

Whether Community law can recognize non-discriminatory rules on transmissions, in the country concerned, of both domestic and foreign programmes as in the general interest depends on whether the rules include requirements designed to protect one or more of the interests listed in Article 10(2) of the ECHR. If so, the next step is to check whether there is any justification for applying the rule to retransmission of broadcasts from abroad as well (see Section C).

First, however, one must define precisely what constitutes each of these interests. Since they involve derogations from the principle of freedom of expression, they are interpreted narrowly.[1] The individual terms are interpreted not in accordance with their meaning within the country,[2] but "within the meaning of the Convention", i.e. autonomously.

Most of them are relatively clearly-defined, and hence easy to apply for legal purposes; consequently, no further comment appears necessary here. For instance, rules to protect the integrity of the State (see Part VI, Section B I, for examples) or on law and order (see loc. cit. for examples) clearly come under categories (i) to (v), those to safeguard public morality (see loc. cit. for examples) and youth (see Part VI, Section B II 1 for further details) under "protection of morals" and those to protect the moral rights of individuals (see Part VI, Section B I and III) under "protection of the reputation or rights of others".

The provisions on the protection of the owners of copyright and performers' rights may also come under "protection ... of the rights of others ",[3] as may provisions on the protection of the rights of consumers against misleading and deceptive practices in advertisements.[4]

In practice the key question is what does "prevention of disorder" mean. Similarly, in some unauthentic language versions the term for "public safety" could also be interpreted more broadly than intended by the wording of the authentic versions. However, any doubts can soon be dispelled by looking at the terms which are the only ones valid - namely, "public safety" (or "sûreté public") and "prevention of disorder" (or "à la défense de l'ordre"). It is perfectly clear from these that the security or order dealt with by police regulations or criminal law is what is meant. Article 10(2) of the ECHR avoids the broader concept "public policy" ("ordre public"), just as the official German translation avoids, say, "öffentliche Ordnung".

---

[1] "The Court is faced ... with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted ..." European Court of Human Rights 26.4.1979 - Sunday Times - loc. cit., p. 30, before § 66, with further references.

[2] European Court of Human Rights, loc. cit., p. 24, § 55 with further references, and p. 27, § 60.

[3] See the arguments for and against in European Commission of Human Rights 15.12.1966 - Televizier v Netherlands 2690/65 - Yearbook of the European Convention on Human Rights 9 (1966) 512 (538, 540, 542). The question was not decided, because the application was withdrawn.

[4] See European Commission of Human Rights 5.5.1979 X v Sweden, loc. cit., p. 73.

For all these reasons enforcement of the national broadcasting legislation neither comes under Article 10(2) of the ECHR nor, hence, is one of those grounds of national general interest which justify interference with the freedom guaranteed by Community law to broadcast from other Member States and with the retransmission of broadcasts from other countries on the national network. The same applies to specific requirements such as the public, public-law or non-commercial character of broadcasting, its public service nature, its public role, its internal structure, its function in helping to form public opinion, its capacity to integrate its viewers and listeners into the State and the general provisions governing programmes (see also (d)).

There are a number of other reasons for this conclusion. First, audiences can readily recognize broadcasts from other countries as such; hence the impact of foreign broadcasts as a factor in forming public opinion can be kept within limits, even if they are received and retransmitted in the language(s) of the country concerned.

Another reason is that this mutual exchange and interpenetration of cultures is inherent in the free movement of workers and of the self-employed which has already become established within the Community. These rights guaranteed by Community law preclude placing restrictions motivated purely by broadcasting policy on the retransmission of broadcasts from other Member States.

Above all, though, restrictions on the grounds of broadcasting policy would hit at the heart and foundation of the rights and freedoms conferred by Article 10(1) of the ECHR and by Articles 59 and 62 of the EEC Treaty. For these rights and freedoms could no longer be exercised to the full extent allowed and intended by the broadcasting legislation of the country of transmission. As a result the programmes would lose at least part of their unique foreign character. Freedoms which transcend national frontiers would be distorted into obligations to comply with the programming requirements laid down by the broadcasting legislation of the country concerned which, in many cases, would make it impossible to exercise these freedoms at all. It therefore follows that the national general interest is not the same as the national broadcasting legislation. On the contrary, this, and any other, national legislation prevails only in the situations listed and only then where necessary in a democratic society.

Nor do either Article 10(2) of the ECHR or the reservation concerned general interest allowed by Community law admit economic reasons for restricting the freedom of broadcasting within the Community, and, hence, the rights and freedoms guaranteed by Article 10(1) of the ECHR - for example, rules applying indiscriminately to broadcasts from the country concerned and from other countries to maintain (a) the economic base of the national broadcasting services, (b) advertising and/or licence fee revenue in the country in which the programme is shown and (c) the economic and competitive structure of the national media (see Section B III 1 (a) and (c) in fine).

Overall, free flow of information across frontiers and freedom of broadcasting within the Community imply that the Member States' self-contained broadcasting systems must be opened up to each other as they stand, with each complementing and influencing the other. Accordingly, all-embracing grounds and judgments are insufficient justification for restricting the rights and freedoms conferred by Article 10(1) of the ECHR and Articles 59 and 62 of the EEC Treaty from the point of view of Article 10(2) of the ECHR and of the general interest criterion which must be applied and interpreted in the light of that Article. On the contrary,

these rights and freedoms are so fundamental that Article 10(2) of the ECHR instead specifies which interests in need of protection could possibly take precedence over them under certain circumstances.

(c) Justified rules

Even if a legal provision protects one of these interests - and hence one component of the general interest recognized by Community law - it remains to be seen whether there is any justification for applying it to retransmission of broadcasts from other Member States. The formal implications were discussed in Section (a).

Substantively, the restrictive measure must be "necessary in a democratic society" (see Article 10(2) of the ECHR). As the European Court of Human Rights has made clear,[1] the adjective "necessary" is not synonymous with "indispensable". Nor has it the flexibility of such expressions as "admissible", "usual", "useful", "reasonable" or "desirable". However, it does imply the existence of a "pressing social need".

In the Court's view, Article 10(2) of the Convention gave the Contracting States a power of appreciation. However, that power of appreciation was not unlimited. The Court was empowered to give the final ruling on whether a "restriction" was reconcilable with the freedom of expression protected by Article 10 of the Convention. The domestic margin of appreciation thus went hand in hand with a European supervision, which covered not only the basic legislation, but also the decision applying it, even one given by an independent court.

Such supervision was not limited to ascertaining whether a State had exercised its discretion reasonably, carefully and in good faith. Even a State so acting remained subject to the Court's control as regards the compatibility of its conduct with the engagements it had undertaken under the Convention.

"It is 'necessity' in terms of the Convention which the Court has to assess, its role being to review the conformity of national acts with the standards of that instrument."[2] Such standards

---

[1] European Court of Human Rights 7.12.1976 - Handyside - loc. cit. p. 22 § 48, p. 23, §§ 49, 50; European Court of Human Rights 26.4.1979 - Sunday Times loc. cit. p. 26, § 59.

[2] European Court of Human Rights 26.4.1979 - Sunday Times - loc. cit. p. 27, § 60.

included whether, in the light of all the circumstances of the case, the relevant "interference" (second sentence of Article 10(1) of the Convention) in freedom of expression corresponded to a "pressing social need", whether it was "proportionate to the legitimate aim pursued", and whether the reasons given by the national authorities to justify the "interference" were "relevant and sufficient under Article 10(2)", particularly in view of the task of the media to impart information and ideas and the right and interest of the public to receive them. It was therefore not sufficient that the "interference" involved belonged to that class of exceptions listed in Article 10(2) which had been invoked by the State in question.[1]

Thus, the authorities in the Member States and in the Community are provided with the principles and criteria on the basis of which they can assess and must decide whether or not it is "justified" in terms of Community law for a national provision which has been or is to be adopted for the protection of a general interest recognized in accordance with Community law ((b) above and (d) below)) to be extended to apply to the distribution of broadcasts from other Member States.

In view of these pronouncements, the argument that the rule applies equally to domestic programmes is not adequate justification for applying a rule adopted on grounds of the general interest recognized by Community law to the retransmission of programmes from abroad. For the purposes of Community law the fact that requirements such as this apply equally to national broadcasts and to broadcasts from other countries is not in itself justification for imposing them on broadcasts from other countries or proof that they are necessary in a democratic society. For this the programmes would have to be directed specifically against one or more of the legal rights which Article 10(2) of the ECHR lists as worthy of protection at international level. Only programmes which pose a threat to public safety, order, health or morals in the country concerned can be considered in this category.

"In a democratic society" means that the restriction on freedom must be necessary not only in a specific state or democracy, but in a free society in general. Although one's own society may be taken as the starting point, it is not the only yardstick. The true standard is the society understood by the Council of Europe institutions set up to apply and protect human rights. It therefore follows that the European rights and freedoms conferred by Article 10(1) of the ECHR and the Community rights and freedoms derived from them cannot be changed back into national rights and freedoms by imposing the restrictions allowed by Article 10(2) and by applying the general interest criterion derived from that Article. For these restrictions are in turn limited by two reservations - what is "necessary" in "a" European democratic society - and are hence bound by the principle of proportionality.

---

[1] European Court of Human Rights 7.12.1976 - Handyside - loc. cit. pp. 22-24, §§ 48-50; European Court of Human Rights 26.4.1979 - Sunday Times - loc. cit. p. 27, § 62, pp. 29-30, § 65.

sufficiently serious risk to one of the fundamental interests of the company in the receiving country and if the restriction on the freedom of broadcasting is necessary in a democratic society and, as such, justified from the point of view of the Community and of the freedom to provide services which it embodies.

(d) Requirements as to the content of foreign programmes

The most important question in practice is whether rules concerning the content of programmes may also be imposed on foreign broadcasts as soon as they are rebroadcast within the country, so that the parts of the programme which infringe the rules must be deleted by the rebroadcaster.

First, it must again be emphasized that under Article 10(2) of the European Convention on Human Rights and the corresponding reservation under Community law which permits "rules ... justified by the general interest", the only restrictions or conditions which are permissible - and that by way of exception - are those "prescribed by law". Rules of inferior rank - such as regulations, administrative provisions, general contractual conditions, byelaws, internal directives, agreements between broadcasting organizations etc. - cannot rely on the reservation and hence cannot impose any restrictions on foreign programmes when these are rebroadcast within the country.

The residual possibility of imposing by law restrictions or conditions on programmes from other Member States which are to be rebroadcast within the country leaves scope for two groups of rules: those intended to protect a value recognized in Article 10(2) of the Human Rights Convention and those intended for other purposes.

The latter are not caught by the reservation in Article 10(2), nor by that of the "general interest" recognized by Community law, and thus cannot be applied to such foreign programmes. Examples of these requirements are those relating to the nature and quality of programmes (e.g. information, entertainment, education; high quality entertainment), to the orientation of programmes (e.g. impartiality, representation of a particular tendency in society), to the reliability of information (e.g. prior examination of source, content and accuracy), to the programmes available generally from a broadcasting organization (e.g. minimum requirements as regards the expression of different opinions or the balance of programmes). Rules concerning broadcasting time and breaks also fall into this group.

Rules made to protect the values mentioned in Article 10(2) of the Convention include the special rules (some of them specific to the media) designed for the protection of the young and rules concerning the right of reply (see below, Part Six, B II.1 and III.1). They also include a certain number of provisions of general law - frequently criminal law - concerning state security, peace and order, public morals in sexual matters and aspects of individual personality such as reputation, privacy, the right to one's own portrait (some examples of these situatio are given in Part Six under B.1).

If a national legislature were to venture to extend such rules to foreign programmes to be rebroadcast within the country, it would not only have to consider whether this was permissible under its own law - especially constitutional law - but also whether it was justified under the law of the Human Rights Convention (reservation in Article 10(2)) and Community law (reservation of the general interest). In this context Community law, as already explained, imposes on the Member States at least the same limitations on restriction of the freedom to provide broadcasting services as the Convention imposes on restriction of the free flow of information regardless of frontiers. In case of doubt, it is highly desirable that the legislature should authorize or permit[1] exceptions, in the case of foreign programmes relayed within the country, from the requirements imposed on national programmes.

2. Approximation of the law on broadcasting

(a) Approximation of laws and freedom to provide services

Could and should these problems, and the other problems discussed under heading 1, be solved by means of approximation of laws? It is impossible to answer this question in general terms.

If a specific rule infringes Article 59 or 62, it is no longer applicable and must be repealed. Such a rule can neither be maintained pending approximation of the relevant provisions nor be legalized by being incorporated in a directive concerned with approximation.

Where on the other hand a rule has been made on a ground recognized by Community law as justified in the general interest within the country (1(b) above), its application is also justified under Community law (1(c) above), and different rules exist in other Member States so that freedom to provide services is impossible or restricted, there is a need for approximation under Article 57(2) so as to attain this freedom. By thus opening up the national arrangements to create a uniform legal situation throughout the Community, a common market in this sector must be created.

Articles 59 and 62 on the one hand (quoted at the beginning of B) and Article 57(2) on the other hand (quoted in C IV 2(b)) are aimed at different objectives. The two first-mentioned articles are intended, apart from precisely defined exceptions (applicability of special rules for foreign nationals under Article 56(1) and of rules justified by the general interest and applicable without discrimination to nationals and non-nationals alike) to eliminate all discriminatory and all indiscriminately restrictive rules. Article 57(2) however is based on the general objective,

[1] See for example Section 85(1) of the new French Act and the explanations thereon given by the Minister for Communications in TF 1, loc. cit. (Part Four, under G, footnote 2) 137.

by approximating the legal and administrative provisions of the Member States, "to make it easier for persons to take up and pursue activities as self-employed persons" (Article 57) and thus to lessen the obstacles arising from the differences between these rules.

In so far, then, as freedom to provide services on the basis of Articles 59 and 62 has been attained or can be attained, there is no need for a Directive based on Article 57(2), but rather for a harmonization of the rules justified by the general interest, and thus not requiring repeal, in order to make it possible in this sphere also to pursue the freedom to provide services within a framework of common rules.

More than this, Article 57(2), worded as it is with great clarity, seeks to attain more far-reaching objectives of the Treaty beyond the freedom to provide services within the meaning of Articles 59 and 62, namely the establishment of a common market or the creation of legal conditions for the individual activities of self-employed persons corresponding to those of an internal market. This approximation therefore comprises not only the rules justified on grounds of the general interest but also the remaining "provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons" (Article 57(2) which apply indiscriminately to nationals and non-nationals alike.

The opening up of the national markets thus falls (when no reservation is applicable) within the prohibitions and obligations imposed by the Treaty, whilst their merger into a single market (and the abolition or restriction of the reservations) is a matter for the approximation of laws. The latter is based on Article 57(2), except for the approximation of the special arrangements mentioned in B III 1 for foreign nationals which are based on grounds of public order, public security or public health. This coordination must be undertaken on the basis of Article 56(2) (see B III 2).

(b) Rules for the protection of public security, public policy and morals

Member States' rules for the protection of state security, peace and order, public morals and youth are, as explained above (1(b) and (c)), among those which may even under Community law be applied to foreign broadcasts to be relayed within the country, on grounds "justified by the general interest". If such rules differ from one Member State to another and hence the standards imposed on a broadcast likewise differ, these differences can lead to restrictions on freedom to provide services in connection with broadcasting (obstacles, deletions, intervention by the courts, etc.).

However, an approximation of most of these rules is not desirable for several reasons, discussed in Part Six under B I. Probably the most important is the limited practical importance of these rules for broadcasting and television.

One exception to this should be the law on the protection of the young from broadcasts which can be harmful for the moral and spiritual well-being of children and young people (see Part Six, B II).

(c) Rules concerning programmes

Rules imposing general requirements on programmes do not fall under the reservation of general interest recognized by Community law (1(b) and (d) above). Where they are applied to foreign broadcasts to be relayed within the country, and thus restrict freedom of broadcasting, they are caught by the prohibitions in Articles 59 and 62. The elimination of such restrictions is not a matter for approximation of laws but rather a matter of applying the EEC Treaty.

Quite apart from any such infringements of the Treaty however an approximation of the rules on broadcasting - especially as regards the content of programmes - is already possible, and in the long term necessary, in order to make such activities "easier" (Article 57(2)) and to achieve a common market for broadcasting. The question is not whether this objective of the EEC Treaty must be attained, but when and at what stage of integration.

In the sphere of broadcasting, as in others, the Commission recommends a gradual approach and intends therefore at present simply to circulate proposals on the approximation of the law on broadcast advertising (above, IV 2 and below, Part Six A), of the law on the protection of the young in connection with broadcasting (above, (a) and Part Six B II), of the law on the right of reply (above, (a) and Part Six B III), and of the law of copyright in relation to broadcasting (below, VII and Part Six C).

A new situation would arise however if the reservation permitting the application of rules justified by the general interest were to be more broadly interpreted than is suggested in this Green Paper. The primary concern here has been to interpret this reservation with due regard to the special importance of the freedoms at stake, namely those of the provision of services or the free movement of broadcasting and of the free flow of information regardless of frontiers.

In the view of the Commission a provision which, like that of Articles 59 and 62, confers a fundamental right on persons protected by Community law and also creates an institutional freedom, i.e. an objective formative principle of the common market, would at the end of the day be worthless if at the same time it gave Member States a practically unconditional reservation, a virtually boundless freedom to impose restrictions. In that case the freedom originally granted can be taken away. The right becomes an empty shell. The question of how far the Treaty and the Community institutions can fulfil their task of protecting and developing European fundamental rights, and with them a Community-wide democracy, depends on where the boundaries are drawn between the commitment to the freedoms enshrined in the Treaty and the power to restrict them unilaterally.

For this reason the Commission, in interpreting the reservation, has drawn primarily on the Court's decisions on freedom of movement of workers and of self-employed persons, especially those on Article 56(1) (above, B II 1 (a) and (b)). It has not attempted to extend the broad interpretation of the reservation given by the Court in Debauve, in connection with the law on the broadcasting of advertisements, to other aspects of broadcasting law, particularly where this would involve giving priority to national requirements on the content of programmes over the principle of freedom of broadcasting within the Community and the free flow of information across frontiers.

The consequence of a broad interpretation of the reservation would be the same as that recognized by the Court in Debauve in connection with the law on broadcast advertising:[1] the approximation of the law on programmes would be necessary. Just as the relay of foreign advertisements within a state can, until the rules on advertising are harmonized, be subjected to domestic arrangements and thus prohibited or restricted, so the relay of other foreign broadcasts (particularly information, opinions, ideas, entertainment, art, education, sport) which do not comply with rules similar to the domestic programme rules can be prevented or impeded until this part also of the law on broadcasting is harmonized. Experience teaches us that this would take many years and would not easily come about. The free provision of these services also and the free flow of this information (in the widest sense) would be made subject to the reservation of a prior approximation of the national rules of law and would thus for a long time be largely meaningless.

For several reasons it appears to the Commission that there are no convincing grounds for extending the treatment of advertising to the law on the content of programmes.

The primary object of commercial advertising is to encourage the production, marketing and sale of goods (or services). Other types of broadcasting are concerned with the furtherance of social or cultural interests. Admittedly Article 10(1) of the European Convention on Human Rights extends also to the free flow of advertising; but this enjoys a lesser degree of protection than other ideas, information and opinions. The broadcasting of advertisements involves the use of the freedom of information for commercial ends; this does not appear to merit the same degree of protection or to be so important for democracy as the protection of programmes with a social and cultural content.

The broadcasting of advertisements, where it is permitted, is a direct source of revenue for the broadcasting organization, whilst other forms of broadcasting (apart from Pay TV) are not. If, therefore, broadcasting coming from abroad is not subject to similar conditions as regards quantity, quality and timing to those applicable within the country, but is subject to substantially more liberal principles, this could lead to a deflection of advertising to foreign broadcasting organizations and thus to a reduction in the income of domestic broadcasting organizations. The terms of their competition with the foreign broadcasting organizations would be distorted by the differences in the law.

[1] Debauve at 856, ground 13, and at 857, ground 15.

Such a partial shift of advertising over to foreign stations could, in certain circumstances, also have financial repercussions on the national press. National restrictions on advertising by broadcasting stations also serve to maintain the financial base of the press, the major part of which comes from advertising.

Finally, national bans and restrictions on radio and television advertising are to protect the audience - either from advertising altogether or from advertising for certain products, or again from a so-called "commercialization" of programmes because of the extent, timing and target area of advertising.

The considerations governing the legal requirements for other broadcasts are quite different. It is not a matter of assessing the commercial interests of the advertising world, the financial interests of the broadcasting organizations and of the state as well as the financial and cultural interests of the audience (as consumer, as subscriber, as listener and as spectator). It is rather a matter of formulating important fundamental rights and their inter-relationship.

In a Community which provides and guarantees fundamental European rights to freedom and equality in addition to the national rights, it is important that the two liberal systems should not work against each other but rather complement each other. More precisely, this means, in the field of radio and television, that the national set-ups regarding cable broadcasting should be open to one another but also that the Community should respect their individual identities. This implies on the one hand particular restraint where harmonization of the law on radio and television programmes is concerned and, on the other hand, understanding for national provisos, which suppress only in exceptional cases freedom to broadcast and disseminate information, in the name of the particular national system, so that it is no longer urgent to carry out harmonization. The idea under Articles 59 and 62 of the Treaty, together with Article 10 of the European Convention on Human Rights, is to provide cross-frontier broadcasts and flow of information and, precisely, to keep foreign programmes independent from the receiving state's own system.

Harmonization of the general provisions on programme content (programme control and limitation) might also damage the expression and dissemination of the range of political, constitutional and cultural material in the Community. Part of this variety is also the differing view of national fundamental rights and the consequent provisions on programmes. Such developments should not be interfered with as long as the Member States are demonstrating a growing preparedness to accept the risk inherent in free broadcasting and flow of information and do not take refuge in a policy of reservations about the national redistribution of foreign broadcasts from other Member States.

(d) Applicability of Article 57(2)

Since the grounds for applying these provisions to the harmonization of radio and television advertising law (see IV.2(b) and (c) above) have already been stated, it remains to be seen whether Article 57(2) can also act as the legal basis for the harmonization of other radio and television law as well as, if necessary, telecommunications law.

In Article 57(2) provision is made for the "coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons".

Either natural or legal persons may engage in the broadcasting of radio and television programmes and they do so in all the Member States. This is, therefore, a business activity, an independent activity. Just as there are numerous occupations or progressions in broadcasting (radio and television) that all benefit (as being for employed persons) from the provisions on freedom of establishment and freedom to provide services (inasmuch as they can engage in activities as self-employed persons)[1], there is also the activity in the Member States that involves setting up and/or running an independent broadcasting station which designs, produces and broadcasts programmes or takes over and relays programmes from other stations.

From the Community's point of view it is immaterial whether radio and television broadcasting is seen as a profession, a service industry, a public function or a public service; suffice it that, under Article 57(2), it is an activity that can be or is taken up and/or exercised by a self-employed person.

Since this activity, by its very nature, must not necessarily be reserved for the state and is in fact not so reserved but is in many cases handed over to an institution set up by law, which then exercises it independently, it remains within the scope of Article 57(2) as not being a state occupation. Moreover, for the purposes of applying this Article, it does not matter how important the independent activity is for the state, for the general public, for forming public opinion, for political parties, specific groups or individuals.

Neither does it matter very much what kind of independent activity is being exercised or what is involved, whether it is in itself of a commercial nature of deals with economic matters. This is confirmed in the second sentence of Article 57(2) and in Article 57(3), which refers explicitly to the need to harmonize provisions on health-related activities.

Under the EEC Treaty, the freedom of Europe is also granted to anyone exercising an intellectual/cultural activity - particularly of an artistic, literary, journalistic or educational nature - and with it comes freedom of establishment and the free movement of the services provided by such persons, provided they are self-employed. Therefore, it is of no consequence whether an activity is exercised in the sphere of economics, law or technology or is concerned with society (e.g. education, health, sport, entertainment, leisure activities) or intellectual pursuits (culture, art, science, research). For example, independently operating undertakings are included, such as those which put on plays, operas, concerts or films or which run a publishing house, a periodical, newspaper, news agency or illustrated magazine.

---

[1] For example: programme assistants/editors, reporters, speakers, script writers, composers, conductors, musicians, singers, actors, playwrights, directors, camermen, cutters, sound engineers, film engineers, programme managers or managers of technical departments, studio managers, programme directors, general managers or directors general.

In fact the EEC Treaty does not state whether the independent activity has to be a trade, commerce, craft or any other form of activity, independent or otherwise. The main point is whether it constitutes a service "normally provided for remuneration" (Article 60(1)). It has already been amply demonstrated in section A.I.2 that this is the case where radio and television is concerned.

For these reasons Article 57(2) cannot be applied solely to the sphere of radio and television advertising. It encompasses rather everything that has anything to do with the activities of a radio and television broadcasting organization.

The Member States' legislation on radio and telecommunications forms part of the provisions that govern "the taking up and pursuit of activities as self-employed persons" (Article 57(2)). For they govern how and whether radio and television stations operate. They confer right of control and licensing. They set personal, professional, organizational and technical standards for the radio and television company or companies and their actions. They set out the terms for the establishment and operation of radio and television undertakings.

This Green Paper deals first and foremost with the provisions on the pursuit of radio and television activities. From the summary of the Member States' legislation on radio and television (Part Four) it can be seen, however, that the provisions on the taking up of these activities (establishment of organizations, granting of monopolies, acceptance, legal form, aims, structure, organization, responsibility, financing, etc.) also differ considerably and, in some cases, reveal substantial differences in conception and system.

Nevertheless, the Commission is not intending to become involved in a harmonization process for the time being. The first step to be taken seems to be to achieve the free movement of broadcasts and information without regard to intra-Community frontiers, especially in the spheres of satellite and cable television. This step is concerned with the pursuit and not the taking up of broadcasting activity. Not until the provisions on right of establishment for broadcasting stations are made more flexible - for which Article 57(2) is of use as well as for ensuring freedom to provide services - will the harmonization of some provisions on the taking up of broadcasting activities become essential. In the Commission's opinion, this should be the second step towards achieving the framework legislation demanded by Parliament. It is difficult to carry through before or at the same time as the first step. This would be asking too much of both the Member States and the Community.

It must not be forgotten in this context that Article 57(2) not only provides for the harmonization of the provisions covered by it but also dictates such harmonization. For the wording is in the coloured future tense ("the Council shall ... on a proposal from the Commission and after consulting the Assembly, issue directives ..."), which is the legal imperative - it must issue. Therefore, the Community institutions may not exercise their discretion as to whether there should be harmonization but only as to when and how, and how far it should go.

VII. National copyright and foreign broadcasts

Free movement of broadcasting services in the Community is restricted not only by the broadcasting laws - especially the provisions on advertising and programme content - and telecommunications legislation (see B. I, Part One B. III, IV above) but also by copyright. The situation in this area is described in Part Six under C. I and II.

Whether harmonization of the copyright legislation preventing or hindering the free movement of broadcasts is admissible, necessary and urgent depends - as with advertising and programme rights - first and foremost on whether such copyright restrictions on the provision of services are already covered by the interdiction of Articles 59 and 62 and are hence removed or not. In the latter case, only harmonization of these provisions can make free movement of broadcasts possible within the Community.

1. Applicability of national provisions based on literary and artistic property rights

In the Coditel v Ciné Vog case, the Court had to decide "whether Articles 59 and 60 of the Treaty prohibit an assignment, limited to the territory of a Member State, of the copyright in a film, in view of the fact that a series of such assignments might result in the partitioning of the Common Market as regards the undertaking of economic activity in the film industry."[1]

The Commission said that they did (see II.3. above). In its view, protection of the subject-matter of the specific performing right (concerning the simultaneous retransmission by cable of the original broadcast) does not require that the owner of that right should have a right to give his authorization, with the result that he can prohibit retransmission. As the owner has consented to the initial broadcast, his legitimate interest may be regarded as satisfied if national law entitles him to receive fair remuneration from the cable diffusion company which made the simultaneous retransmission. The Commission came to this middle-of-the-road conclusion on the basis of a comparative analysis of the very different legal situations in the individual Member States, in the United States and according to the Berne Convention.[2] The Commission had even raised the question as to whether this state of national copyright law must be accepted without more ado or whether the Community should take steps to harmonize.[3]

The Court did not follow the Commission and answered in the negative, as follows:[4] "Whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass

---

[1] Coditel v Ciné Vog at 902, ground 11.
[2] Coditel v Ciné Vog at 894-896.
[3] Coditel v Ciné Vog at 897.
[4] Coditel v Ciné Vog at 903, grounds 15 and 16.

limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. ... The effect of this is that, whilst copyright entails the right to demand fees for any showing or performance, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard."

When dealing with the provisions on the protection of intellectual property, we are not concerned with provisions made in the general interest as we were with the restrictions on advertising. The Court bases its restrictive interpretation of Article 59 and 62 on legal and economic considerations.[1] Firstly "the fact that the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work" and "that the exploitation of copyright in films and the fees attaching thereto cannot be regulated without regard being had to the possibility of television broadcasts of those films".

Thus, the Court recognized that there was a proviso regarding the applicability of legislation on the provision of services, which was based on the concept of literary and artistic property. This possibility for restricting freedom to provide services, which is not explicitly provided for in the Treaty, corresponds to the possibility offered in the first sentence of Article 36 of restricting the free movement of goods "justified on grounds of ... the protection of industrial and commercial property". According to the judgment, a restriction is justified in the sense of the first sentence of Article 36, as with the legal proviso about performing rights, when it forms part of the "specific subject-matter", "essential function" or the existence of the intellectual right. A restriction can be unjustified when it affects the "exercise" of the intellectual right. It depends on the circumstances of the case in question.

In clarification of Coditel I, the Coditel v Ciné Vog II Decision[2] contains the explanation that Article 36 concerns restrictions on the free movement of goods whereas here we "are concerned with the question of prohibitions or restrictions placed upon the free movement of services". Nevertheless, "the distinction, implicit in Article 36, between the existence of a right conferred by the legislation of a Member State in regard to the protection of artistic and intellectual property, which cannot be affected by the provisions of the Treaty, and the exercise of such right, which might constitute a disguised restriction on trade between Member States, also applies where that right is exercised in the context of the movement of services". It is "conceivable that certain aspects of the manner in which the right is exercised may prove to be incompatible with Articles 59 and 60...".

---

[1] Coditel v Ciné Vog at 903, ground 14.

[2] Case 262/81 / 1982 / ECR 3381 Coditel v Ciné Vog II (3400, ground 10; grounds 13 and 14).

In quoting this last sentence the Court refers back to the restriction or limit of the proviso in Coditel I, namely "save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States." This is in accordance with the second sentence of Article 36.

2. Harmonization of copyright for radio and television

The effect of the Coditel I Decision on copyright in respect of radio and television broadcasts is the same as the effect of the Debauve judgment on radio and television advertising - despite Articles 59 and 62 the respective restrictions may be maintained basically. Hence, the free movement of numerous broadcasting services has been postponed - in both the sets of circumstances in point - until a solution is found by harmonizing the different provisions. Only thus will it be possible to build up a Common Market for radio and television broadcasts. Just where the problems and differences lie is set out in Part Six (C.I, II) as well as why and in which fields harmonization appears necessary (C. II, III) and what solution the Commission proposes (C.IV).

3. Applicability of Article 57(2)

The directive on the harmonization of the Member States' copyright provisions relating to the pursuit of broadcasting activities could and should be based on Article 57(2). The question then is whether we are dealing with "provisions ... concerning the ... pursuit of activities as self-employed persons" - here radio and television broadcasting.

Copyright is a general prerequisite for the freedom to pursue the activity protected by it. However, copyright is generally understood to incorporate special rules governing radio and television activities.[1] These provisions govern important soecial conditions for the exercise of the activity of a radio and television broadcasting organization. In the Commission's view (Part Six, C.IV.) we are concerned with a subdivision of these provisions, namely the retransmission of cross-frontier radio and television broadcasts by cable companies. Such transmission or exploitation of works protected by copyright - as well as their broadcasting by radio and television stations - forms part and parcel of the pursuit of an independent activity by such companies, as do their other activities. For this reason, the copyright provisions specific to radio and television must also be included in the provisions governing the pursuit of broadcasting as an independent activity. Hence they come under Article 57(2).

[1] Expertenkommission Neue Medien, loc. cit., p. 153.

Furthermore, Article 57(2) must not be construed too narrowly, but must be interpreted in the light of its objective, which is "to make it easier for persons to take up and pursue activities as self-employed persons." In accordance with the established practice of the Commission, Parliament and the Council in areas such as insurance, banking and savings banks, the provision also includes the coordination of sectoral rules and regulations governing legal conditions for exercising competition within the individual areas in which people pursue activities as self-employed persons, and coordination of the protective provisions prescribed for self-employed persons in their own interests and in the interests of others. These include the abovementioned broadcasting copyright provisions.

D. Direct effect of freedom to provide services

Article 59(1) does not contain merely an instruction to the Community organs and the Member States to abolish restrictions on the freedom to provide international broadcasts in the Community, i.e. an institutional guarantee of radio and television broadcasting throughout the Community as an objective principle of the Community constitution to be achieved by the exercise of sovereignty. It also protects this freedom as a subjective right of the individual against intervention by the authorities or third parties. The foreign provider of a service may therefore enforce his freedom to transmit programmes from his own Member State into other Member States before the authorities and courts of those States. The same right of the individual is accorded by Article 62, which forbids Member States to introduce any new restrictions on the freedom to provide broadcasting services.

This view, that Articles 59 and 62 have direct effect not only in relation to provisions which discriminate against foreign broadcasters or programmes but also in relation to provisions which treat nationals and non-nationals or domestic and foreign broadcasts alike, has already been expressed by the Commission in Debauve:[1] "Article 59 has direct effect in regard to all types of restriction which fall within the scope of that provision."

The reasons for this view were expressed by the Commission as follows:[2] "If the term 'restriction' in Article 59 covers restrictions other than mere discrimination on grounds of nationality or residence, there is no reason for refusing to recognize the direct effect of Article 59. In the van Binsbergen judgment, cited above, the Court attributed such direct effect to the first paragraph of Article 59 and the third paragraph of Article 60, 'at least in so far as they seek to abolish any discrimination ...,' which indicates that the Court, delivering judgment upon the facts of that case, merely refrained from saying any more than was necessary to enable the court making the reference to give its judgment, while leaving the way open for the discovery of other types of restriction falling within the scope of Article 59."

Mr Advocate-General Warner expressed the same view:[3] "The Court has held in at least three cases that that paragraph /Article 59(1)/ has direct effect 'at all events' in so far as it seeks to abolish any discrimination against a person providing a service by reason of his nationality or of his residence - a formula the use of which tends incidentally to confirm that Article 59 has also a wider purpose. I imagine that the Court used that formula in those cases in order to avoid having to go further than was

---

1 /1980/ ECR 833, at 852.
2 Debauve, loc. cit.
3 Opinion in Debauve, at 873-874.

necessary for their solution. The three cases are the van Binsbergen case, the Walrave and Koch case and ... Donà ...[1] There are also cases the judgments in which would be difficult to reconcile with the view that the first paragraph of Article 59 had direct effect only to that limited extent: see in particular ... van Wesemael ....[2] I can see no ground upon which it could be held that the direct effect of that paragraph was so limited, nor was any such ground suggested by anyone who submitted observations to the Court in these cases [Debauve and Coditel v Ciné Vog]. I would therefore hold that the first paragraph of Article 59 had direct effect in all its aspects .... In my opinion, however, the extent of the direct effect of Article 62 and of the first paragraph of Article 59 must be the same."

In van Wesemael the Court explained the direct effect of Article 59(1) as follows, without distinguishing between restrictions discriminating against non-nationals and those applicable to nationals and non-nationals alike:[3] "In laying down that freedom to provide services shall be attained by the end of the transitional period, that provision, interpreted in the light of Article 8(7) of the Treaty, imposes an obligation to obtain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures. It follows that the essential requirements of Article 59 of the Treaty, which was to be implemented progressively during the transitional period by means of the directives referred to in Article 63, became directly and unconditionally applicable on the expiry of that period [on 1 January 1970]."

Thus Articles 59(1) and 62 are by their nature capable of taking effect both as rules imposing a prohibition and as rules conferring rights to equality and freedom. Since the end of the transitional period, being quite general and designed to make provision for the future, they do not require any further specific implementing measures beyond the general programme laid down. As rules imposing prohibitions they crystallize only when they are infringed. As rules conferring rights to freedom, were they not directly effective in the Member States they would be largely nugatory in the hands of those seeking to enforce their rights. Their day-to-day application by domestic courts and authorities would be limited to removing discrimination. Freedom to provide services across frontiers could be denied, and could not be enforced without the intervention of the Commission in formal proceedings under Article 155 or 169.

---

[1] Case 33/74 [1974] ECR 1299, at 1310-1313; Case 36/74 [1974] ECR 1405, at 1421-1422, paragraph 5 of the operative part; Case 13/76 [1976] ECR 1333, at 1342, paragraph 2 of the operative part.

[2] Cases 110 and 111/78 [1979] ECR 35, at 52, ground 26.

[3] van Wesemael, at 52, grounds 25 and 26.

If Articles 59(1) and 62 cover restrictions on freedom to provide services - in this case broadcasting services - arising out of rules operative without discrimination, to say that those articles have direct effect is not to say that the relevant domestic rules are entirely inapplicable. Rather, those rules are inapplicable only when they extend to broadcasters (or broadcasts) from other Member States and thus restrict the provision of services across frontiers. As regards domestic broadcasters and the domestic provision of services the rules are unaffected. The Commission pointed this out clearly in its observations in Debauve and Coditel v Ciné Vog (see above C II 3).

This interpretation of Articles 59 and 62 does not affect the applicability of such provisions - especially those of broadcasting or telecommunications law - applying indiscriminately to the relaying of foreign and domestic broadcasts within the country as are justified on grounds of the general interest, e.g. those concerning advertising (Debauve) or those based on literary or artistic property (Coditel v Ciné Vog).

The situation is thus no different from that of the application - likewise still permissible - of discriminatory provisions prescribing special rules for foreigners where these are justified on the grounds of public policy, public security or health (Article 56(1)). The fact that there are such discriminatory provisions which exceptionally still remain applicable has not prevented the Court from holding that any other domestic provisions, not falling under these three exceptions, that impose special rules on foreigners are inapplicable, and thus confirming the direct effect of Article 59(1). It would be consonant with this view to hold that even those provisions that involve no discrimination cannot be applied to the relaying of foreign programmes within the country unless they fall under one of the two exceptions recognized by the Court.

E. Exceptions

I. Rules applying to undertakings entrusted with the operation of services of general economic interest (Article 90(2))

Article 90(2) provides that: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

And Article 90(3) adds: "The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

1. "Undertakings"

Are broadcasting organizations "undertakings" within the meaning of the Treaty, and especially of Article 90(2)?

It is now widely accepted that "undertaking" includes any activity exercised, otherwise than as an employee, in the manufacture or distribution of goods or services for the market. Hence, an "undertaking" within the mean of Community law need not have legal personality, or be carried on with a view to profit.[1]

[1] Joined Cases 209 to 215 and 218/78 FEDETAB /1980/ ECR 3125 at 3250, ground 88.

As described and illustrated in greater detail in Part Four, the individual broadcasting companies, services, corporations, unions, foundations and institutions carry on, despite their different legal forms, manifold economic and economically important activities as suppliers and purchasers on the relevant markets: as producers and/or purchasers of programmes, as organizers of live broadcasts, as distributors of programmes and broadcasts through transmission and/or relay, as exploiters of their programmes vis-à-vis third parties, as creators, entertainers and/or users of production units, broadcasting studios, broadcasting stations and transmitters, as employers and purchasers, as founders of subsidiary companies, as investors and borrowers, as owners and holders of copyright and performers' rights. Broadcasting organizations form an economic and organizational unit comprising the human, material and financial resources needed for the production and distribution of radio and television programmes.

All the broadcasting organizations discussed in Part Four are therefore undertakings within the meaning of the EEC Treaty and are covered by its relevant provisions (especially Articles 85 to 90). This is an independent Community law concept. Its content cannot be inferred, therefore, from the respective national laws and hence does not differ from one Member State to another.

In 1974 the German Government argued in the Sacchi case that television services are not undertakings within the meaning of the EEC Treaty since they provide a public service, a service of the public authorities.[1] The Italian Government maintained that the services are not an economic activity but operate a public service of a cultural, recreational and informative nature; they are public utilities.[2] The transmission of television signals takes place within the framework of the performance of a public service, a sphere which comes entirely and exclusively under national sovereignty.[3]

The Court of Justice did not agree with this line of argument - although it did not expressly analyse it. Like the Commission,[4] it regarded television services as undertakings within the meaning of the EEC Treaty. It therefore held that, not only are the rules on freedom to provide services applicable to their broadcasts and those on the free movement of goods to their trade in material and products, but also that the rules applying to undertakings, in particular Article 90, are applicable.[5]

---

[1]
[2] Case 155/73 / 1974 / ECR 409 (417-418).
[3] Sacchi at 419.
[4] Sacchi at 424.
[5] Sacchi at 414-415.
Sacchi at 429, grounds 13, 14, 15.

2. "Entrusted" undertakings

To answer the question whether a broadcasting organization can come under Article 90(2), one must first consider the Court's interpretation of it. According to the Court, the rule of restrictive interpretation applicable to all derogations from the EEC Treaty also applies to Article 90(2):[1] "As Article 90(2) is a provision which permits, in certain circumstances, derogation from the rules of the Treaty, there must be a strict definition of those undertakings which can take advantage of it."

Starting from this premise, the Court held once more that undertakings "are entrusted" with the operation of services of general economic interest and that a particular task can be "assigned" to them only where this is done by an act of sovereignty:[2] "Private undertakings may come under that provision, but they must be entrusted with the operation of services of general economic interest by an act of the public authority. This emerges clearly from the fact that the reference to 'particular tasks assigned to them' applies also to undertakings having the character of a revenue-producing monopoly."

Such an act of sovereignty may, according to the case-law, take the form of a law which assigns a particular task to a private-law undertaking set up for that purpose with State participation in the capital, (establishment and operation of a port on the Moselle), grants the undertaking certain privileges for the performance of that task (tax exemptions, the assumption of maintenance charges by the State, right to be consulted before any authorisation is granted for the establishment and operation of further ports) and[3] governs the influence of the State over the undertaking's organs.

A statute, royal charter or decree (order) which establishes a broadcasting undertaking, confers on it a public task or public service and governs its activities and relations with the public authorities (the State or some other area authority) may be regarded as an act of sovereignty within the meaning of this case-law.

---

[1] Case 127/73 BRT v SABAM / 1974 / ECR 313 at 318, ground 19.
[2] BRT v SABAM at 318; grounds 20 and 21; Case 172/80 Züchner v Bayerische Vereinsbank / 1981 / ECR 2021 at 2030, end of ground 8.
[3] Case 10/71 Luxembourg v Müller / 1971 / ECR 723 at 730, ground 8. The precise facts are to be found on pp. 725, 732 and 738-739.

As explained in greater detail in Part Four under C (concerning NOS and STER) and D, this is the case with the foundations, services, corporations and State broadcasting companies described therein.

A governmental act based on a special law, entrusting duties or conferring powers, whereby the public broadcasting service, which is governed in detail by the said law, is transferred to a limited company all of whose shares are owned by the public authorities may also be regarded as an act of sovereignty within the meaning of the case-law. As stated in Part Four B, RAI falls into this category.

On the other hand, the grant of a mere State authorization, permission, concession or licence to organize broadcasting or the allocation of broadcasting time without the simultaneous conferment of a public task does not constitute an act of sovereignty within the meaning of the case-law on Article 90(2). There are examples of this, too, in Part Four, in particular RTL (A), the nine Netherlands private unions and foundations (C), the sixteen British private programme companies (E) and numerous private cable or wireless relay companies in various Member States, especially in Italy (B).

In agreement with the above, the Court held that:[1] "An undertaking to which the State has not assigned any task and which manages private interests, including intellectual property rights protected by law, is not covered by the provisions of Article 90(2) of the EEC Treaty." This case concerned an association of authors and composers set up for the purpose of protecting and exploiting the (copy) rights and interests of its members mainly vis-à-vis broadcasting organizations and gramophone record manufacturers.

3. "Service of general economic interest"

It remains to be examined whether those undertakings which are entrusted with the organization of broadcasting by legal acts of the type described are "services of general economic interest".

It is apparent from the nature of broadcasts and programmes, their production and distribution (diffusion or transmission) that the organization of broadcasting - in particular the presentation and distribution (diffusion or transmission) of broadcasts and programmes - involves "services" within the meaning of Article 90(2).

In the Sacchi case the German Government suggested[2] that broadcasts are "services of general economic interest". This applies even to the radio and television transmission of advertisements, since radio and television advertising are possible only within the framework of more general programmes. By reason of its impact on the formation of public

206

[1] BRT v SABAM at 320, operative part, para. 2.
[2] Sacchi at 418, 429, ground 13.

opinion, the radio and television transmission of advertisements must reflect the principles governing radio and television transmission in general. The Commission rejected this suggestion.[1] Mr Advocate-General Reischl took the view that the derogation in Article 90(2) was applicable.[2]

The Court stated that what mattered was the way in which the national law was formulated:[3] "Moreover, if certain Member States treat undertakings entrusted with the operation of television, even as regards their commecial activities, in particular advertising, as undertakings entrusted with the operation of services of general economic interest, the same prohibitions apply, as regards their behaviour within the market, by reason of Article 90(2), so long as it is not shown that the said prohibitions are incompatible with the performance of their tasks."

A broadcasting undertaking may, therefore, be considered to be "entrusted with the operation of services of general economic interest". This is, however, not the case per se or in principle, but only where the relevant national law governs the services (activities) of the undertaking, i.e. the particular tasks assigned to it (Article 90(2)), in such a way that they are to be recognized under Community law as being in the general economic interest.

The fact that broadcasters are undertakings and undertakings are by definition of an economic nature (above, 1), and the further fact that broadcasting undertakings also carry on numerous economic activities, do not therefore in themselves permit the conclusion to be drawn that such economic activities are activities of general economic interest - and that the non-economic activities are activities of general economic interest. Instead, these are different questions which must be distinguished from one another.

Article 90(2) imposes two cumulative requirements: the nature of the broadcasting organization as an undertaking, i.e. as an (also) economically active entity, a participant in economic life, and the nature of the services the operation of which is entrusted to it by official act (economic activities such as commercial advertising and other activities which are economic only in so far as they are carried on for remuneration) as being in the general economic interest.

---

[1] Sacchi at 425.
[2] Sacchi at 443 to 444.
[3] Sacchi at 430, ground 15, emphasis added.

There is nothing inconsistent, therefore, in the duel approach the Court took in the Sacchi case, on the one hand acknowledging that a broadcaster is an undertaking and carries on "activities of an economic nature"[1] and, on the other, examining in addition whether its economic services (the "commercial activity, in particular advertising") are to be provided under the law in the general or individual economic interest,[2] or whether the operation of services of a non-economic nature - in particular news, entertainment and educational broadcasts - is entrusted to the broadcasting undertaking in the general economic interest or in order to promote general interests of a different type. As long ago as 1971 the Commission distinguished between services of general economic and those of general other, especially cultural and social, interest.[3]

In the Sacchi case the Court held that Article 90(2) did not apply to the Italian broadcasting undertaking RAI. The sentence quoted from the grounds, worded as it is in a conditional and abstract manner, leaves open the question whether the reason for this is that the Court did not regard RAI as being entrusted with the operation of services of general economic interest, or that it was not proved that the application of the Treaty prevented performance of the tasks assigned to RAI (below, 4). At all events, the Court held that Articles 86[4] and 7[5] are applicable to the conduct of broadcasting undertakings possessing a monopoly of television advertising (RAI), Articles 30 to 36 to their trade in television material[6] and Articles 59 to 66 to the transmission of television signals, including those in the nature of advertisements.[7]

Whether a service of general economic interest within the meaning of Article 90(2) exists depends primarily on how the individual Member State has formulated its law. It is the State that entrusts an undertaking with a specific service and thereby determines which "interest", which purpose and the "performance" of which "particular tasks" it serves.

---

[1] Sacchi at 430, ground 14, third paragraph.
[2] Sacchi at 430, ground 15.
[3] Commission Decision 71/224/EEC of 2 June 1971 - GEMA - OJ L 134, 20.6.1971, p. 15 (27 No III 2).
[4] Sacchi at 430, grounds 16-18, 432.
[5] Sacchi at 431, grounds 19 and 20, 432, operative part, para. 6.
[6] Sacchi at 427, grounds 7 and 8, 431, operative part, para. 1, second sentence.
[7] Sacchi at 427, ground 6, 431, operative part, para. 1.

Then it must be considered whether these national legal data satisfy the criteria of the Community law term. These criteria are to be inferred, not from the respective national laws, thereby differing from one Member State to another, but from the meaning of the words of which the concept, valid throughout the Community, is composed. What matters, therefore, is not national terms or descriptions, but in whose and in what interest national law entrusts the operation of the service to the undertaking. Is it an interest of the Community or of individuals, and if it is the former, is it of an economic nature?

"The Commission is responsible for determining whether or not an undertaking is entrusted with "the operation of services of general economic interest" within the meaning of the first sentence of Article 90(2) of the EEC Treaty. This can be determined only on a case by case basis."[1] Article 90(2) does not contain a general exception to the applicability of the EEC Treaty in the case of undertakings in certain fields such as broadcasting. It merely exempts from the Treaty individual service undertakings within one or other sector, each of which falls under the Treaty, in the event of a particular organization of the undertaking's activities by an act of national sovereignty, but only where and in so far as two further conditions (below, 4 and 5) are met.

The analysis in Part Four of national broadcasting legislation showed that all Member States regard broadcasting as a service of general interest and have organized it accordingly. Indeed, express mention is made in many of the laws of "general interest" (B, G, H, K), "national interest" (B), "general utility" (C), "public service" (B, D, E, G), "national service" (F), "public task" or "concern of the Community" (H, Federal Constitutional Court, Land Hessen).

The broadcasting laws of the Member States state just as clearly, however, that this public task, this public, general interest in the organization of broadcasting is not of an economic but of a social (affecting the social life of individuals) and cultural nature. Regardless of their content, broadcasts are services of general social and cultural interest because they translate into reality the rights of citizens to produce and receive radio and television communications (cf., for example, beginning of G). Every type of broadcasting activity constitutes services of an instructive, opinion-forming, entertaining or educational nature.

[1] Commission's answer to Written Question No 1197/81, OJ C 43, 17.2.1982, p. 12.

It is, to quote only a few provisions, a "public service for the dissemination of information, culture and entertainment" (E), "the provision of news, information, entertainment and art ... for the benefit of the Community" (I), and the "transmission of information and news and of works of literature and art" (K). "The programmes of the Bayerische Rundfunk are intended to educate, inform and entertain." (Section 4(1)). The rules governing Radio Bremen (Section 2(1), the Hessische Rundfunk (Section 3(2)), the Norddeutsche Rundfunk (Section 5(1)) and the Südwestfunk (Section 3(3)) are similarly worded; the laws are to be found in Part Four, under H.

Other laws express this general social and cultural interest in broadcasts in different terms and in greater detail, as in France (references at G), Italy (B), the Netherlands (C), the German Länder of Baden-Württemberg (Section 2 SDR Statute), Berlin (Section 3); North-Rhine Westphalia (Section 4) and Saarland (Section 10); cf. H.

To sum up, a detailed analysis of the laws at present in force should show that the special service provided by broadcasting, namely its transmission activity, is intended, not only to supply the population with material goods of general economic interest such as water, energy or transport services, but to satisfy its need for intangible goods of general intellectual interest, in particular instruction and knowledge, stimulus and advice, relaxation and entertainment, art and culture. These are certainly services of general, but not of general economic interest.

Even where commercial advertising in broadcasting is permitted under the laws of the Member States and has been entrusted to a broadcasting undertaking by an act within the meaning of the case-law of the Court of Justice described at 1 above (a clear conferment in this sense took place in the case of the Netherlands STER, Part Four C above), radio and television advertising has not been organized as a service of general economic interest. Although the laws assume, as in the case of other broadcasts, a general or public interest in radio and television advertising, they do so, not in relation to its economic aspects and its impact on the sale of goods and services, but in relation to the protection of the viewer from certain dangers (such as danger to health) and the protection of other broadcasts from a shortening of their duration, interruptions, etc., in other words from "commercialization". Within these legal limits drawn in the general social and cultural interest, and in the interest of health, advertisements are permitted to varying degrees, not because it is felt there is a general economic interest in them, but because individual economic interests in the marketing of goods and services, and in being informed about them, should also be given a chance.

Otherwise, the answer to the question whether a broadasting undertaking can rely on the derogation from Article 90(2) depends, not on one or other of its secondary tasks, but on its clearly-defined principal task, its "particular task" as Article 90(2) describes it. According to the case-law,[1] the activity in question must "fall within" the "special task" of the undertakings concerned, and it must, moreover, "be established that in performing such" activity "they are operating a service of general economic interest with which they have been entrusted by a measure adopted by the public authorities." The adjective "economic" thus cannot be ignored. To extend the exception to general interests of other kinds would be to disregard the Court's injunction to interpret it restrictively. (above, 2).

4. "Performance of the particular tasks assigned to them"

If a Member State organizes the diffusion of radio and television advertising and/or of other programmes by an undertaking as services of general economic interest within the meaning of Article 90(2), broadcasting undertakings "are subject" to the rules contained in the EEC Treaty "in so far as the applciation of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them". Whether, and if so, to what extent a broadcasting undertaking is subject to a rule therefore depends, according to the wording of the first sentence of paragraph 2, first of all on whether or not it is in fact applied. It must then be examined whether the broadcasting undertaking could no longer perform its tasks as a result of such application. If an in so far as this is the case, the rule in question does not apply. It is necessary to proceed accordingly with regard to the other rules. Since they serve different purposes - e.g. establishment, the movement of services, competition, etc. - their application affects the performance of the task of broadcasting undertakings differently: be it not at all, or be it favourably or unfavourably.

Article 90(2) therefore contains no unconditional exception to the Treaty as a whole for individual undertakings. Instead, it provides for a conditional exception, i.e. an exception dependent on a prior examination of the consequences of the application of the individual rules, to the validity of those rules alone which would prevent a broadcasting undertaking from performing its tasks. This must be proved by the undertaking to the Commission's satisfaction. The prohibitions provided for in the Treaty "apply, so long as it is not shown that the said prohibitions are incompatible with the performance of their tasks."[2]

---

[1] Zuchner at 2030, ground 7.

[2] Saachi at 430, ground 15.

The concept of the "particular tasks assigned" to the undertaking has no inherent substance. Instead, it is a generic term for the two types of undertaking covered by Article 90(2), namely those "entrusted with the operation of services of general economic interest" and those "having the character of a revenue-producing monopoly". As can be seen from the wording and structure of the first sentence of paragraph 2, only two formulations were chosen because the revenue-raising task of the revenue-producing monopoly had also to be covered. The particular tasks of the remaining undertakings covered by paragraph 2 therefore consist in the provision of services of general economic interest.[1]

If foreign radio and television programmes are diffused at home - be it from another Member State (freedom to provide services), or from an establishment at home (freedom of establishment) - i.e. if the relevant Treaty provisions (Articles 52 to 66) apply, domestic broadcasting undertakings will be obstructed in the continued performance of their tasks neither in law nor in fact. To deprive the broadcasting undertakings of other Member States of the fundamental rights granted to them by the EEC Treaty, it would not be sufficient that their exercise makes it more difficult for domestic broadcasting undertakings to perform their tasks.[2] According to the clear wording of the first sentence of Article 90(2), the exercise of the rights of establishment, movement of services, etc. would have to "obstruct", i.e. prevent and render impossible performance of the tasks of the domestic broadcasting undertaking. This is the case, however, neither in law nor in fact. The additional supply of foreign broadcasts and their reception at home do not prevent the presentation and transmission of domestic programmes under domestic law. On the contrary, domestic broadcasting undertakings have the same European fundamental rights in the other Member States. A mutual extension of opportunities for action takes place throughout the territory of the Community.

5. "Interests of the Community"

The derogation provided for in the first sentence is limited by the second sentence of Article 90(2): "The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

---

[1] A similar view was expressed by the Commission in its Decision 82/861/EEC of 10 December 1982 - British Telecommunications - OJ No 360 of 21.12.1982, p. 36 at p. 42, 41st recital.

[2] The Commission expressed a similar view in the abovementioned British Telecom Decision, loc. cit., p. 42, 41st and 42nd recitals. See also the Opinion of Mrs Advocate-General Rozès of 26 April 1983 in Case 78/82 Commission v Italy / 1983 / ECR .... (cyclostyled version pp. 38-39).

In this context the development of trade essentially means the movement of services. The Treaty protects the movement of services not only as an objective principle underlying the common market - and hence as a legal institution - but also as a subjective right of citizens of the Member States to freedom and equality in respect of the provision of services across frontiers - i.e. as a fundamental right.

The interests of the Community in the development of the movement of services as thus defined forms an absolute limit to the derogation provided for in the first sentence. In the event of a conflict with interests of Member States, the interests of the Community take precedence.

In the field of broadcasting, the interests of the Community consist, according to the objectives of the EEC Treaty, especially in achieving the minimum of freedom of movement for broadcasts between the Member States and of interstate freedom of transmission and reception for citizens in the Community (Articles 3(c), 59 and 62) necessary to establish a common market in this field also (Article 2) thereby promoting, in addition to the democratic economic and social objectives of the Community, closer relations between the Member States (Article 2) and laying the foundations of an ever closer union among the peoples of Europe (first paragraph of the Preamble).

II. Right of establishment and freedom to provide services (Articles 52 to 66)

We have seen under I that Article 90(2) does not restrict the application to broadcasting organizations of the rules contained in the Treaty; we must now consider whether the application of the rules on the right of establishment of broadcasters and on trade in their services may be restricted by Articles 55 and 58. There are two questions to be answered here: is broadcasting connected with the exercise of official authority in some Member States, so that the two freedoms do not there apply? And are public service broadcasters in general, as well as those broadcasting for purely commercial reasons, entitled to claim freedom of establishment and the freedom to provide cross-border services?

1. Privileged activities: broadcasting and the exercise of official authority

(a) Article 55, first paragraph, to Article 66

The first paragraph of Article 55, in conjunction with Article 66, states that the Chapters of the Treaty dealing with the right of establishment and the freedom to provide services "shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority."

The Court has interpreted this provision as follows: "Having regard to the fundamental character of freedom of establishment and the rule on equal treatment with nationals in the system of the Treaty, the exceptions allowed by the first paragraph of Article 55 cannot be given a scope which would exceed the objective for which this exemption clause was inserted."[1] The same would apply to the freedom to provide services.

The purpose of these exceptions was to enable Member States to exclude non-nationals from taking up or performing functions involving the exercise of official authority. The Court held that this need was fully satisfied "when the exclusion of non-nationals is limited to those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority. An extension of the exception allowed by Article 55 to a whole profession would be possible only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member States concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority. This extension is on the other hand not possible when within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole."[2] The same applies to other independent activities performed for remuneration.

In the absence of any harmonization of the national rules, under Article 57, "the possible application of the restrictions on freedom of establishment provided for by the first paragraph of Article 55 must ..... be considered separately in connection with each Member State having regard to the national provisions applicable to the organization and the practice of this profession. This consideration must however take into account the Community character of the limits imposed by Article 55 on the exceptions permitted to the principle of freedom of establishment in order to avoid the effectiveness of the Treaty being defeated by unilateral provisions of Member States."[3]

As Advocate-General Mayras put it, "if each State retains the power to organize a particular activity in its territory under conditions such that it is connected with the exercise of official authority, it is still necessary for this concept to receive the same definition throughout the whole Community. Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying prerogatives outside the general law, privileges of official power and powers of coercion over citizens. Connection with the exercise of this authority can therefore arise only from the State itself, either directly or by delegation to certain persons who may even be unconnected with the public administration. In this respect Article 55 must be compared with Article 48(4), the objective of

---

[1] Reyners, at 654, ground 43.
[2] Reyners, grounds 45 to 47.
[3] Reyners, grounds 49, 50.

which, as you have seen in the ..... case of Sotgiu,[1] is to allow Member States to restrict the admission of foreign workers to certain activities in the public service which involve the exercise of powers of the State. The objective of Article 55 is very similar ....."[2]

If we consider the Member States' law in the light of the first paragraph of Article 55, we find that broadcasting has a private character even under national law in Luxembourg (Part Four, under A), in Italy (as regards local radio, Part Four, B), the Netherlands (C, with the possible exceptions of NOS and STER), partly in the United Kingdom (E), and more recently partly in France (G). Cable services are wholly or partly private in Italy (B), Belgium (D), Ireland (F) and Denmark (I). The first paragraph of Article 55 raises no difficulty here: it does not provide for any restriction on the fundamental European freedoms going beyond what may be rendered possible by the laws of the individual State. And in any event the fact that the broadcasters concerned hold concessions or licences from the State does not constitute sufficient grounds for considering the activity they carry on under the concession or licence to be "connected with the exercise of official authority".

The same applies even where broadcasting bodies are set up by the State or a regional or local authority by law (or by order or charter or State contract), as was done in Belgium, Denmark, France, Germany, Greece and Ireland, and partly in the Netherlands and the United Kingdom (Part Four, C to K). The creation by law of the foundations or corporations here concerned does represent the exercise of official authority, but it does not follow that the activities carried on by the broadcasters on the basis of the law are "connected with the exercise of official authority" within the meaning of the paragraph. It is not sufficient that the activity has some close link with official authority; the activity must itself be connected with the exercise of official authority, which means that the person concerned must by his activity participate in the exercise of official authority. This is clearest from the French and Italian versions of the paragraph. Whether or not a broadcasting organization participates in the exercise of official authority in this way will depend on the legal nature of its activity, meaning the means of action available to the legal persons, whether set up under public or private law.

Nor is this situation affected even where individual States or regional authorities grant a broadcaster a monopoly by law (see Part Four), or give it monopoly or oligopoly status in practice. Here too official authority is exercised in the grant of a monopoly or refusal to establish competing broadcasters, but not necessarily in the monopoly activity then carried on.

If we now consider how the activity carried on by broadcasters is to be described, we may note first of all that the broadcasting legislation in Denmark (Part Four, I) Greece (as regards ERT 1, K),

---

[1] Case 152/72 / 1974 / ECR 153.

[2] Opinion in Reyners, at 664-665. The Commission took the same view (at 640-641).

the Netherlands (as regards NOS and STER, C, and most of the German Länder, (H),[1] confines itself to conferring duties and functions on the bodies it sets up, without making any explicit statements as to the public or private nature of those duties or functions.

The German Federal Constitutional Court has held that the fundamental freedom of broadcasting requires that there be no State involvement in the organization of broadcasting, and that all social forces of consequence should participate. Broadcasting, it said, could be organized by associations of broadcasters set up under public law or, in certain conditions, under private law.[2] The organization of broadcasts was however a public function in the sense of a function of the public administration.[3] Elsewhere the Constitutional Court held that the Länder had transferred to the public-law bodies they had set up by legislation a function of public administration which they themselves could not perform directly, because of the requirement that broadcasting be free of State involvement. The activities of these broadcasting bodies thus belonged to the sphere of public law.[4]

The following broadcasting legislation describes the functions it transfers as a "public service": the Belgian legislation governing BRT, RTBF and BRF (Part Four, D); the French legislation governing TDF, INCA, the limited companies TF 1, A 2, FR 3, the regional television companies, the television production company and the marketing company (G); the Italian legislation governing the RAI (B); and the United Kingdom legislation governing the BBC and the IBA (E). The French 1982 Act describes TDF and INCA as "établissements publics à caractère industriel et commercial" (public establishments of an industrial and commercial character).

On the wording of the first paragraph of Article 55 and its interpretation by the Court of Justice, however, the question whether and to what extent the fundamental European rights of freedom of establishment and freedom to provide services can be restricted in a Member State does not depend on whether or in what way the respective domestic law describes a particular self-employed activity (considered as a whole comprising a number of activities belonging to it), or where it places such an activity in its legal system, or what legal form it gives to the body carrying this activity on. The paragraph does not relate to the type of functions involved (public or private, public-law or private-law, public administration or private management) or the status of the person concerned (a person governed by public or private law); it relates only to a particular aspect of what that person does. The sole question is whether the domestic broadcasting law has so designed certain broadcasting activities that "taken on their own /they/ constitute a direct and specific connection with the exercise of official authority", as the Court put it in Reyners.

---

[1] An exception is Hesse, where broadcasting is stated to be a public matter in Section 3(1) of the Hesse Broadcasting Act of 2 October 194 published in Gesetz- und Verordnungsblatt Hessen p. 123.

[2] Judgment of 28 February 1961, published in Entscheidungen des BVerfG 12, 205, 259-263.

[3] Loc. cit. 243-246.

[4] Judgment of 27 July 1971, published in Entscheidungen des BVerfG 31, 314, 329.

Under the rules laid down by States broadcasters are required to disseminate information, education and entertainment. To this end they are authorized and required to carry out the following main activities (for more detail see Part Four). They organize live broadcasts. They produce other programmes, or parts of programmes, or have them produced. They broadcast their programmes or in some cases transmit them by cable. For these purposes they set up, maintain or use transmission facilities, departments or separate firms for the production of programmes, and studios for the organization of broadcasts. They plan the individual broadcast items, design or select them, combine them into their general programmes and supervise their execution in accordance with criteria laid down by law.

In carrying on all these activities[1] broadcasting organizations do not act as authorities or as offices or indirect agencies of the State or some regional authority, but as corporations, established under public or private law, operating for their own account and independent of the State. They are not placed over the people they deal with (those receiving their programmes, those contributing to their broadcasts, and the suppliers and producers of programmes, premises and equipment); they deal with them in the ordinary way, at the same level. They do not act as authorities, issuing orders and exercising compulsion; they use the means available in private law. Indeed they are not entitled to exercise powers of a public-law nature over citizens, namely to intervene in the citizens' private sphere, to address binding legal acts to them, or to exercise compulsion.[2] In their varied activities broadcasters have no powers, prerogatives or privileges to call on in their dealings with citizens. They supply no services which listeners or viewers are required to take by law, by order of some authority, or even by order of the broadcasting body itself.

Thus in the domestic law of the Member States practically none of the many individual activities engaged in by broadcasters has a direct and specific connection with the exercise of official authority such as would be caught by the first paragraph of Article 55, and it follows that the activity of broadcasting as a whole is not connection with the exercise of official authority.[3]

As we have seen, the concept in Community law does not mean the same thing as performing a public service, or a service governed by public law, or a function of the public administration. These concepts are broader. They may involve the exercise of official authority; but they need not necessarily do so. The exercise of official authority contemplated in the first paragraph of Article 55 is just one way, the most forceful way, in which a public function may be performed. Other instruments are those we have set out above.

---

[1] The Greek ERT 2 is still an independent authority, see Part Four, K.

[2] An exception is the power conferred on the three Belgian bodies and RTE in Ireland to acquire land by compulsory purchase where necessary (see Part Four, D and F).

[3] The power of compulsory purchase of land which exists in two Member States is a marginal part of broadcasting activities as a whole, and easily "separable", in the words of the Court.

They derive primarily from private law, and may confer an "industrial and commercial character" even on bodies established under public law, as is done explicitly in the French Broadcasting Act of 1982.

(b) Article 55, second paragraph, and Article 66

Some of the individual activities comprised in a self-employed activity as a whole may be connected with the exercise of official authority in one Member State, but not in the others; and in that case Article 55, first paragraph, and Article 66 have the effect that the right of establishment and the freedom to provide services apply only in those other Member States. It may be made difficult or impossible for non-nationals to pursue such an activity in the first Member State, while its own nationals have free access to the rest of the Community. Unequal treatment of this kind, with two fundamental freedoms being partly deprived of their force, could be a source of disturbances or difficulties in the Community. The second paragraph of Article 55 therefore provides that "the Council may, acting by a qualified majority on a proposal from the Commission, rule that the provisions of this Chapter shall not apply to certain activities." As we have seen under (a), broadcasting comprises practically no activities which have a direct and specific connection with the exercise of official authority, so that the Commission is not faced with the question whether or not it should make use of its powers under this paragraph. It has never done so in any matter to date.

2. Exempted broadcasting organizations

(a) Persons and forms of organization caught (Articles 52, 58 59 and 66)

The EEC Treaty states that nationals of Member States are entitled to establish themselves in another Member State (Article 52, first paragraph, first sentence). They may establish themselves in the other Member State (first sentence) and carry on a self-employed activity there, or they may set up agencies, branches or subsidiaries there (second sentence). They may set up and manage undertakings there, in particular companies or firms within the meaning of the second paragraph of Article 58 (Article 52, second paragraph).

The EEC Treaty applies to suppliers of services who are nationals of Member States established in the Community (Article 59, first paragraph); acting unanimously on a proposal from the Commission, the Council may also decide that it is to apply to nationals of a third country who provide services and who are established within the Community (second paragraph).

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States (Article 58, first paragraph). This provision forms part of the Chapter on freedom of establishment, but is applied in the Chapter on services by Article 66.

The same Article 66 likewise applies the definition of the companies and firms given in the second paragraph of Article 58. That definition reads: "Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are not profit-making."

The concep. of companies or firms is defined as broadly as possible in this paragraph. It comprises all forms of companies which exist in the law of the Member States. These include public limited companies, associations, foundations, corporations and other bodies governed by public law.

(b) Broadcasting companies and profit-making activities (Article 58, second sentence)

However, the second sentence means that companies in any of these forms enjoy freedom of establishment and freedom to provide services only provided they are carried on with a view to profit.

As we have seen in Part Four, this is without any doubt the case with RTL (A); with the 15 UK programme contractors, their joint subsidiary ITN, and the TV-AM company (E); with the French marketing company (G); with the Italian RAI's subsidiaries SIPRA and SACIS (B); with the nine advertising companies of the German Land broadcasting organizations (H); and with a large number of privately-owned cable television companies (A to F). They therefore have the right of establishment and the right to supply their services freely within the Community.

The eight Dutch private-law broadcasting associations and foundations, along with NOS and STER, which are public-law foundations, may make profits only provided these are devoted to performing their broadcasting function (for more details, see C). Can they be considered profit-making within the meaning of the second paragraph of Article 58?

The situation is similar with the following organizations which are also non-profit-making in the sense that they operate without a view to making a profit for their owners: in Italy the RAI (B); in Belgium BRT, RTBF and BRF (D); in Denmark DR (I); in Germany BR, HR, NDR, RB, SR, SFB, SDR, SWF, WDF, ZDF (H); in France TDF, INCA, TF 1, A 2, FR 3, the regional television companies, and the television production company (G); in Greece ERT 1 (K); in Ireland RTE (F); and in the United Kingdom the BBC and IBA (E).

These "companies", in the terminology of the second paragraph of Article 58, do however pursue another important commercial objective which does represent a view to profit, in the sense of a desire to cover the costs of their own financing, particularly from advertising (whether directly, or through the profits made by their subsidiaries and accruing to them, or through the payments made to them by programme contractors); from the exploitation of their productions and their copyrights and other rights by outside parties; from investments; from publications; and from public events. Can the objective of acquiring money in this way, where no financial gain to the owners is intended, be considered a desire to make a profit for purposes of the second paragraph of Article 58?

The expression "non-profit-making" is not intended literally. It is not to be interpreted in a technical sense derived from company law, but rather in harmony with the other provisions of the two Chapters and with the objectives of the Treaty. It is a concept of Community law with its own meaning, and not a concept of domestic law whose meaning may vary from one Member State to another.

This is clear first of all from the second paragraph of Article 58 itself. Cooperative societies, for example, operate without a view to profit for

purposes of the law of the Member States, and this might otherwise be taken to mean that they have no freedom of establishment or freedom to provide services. But they do enjoy both freedoms: the paragraph specifically includes them. Thus the expression "non-profit-making" has another, broader meaning.

The meaning is that the company must pursue a commercial or commercially relevant objective, not in the technical sense that its legal form or founding documents require it to operate with a view to gain, but rather in the sense that it takes part in commercial life, that it carries on an economic activity. Its objective as laid down by law or its founding documents might have to do with information culture, or sport, for example; but once this is linked to a commercial or commercially relevant activity, the company is within the scope of the Treaty.

It makes no difference whether the objective laid down by law or in the founding documents is of a public or private nature, whether it is in the interests of the general public or of individuals, whether it is pursued in the general interest or out of self-interest. The second paragraph of Article 58 also specifically includes all forms of corporation governed by public law, so that such corporations too enjoy freedom of establishment and freedom to supply services.

Secondly, this view of the meaning of the words "non-profit-making" is also supported by the link which exists between Articles 58 (and 66), 52 and 60. The second paragraph of Article 52 states that "freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58 ...". The right of establishment is thus not confined to the companies and firms referred to in Article 58, but explicitly includes all undertakings whether they are non-profit-making or not, and regardless of whether they are publicly or privately owned. Article 90(1), which explicitly states that public undertakings and undertakings to which Member States grant special or exclusive rights are within the scope of the EEC Treaty as a whole, confirms this. The Treaty defines its scope in terms of economic fact, and not in terms of legal distinctions.

Although the Danish version uses words suggesting commercial activities, the other versions speak only of activities, so that there is no reference to a commercial purpose. It is not disputed that the right of establishment does apply to activities which are not aimed at profit maximization but which are nevertheless expected to provide an income (namely the professions), or which are in fact for the general benefit but which are regularly carried on for consideration, or which are carried on for consideration partly by persons who are acting with a view to gain and partly by persons who are not and who may well be in competition with those who are.

Thirdly, in line with this interpretation of Article 52, all versions of the first paragraph of Article 60 define the services within the scope of the EEC Treaty as those which "are normally provided for remuneration". Services may be provided for remuneration by companies and firms operating without a view to profit. But no one has yet denied such companies or firms the right to supply their services free in the Community. In the established case law of the Court the Treaty is to be interpreted in such a way that it is not partly or entirely deprived of practical effect (the rule of effectiveness, règle de l'effet utile, Effektivitätsgrundsatz).

220

Fourthly and lastly, the interpretation of the second paragraph of Article 58 put forward here is in line with the general objectives of the EEC Treaty. The Court of Justice has held: "Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty. When such activity has the character of gainful employment or remunerated service, it comes more particularly within the scope, according to the case, of Articles 48 to 51 or 59 to 66 of the Treaty."[1] An activity is thus an economic activity when it is carried on for gain. The Court made this particularly clear in the Donà case where, after saying that the practice of sport was subject to Community law only in so far as it constituted an economic activity, it sent on: "This applies to the activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated service."[2] The same must apply to journalistic activity (reporting and commenting) and to cultural activity (of an artistic/entertainment nature).

The details provided in Part Four show that the organization of broadcasts is not only a social and cultural activity in the Member States, but is also an "economic activity" within the meaning of Article 2 of the EEC Treaty. Firstly, broadcasters make their transmissions for remuneration (cf. above, A I 2). Secondly, as we said in Part Four, the production of programmes, the organization of live broadcasts and their transmission also imply a considerable level of economic activity. This is particularly relevant in the case of transmissions and programmes with no commercial content. The production of programmes and organization of broadcasts, mobilizing the staff and the technical and financial resources needed for each item, may well come under other headings too, but irrespective of the content of the broadcasts it is an economic activity.

Thus the EEC Treaty applies to the activities of broadcasters, which together constitute a self-employed activity for purposes of Articles 52 and 66. Subject to Article 90(1) (see C V 3 above), it confers the right of establishment in the other Member States on the associations, companies, corporations, institutes and foundations discussed in Part Four. In particular they are entitled to set up agencies, branches, subsidiaries and other undertakings there (Article 52). They are also entitled to supply their services, i.e. to broadcast their programmes, across the Community's internal frontiers (Articles 59 and 62). "In order to make it easier" for broadcasters to exercise their freedom to supply services and their freedom of establishment (Article 57(1) and (2) and Article 66), the Treaty prescribes "the coordination of the provisions laid down by law, regulation or administrative action in the Member States concerning the taking up and pursuit of activities as self-employed persons" (Article 57(2) and Article 66), which thus include the activity of broadcasting.

---

[1] Case 36/74 Walrave [1974] ECR 1405: at 1422, operative part, para. 1; at 1417, grounds 4 and 5 (cycling); Case 13/76 Donà [1976] ECR 1333, [2] 1340, grounds 12 and 13 (football).

[2] Donà, ground 12.

In line with this conclusion, the Court held in the Sacchi[1] and Debauve[2] cases that the broadcasting of television signals, including those in the nature of advertisements, and the transmission of such signals by cable, comes, as such, within the rules of the Treaty relating to services (Articles 59 to 66).

222

[1] Case 155/73 [1974] ECR 409, 432, operative part, para. 1.
[2] Case 52/79 [1980] ECR 833, 855 (ground 8).