OPINION OF ADVOCATE GENERAL JACOBS
delivered on 17 September 1996 *

1. These cases, which come by way of preliminary reference from the Marknadsdomstol (Market Court), Stockholm, concern the compatibility with Community law of restrictions on television advertising imposed by Swedish law.

2. The main proceedings in all three cases are applications to the Marknadsdomstol by the Consumer Ombudsman seeking orders essentially prohibiting the respondent companies from pursuing certain advertising practices.

3. The cases involve television advertisements alleged to be in contravention of prohibitions in Swedish law against (in the first case) television advertisements designed to attract the attention of children under the age of 12 and (in all cases) marketing which is unfair to consumers or traders. The advertisements at issue appeared on various television channels in Sweden, some being broadcast from the United Kingdom and others from within Sweden.

* Original language: English.

The national law

4. Section 2 of the Marketing Practices Law [1] provides that a trader who, in the marketing of goods, services or other commodities, advertises or engages in activity which, by conflicting with good commercial practice or otherwise, is unfair towards consumers or traders, may be prohibited by the Marknadsdomstol from continuing therewith or from engaging in other similar activity.

5. That provision is expressed to extend to satellite television transmissions within the European Economic Area.

6. Where a trader has omitted to provide in its advertising information significant to consumers, Section 3 of the Marketing Practices Law authorizes the Marknadsdomstol *inter*

1 — Law 1975: 1418. It was stated at the hearing that that law had been replaced with effect from 1 January 1996 by a new Marketing Practices Law, the relevant provisions of which are to the same effect.

alia to order the trader to provide such information in its advertising.

7. In the preamble to the Marketing Practices Law it is stated that that law is applicable to all marketing practices directed at the Swedish public even if they consist of, for instance, advertisements produced abroad but distributed from there to recipients in Sweden.

8. Section 11 of the Radiolag (Broadcasting Law) [2] provides that an advertisement broadcast during a commercial break on television may not be designed to attract the attention of children under the age of 12. It appears from the observations of the Swedish Government that that prohibition extends to cable television [3] and to satellite broadcasts. [4] It appears to be accepted by all parties that the Broadcasting Law is not directly applicable to television broadcasts from outside Sweden.

9. In its case-law the Marknadsdomstol has established the principles that

(a) marketing which conflicts with mandatory legal provisions may be considered to be unfair within the meaning of the Marketing Practices Law and

(b) advertising which is misleading is normally considered to be unfair within the meaning of that law.

10. It appears that the Marknadsdomstol has jurisdiction to deal with cases pursuant to a number of specified statutes, including the Marketing Practices Law but not including the Broadcasting Law. It is for that reason, I assume, that the Consumer Ombudsman's action in the first case is brought on the basis that the advertisements are unfair within the meaning of the Marketing Practices Law because they are contrary to the prohibition in the Broadcasting Law, rather than directly under the Broadcasting Law itself. The Consumer Ombudsman moreover argues that the advertisements broadcast from the United Kingdom are unfair within the meaning of that law even though it appears to be accepted that the Broadcasting Law applies directly only to advertisements broadcast from within Sweden.

The facts and the questions referred

11. The first case concerns television advertising of a children's magazine about dinosaurs. The Consumer Ombudsman asks the

2 — Law 1966: 755.
3 — Law 1991: 2027.
4 — Law 1992: 1356.

Marknadsdomstol in accordance with the Marketing Practices Law (a) to prohibit the publisher of the magazine from marketing its product in a way designed to attract the attention of children under 12 or (b) in the alternative to order it to make the price of the entire series of 18 issues clear in its advertising and to prohibit it from implying in its advertising that complete parts for a fluorescent dinosaur model can be collected for the price of one issue rather than the price of the entire series.

12. The second case concerns television advertising for skin-care products. The Consumer Ombudsman asks the Marknadsdomstol in accordance with the Marketing Practices Law

(a) to prohibit the advertiser from making, in connection with the marketing of skin-care products,

(i) statements as to the products' effect on the skin which are not susceptible of corroboration at the time of marketing;

(ii) statements that the products have healing or therapeutic effects when they have not been approved as authorized pharmaceuticals;

(iii) suggestions that the purchasers will receive free extra items whereas the product is not normally sold at the same price as that indicated in the advertising at issue;

(iv) price comparisons which the advertiser cannot show to relate to the same or equivalent products; and

(v) indications that in order to receive certain extra items the consumer must order within 20 minutes or in a comparably short period of time; and

(b) to order the advertiser to indicate clearly additional costs for postage, delivery etc.

13. The third case concerns television advertising for detergents. The Consumer Ombudsman asks the Marknadsdomstol in accordance with the Marketing Practices Law to prohibit the advertiser from (a) making statements about the products' effectiveness and environmental effect which are not susceptible of corroboration and (b) using imprecise phrases suggesting that the product is beneficial to the environment.

14. In all the cases the television advertising was broadcast to Sweden by satellite from the United Kingdom and shown on the

channel TV3. The advertising was in addition in each case shown on a domestic channel (TV4 in the first case, Homeshopping Channel in the second and third cases) without having been previously broadcast from another Member State, although it is only in relation to the first case that the Court is asked to consider the compatibility with Community law of restrictions sought to be enforced against the advertiser in respect of the domestic broadcast.

15. TV3 is a company established in the United Kingdom. It broadcasts television programmes by satellite from the United Kingdom to Denmark, Sweden and Norway. It appears from the observations of the respondent company in the second and third cases that the signal retransmitted from the satellite may be received either directly by viewers with parabolic antennae (satellite dishes) or by cable companies which then retransmit to viewers by cable. Although the same video signals are broadcast to all receiving States, recipients receive the sound signals in the language of the region concerned.

16. The respondent company in the first case, De Agostini (Svenska) Förlag AB ('De Agostini'), is a Swedish company which is part of an Italian group, Istituto Geografico De Agostini, with companies in several European countries. The group's activities consist mainly in publishing, including the publication of magazines in various European languages. The children's magazine in question is described by De Agostini as an encyclopedic magazine about dinosaurs. It is published in series, each consisting of several issues. With each issue comes a constituent part of a model dinosaur: when an entire series has been purchased, all parts of the model will have been collected. The magazine, which is published in several languages, has been launched in numerous Member States since its inception in 1993, apparently in each case by a local subsidiary of the De Agostini group. It appears that all the language versions of the magazine are printed in Italy.

17. The advertisement in the first case had, before being shown on TV3 in September 1993, already been shown in different language versions in all the then EC Member States except Greece, where it was not launched until January 1995 and where it has apparently since been advertised. Nowhere except in the United Kingdom was there any suggestion that the advertisement might conflict with domestic legislation. In the United Kingdom, the Independent Television Commission reviewed the advertisement and found no grounds to object to it.

18. The respondent company in the second and third cases, TV-Shop i Sverige AB ('TV-Shop'), is a Swedish company belonging to an international group with subsidiaries throughout Europe (both Member States and non-member States) and beyond. TV-Shop's business consists in the television marketing and telephone selling of imported goods: potential customers telephone their orders

for products after seeing them advertised on television, and receive their purchases by post. The main form of television marketing used — and apparently the form at issue in the main proceedings — consists in 'infomercials', programmes introduced by a presenter, sometimes with the collaboration of well-known names, and involving product demonstrations, interviews with satisfied customers, etc.

19. De Agostini and TV-Shop argue essentially that the Swedish law prohibitions in question are contrary to Articles 30 and 59 of the EC Treaty and 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 ('the Television Directive'). [5]

20. The references were originally directed to the EFTA Court by way of requests for an advisory opinion made by the Marknadsdomstol on 30 August 1994. Those requests were withdrawn after Sweden's accession to the European Union on 1 January 1995. By orders of 7 February 1995 the Marknadsdomstol requested a preliminary ruling from this Court on the question whether Article 30 or Article 59 of the EC Treaty or the Television Directive (i) (in all cases) prevents a Member State from taking action against television advertisements which an advertiser arranges to have broadcast from another Member State or (ii) (in the first case) precludes application of a national law prohibiting advertisements directed at children.

21. It may be noted that the EFTA Court gave judgment in two joined cases involving Norway brought under the Television Directive and Articles 11 and 13 of the EEA Agreement, which are equivalent to Articles 30 and 59 of the EC Treaty. [6] Those cases are analogous to Case C-34/95 *De Agostini* in that they concern a Norwegian prohibition on television advertisements specifically targeting children. The EFTA Court advised that the directive precluded a prohibition imposed on an advertiser whereby he is prevented from showing an advertisement contained in a television programme of a broadcaster established in another EEA State if that arose as a consequence of a general prohibition laid down in national law of advertisements which specifically target children. [7] At the hearing of the present cases before this Court, it was stated on behalf of the Norwegian Government (which submitted observations pursuant to Article 20 of the Statute of the Court of Justice of the EC) that the Norwegian prohibition had not been enforced since that judgment.

5 — OJ 1989 L 298, p. 23.

6 — Joined Cases E-8/94 and E-9/94 *Forbrukerombudet* v *Mattel Scandinavia and Lego Norge*, judgment of 16 June 1995.

7 — Paragraph 57 and operative part of the judgment.

The Television Directive

22. The principal objective of the Television Directive (frequently described as the 'television without frontiers' directive), adopted on the basis of Articles 57(2) and 66 of the Treaty, is to facilitate the free movement of television broadcasts within the Community. In essence, it seeks to attain that objective by laying down minimum standards which must be complied with by broadcasters under the jurisdiction of a Member State and by generally prohibiting Member States from subjecting broadcasts from another Member State to any further control before reception or retransmission.

23. The preamble provides as follows:

'... it is consequently necessary and sufficient that all broadcasts comply with the law of [the] Member State from which they emanate; [8]

... it is necessary, in the common market, that all broadcasts emanating from and intended for reception within the Community and in particular those intended for reception in another Member State, should respect the law of the originating Member State applicable to broadcasts intended for reception by the public in that Member State and the provisions of this Directive; [9]

... the requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Community law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States; ... [10]

... this Directive, being confined specifically to television broadcasting rules, is without prejudice to existing or future Community acts of harmonization, in particular to satisfy mandatory requirements concerning the protection of consumers and the fairness of commercial transactions and competition; [11]

... in order to ensure that the interests of consumers as television viewers are fully and properly protected, it is essential for television advertising to be subject to a certain number of minimum rules and standards and that the Member States must maintain the right to set more detailed or stricter rules

8 — 12th recital.

9 — 14th recital.

10 — 15th recital.

11 — 17th recital.

and in certain circumstances to lay down different conditions for television broadcasters under their jurisdiction; [12]

... it is, furthermore, necessary to introduce rules to protect the physical, mental and moral development of minors in programmes and in television advertising.' [13]

24. Article 1(a) of the directive defines 'television broadcasting' as 'the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public ...'.

25. Article 1(b) defines 'television advertising' as:

'any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immoveable property, or rights and obligations, in return for payment.

Except for the purposes of Article 18, this does not include direct offers to the public for the sale, purchase or rental of products or for the provision of services in return for payment.' [14]

26. The cornerstone of the structure envisaged by the directive is the 'transmitting State principle'. That principle, elegantly expressed in the 12th recital in the preamble quoted above, is set out in Article 2, which provides in so far as is relevant:

'1. Each Member State shall ensure that all television broadcasts transmitted

— by broadcasters under its jurisdiction, ...

comply with the law applicable to broadcasts intended for the public in that Member State.

2. Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons

12 — 27th recital.
13 — 32nd recital.
14 — Article 18 concerns permitted advertising time and is not relevant to these cases.

which fall within the fields coordinated by this Directive.'

27. The only exception to that principle envisaged by the directive relates to repeated manifest, serious and grave infringements of Article 22, which seeks essentially to protect minors from exposure to programmes involving pornography or gratuitous violence or other specified offensive content. Although none of the situations there described is relevant to these cases, the fact that it is only in those highly specific and extreme circumstances that a Member State is permitted by the directive to suspend retransmission of broadcasts from another Member State demonstrates the significance in the scheme of the directive of the transmitting State principle.

28. Article 3(1) (which is unfortunately incorrectly translated in the English version of the directive) permits Member States to lay down more detailed or stricter rules in the areas covered by the directive with regard to television broadcasters under their jurisdiction. Article 3(2) requires Member States to ensure that television broadcasters under their jurisdiction comply with the provisions of the directive.

29. The directive contains detailed provisions on television advertising and sponsorship in Chapter IV, some of which are mentioned below. Article 16, which concerns the protection of minors, provides:

'Television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection:

(a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;

(b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;

(c) it shall not exploit the special trust minors place in parents, teachers or other persons;

(d) it shall not unreasonably show minors in dangerous situations.'

30. It will be recalled that in all three cases the national court is asking whether *inter alia* the Television Directive prevents a Member State from taking action against television advertisements broadcast from another Member State. Additionally in *De Agostini* the court is asking whether *inter alia* that directive precludes application of a national law prohibiting advertisements directed at children. It appears from the order for reference that that last question relates specifically to the advertisements broadcast on the domestic channel, TV4. I will first consider the former question, which relates to the advertisements broadcast from the United Kingdom on TV3.

31. Before turning to the specific issue whether Article 2(2) of the Television Directive prohibits a Member State from restricting retransmission on its territory of broadcasts of the type in question, I shall consider three arguments that have been adduced by various parties to the effect that the Television Directive is not in any event applicable in the circumstances of these cases.

The argument that TV3 is a Swedish channel

32. First, the Consumer Ombudsman argues in effect that TV3 must in practice be regarded as a Swedish television channel in the same way as TV4, on the basis that (a) all its programmes shown in Sweden are produced in Sweden; (b) all the programmes are dubbed or sub-titled in Swedish; (c) the announcers all speak Swedish; and (d) the advertisements are exclusively designed for the Swedish market given the language in which they are prepared and the products which are marketed (it should however be noted that that final proposition directly conflicts with the explanations given by De Agostini and TV-Shop of their marketing strategy).

33. In so far as is relevant to the Television Directive, the Consumer Ombudsman is presumably seeking to argue that Sweden is entitled to lay down stricter rules with regard to TV3 than those set out in the directive on the basis that, for the reasons listed above, TV3 is under its jurisdiction within the meaning of Article 3(1) of the directive.

34. That proposition is in my view untenable. For the reasons given by the Court in *Commission* v *United Kingdom* [15] with regard to the meaning of the same term in Article 2(1) of the Television Directive, I consider that the Member State under whose jurisdiction a broadcaster comes is the Member State in which that broadcaster is established. Since TV3 is established in the

15 — Case C-222/94, [1996] ECR I-4025; see paragraphs 35 to 42 of the judgment and see also paragraphs 32 to 75 of the Opinion of Advocate General Lenz.

United Kingdom, it comes under that State's jurisdiction for the purposes of the directive. It may be noted that the construction advanced by the United Kingdom and rejected by the Court in that case, to the effect that broadcasters under the jurisdiction of a Member State must be understood as referring to those broadcasters which transmit their television programmes from locations within the territory of the Member State in question, would in any event not assist the Consumer Ombudsman in this case, since the television advertising at issue was transmitted from within the United Kingdom.

The argument that the directive does not cover advertisers

35. Secondly, it is argued by the Consumer Ombudsman and the Swedish, Finnish and Norwegian Governments that the directive in general and the transmitting State principle in particular cover only the conduct of broadcasters and not that of advertisers, so that the directive does not prevent a Member State from taking action, as in this case, against an advertiser in respect of television advertisements broadcast from another Member State.

36. In my view, that argument is untenable for a number of reasons.

37. It would seriously undermine the object and effect of the transmitting State principle if the directive were to be regarded as inapplicable to advertisers: the State of reception would be free to restrict advertisements broadcast from another Member State which would *ex hypothesi* 'restrict retransmission on their territory of television broadcasts' contrary to Article 2(2).

38. Moreover, it would be incongruous for the directive not to be applicable to advertisers given that it contains numerous rules as to the form and content of television advertisements.

39. Finally, to regard the activity of broadcasting as intrinsically distinct from ancillary activities such as advertising could pave the way for Member States to frame legislative measures so as to be applicable only to producers, advertisers, sponsors, etc., thereby in fact fettering broadcasting activities as a whole albeit without formal contravention of the directive. Such a construction cannot be consistent with the objectives of the directive or the intentions of the legislature.

The argument that Van Binsbergen *applies*

40. The third main argument as to why the directive is not applicable in this case, put forward by the Consumer Ombudsman and the Swedish, Finnish, Norwegian and Belgian Governments, is to the effect that it does not apply to advertisements in television broadcasts which are specifically aimed and directed at the receiving State only.

41. That argument is based on *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid*, [16] in which the Court first formulated the principle that a Member State is entitled to take measures in order to prevent a provider of services whose activity is entirely or principally directed towards its territory from exercising the freedom to provide services in order to avoid the legislation applicable in the State of destination.

42. The Court has recently (albeit in respect of facts which arose before the Television Directive was required to be transposed into national law) applied that principle to the broadcasting sector in *Veronica Omroep Organisatie* [17] and *TV10*. [18]

43. In *Veronica*, the Court upheld national legislation prohibiting national broadcasting organizations from helping to set up commercial radio and television companies abroad for the purpose of providing services there directed towards the legislating State, observing that the legislation had the specific effect, with a view to safeguarding the exercise of the freedoms guaranteed by the Treaty, of ensuring that those organizations could not improperly evade the obligations deriving from the national legislation concerning the pluralistic and non-commercial content of programmes. [19]

44. In *TV10* the Court ruled that the Treaty provisions on freedom to provide services did not preclude a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State whose activities were wholly or principally directed towards the territory of the first Member State if that broadcasting body had been established there in order to enable it to avoid the rules which would have been applicable to it had it been established within the first State. [20]

45. The *Van Binsbergen* principle may be seen simply as an application of the general principle of abuse of rights, recognized in most systems of law. As such, it might be

16 — Case 33/74 [1974] ECR 1299.
17 — Case C-148/91 [1993] ECR I-487.
18 — Case C-23/93 [1994] ECR I-4795.

19 — Paragraph 13 of the judgment.
20 — Second paragraph of the operative part of the judgment.

expected that it would remain capable of application in the field of television broadcasting notwithstanding implementation of the Television Directive, and Advocate General Lenz has recently endorsed this view. [21] That proposition, however, as the Advocate General made clear, should not be read too widely: it must not be overlooked that, as an exception to one of the freedoms constituting the internal market, the scope for intervention which that principle confers on the receiving Member State must be narrowly interpreted. [22] Although the Court in *Commission* v *Belgium* left open the question whether the principle remained applicable in the field of television broadcasting, it ruled that in any event it could not authorize a Member State generally to exclude the provision of certain services by operators established in other Member States, since that would entail abolition of the freedom to provide services. [23]

46. To allow the principle to be invoked in a case such as the present where the interests protected by the rules allegedly sought to be avoided are within the scope of the directive would moreover fundamentally undermine the transmitting State principle, which is itself the primary expression of the directive's aim to abolish obstacles to freedom of movement for services with a view to bringing about the internal market. [24] It was presumably for that reason that the directive contains no provision such as that in Article 16 of the European Convention on Transfrontier Television of 5 May 1989 (on which Chapter IV of the directive, dealing with television advertising and sponsorship, was to a large extent modelled) expressly providing that advertisements 'which are specifically and with some frequency directed to audiences in a single Party other than the transmitting Party shall not circumvent the television advertising rules in that particular Party'. The Commission's view that the omission was deliberate has recently been endorsed by Advocate General Lenz, who points out in his Opinion in *Commission* v *United Kingdom* [25] that a provision such as Article 16 of the Convention would have been inappropriate in rules serving to bring about the internal market. It is moreover consistent with the ruling of the EFTA Court in the Norwegian cases, mentioned above. [26]

47. There is in any event nothing in this case to suggest that TV3 was in fact established in the United Kingdom in order to avoid the Swedish rules in question. It cannot be inferred from the mere fact that a broadcaster established in one Member State transmits broadcasts intended for reception in another Member State that the broadcaster is seeking to avoid legislation applicable in the Member State of reception: the broadcaster

21 — See paragraph 74 of the Opinion in Case C-11/95 *Commission* v *Belgium*, [1996] ECR I-4115, I-4117.

22 — Ibid., paragraph 75.

23 — Paragraph 65 of the judgment.

24 — See the second recital in the preamble.

25 — Cited in note 15; see paragraph 55 of the Opinion.

26 — Cited in note 6, paragraphs 51 to 53 of the judgment.

must be acting *wrongfully* [27] or *improperly* [28] in order for the *Van Binsbergen* principle to apply. That view is borne out by the fact that the directive itself indicates in the 14th recital in its preamble that 'all broadcasts emanating from and intended for reception within the Community and in particular those intended for reception in another Member State, should respect the law of the originating Member State': a Member State cannot therefore assume that all broadcasts by foreign broadcasters directed specifically at its public for that reason alone constitute an abuse. [29] The burden of proof of such impropriety, moreover, is on the Member State seeking to avail itself of the exception. [30]

48. Furthermore, the fact that in these cases the broadcasts by TV3 were, as appears from the observations of the parties, transmitted (albeit with different language signals) to Denmark and Norway as well as to Sweden suggests that application of the principle — designed to preempt reliance on Community law by a provider of services whose activity is entirely or principally directed towards the Member State seeking to invoke it — is not appropriate.

49. Finally, I will deal with an argument put forward by TV-Shop to the effect that the *Van Binsbergen* principle may be invoked only where the laws in question — namely the law sought to be avoided and the law to which the avoiding entity is instead subject — are significantly different. Given that the rules relating to television advertising are broadly similar in Sweden and England, it submits that there is no scope for application of the principle.

50. It is obvious that, where the laws in question are to all intents and purposes the same, there will be no scope in practice for application of the principle since there will be nothing to be gained in avoiding one system of legislation by opting for the other. Where differences in legislation are sufficient to warrant an undertaking's establishing itself in another Member State purely in order to exploit those differences then *ex hypothesi* there is scope for application of the principle. In my view it is neither desirable nor feasible to lay down any general rule as to the degree of parity necessary as a matter of law in order to preclude or to trigger application of the principle.

27 — *TV10*, cited in note 18, paragraph 21 of the judgment. The French is perhaps stronger, 'de manière abusive'. However there appears to be no equivalent adverb at all in Dutch, the language of the case.

28 — *Veronica*, cited in note 17, paragraph 13 of the judgment: the French is 'abusivement'; again there appears to be no equivalent in Dutch, the language of the case.

29 — See paragraph 74 of the Opinion of Advocate General Lenz in *Commission* v *Belgium*, cited in note 21. See further Advocate General Lenz's analysis in *TV10*, cited in note 21 (paragraphs 62 to 68 of his Opinion), of the factors relevant to determining avoidance of legal provisions by a legal person.

30 — See the Opinion of Advocate General Lenz in *Commission* v *Belgium*, cited in note 21, paragraph 75.

51. The cumulative effect of the points made above is in my view sufficient to displace any argument based on *Van Binsbergen* in this case.

52. I am not in any event convinced that the principle, even if applicable, would assist those who invoke it in this case. A distinguishing feature is that, in contrast to *Veronica* and *TV10*, enforcement of the measure at issue in this case is being sought not against TV3, the provider of services, which is established in another Member State, but against the advertiser, which is clearly established in Sweden. It would require a further development of the *Van Binsbergen* principle for it to be applicable in these circumstances. Moreover, any attempt to argue that the advertiser was seeking to use an undertaking established in another Member State solely in order to avoid its own national legislation would surely founder given that the advertisements at issue were also broadcast on domestic channels (TV4 in *De Agostini* and Homeshopping Channel in *TV-Shop*).

53. I am accordingly unconvinced by any of the general arguments seeking to demonstrate that the Television Directive is not applicable in the circumstances of these cases. I shall now turn to the specific question referred by the national court, namely whether that directive prevents a Member State from taking action against television advertisements broadcast from another Member State. The answer to that question is in my view in all cases that the Television Directive does prevent a Member State from taking such action.

54. Article 2(2) of the directive, set out above, prohibits Member States from restricting retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by the directive. The answer to the national court's question accordingly depends on whether the regulation of advertisements of the type at issue falls within those fields. *De Agostini* primarily concerns advertising directed at children; in addition, the order sought by the Consumer Ombudsman in the alternative appears to be based on the assumption that the advertising is in part misleading and hence contrary to the Marketing Practices Law. In *TV-Shop* the ground on which the Consumer Ombudsman seeks to prohibit the advertiser from making certain claims and suggestions in its advertisements appears to be that the advertisements are misleading and hence contrary to the Marketing Practices Law. I will consider the two types of advertising separately.

Advertising directed at children

55. The Consumer Ombudsman and the Swedish, Finnish, Norwegian and Greek Governments seek to justify the restriction on transmission at issue in *De Agostini* on the ground that it is intended to protect children from television advertising.

56. In my view, such an aim, however laudable in itself, clearly falls within the fields coordinated by the directive, in which case Article 2(2) applies and the receiving State is not to restrict retransmission on its territory of broadcasts from other Member States. That conclusion to my mind flows from the scheme of the directive and its provisions concerning advertising.

57. It is clear from the 27th recital in the preamble that the directive lays down 'a certain number of minimum rules and standards' for television advertising in the interests of consumer protection. The 29th, 30th and 32nd recitals give various further reasons for prohibiting or limiting certain types of television advertising, such as for tobacco and medicinal products; those reasons include (in the 32nd recital) the protection of the physical, mental and moral development of minors in programmes and in television advertising.

58. Chapter IV of the directive, 'Television advertising and sponsorship', lays down general and specific provisions for the regulation of advertising via television broadcasts. That chapter, which consists of Articles 10 to 21, lays down both rules concerning when, where and how advertisements may be placed (Articles 10, 11, 18 to 20) and rules concerning the content and presentation of advertisements (Articles 12 to 16).

59. Article 12 requires compliance with certain general ethical and public-interest standards. Article 13 contains a strict prohibition on all forms of television advertising for cigarettes and other tobacco products. Article 14 prohibits television advertising for certain medicinal products and treatment. Article 15 lays down a number of criteria with which advertising for alcoholic beverages must comply, among which are that it may not be aimed specifically at minors or depict minors consuming such beverages. Finally, Article 16 provides that television advertising must not cause moral or physical detriment to minors and must therefore comply with specified criteria for their protection.

60. Article 21 requires Member States to ensure that, in the case of television broadcasts that do not comply with the provisions of Chapter IV, appropriate measures are applied to secure compliance with those provisions.

61. It is in my view clear from the combined effect of the provisions considered above that the directive lays down minimum rules and standards regulating television advertising, including standards for the protection of minors.

62. I accordingly conclude that the type of advertising here at issue, namely advertising directed at children, falls within the scope of the directive, and hence by virtue of Article 2(2) a Member State may not restrict transmission on its territory.

63. It may be noted that the EFTA Court came to the same conclusion as to the combined effect of Articles 16 and 2(2) in the Norwegian cases mentioned above. [31]

Misleading advertising

64. Although the advertisements in *TV-Shop* are what is known as 'tele-shopping', and hence fall outside the definition of 'television advertising' for the purposes of Chapter IV of the Television Directive, they none the less unquestionably constitute television broadcasts for the purposes of Chapter II of the directive, 'General provisions'; thus Article 2(2) prohibits restrictions on retransmission for reasons which fall within the fields coordinated by the directive.

65. The Consumer Ombudsman, the Swedish and Finnish Governments and the Commission submit that the regulation of misleading advertisements does not come within the scope of the Television Directive. Various arguments are adduced in support of that proposition.

66. Before turning to those arguments, however, it is appropriate briefly to describe Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [32] ('the Misleading

31 — Cited in note 6; see paragraphs 31 to 41 of the judgment and the operative part.

32 — OJ 1984 L 250, p. 17.

Advertising Directive'), since it is relied on by various parties.

67. The Misleading Advertising Directive aims to improve consumer protection and to put an end to distortions of competition and hindrances to the free movement of goods and services arising from disparities between the Member States' laws against misleading advertising. [33] With those objectives in mind, it seeks to establish minimum objective criteria for determining whether advertising is misleading and minimum requirements for the means of affording protection against such advertising. 'Advertising' and 'misleading advertising' are widely defined [34] and would unquestionably encompass misrepresentations of the type allegedly made in the course of a televised infomercial.

68. The first argument as to why the Television Directive does not apply to misleading advertising is put forward by the Consumer Ombudsman, who states that the Commission's original proposal for the Television Directive [35] indicates clearly that national legislation on advertising may be applied to cross-border advertisements.

69. Since there is nothing to that effect in the proposed directive — which on the contrary expressly refers to the adverse effect on the free movement of goods and services of disparities in the field of broadcast advertising [36] — it must be assumed that the Consumer Ombudsman is referring to the Commission's Explanatory Memorandum concerning the proposed directive. [37]

70. It is indeed mentioned in that memorandum that Member States should continue to be able to apply non-discriminatory national laws relating to advertising in general to cross-border broadcasts, provided that those laws are necessary in the public interest to satisfy mandatory requirements concerning, in particular, the protection of public health, the fairness of commercial transactions and consumer protection. [38] The memorandum however continues by making it clear that that possibility was intended to be retained only in areas where there was no harmonization. [39] Since the area of misleading advertising has been harmonized by the Misleading Advertising Directive, there can be no scope

33 — Case C-373/90 *Complaint against X* [1992] ECR I-131, paragraph 9 of the judgment.

34 — See Article 2.

35 — Commission proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, OJ 1986 C 179, p. 4.

36 — See the 16th recital in the preamble.

37 — COM (86) 146 final.

38 — Paragraph 47.

39 — Paragraph 48.

for a Member State to invoke its national laws in that area to restrict cross-border broadcasts.

71. That construction is consistent not only with the Explanatory Memorandum referred to by the Consumer Ombudsman but also with the objectives of harmonization in general.

72. The Consumer Ombudsman also refers to Article 11 of the European Convention on Transfrontier Television, which provides in its second paragraph that advertisements shall not be misleading and shall not prejudice the interests of consumers. Although not developed further, it may be surmised that the Consumer Ombudsman's argument is that the fact that misleading advertising is expressly dealt with in the Convention but not mentioned in the directive suggests that the omission in the latter instrument was deliberate and hence supports his view that the directive does not apply to misleading advertising.

73. That argument is to my mind misconceived.

74. The Convention on Transfrontier Television must be seen in its specific context: in contrast to the Television Directive, it was not adopted against the background of existing harmonization measures. The drafters of the Convention presumably considered that, in order to benefit from the freedom of reception the Convention sought to put in place, advertisements should comply with a general requirement that they should not be misleading and should not prejudice the interests of consumers. Since there was no existing instrument imposing such a requirement, it was included in the Convention. The drafters of the Television Directive, on the other hand, had no need to legislate to that effect, since the Misleading Advertising Directive, adopted five years before the directive, already required Member States to enact legislation protecting consumers against misleading advertising. The fact that the Convention makes provision for misleading advertising does not therefore in my view support the argument that the directive does not extend to such advertising.

75. The Consumer Ombudsman, the Swedish Government and the Commission invoke the 17th recital in the preamble to the Television Directive in support of their view that that directive does not preclude restrictions on retransmission on the basis of misleading advertising legislation. That recital states that the directive is without prejudice to existing or future Community acts of harmonization, in particular to satisfy mandatory requirements concerning the protection of consumers and the fairness of commercial transactions and competition.

76. The various submissions made as to the meaning and effect of the 17th recital are not always wholly easy to disentangle. The common thread, however, appears to be that the 'Community acts of harmonization' there referred to include in particular the Misleading Advertising Directive, and that the effect is that a Member State may continue to prohibit broadcast advertising which is misleading within the meaning of that directive and, presumably, its national legislation implementing that directive.

77. The recital to the effect that the Television Directive is without prejudice to existing or future Community acts of harmonization in my view means simply what it says: any such acts of harmonization are not affected by it. The Misleading Advertising Directive accordingly remains in force in its original version: Member States remain under the obligation to ensure that their national law confers at least the minimum protection against misleading advertising required by that directive. I cannot however see that there are any grounds for interpreting it as meaning that a field which has been the subject of harmonization is *ipso facto* not within the scope of the Television Directive.

78. The preamble to the Misleading Advertising Directive, explaining the objectives of the directive, states that the differences between the laws of the Member States hinder the execution of advertising campaigns beyond national boundaries and thus affect the free circulation of goods and provision of services: [40] for that reason *inter alia* it seeks to approximate the laws, regulations and administrative provisions of the Member States concerning misleading advertising. It would be perverse if a directive explicitly seeking to encourage the free movement of goods and services by facilitating cross-border advertising could be used to the opposite effect.

79. Finally, it is argued by the Consumer Ombudsman, the Swedish Government and the Commission that misleading advertising is not within the fields coordinated by the Television Directive within the meaning of Article 2(2), so that a Member State may restrict retransmission of advertisements broadcast from another Member State on the ground that it contravenes the recipient State's legislation on misleading advertising. That argument clearly to some extent echoes the previous one. The Commission however makes the separate point that, because there is no specific rule in the Television Directive regulating it, misleading advertising is not within the fields coordinated.

80. That proposition to my mind confuses two distinct issues, namely the fields coordinated by the directive and the specific matters regulated by it. It is the former concept

40 — Fourth recital.

which is crucial in determining whether Article 2(2) applies.

81. The fields coordinated by the directive comprise the promotion of distribution and production of television programmes (Chapter III), television advertising and sponsorship (Chapter IV), the protection of minors (Chapter V), and the right of reply (Chapter VI). That construction is in my view clear from the scheme and objectives of the directive; that it is the correct construction is moreover apparent from the *travaux préparatoires*, which indicate that the directive was intended to coordinate the abovementioned fields (with, originally, the addition of copyright) by, *inter alia*, coordinating national laws which may be invoked so as to hinder reception of cross-border broadcasts. [41] A narrow construction of the concept of 'the fields coordinated' by the directive is accordingly not appropriate.

82. That view moreover finds support in the Opinion of Advocate General Lenz in *Commission* v *Belgium*, [42] in the context of an argument that, since the concepts of public order, morals and security are not explicitly, or in any event comprehensively, mentioned in the directive, they are not among the fields coordinated by the directive for the purposes of Article 2(2) and hence a Member State may restrict retransmission for reasons relating to those concepts. Advocate General Lenz rejected that argument on the ground that such an interpretation would to a large extent destroy the liberalization pursued by the directive, which is based on the fundamental principle of Member States' mutual confidence. The prohibition of a second 'control' of broadcasts by the receiving State is the expression of that principle. [43] The Court endorsed the Advocate General's approach. [44]

83. Admittedly Advocate General Lenz appears to imply earlier in his Opinion [45] that the effect of the 17th recital in the preamble is that the areas there mentioned are not among the fields coordinated for the purposes of Article 2(2). That suggestion, however, was made in the context of several doomed arguments based on areas which are clearly not within those fields, namely

(i) a provision in the European Convention on Human Rights making it clear that it is not a contravention of the right of freedom of expression for States to require the licensing of, *inter alia*, broadcasting enterprises,

(ii) copyright (which, although originally clearly intended to be a field coordinated, comprising Chapter V of the

41 — See in particular paragraphs 1 to 3 and 24 to 30 of the Explanatory Memorandum to the Commission's proposal, cited in note 37.

42 — Cited in note 21.

43 — See paragraphs 99 to 101 of the Opinion.

44 — See paragraphs 88 and 92 of the judgment.

45 — See paragraph 53.

Commission's proposal, [46] was removed from the scope of the directive in the course of the legislative process),

(iii) Article 128(4) of the Treaty, which requires the Community to take cultural aspects into account in its action under the Treaty, and

(iv) the principle of subsidiarity. The Advocate General's passing remark about the effect of the 17th recital in the preamble should perhaps therefore not be construed too widely.

84. It may finally be noted that the view that national laws on misleading advertising may be invoked so as to prevent retransmission of broadcasts from another Member State would not only gravely undermine the transmitting State principle but also give rise to significant practical difficulties. [47] In the present cases, admittedly, the advertisers in question are Swedish, so that remedies for misleading advertising available under Swedish law could be enforced against them without difficulties of principle. Frequently, however, it may be envisaged that in an analogous situation the advertiser concerned will be established in another Member State. In such circumstances, the practical difficulties of enforcing remedies available under the receiving State's national law are all too apparent.

85. Admittedly the EFTA Court in the Norwegian cases cited above [48] expressed the view that the Television Directive was not intended to preclude a State from taking action under the Misleading Advertising Directive with regard to an advertisement that must be considered to be misleading under the terms of the latter directive. [49] That comment, however, was clearly made *obiter*, and it appears from the wording of the judgment and from the report for the hearing in those cases that the EFTA Court heard no argument on the matter from any of the parties. In an area where laws have already been harmonized, it is difficult to see any rationale for the view that those laws may be invoked against broadcasts in respect of which the Television Directive guarantees freedom of reception and retransmission. Moreover — as indeed these cases demonstrate — the result of such a view would be both unsatisfactory and anomalous, requiring individual broadcasts to be conceptually dismantled in order to determine which fragments were within the scope of that directive and which were not.

86. In my view, therefore, Article 2(2) of the Television Directive prevents a Member State

46 — Cited in note 35.

47 — This point is also mentioned, albeit briefly, by Advocate General Lenz in his Opinion in *Commission* v *Belgium*, cited in note 21; see paragraph 103 of the Opinion.

48 — Cited in note 6.

49 — See paragraphs 54 to 56 and 58 of the judgment.

from restricting retransmission on its territory of television broadcasts from other Member States on the ground that the broadcasts infringe its national laws on misleading advertising.

87. I accordingly conclude that the Television Directive prevents a Member State from taking action against television advertisements broadcast from another Member State which are directed at children or which are allegedly misleading within the meaning of the Misleading Advertising Directive.

88. That conclusion would be the same even if it were the case — as has been suggested in *De Agostini* [50] — that the United Kingdom, notwithstanding apparently imposing more stringent rules than required by the directive with regard to advertising directed at children, [51] does not in fact monitor compliance with those controls in the case of broadcasts transmitted abroad, thus infringing Articles 2(1) and 21 of the directive. The proper course in those circumstances would be for the dissatisfied State of reception to bring proceedings against the transmitting State under Article 170 of the Treaty or to bring the matter to the attention of the Commission with a view to proceedings under Article 169. [52]

89. That remedy will equally be appropriate if the State of reception considers that the State of transmission is failing to ensure, as required by Article 2(1) of the Television Directive, that broadcasts transmitted by broadcasters under its jurisdiction comply with its own laws applicable to broadcasts intended for its public, which in the case of advertising within the very wide meaning of the Misleading Advertising Directive will include its laws on misleading advertising.

90. It may be noted that the Commission recently brought proceedings under Article 169 against the United Kingdom seeking a declaration that the United Kingdom had failed correctly to implement the Television Directive. [53] One of the Commission's heads of claim concerned the fact that in the United Kingdom there are two separate regimes for domestic and non-domestic satellite services; the rules applicable to the latter are less stringent than those applicable to the former (and moreover it appears from an exchange of letters with the United Kingdom Independent Television Commission, annexed to the observations of TV-Shop, that compliance with those rules is not monitored at all in the United Kingdom when the broadcasts are not in English). The Commission alleged that that distinction constituted a breach of Articles 2(1) and 3(2) of the directive.

50 — See paragraph 90 of this Opinion.

51 — See paragraph 40 of the judgment of the EFTA Court in the Norwegian cases, cited in note 6.

52 — See *Commission* v *Belgium*, cited in note 21, paragraphs 34 to 37 of the judgment and paragraphs 50 and 51 of the Opinion of Advocate General Lenz. See also the Court's judgment of 23 May 1996 in Case C-5/94 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd*, in particular paragraphs 19 and 20.

53 — See note 15.

91. The Court delivered its judgment in *Commission* v *United Kingdom* on 10 September 1996, ruling that that head of the Commission's complaint was well founded. [54]

92. Finally in the context of *De Agostini* I can deal summarily with the national court's second question in relation to the effect of the Television Directive, namely whether it precludes application of the national law prohibiting advertisements directed at children with regard to the domestic channel TV4. In my view it clearly does not preclude the restrictions in relation to the advertisement there broadcast since by virtue of Article 3(1) Member States are free to lay down stricter rules with regard to broadcasters under their jurisdiction. The question whether that prohibition is contrary to Article 30 of the Treaty is considered below.

The Treaty provisions

93. The national court in addition asks, first, in relation to all three cases referred whether Article 30 or Article 59 of the Treaty prevents a Member State from taking action against television advertisements which an advertiser arranges to have broadcast from another Member State, and, secondly, in relation to the first case only, whether either of those articles precludes application of a national law prohibiting advertisements directed at children.

94. The first of those questions is no longer relevant given my view that the advertising in question falls within the scope of the Television Directive, Article 2(2) of which prevents a Member State from taking such action. I will accordingly turn to the second question, which as stated above [55] appears from the order for reference to relate specifically to the advertisements broadcast on the domestic channel, TV4. It will be recalled that the national law prohibits all television advertising to children, that the magazines at issue in *De Agostini* were printed in Italy and that TV4 is a Swedish channel broadcasting to the Swedish public and offering services (namely air time for advertising) to a Swedish company.

Article 30

95. De Agostini argues in essence that the national restrictions on advertising sought to

54 — See paragraphs 70 to 75 of the judgment. See also paragraphs 84 and 85 of the Opinion of Advocate General Lenz.

55 — Paragraph 30.

be invoked against it by the Consumer Ombudsman are contrary to Article 30, which prohibits quantitative restrictions on imports and all measures having equivalent effect.

96. The Court ruled in *Keck and Mithouard* [56] that national provisions restricting or prohibiting certain selling arrangements are not caught by Article 30 provided that they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. [57] Whether the measures at issue are contrary to Article 30 therefore depends, on the present state of the law, on whether they satisfy those requirements.

97. With regard to the first issue, namely whether the measures restrict or prohibit selling arrangements, the Court ruled in *Leclerc-Siplec* v *TF1 Publicité and M6 Publicité* [58] that a prohibition of televised advertising in a particular sector (distribution) concerned selling arrangements since it prohibited a particular form of promotion (televised advertising) of a particular method of marketing products (distribution). [59] A measure prohibiting that form of promotion in relation to a particular category of potential consumers, or a particular category of goods, must on that basis be regarded as a selling arrangement, assuming that other forms of promotion are available and effective for the category concerned. Whether that is so is a question of fact for the national court to ascertain: it may be noted that it is vigorously disputed by De Agostini.

98. In addition, in order to come within the category of measures which on the basis of *Keck* must be regarded as falling outside the scope of Article 30 the measure in question must apply to all relevant traders operating within the national territory and must affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States.

99. The first condition is clearly satisfied in all these cases. In my view however the position is not so clear with regard to the second condition: I share the Commission's concern that the effect of the prohibition of all television advertising directed at children might in fact be greater on products from other Member States. As I argued in my Opinion in *Leclerc*, it would be inconsistent with the objectives of the Treaty to interpret *Keck* so as to exclude from the scope of Article 30 a total ban on the advertising of a product which may lawfully be sold in the Member State where the ban is applied and in other

56 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.
57 — Paragraph 16 of the judgment.
58 — Case C-412/93 [1995] ECR I-179.
59 — Paragraph 22 of the judgment.

Member States: 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, so that the measure would be tantamount to a quantitative restriction on trade between Member States. [60] However the discrimination test laid down by *Keck* is interpreted, it is difficult to resist the conclusion that in practice such a ban will almost certainly have a perceptible effect on imports.

100. *A fortiori* the same concern arises with regard to a total ban on the television advertising of any product to a particular sector of consumers. I accordingly consider that the total ban on advertising to children is in principle contrary to Article 30.

101. A measure applicable without distinction which restricts the free movement of goods may however be compatible with the Treaty if it is necessary in order to satisfy imperative requirements relating to the general interest and proportionate to its aim. [61]

102. It is settled law that the fairness of commercial transactions and consumer protection in general figure among the objectives which can justify restrictions on the free movement of goods. [62] The protection of a particularly vulnerable sector of consumers such as children must *a fortiori* also constitute an overriding public-interest ground capable of justifying such restrictions.

103. In addition it must be demonstrated that the restriction does not exceed what is necessary to attain the objectives sought. In this case the Commission has expressed doubts (in the parallel context of Article 59) whether the total ban on advertising to children can properly be regarded as proportionate to the objective pursued, arguing that that objective could be attained by means less draconian than a total prohibition, for example by way of rules as to content and quality or an obligation to indicate the price of costly items. Another possibility would perhaps be to exempt from the ban educational material.

104. It is not however obvious to my mind that tempering the ban in such a way would be an equally effective method of meeting the Swedish Government's concerns that young children, since they are not able to distinguish between documentary and publicity, should not be exposed to the latter. I am consequently not persuaded that the ban is necessarily disproportionate to the objectives sought. It may be noted that the Court

60 — See paragraph 50 of my Opinion.

61 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 ('Cassis de Dijon').

62 — Ibid., paragraph 8 of the judgment.

has accepted — in the parallel field of justification of measures to which Article 59 applies — that certain types of prohibition of advertising, for example a prohibition on advertising particular products or on certain days or restrictions designed to enable viewers not to confuse advertising with other parts of the programme, may be permissible: see *Collectieve Antennevoorziening Gouda* [63] (albeit in that case the Court ruled that the restrictions were not in fact justified since their object and effect were to protect the revenue of the national television advertising foundation).

105. I accordingly conclude that Article 30 of the Treaty does not preclude application of a national law prohibiting advertising directed at children under 12.

Article 59

106. It is clear from previous decisions of the Court that television broadcasting in general and the broadcasting of television advertisements in particular come within the Treaty rules relating to services: see in particular the early case of *Sacchi*. [64] Although that case concerned only terrestrial transmissions (or 'over the air' broadcasts) and transmissions by cable television, the principle it laid down applies equally to the form of broadcasting at issue in these cases, namely transmission by satellite. [65]

107. The Court has on a number of occasions considered the compatibility with Article 59 of restrictions on television advertising. [66] In *Bond van Adverteerders* [67] it analysed the effect of a ban on advertising and concluded that such a ban involves a twofold restriction on the freedom to provide services: first, it prevents cable network operators established in a Member State from relaying television programmes supplied by broadcasters (in that case, via satellite transmission) established in other Member States; secondly, it prevents those broadcasters from scheduling for advertisers established in particular in the Member State where the programmes are received advertisements intended for the public in that State. [68]

63 — Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 27 of the judgment.

64 — Case 155/73 [1974] ECR 409, paragraph 6 of the judgment. See also the sixth recital in the preamble to the Television Directive.

65 — See generally the comments of Advocate General Mancini in Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085 as to the continuing relevance of the principles established in *Sacchi* notwithstanding subsequent technical advances in broadcasting methods.

66 — See *Sacchi*, cited in note 64, Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833, *Bond van Adverteerders*, cited in note 65, and *Collectieve Antennevoorziening Gouda* cited in note 63.

67 — Cited in note 65.

68 — Paragraph 22 of the judgment.

108. The provisions of the Treaty on freedom to provide services cannot apply, however, 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. [69]

109. In the case of the advertisements broadcast on TV4, Article 59 appears for that reason in the circumstances of this case to be inapplicable: TV4 is a Swedish channel broadcasting to the Swedish public and is offering services to a Swedish company, albeit belonging to an international group established in Italy. It will be obvious, however, that that article would be applicable to the national law at issue in other circumstances which may readily be envisaged: for example, if the advertiser or the viewers were not purely domestic.

110. I accordingly conclude that in the circumstances of *De Agostini* Article 59 of the Treaty does not preclude application of a national law prohibiting advertisements directed at children.

Conclusion

111. Accordingly, I am of the opinion that the questions put by the Marknadsdomstol should be answered as follows:

(1) Article 2(2) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities prevents a Member State from taking action against television advertisements broadcast from another Member State;

69 — See for example *Debauve*, cited in note 66, paragraph 9 of the judgment, and *TV10*, cited in note 18, paragraph 14 of the judgment.

(2) Neither that directive nor Article 30 of the Treaty nor Article 59 of the Treaty precludes application by a Member State of a national law prohibiting advertisements directed at children under 12 where both the advertiser and the broadcaster are established in that State and the advertisements are broadcast on a domestic television channel received exclusively by viewers in that State.