OPINION OF ADVOCATE GENERAL JACOBS
delivered on 24 November 1994 *

1. Leclerc-Siplec distributes petrol and other fuels at service stations in France. The service stations are, it appears, integrated into supermarkets operated by the same group under the name E. Leclerc. Leclerc-Siplec asked the French television advertising companies TF1 Publicité and M6 Publicité to broadcast an advertisement for its petrol stations on television. TF1 Publicité and M6 Publicité refused on the ground that a provision of French law — namely Article 8 of Decree No 92/280 of 27 March 1992 — prevents the distribution sector from advertising on television. That provision also prohibits the advertising on television of alcoholic beverages with an alcohol content in excess of 1.2 degrees, literary publications, the cinema and the press. It appears that one of the main purposes of the prohibition is to protect France's regional daily press by forcing the sectors in question to advertise in regional daily newspapers rather than on television.

2. Leclerc-Siplec commenced proceedings against TF1 Publicité and M6 Publicité in the Tribunal de Commerce de Paris. It invited that court to seek a preliminary ruling from the Court of Justice on the question whether a provision of national law excluding the distribution sector from television advertising is compatible with certain provisions of the Treaty and with the provisions of the Council Directive known as 'Television without frontiers' (Directive 89/552/EEC). [1] The defendants were in agreement that the matter should be referred to the Court of Justice but TF1 Publicité asked for the scope of the question to be widened, so as to ascertain whether 'whole sectors of economic activity' (i. e. not just the distribution sector) can be excluded from television advertising.

3. It may be noted that Leclerc-Siplec also argued, before the national court, that the contested prohibition was contrary to Article 10 of the European Convention on Human Rights, which protects the right to freedom of expression.

1 — Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L 298, p. 23.

* Original language: English.

4. By judgment of 27 September 1993, the Tribunal de Commerce referred to the Court of Justice the question:

'Whether Articles 30, 85, 86, 5 and 3(f) of the EEC Treaty and Directive 89/552 of 3 October 1989 are to be interpreted as prohibiting a Member State from banning, by statute or by regulation, televised advertising in respect of certain sectors of economic activity, in particular the distribution sector, and more generally whether Article 8 of the decree of 27 March 1992 may be considered compatible with the aforesaid provisions.'

Admissibility

5. The Commission suggests that the reference may be inadmissible because the parties are in agreement about the result to be obtained, namely a reference to the Court of Justice leading to a finding that the contested decree is contrary to Community law. There is thus no dispute between the parties and the Court is being called upon to give an advisory opinion on general questions of law. The Commission cites *Foglia* v *Novello* (No 2), [2] *Meilicke*, [3] *Lourenço Dias* [4] and *Telemarsicabruzzo*. [5]

6. It is clear from the cases cited by the Commission that the Court does not have jurisdiction to deliver advisory opinions on general or hypothetical questions. It is also clear from *Foglia* v *Novello* (Nos 1 and 2) that the Court will in certain circumstances refuse to entertain a request for a preliminary ruling on the ground that Article 177 of the Treaty is being used as a 'procedural device' [6] or an 'artificial expedient' [7] by parties who are in complete agreement with each other and engage in contrived litigation in order to obtain a preliminary ruling establishing that national legislation is incompatible with Community law.

7. In *Foglia* v *Novello* (No 1) an Italian court referred a number of questions designed to ascertain, essentially, whether the French legislation on the taxation of liqueur wines was contrary to Articles 92 and 95 of the Treaty. The Court of Justice held that it had no jurisdiction to rule on the questions submitted by the Italian court, on the grounds that there was no genuine dispute between the parties, that the litigation between them was contrived and that to give a preliminary ruling in such circumstances would 'jeopardize the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty'. [8]

2 — Case 244/80 [1981] ECR 3045; see also Case 104/79 *Foglia* v *Novello* (No 1) [1980] ECR 745.

3 — Case C-83/91 [1992] ECR I-4871.

4 — Case C-343/90 [1992] ECR I-4673.

5 — Joined Cases C-320/90, C-321/90 and C-322/90 [1993] ECR I-393.

6 — *Foglia* v *Novello* (No 2), cited in note 2, paragraph 18 of the judgment.

7 — *Foglia* v *Novello* (No 1), cited in note 2, paragraph 10 of the judgment.

8 — *Foglia* v *Novello* (No 1), cited in note 2, paragraph 11 of the judgment.

8. There is an obvious similarity between that case and the one now before the Court. In the present case the parties are in agreement about the legal issues that have been raised and their sole purpose in conducting litigation is to obtain a preliminary ruling establishing that certain provisions of national law are contrary to Community law. There is, however, also an important difference between the two cases. In *Foglia* v *Novello* the parties were challenging the compatibility with Community law of a French law before an Italian court. In the present case the parties are challenging the validity of a French law before a French court.

9. It is clearly essential that individuals whose rights are adversely affected by the legislative or administrative acts of a Member State should be able to challenge those acts in judicial proceedings and to invoke, where appropriate, Community law, including the possibility of a reference under Article 177 of the Treaty; it is also important that the Member State concerned should have adequate opportunity to defend those acts. It is desirable therefore that such challenges should be mounted in the Member State whose legislation or administrative practice is called in question. If the proceedings took place in another country, the Member State in question might not even be aware of their existence and might in any event have difficulty in organizing its defence. The fact that the legislation of one Member State was being challenged in the courts of another Member State appears to have influenced the Court's decision to reject the reference in *Foglia* v *Novello* as inadmissible, [9] although in other cases the Court has not rejected a reference on that ground. [10]

10. I do not think that *Foglia* v *Novello* established a general rule that a reference is inadmissible simply because the parties are in agreement about the need for a reference, about the questions to be referred and about the answers to those questions. If under the procedural law of a Member State non-hostile litigation is a permissible way of bringing an issue before the courts, it would not be appropriate for the Court of Justice to interfere with the procedural autonomy of that Member State by holding that such litigation cannot lead to a reference to the Court under Article 177 of the Treaty. The French Government, which submitted written observations in these proceedings and was represented at the hearing, has not objected to the procedure and has not suggested that it has been prevented from defending the contested decree as a result of the way in which the litigation has been conducted.

11. I therefore consider that the reference should not be dismissed as inadmissible.

9 — See paragraphs 28 to 30 of the judgment in *Foglia* v *Novello* (No 2), cited in note 2.

10 — See for example Case C-150/88 *Parfümerie-Fabrik 4711* v *Provide* [1989] ECR 3891, paragraphs 11 and 12 of the judgment.

The scope of the question referred

12. The question referred by the French court suggests three ways in which the contested decree might be incompatible with Community law. First, it may constitute a measure equivalent in effect to a quantitative restriction on imports contrary to Article 30 of the Treaty; secondly, it may be contrary to the competition rules laid down in Articles 85 and 86 of the Treaty, read together with Article 5; thirdly, it may be inconsistent with the terms of Directive 89/552.

13. The referring court has not raised the issue of the compatibility of the contested legislation with Article 52 of the Treaty, which requires the abolition of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State, or with Article 59 of the Treaty, which requires the abolition of restrictions on the freedom to provide services within the Community. Nor does the question raise directly the issue of commercial free speech under Article 10 of the European Convention on Human Rights. It is, however, clear from the order for reference that Leclerc-Siplec invoked that provision before the national court. It may also be noted that the eighth recital in the preamble to Directive 89/552 states that the freedom to provide services in the field of television broadcasting is a specific manifestation of the principle of freedom of expression laid down in Article 10 of the Convention.

14. In view of the terms of the question referred I will not deal with Article 59 of the Treaty, which certainly applies to restrictions on television advertising, [11] or with the issue of commercial free speech under Article 10 of the Convention. On the latter point I will merely note that, if the restrictions in question were held to fall within the scope of Community law, the Court would have jurisdiction to examine their compatibility with the Convention. [12]

15. I therefore consider it appropriate to concentrate on the three issues directly raised by the national court as set out in paragraph above.

16. The question formulated by the national court raises the issue of the compatibility with Community law of a prohibition on television advertising not only as regards the distribution sector but also as regards the other sectors of economic activity excluded

11 — See Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833; Case 352/85 *Bond van Adverteerders* v *Netherlands* [1988] ECR 2085; Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007.

12 — Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 42 of the judgment.

by the legislation in question. The Commission contends that the issue raised by the French court is entirely hypothetical as regards the exclusion from television advertising of those other sectors of economic activity. The Commission implies that, if the Court admits the reference, it should confine itself to considering the validity of the contested legislation only in so far as the prohibition of television advertising for the distribution sector is concerned.

17. The Commission's view has much to commend it, and I propose to concentrate on the distribution sector, confining myself to certain general comments on the other sectors.

18. In what follows I shall deal successively with the free movement of goods, the interpretation of Directive 89/552 and the competition rules of the Treaty. It is appropriate first, however, to address briefly the significance of advertising, so that the significance of restrictions on advertising can be properly assessed.

The role of advertising

19. In a developed market economy based on free competition the role of advertising is fundamental. Advertising is the means by which manufacturers and distributors of goods, and providers of services, seek to persuade consumers that their goods or services are worth buying. As was stated in a leading case in the United States Supreme Court, 'So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.' [13]

20. Advertising plays a particularly important part in the launching of new products. It is by means of advertising that consumers can be induced to abandon their existing brand loyalties and make a sample purchase of a different manufacturer's goods. Without advertising consumers would tend to go on buying the goods that they are familiar with and it would be difficult for manufacturers to persuade retailers to stock unknown brands that could not be promoted by means of advertising. Without advertising it would be much easier for established manufacturers to retain their existing market share, because prospective market entrants would find it difficult to gain a foothold. In short, advertising injects greater fluidity and mobility into the economy and enhances competitiveness. A ban on advertising tends to crystal-

13 — *Virginia State Board of Pharmacy* v *Virginia Citizens Consumer Council* 425 US 748, 48 L Ed 2d (1976).

lize existing patterns of consumption, to ossify markets and to preserve the *status quo*.

21. These findings have important implications for the basic freedoms created by Community law. In markets that are still, notwithstanding the process of economic integration initiated by the Treaty, to a large extent divided and compartmentalized along the lines of national frontiers, it is likely that the established brands will predominantly belong to domestic producers. Without advertising it would be extremely difficult for a manufacturer located in one Member State to penetrate the market in another Member State where his products have not previously been sold and so enjoy no reputation among consumers. Thus measures that prohibit or severely restrict advertising tend inevitably to protect domestic manufacturers and to disadvantage manufacturers located in other Member States. Such measures prevent the interpenetration of markets and are inimical to the very concept of a single market. The Court should therefore be extremely vigilant when appraising the compatibility with Community law of restrictions on advertising.

22. The recognition that freedom to advertise is an essential corollary to the fundamental freedoms created by the Treaty does not of course mean that Member States are prevented from regulating and restricting advertising. On the contrary, Article 36, supplemented by the case-law on 'mandatory requirements', provides ample scope for Member States to subject advertising to reasonable restrictions. These may be based *inter alia* on the protection of health, public morality, consumer protection and fair trading, and protection of the environment. There is thus no reason to fear that by recognizing a general principle of freedom to advertise the Court will deprive Member States of the power to curb the worst excesses of the advertising industry.

The free movement of goods

(a) *The case-law on Article 30 prior to the Keck judgment*

23. Article 30 of the Treaty prohibits — subject to certain exceptions laid down in Article 36 — quantitative restrictions on trade between Member States and measures having equivalent effect. The concept of measures having equivalent effect to a quantitative restriction has been broadly construed by the Court. In *Dassonville* [14] the Court held that:

'All trading rules enacted by Member States which are capable of hindering, directly or

14 — Case 8/74 [1974] ECR 837.

indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.'

24. Until the *Keck* judgment, [15] which I will consider below, it was a well established and fundamental principle that a measure does not lie outside the scope of Article 30 simply because it applies without distinction to domestic and imported products. In *Rewe-Zentral* v *Bundesmonopolverwaltung für Branntwein* [16] (commonly known as the 'Cassis de Dijon' judgment) the Court held that, where a product has been lawfully marketed in one Member State, its sale in another Member State cannot be prevented on the ground that it does not comply with the legislation of that other State, unless such a restriction is justified in order to satisfy mandatory requirements relating, in particular, to consumer protection and fair trading.

25. The importance of the 'Cassis de Dijon' principle cannot be overstated: if a Member State were allowed to prevent the importation and sale of products lawfully manufactured in another Member State, simply because they were not made in the manner prescribed by the law of the importing State, there would be no such thing as a common market, at least until all legislation governing such things as the composition, packaging and labelling of goods had been harmonized.

26. More difficult questions arise when national legislation, instead of simply prohibiting the sale of certain goods lawfully marketed in another Member State, restricts the circumstances in which certain goods — or indeed all goods — may be marketed. Such legislation is sometimes referred to as rules stating when, where, how, by whom, and at what price goods may be sold. [17] This type of legislation does not normally have such an obvious propensity to interfere with the free movement of goods as legislation of the type at issue in 'Cassis de Dijon'. But it would be wrong to say that such legislation has no effect on trade between Member States. The effect may indeed be very significant. For example, legislation under which parapharmaceutical products may be sold only in pharmacies may, by severely restricting sales outlets, substantially restrict the access to the market of goods from other Member States. The same is true of legislation under which alcoholic beverages may be sold only in licensed stores for consumption off the premises.

15 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

16 — Case 120/78 [1979] ECR 649.

17 — See White, 'In search of the limits to Article 30 of the EEC Treaty', *Common Market Law Review* 1989, 235.

27. In a number of cases decided in the 1980s and early 1990s the Court grappled with the problems posed by national measures which restrict the circumstances in which goods may be marketed. The Court's approach was not always consistent and two contradictory tendencies emerged in the case-law. In some cases the Court interpreted the scope of Article 30 narrowly: for example, it held in *Oebel* [18] that trade between Member States was not restricted, within the meaning of that provision, by legislation which prohibited the delivery of bakery wares to retailers between certain hours, since deliveries to wholesalers were permitted. In *Blesgen* [19] the Court held that a prohibition on the sale of strong alcoholic beverages in bars and restaurants was not of such a nature as to impede trade between Member States and in *Quietlynn* [20] it reached a similar conclusion with regard to a law prohibiting the sale of pornography except in licensed 'sex shops'.

28. More frequently, in relation to measures regulating marketing, the Court has interpreted the scope of Article 30 broadly. The first such case, *Oosthoek*, [21] concerned a Netherlands law which prohibited the offering or giving of products as free gifts within the framework of a commercial activity. A company that marketed encyclopaedias in the Netherlands and Belgium was prosecuted for offering gifts such as a dictionary or atlas to purchasers of its encyclopaedia. The Court held that:

'Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. The possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction.'

The Court then proceeded to enquire, as in the 'Cassis de Dijon' case, whether the obstacle to imports was justified in order to satisfy mandatory requirements relating to consumer protection or fair trading. It con-

18 — Case 155/80 *Oebel* [1981] ECR 1993.

19 — Case 75/81 *Blesgen* v *Belgium* [1982] ECR 1211.

20 — Case C-23/89 *Quietlynn* v *Southend Borough Council* [1990] ECR I-3059.

21 — Case 286/81 [1982] ECR 4575.

cluded that legislation of the type in issue was justified on those grounds.

29. A similar approach was adopted in *Buet*, [22] in which the Court had to consider a French law which prohibited the door-to-door selling of educational material. Mr Buet was prosecuted for using that sales method to market a language course manufactured in Belgium. The Court held that such a law might impede imports but was justified in order to satisfy mandatory requirements relating to consumer protection.

30. A similarly broad view of the prohibition laid down in Article 30 was taken in a number of cases concerning advertising rules. For example, in *Aragonesa de Publicidad* [23] the legislation in issue prohibited the advertising of beverages having an alcoholic strength of more than 23 degrees in the media, on streets and highways, in cinemas and on public transport. Although the legislation was found to be non-discriminatory, the Court held that the legislation might constitute a hindrance to imports and must in principle be regarded as a measure having equivalent effect within the meaning of Article 30.

31. *GB-INNO-BM*, [24] *SARPP* [25] and *Yves Rocher* [26] all concerned rules regulating the content of advertising material. In *GB-INNO-BM* the operator of supermarkets in Belgium distributed advertising leaflets both in Belgium and in Luxembourg. The leaflets complied with Belgian law but not with the law of Luxembourg. The Court considered that, if the Belgian supermarket operator were required to adapt its advertising leaflets in accordance with the law of Luxembourg, that would constitute a measure having equivalent effect. The Court expressly rejected the argument that Articles 30 to 36 were not concerned with rules on advertising. In doing so it repeated the statement first made in *Oosthoek* to the effect that legislation which restricts advertising may restrict the volume of trade between Member States because it affects marketing opportunities for imported products. [27] In *SARPP* proceedings were brought against a number of companies which imported or marketed artificial sweeteners in France. The relevant French law prohibited any reference in the advertising of artificial sweeteners to sugar or to the physical, chemical or nutritional properties of sugar. The Court held that an obstacle to imports might ensue if a producer were compelled to modify the form or content of an advertising campaign or to discontinue an advertising scheme which he considered to be particularly effective. [28] In *Yves Rocher* proceedings were brought against a French firm for distributing in Germany catalogues and brochures which infringed a German law prohibiting eye-catching price comparisons. Such a law was held by the Court to be a measure having equivalent effect.

22 — Case 382/87 [1989] ECR 1235.

23 — Joined Cases C-1/90 and C-176/90 [1991] ECR I-4151; see also Case 152/78 *Commission* v *France* [1980] ECR 2299, in particular at paragraph 11 of the judgment.

24 — Case C-362/88 [1990] ECR I-667.

25 — Case C-241/89 [1990] ECR I-4695.

26 — Case C-126/91 [1993] ECR I-2361.

27 — Paragraph 7 of the judgment in *GB-INNO-BM*.

28 — Paragraph 29 of the judgment.

32. In *GB-INNO-BM*, *SARPP* and *Yves Rocher* the Court proceeded on the basis that the obstacle to trade between Member States was due to disparities in national law. It then applied a principle similar to the one formulated in 'Cassis de Dijon', namely that a trader who produces advertising material in accordance with the law of one Member State should be able to use it in other Member States, unless the imperative requirements of consumer protection and fair trading dictate otherwise. If traders had to modify their publicity brochures in accordance with the legislation of each Member State, they would incur the same sort of additional burden that is imposed when the goods themselves have to be modified.

33. A different approach (or series of approaches) was adopted in a number of cases [29] dealing with restrictions on Sunday trading. The position was summarized in *Stoke-on-Trent Council* v *B&Q*, where the Court confirmed that rules restricting the opening of shops on Sundays pursued an aim which was justified under Community law and that such rules were not prohibited by Article 30 where the restrictive effects on Community trade which might result from them did not exceed the effects intrinsic to trading rules. The Court held that the restrictive effects on trade of national rules prohibiting shops from opening on Sundays were not excessive in relation to the aim pursued. In reaching that view the Court stated that:

'Appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods. In that regard, in order to verify that the restrictive effects on intra-Community trade of the rules at issue do not exceed what is necessary to achieve the aim in view, it must be considered whether those effects are direct, indirect or purely speculative and whether those effects do not impede the marketing of imported products more than the marketing of national products.' [30]

(b) *The judgments in* Keck *and* Hünermund

34. Last year's judgment in *Keck* [31] represented an attempt by the Court to remove

29 — Case C-145/88 *Torfaen Borough Council* v *B&Q* [1989] ECR 3851; Case C-312/89 *Conforama and Others* [1991] ECR I-997; Case C-169/91 *Stoke-on-Trent Council* v *B&Q* [1992] ECR I-6635.

30 — Paragraph 15 of the judgment in *Stoke-on-Trent Council* v *B&Q*, cited in note 29.

31 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard*, cited above in note 15.

some of the confusion created by the contradictions in the previous case-law. As is apparent from the judgment itself, the Court was concerned to discourage what it regarded as excessive resort to Article 30. The Court, having reaffirmed 'Cassis de Dijon' in relation to measures laying down requirements to be met by the goods in question (such as requirements as to designation, form, size, weight, composition, presentation, labelling, packaging), held that a law prohibiting the resale of goods at a loss by retailers lay outside the scope of Article 30, observing that:

'... contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.' [32]

The *Keck* judgment has subsequently been applied in a number of cases of which the only one which need be considered here is *Hünermund*. [33] The effect of the *Keck* judgment is still uncertain: perhaps it is best understood as excluding from the scope of Article 30 only measures of an entirely general character which do not preclude imports, which operate at the point of sale, and which have no effect on trade other than to reduce the overall quantity of goods sold and which in doing so affect imports and domestic products alike.

35. In *Hünermund* the Court applied the *Keck* judgment to a restriction on advertising. The case concerned rules of professional conduct laid down by the body responsible for regulating the activities of pharmacists in Baden-Württemberg. Under those rules [34] pharmacists were not allowed to advertise at all in cinemas, on radio or on television. They were allowed to place advertisements in newspapers and magazines but such advertisements could contain nothing except the name, address and telephone number of the pharmacy and the name of the proprietor. The purpose of the rules was clearly to prevent excessive competition between pharmacists. Mrs Hünermund and 12 other phar-

32 — Paragraph 16 of the judgment.

33 — Case C-292/92 [1993] ECR I-6787; see also Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratories and Estée Lauder* [1994] ECR I-317, Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199 and Joined Cases C-69/93 and C-258/93 *Punto Casa* [1994] ECR I-2355.

34 — See the Report for the Hearing, p. I-6790.

macists wished to advertise parapharmaceutical products which they were authorized to sell in their pharmacies. They sought a declaration from the competent administrative court that the above rules, which prevented them from advertising parapharmaceutical products except inside their pharmacies, were invalid, in particular on the ground that they were contrary to Article 30 of the Treaty. The case was referred to the Court of Justice for a preliminary ruling.

(c) *Application of the judgments in* Keck *and* Hünermund *to the prohibition in question*

36. The Court recited paragraph 16 of the *Keck* judgment and then stated [35] that the conditions laid down in that paragraph for excluding a measure from the scope of Article 30 were satisfied as regards the application of rules of professional conduct laid down by a professional body which prohibited pharmacists from advertising, outside their pharmacies, parapharmaceutical products which they were authorized to sell. The Court observed that the rules applied, without distinguishing according to the origin of the goods in question, to all pharmacists in the area over which the professional body had jurisdiction and did not affect the marketing of products from other Member States differently from the way they affected the marketing of domestic products.

35 — Paragraph 22.

37. Were it not for the judgment in *Hünermund*, it would perhaps not have been clear that the phrase 'national provisions restricting or prohibiting certain selling arrangements' in *Keck* covered rules on advertising. For the reasons set out above, advertising restrictions may pose a particularly serious threat to the integration of markets. Possibly the Court was influenced in *Hünermund* by the relatively insignificant nature of the restrictions in issue there, and did not envisage the same test applying to more serious restrictions. If the test laid down in *Keck* is to be applied to the French rules in issue here, it will be necessary to consider whether those rules 'apply to all affected traders operating within the national territory and ... affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States'. In my view they do. First, just as in *Keck* the prohibition on resale at a loss applied to all traders reselling goods in an unaltered state, so too in this case the prohibition on television advertising is a general measure applicable to the distribution sector as a whole. Secondly, except in certain specific cases — not in issue here — such as that of goods sold by the technique of direct television marketing (see paragraph below), the prohibition is likely to have an equal impact on the marketing of

domestic and imported goods. As noted below, any decline in sales by the distribution sector as a result of the prohibition would affect domestic and imported goods alike. Consequently, I conclude that, if the test laid down in *Keck* is to be applied, the prohibition falls in principle outside the scope of Article 30.

(d) *An alternative analysis*

38. I prefer however to take a different approach, even if that approach may lead in this case to the same conclusion. In my view the Court's reasoning — although not the result — in *Keck* is unsatisfactory for two reasons. First, it is inappropriate to make rigid distinctions between different categories of rules, and to apply different tests depending on the category to which particular rules belong. The severity of the restriction imposed by different rules is merely one of degree. Measures affecting selling arrangements may create extremely serious obstacles to imports. For example, a rule permitting certain products to be sold only in a handful of small shops in a Member State would be almost as restrictive as an outright ban on importation and marketing. The point is particularly well illustrated by restrictions on advertising: the type of restriction in issue in *Hünermund* may have had little impact on trade between Member States, but it is difficult to contend that, for example, a total ban on advertising a particular product which can lawfully be sold could fall outside Article 30. As I shall explain below, it would be more appropriate to measure restrictions against a single test formulated in the light of the purpose of Article 30.

39. Secondly, the exclusion from the scope of Article 30 of measures which 'affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States' amounts to introducing, in relation to restrictions on selling arrangements, a test of discrimination. That test, however, seems inappropriate. The central concern of the Treaty provisions on the free movement of goods is to prevent unjustified obstacles to trade between Member States. If an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade. I have difficulty in accepting the proposition that a Member State may arbitrarily restrict the marketing of goods from another Member State, provided only that it imposes the same arbitrary restriction on the marketing of domestic goods. If a Member State imposes a substantial barrier on access to the market for certain products — for example, by providing that they may be sold only in a very limited number of establishments — and a manufacturer of those products in another Member State suffers economic loss

as a result, he will derive little consolation from the knowledge that a similar loss is sustained by his competitors in the Member State which imposes the restriction.

40. Equally, from the point of view of the Treaty's concern to establish a single market, discrimination is not a helpful criterion: from that point of view, the fact that a Member State imposes similar restrictions on the marketing of domestic goods is simply irrelevant. The adverse effect on the Community market is in no way alleviated; nor is the adverse effect on the economies of the other Member States, and so on the Community economy. Indeed the application of the discrimination test would lead to the fragmentation of the Community market, since traders would have to accept whatever restrictions on selling arrangements happened to exist in each Member State, and would have to adapt their own arrangements accordingly in each State. Restrictions on trade should not be tested against local conditions which happen to prevail in each Member State, but against the aim of access to the entire Community market. A discrimination test is therefore inconsistent as a matter of principle with the aims of the Treaty.

41. The question then is what test should be applied in order to determine whether a measure falls within the scope of Article 30. There is one guiding principle which seems to provide an appropriate test: that principle is that all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market. In spite of occasional inconsistencies in the reasoning of certain judgments, that seems to be the underlying principle which has inspired the Court's approach from *Dassonville* through 'Cassis de Dijon' to *Keck*. Virtually all of the cases are, in their result, consistent with the principle, even though some of them appear to be based on different reasoning.

42. If the principle is that all undertakings should have unfettered access to the whole of the Community market, then the appropriate test in my view is whether there is a substantial restriction on that access. That would of course amount to introducing a *de minimis* test into Article 30. Once it is recognized that there is a need to limit the scope of Article 30 in order to prevent excessive interference in the regulatory powers of the Member States, a test based on the extent to which a measure hinders trade between Member States by restricting market access seems the most obvious solution. Indeed it is perhaps surprising that, in view of the avowed aim of preventing excessive recourse to Article 30, the Court did not opt for such a solution in *Keck*. The reason may be that the Court was concerned lest a *de minimis* test, if applied to all measures affecting trade in goods, might induce national courts, who

have primary responsibility for applying Article 30, to exclude too many measures from the scope of the prohibition laid down by that provision. Caution must therefore be exercised and if a *de minimis* test is to be introduced it will be necessary to define carefully the circumstances in which it should apply.

43. Clearly it would not be appropriate to apply a *de minimis* test to measures which overtly discriminate against goods from other Member States. Such measures are prohibited by Article 30 (unless justified under Article 36) even if their effect on inter-State trade is slight: there is a *per se* prohibition of overtly discriminatory measures.

44. Only in relation to measures which are applicable without distinction to domestic goods and goods from other Member States would it be necessary to introduce a requirement that the restriction, actual or potential, on access to the market must be substantial. The impact on access to the market of measures applicable without distinction may vary greatly, depending on the nature of the measure in issue. Where such a measure prohibits the sale of goods lawfully placed on the market in another Member State (as in 'Cassis de Dijon'), it may be presumed to have a substantial impact on access to the market, since the goods are either denied access altogether or can gain access only after being modified in some way; the need to modify goods is itself a substantial barrier to market access.

45. Where, on the other hand, a measure applicable without distinction simply restricts certain selling arrangements, by stipulating when, where, how, by whom or at what price goods may be sold, its impact will depend on a number of factors, such as whether it applies to certain goods (as in *Blesgen*, *Buet* or *Quietlynn*), or to most goods (as in *Torfaen*), or to all goods (as in *Keck*), on the extent to which other selling arrangements remain available, and on whether the effect of the measure is direct or indirect, immediate or remote, or purely speculative [36] and uncertain. [37] Accordingly, the magnitude of the barrier to market access may vary enormously: it may range from the insignificant to a quasi-prohibition. Clearly, this is where a *de minimis* test could perform a useful function. The distinction recognized in *Keck* between a prohibition of the kind in issue in 'Cassis de Dijon' and a mere restriction on certain selling arrangements is therefore valuable: the former inevitably creates a substantial barrier to trade between Member States, whereas the latter may create such a

36 — As in paragraph 15 of the judgment in *Stoke-on-Trent Council* v *B&Q* (quoted above in paragraph).

37 — As in Case C-69/88 *Krantz* [1990] ECR I-583, paragraph 11 of the judgment.

barrier. But it cannot be maintained that the latter type of measure is not capable of hindering trade contrary to Article 30 in the absence of discrimination. It should therefore be recognized that such measures, unless overtly discriminatory, are not automatically caught by Article 30, as are measures of the type at issue in 'Cassis de Dijon', but may be caught if the restriction which they cause on access to the market is substantial.

46. It might be objected that the approach advocated above is contrary to a number of judgments in which the Court has expressly rejected the idea that a measure should be excluded from the scope of Article 30 because its effect on imports is slight. However, in most of those cases the measure in question was plainly discriminatory, as in *Prantl*, [38] *Commission* v *France* [39] and *Commission* v *Italy*; [40] and in the last case the effect of the measure was in any event recognized to be substantial. [41] It is true that in *Van de Haar and Kaveka de Meern* [42] the Court rejected a *de minimis* test in relation to a measure applicable without distinction (namely, a price-fixing regulation); however, it did so purely in the abstract and went on to rule, in the same judgment, that a price-fixing regulation is contrary to Article 30 only if prices are fixed at such a level as to prevent imported goods from being marketed profitably or to cancel out a competitive advantage enjoyed by the manufacturer of imported products. That is not very different, in effect, from saying that Article 30 only comes into play if there is a substantial barrier to market access.

47. A final point that should be noted is that the position is different with the prohibition of charges having equivalent effect to customs duties under Articles 12 and 16 of the Treaty. The Court has rightly held that that prohibition applies to all charges, however small. [43] The scope of that prohibition, however, is far more specific than the scope of Article 30; moreover such charges, however small, necessarily entail impeding the flow of goods by reason of the fact that they cross a frontier, when it is the object of those Treaty provisions to eliminate such frontiers; [44] that rationale does not apply with the same force to the prohibition of measures having equivalent effect under Article 30.

48. In *Keck* itself, the result is consistent with the view taken above. A law which prohibits all retailers of all goods from reselling goods at less than cost price is unlikely to have a significant impact on the marketing of

38 — Case 16/83 [1984] ECR 1299.

39 — Case 269/83 [1985] ECR 837.

40 — Case 103/84 *Commission* v *Italy* [1986] ECR 1759.

41 — Paragraph 18 of the judgment.

42 — Joined Cases 177/82 and 178/82 [1984] ECR 1797, paragraph 13 of the judgment.

43 — See, for example, Case 24/68 *Commission* v *Italy* [1969] ECR 193, paragraph 9 of the judgment.

44 — Ibid.

imported goods. It has no significant effect on the global volume of imports and it does not prevent a trader in another Member State from enjoying full access to the market. The same will normally be true of legislation which restricts the opening hours of shops, at least if it is of general application and does not arbitrarily restrict marketing opportunities for a limited range of goods. Such legislation may lead to a slight reduction in the total volume of sales of goods, including imported goods, but it is unlikely to restrict substantially market access for any specific trader's goods, since its impact will be spread across the whole range of goods.

49. Accordingly, I reach the conclusion that Article 30 should be regarded as applying to non-discriminatory measures which are liable substantially to restrict access to the market. [45]

50. How is that test to be applied to restrictions on advertising? As I have already suggested, in view of the significance of freedom to advertise, a total ban on the advertising of a product which may lawfully be sold in the Member State where the ban is imposed and in other Member States cannot lie outside the scope of Article 30. The effect of such a ban would be that manufacturers in other Member States would find it virtually impossible to penetrate the market in which the ban was imposed, if their products were not already known to consumers in that country. A measure that constitutes such a significant barrier to the entry of goods from other Member States must surely be equivalent in effect to a quantitative restriction on trade between Member States. Even if the discrimination test formulated in *Keck* were applied, the same conclusion would be reached: an advertising ban, far from being neutral in its effects, tends to operate to the particular detriment of imported goods.

51. The measure directly in issue in this case is the prohibition of advertising on television for the distribution sector imposed by the French legislation. But the reality of the barrier to imports which even a partial ban on the advertising of specific products may represent may be illustrated by the example of another prohibition in the same legislation. In France it is against the law to advertise on television alcoholic beverages with an alcohol content in excess of 1.2 degrees. Such a measure might prove to be justified under Article 36 of the Treaty, but it cannot be con-

45 — See also Roth, Comment on *Keck* and *Hünermund*, *Common Market Law Review* 1994, 845, especially at p. 853.

tended that it falls outside Article 30. If a German brewer whose beers have not hitherto been marketed in France decides to enter the French market, he is unlikely to have a significant impact on the market unless he can promote his products by advertising. Television is recognized as a particularly effective medium for advertising, especially as regards consumer products intended for a mass market. If the German brewer is prevented from advertising on television, he will find it more difficult to penetrate the French market, which will continue to be dominated by the well-established domestic brands.

52. It is not necessary, however, for the Court to rule on that prohibition. Nor is it necessary to consider whether there is a substantial impact on access to the market as regards the other classes of products excluded from television advertising, namely literary publications, newspapers and magazines. The question in this case is whether a partial ban on advertising for a certain sector of the economy, namely a ban on television advertising by the distribution sector, falls outside the scope of Article 30. The answer to that question must, in my view, depend on the effects of the partial ban. If it creates a substantial barrier to the entry of goods manufactured in another Member State, then it is incompatible with Article 30 unless justified on grounds recognized by Community law. If, on the other hand, a partial ban on advertising has no substantial effect on inter-State trade and does not constitute a barrier to market penetration for imported goods, there is no objection to excluding it from the ambit of Article 30.

53. The effect of the prohibition on television advertising by the distribution sector appears more marginal than the prohibition relating to the advertising of alcoholic beverages. As I have pointed out, it applies to the whole range of goods and is thus not open to the objection that certain categories of goods are targeted arbitrarily. If shops are prevented from advertising on television, the impact on trade will be predominantly — but not exclusively — internal to the Member State in question. Various possible effects could be envisaged: for example, there may be a transfer of advertising revenue from undertakings which operate television stations to undertakings which provide alternative methods of publicity, including proprietors of newspapers (both national and regional); the larger retailers, in particular the owners of chains of supermarkets, who are in practice the most likely users of television advertising, may find that their competitive advantage over small shop-keepers is less than it would otherwise be; and the total volume of sales of goods in general, including imports, may decline slightly if distributors are not able to promote sales by television advertising. None of those effects, however, amounts to a substantial impact on trade between Member States sufficient to bring Article 30 into play.

54. However, although the effects of a restriction applicable only to the distribution sector are generally internal to the Member State concerned, it is possible to imagine situations in which a genuine obstacle to imports may arise. One example is provided by the system of direct television marketing which has become increasingly common in Europe in recent years. A distributor advertises goods on television and then displays telephone numbers through which the goods can be ordered in the various countries in which the television channel is received. If such a system were prohibited in France, the resulting obstacle to trade could hardly be described as insubstantial. That type of obstacle is moreover inimical to the concept of a single market, because it prevents distributors from developing a global marketing strategy. If in such a case a distributor established in another Member State sought to rely on the Treaty, then an issue might well arise under Article 30 or Article 59. Again, it is possible to envisage that an undertaking from another Member State might seek to establish a supermarket chain in France: in that case, the prohibition of televised advertising in the distribution sector might raise an issue under Article 52 of the Treaty.

55. No such issues are raised in the present case. As I have said, the effects of a restriction applicable to the distribution sector, such as in issue here, are primarily internal. The restriction affects only one form of advertising, although the most effective as far as mass consumer goods are concerned; and advertisement of the goods themselves is not affected other than indirectly. As in the case of legislation restricting the opening hours of shops, mentioned above, [46] the measure may result in a slight reduction in the total volume of sales of goods, including imports. But it cannot be said to have a substantial impact on access to the market. It therefore falls in my view outside the scope of Article 30.

(e) *The issue of justification*

56. As I have reached the conclusion that the measure in issue is not caught by Article 30, either on the test laid down in *Keck* or on the alternative analysis I have suggested, it may be unnecessary to examine the justification for the measure; but I will do so in case a different view is taken of Article 30, and will approach the issue on the basis that, contrary to my view, Article 30 applies. Since the measure applies without distinction to domestic and imported goods, justification may be sought not only in Article 36 of the Treaty but also in the list of mandatory requirements recognized by the Court in the 'Cassis de Dijon' case-law.

46 — See above, paragraph 48.

57. In order for the measure to be justified it is necessary to establish (a) that the measure pursues a legitimate aim, (b) that it is an appropriate means of pursuing that aim and (c) that the aim could not be pursued just as effectively by alternative means that would be less restrictive of trade between Member States.

58. According to the French Government, the purpose of the contested decree, at least as far as the distribution sector is concerned, is to protect the regional daily press and to guarantee pluralism in the media, the assumption being that advertisers who are prevented from using the medium of television will instead advertise in regional daily newspapers. It is not entirely clear whether that is also the reason (or one of the reasons) for prohibiting television advertising for alcoholic beverages, literary publications, the press and the cinema. It seems probable that the main purpose of restricting the advertising of alcoholic beverages is to protect public health by discouraging the excessive consumption of alcohol. It is also conceivable that the restrictions on advertising books, magazines, newspapers and cinematographic works are motivated by the underlying belief that vigorous competition is not desirable in the cultural field.

59. It is clear from *Commission* v *France* and *Aragonesa de Publicidad* [47] that restrictions on the advertising of alcoholic beverages may be justified on grounds of protection of public health, provided that they are non-discriminatory and not disproportionate. An assessment of the proportionality of the ban on advertising alcoholic beverages on television would require a detailed analysis of the effects of that ban, as regards both trade and public health, and an examination of the available alternatives. These matters have not been fully discussed before the Court in the present case, doubtless because the case is not directly concerned with the advertising of alcoholic beverages, and it would not therefore be appropriate to rule definitively on whether the advertising ban is justified in so far as it extends to alcoholic beverages. I will simply note that the threshold of 1.2 degrees seems unusually low and would appear to preclude even the advertising of low-alcohol beers, that it is not easy to see why the advertising of alcoholic beverages on television is more harmful to public health than the advertising of alcoholic beverages in newspapers, magazines and cinemas, and that it is arguable that more limited restrictions (for example, rules about the content of advertisements, such as those laid down in Article 15 of Directive 89/552) would protect public health just as effectively.

60. As to whether the other restrictions imposed by the contested decree can be jus-

47 — Both cited above in note 23.

tified on the ground that they serve to protect the regional daily press and preserve pluralism in the media, the first question that arises is whether such aims are capable in principle of justifying a measure equivalent to a quantitative restriction on the free movement of goods. The protection of the press and the preservation of pluralism in the media are not of course mentioned in Article 36 of the Treaty and they have not hitherto been recognized as mandatory requirements under the 'Cassis de Dijon' case-law. The Court has however recognized the preservation of pluralism in the media as capable of justifying restrictions on the freedom to provide services within the audio-visual sector. [48] I would therefore accept that some restrictions on the free movement of goods may be justified for the sake of protecting the regional daily press.

61. There is however no need to dwell on that issue because it is in any event difficult to see how the contested measures can satisfy the requirements of proportionality. In the first place, it is questionable whether those measures can be an effective means of protecting the regional daily press, since there is no guarantee that those who are prevented from advertising on television will advertise instead in regional daily newspapers; in the absence of an obligation to direct a part of their advertising budget to regional daily newspapers, they might choose alternative forms of advertising, such as commercial radio stations, cinemas, posters or national newspapers. Secondly, there are clearly other means of protecting the regional daily press which might be equally effective but less detrimental to trade between Member States. One such measure is expressly mentioned in Article 19 of Directive 89/552, which allows a Member State to limit the total amount of programme time that broadcasters under its jurisdiction may devote to advertising; such a measure might have the effect of increasing the price of the available 'air time' and make advertising in newspapers, including regional dailies, more price-competitive. Alternatively, government agencies and State-owned industries could be required to advertise in regional dailies or the government could assist newspapers by means of tax benefits or even direct subsidies, subject to compliance with the Treaty rules on State aid.

62. Even if the contested measure were an effective means of assisting regional daily newspapers, there remains the further objection that no good reason has been advanced for imposing the burden of supporting regional daily newspapers on distributors, literary publishers, cinema owners and film makers. The choice of those sectors of the economy as the vehicle for maintaining pluralism in the press seems arbitrary. In my view, it would be difficult to hold that a measure having equivalent effect to a quantitative restriction on imports is justified when it

48 — See most recently Case C-23/93 *TV10 SA*, judgment of 5 October 1994, [1994] ECR I-4795, paragraphs 18 and 19; see also Article 19 of the 'Television without frontiers' directive, set out below, paragraph 65.

operates in an arbitrary manner. Accordingly, if I had taken the view that the restriction on advertising fell within Article 30, I would not regard it as capable of being justified.

Council Directive 89/552/EEC

63. The basic purpose of Directive 89/552, which was adopted under Articles 57(2) and 66 of the Treaty, is to facilitate the free movement of television broadcasts within the Community. The preamble states that television broadcasting constitutes a service within the meaning of the Treaty, that the Treaty provides for the free movement of all services normally provided against payment, without exclusion on grounds of their cultural or other content, and that that freedom, as applied to broadcasting, is a specific manifestation of the freedom of expression enshrined in Article 10(1) of the European Convention on Human Rights: see the 6th, 7th and 8th recitals. The directive pursues its aim of facilitating the free movement of television broadcasts by laying down minimum standards which must be complied with by broadcasters under the jurisdiction of a Member State. Broadcasts which comply with those minimum standards may be transmitted to other Member States. Article 2(2) of the directive provides that in principle Member States must ensure freedom of reception and must not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by the directive. The only exception to that principle is laid down in Article 2(2) itself, inasmuch as it allows Member States, subject to stringent conditions, to suspend broadcasts which 'manifestly, seriously and gravely' infringe Article 22 of the directive. The latter provision requires Member States to ensure that broadcasters under their jurisdiction do not broadcast programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence.

64. Chapter IV (Articles 10 to 21) of the directive is entitled 'Television advertising and sponsorship'. Article 10 establishes the basic principle that advertising must be distinct from other parts of the programme service. Article 11 makes detailed rules designed to achieve such a separation. Article 13 prohibits television advertising for cigarettes and other tobacco products. Article 14 prohibits television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls. Article 15 restricts television advertising for alcoholic beverages. Article 18 limits the amount of advertising that may be shown. It provides as follows:

'1. The amount of advertising shall not exceed 15% of the daily transmission time.

However, this percentage may be increased to 20% to include forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services, provided the amount of spot advertising does not exceed 15%.

2. The amount of spot advertising within a given one-hour period shall not exceed 20%.

3. Without prejudice to the provisions of paragraph 1, forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provisions of services shall not exceed one hour per day.'

65. Article 19 provides as follows:

'Member States may lay down stricter rules than those in Article 18 for programming time and the procedures for television broadcasting for television broadcasters under their jurisdiction, so as to reconcile demand for televised advertising with the public interest, taking account in particular of:

(a) the role of television in providing information, education, culture and entertainment;

(b) the protection of pluralism of information and of the media.'

Article 20 provides:

'Without prejudice to Article 3, Member States may, with due regard for Community law, lay down conditions other than those laid down in Article 11(2) to (5) and in Article 18 in respect of broadcasts intended solely for the national territory which may not be received, directly or indirectly, in one or more other Member States.'

Article 3(1) contains a more general derogation. It provides that Member States shall remain free, as regards television broadcasters under their jurisdiction, to lay down

more detailed or stricter rules in the areas covered by the directive. [49]

66. The directive expressly prohibits television advertising for only two classes of product or service: namely, cigarettes and other tobacco products (Article 13) and medicinal products and medicinal treatment available only on prescription (Article 14). The question that arises in these proceedings is whether the directive allows Member States to prohibit television advertising, as regards broadcasters under their jurisdiction, for other classes of product or sectors of economic activity, such as the distribution sector. On that point, the directive is somewhat ambiguous: it does not state clearly whether other products or services may or may not be excluded from television advertising.

67. There are four provisions in the directive that authorize Member States to subject television broadcasters under their jurisdiction to more stringent conditions than those laid down in the directive: Articles 3(1), 19 and 20, which I have already cited, and Article 8, which allows Member States to lay down more detailed or stricter rules 'for purposes of language policy'. The last-mentioned provision is clearly not relevant. Hence it is necessary to examine Articles 3(1), 19 and 20 in order to determine whether they authorize Member States to prohibit television advertising, as regards broadcasters under their jurisdiction, for any product, service or sector of economic activity other than those expressly excluded from television advertising by the directive itself.

68. Article 19 allows Member States to 'lay down stricter rules than those in Article 18 for programming time and the procedures for television broadcasting for television broadcasters under their jurisdiction'. Thus Article 19 derogates solely from Article 18, which is concerned not with the types of product or service that may be advertised but with the amount of daily transmission time that may be devoted to advertising. The same argument applies to Article 20, which allows derogations solely from Articles 11(2) to (5) and 18. Article 11 lays down detailed rules to ensure a clear separation between advertising and programmes and prohibits the insertion of advertising in certain types of programme. It does not deal with the types of product or service that may be advertised. It is also clear that Article 20 cannot apply in the circumstances of the present case, since it authorizes derogations from Articles 11(2) to (5) and 18 only as regards

49 — In fact, the English text of Article 3(1) states as follows: 'Member States shall remain free to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by this Directive.'
That is clearly a mistranslation, in view of the other language versions. The French text, for example, reads as follows:
'Les Etats membres ont la faculté, en ce qui concerne les organismes de radiodiffusion télévisuelle qui relèvent de leur compétence, de prévoir des règles plus strictes ou plus détaillées dans les domaines couverts par la présente directive.'

'broadcasts intended solely for the national territory which may not be received, directly or indirectly, in one or more other Member States'. Here, it is sufficient to note that both TF1 and M6 may be received in other Member States, at least in frontier zones.

69. The question that remains then is whether, as the French Government and the Commission contend, Article 3(1) of the directive authorizes Member States to impose the type of restriction at issue in these proceedings. The precise scope of Article 3(1) is not free from doubt. It seems to contain an extremely wide derogation from the ordinary rules of the directive, since it authorizes Member States to lay down more detailed or stricter rules in the areas covered by the directive, as regards television broadcasters under their jurisdiction. The difficulty is due to the absence of any clear indication, in the wording or scheme of the directive, as to the relationship between that very broad derogation and the more narrowly formulated derogations in Articles 19 and 20 (and also Article 8). If Article 3(1) were construed as authorizing Member States to impose any restriction whatsoever on broadcasters under their jurisdiction, the more narrowly formulated derogations in Articles 19 and 20 would be redundant. On the other hand, if the view were taken that Member States may not impose on broadcasters under their jurisdiction more stringent rules than those of the directive except in the circumstances defined in Articles 8, 19 and 20, then Article 3(1) would itself be devoid of purpose. It could be that the explanation for this apparent contradiction in the scheme of the directive lies in its complicated legislative history. [50]

70. It is unfortunate that the Community legislation should be so ambiguous on such an important point. One thing is, however, clear: namely, that if the directive on television without frontiers did not exist, the Member States would be free to restrict advertising with television broadcasters under their jurisdiction, provided that in doing so they did not infringe the Treaty or any other provision of Community law. I do not think that it would be appropriate to construe the directive as depriving the Member States of that power unless that was clearly the purpose and effect of the directive. There is no clear indication that such was the intention of the authors of the directive. On the contrary, the general scheme of the directive is to pursue the aim of free movement of television broadcasts by laying down a minimum standard and leaving the Member States free to regulate broadcasters under their jurisdiction more stringently. That aim is not endangered if Member States prohibit broadcasters under their jurisdiction from carrying advertising for certain goods and services in circumstances other than those mentioned in Articles 13 and 14. I conclude that legislation of the type in issue is not contrary to the directive.

50 — See, on this subject, Delwit and Gobin, 'Etude du cheminement de la directive "télévision sans frontières": synthèses des prises de positions des institutions communautaires', in *L'espace audiovisuel européen*, edited by Vandersanden, Brussels, 1991, pp. 55 to 74.

The competition rules of the Treaty

71. I can deal more briefly with the argument that the contested legislation is contrary to Articles 85 and 86 of the Treaty.

72. The gist of the argument is that Leclerc-Siplec's competitors have entered into an agreement regarding the composition of an unleaded petrol which does not correspond to any European standard and that they have jointly decided to market that product by means of a selective distribution system under which the retailer is obliged to display the manufacturer's name at the pump. The agreement between Leclerc-Siplec's competitors is alleged to be an agreement prohibited by Article 85 of the Treaty and those undertakings are alleged to be seeking abusively to acquire a dominant position contrary to Article 86 of the Treaty. The agreement has been made possible or at least facilitated, according to Leclerc-Siplec, by the provisions of the contested decree because the ban on television advertising prevents distributors of petrol, such as Leclerc-Siplec, from promoting their unleaded petrol and thus competing with the parties to the agreement.

73. This argument must clearly fail. As Leclerc-Siplec recognizes, Articles 85 and 86 are concerned, not with measures adopted by the State, but with the conduct of undertakings. It is true that the Court has held on numerous occasions — for example in *Meng* [51] and *Ohra* [52] — that, by virtue of the combined effect of Article 5 and Articles 85 and 86 of the Treaty, the Member States must not adopt or maintain in force measures that are capable of destroying the effectiveness of the competition rules applicable to undertakings. That is the case when a Member State requires or encourages undertakings to conclude agreements contrary to Article 85 or reinforces the effects of such agreements or deprives its own legislation of its State character by delegating to private undertakings responsibility for taking decisions to intervene in economic matters.

74. It is clear that the contested decree did not require or encourage the competitors of Leclerc-Siplec to conclude the alleged agreement. Nor can it be said, in the light of the judgment in *Meng*, that the decree has reinforced an anti-competitive agreement. There it was held that legislation applicable to a specific insurance sector could not be regarded as reinforcing the effects of a pre-existing agreement unless it simply took over the terms of an agreement concluded between the undertakings trading in that sector. It is also clear that the contested decree does not delegate responsibility for regulating television advertising to private undertakings.

51 — Case C-2/91 [1993] ECR I-5751, paragraph 14 of the judgment.

52 — Case C-245/91 [1993] ECR I-5851, paragraph 10 of the judgment.

Conclusion

75. I am accordingly of the opinion that the question submitted by the Tribunal de Commerce de Paris should be answered as follows:

(1) A measure enacted by a Member State which prevents distributors established in that Member State from advertising on television does not constitute a measure equivalent in effect to a quantitative restriction on imports, within the meaning of Article 30 of the EEC Treaty.

(2) Such a measure is not contrary to Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

(3) Such a measure is not contrary to Articles 85 and 86 of the EEC Treaty, read together with Article 5 of the Treaty.