portionate measure in relation to the objective to be achieved, in that the prohibition in question is relatively ineffective in view of the existence of natural reception zones, or discrimination which is prohibited by the Treaty in regard to foreign broadcasters, in that their geographical location allows them to broadcast their signals only in the natural reception zone.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 18 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 13 DECEMBER 1979

My Lords,

Introduction

Of these two cases, one, Case 52/79, comes to the Court by way of a reference for a preliminary ruling by the Tribunal Correctionnel of Liège, the other, Case 62/79, by way of a reference for a preliminary ruling by the Cour d'Appel of Brussels.

Both raise questions of interpretation of Articles 59 to 66 of the EEC Treaty, relating to the free movement of services.

Both have as their background the activities of undertakings providing television diffusion services in Belgium. Essentially, such a service consists in picking up by means of an aerial television signals that have been broadcast over the air and distributing the signals by cable to the television sets

of subscribers to the service. We were told that, from a technical point of view, it is only the scale and professionalism of the operation (in particular, the size and location of aerials and the standard of maintenance) that distinguishes it from that involved in the use of a common aerial for television reception in, for instance, a block of flats.

Cable diffusion of television was said to have four beneficial effects. First, it provides a means of overcoming obstacles to the direct reception of broadcasts, such as hills, forests and tall buildings. Secondly, it improves the quality of both picture and sound. Thirdly, it enables subscribers to receive television programmes even though they live beyond the range of the broadcasting stations emitting those programmes, i.e. outside what was called their "zone of natural reception". Finally, there is an evironmental consideration: cable diffusion dispenses with the need for unsightly private aerials on the roofs of houses. It was stressed that, once a viewer has become a subscriber to a diffusion service, he receives all television programmes by cable, including those within whose zone of natural reception he may be living.

These cases are about problems arising from the cable diffusion in Belgium of programmes broadcast by television stations outside Belgium. The Court was shown a map which made it clear that every part of Belgium lies within the zone of natural reception of one or more foreign stations (British, Dutch, German, Luxembourgish or French). The extent of penetration by foreign broadcasts shown on the map was questioned by Counsel for the German Government, but he did not press the point, nor would the overall picture have been much altered if he had been right. It was said, without contradiction, that the effect of cable diffusion was to increase the number of foreign programmes available to Belgian viewers from, in the most favoured areas, two or three to eight or ten.

Case 52/79 arises from a prosecution for infringement of a prohibition of the diffusion of commercial advertisements contained in an Arrêté Royal to which I shall refer in more detail in a moment. Case 62/79 arises from a civil action for breach of copyright.

The relevant Belgian law

Broadcasting is in Belgium a statutory monopoly, covering both radio and television. It is now governed by a statute of 18 May 1960, which (as amended by a decree of 12 December 1977) set up two broadcasting corporations ("instituts d'émission"), namely, "Radiodiffusion-télévision belge de la Communauté culturelle française" (commonly known as "RTBF") and "Belgische radio en televisie, Nederlandse uitzendingen" (commonly known as "BRT"). The statute also established a joint body, the "Radiodiffusion-télévision belge — Institut des services communs", which is responsible for common technical, administrative, financial and cultural services, for broadcasts in German, and for a world service.

Among other restrictions, the statute, by Article 28 (3), forbids any broadcast by RTBF or BRT (or, as I understand it, by the joint "Institut") of any material in the nature of a commercial advertisement ("revêtant un caractère de publicité commerciale"). We were told that none the less programme sponsorship by bodies of a public or quasi-public nature, such as SABENA, the Caisse de Crédit Communal and the Caisse d'Epargne, is permitted.

Cable diffusion of television is regulated by an Arrêté Royal of 24 December 1966.

Chapter II of that Arrêté Royal contains provisions on the licensing of cable diffusion networks.

Under Article 2 the establishment of such a network without a licence from the competent Minister is prohibited. We were told that an application for a licence must state the broadcasting stations whose programmes the applicant is proposing to relay, and that any addition to or subtraction from the group of stations thus specified requires fresh authorization.

Article 7 provides that licences shall be granted in respect of a defined territory constituting part of a commune, a single commune or a number of adjoining communes. However, the competent Minister may authorize the installation outside that territory of aerials and of equipment connected thereto.

Chapter VI of the Arrêté Royal is headed "Programmes". Included among its provisions are Articles 20 to 23, which are, so far as material, in these terms:

"Article 20.

Sauf en cas d'impossibilité reconnue par la Régie des Télégraphes et des Téléphones, tout réseau de distribution d'émissions de radiodiffusion télévisuelle doit transmettre simultanément et dans leur intégralité toutes les émissions de la Radiodiffusion Télévision belge.

Article 21.

Sous réserve des stipulations des conventions internationales, le distributeur peut transmettre les émissions de toute autre station de radiodiffusion télévisuelle autorisée par le pays où elle est établie.

Est toutefois interdite la transmission:

1° des émissions revêtant un caractère de publicité commerciale;

...

Article 22.

Il est interdit au distributeur de relier au réseau de distribution d'émissions de radiodiffusion télévisuelle des appareils susceptibles de distribuer des images et sons autres que ceux des programmes autorisés.

...

Article 23.

Il est interdit de distribuer des émissions:

a) attentatoires à la sûreté de l'État, à l'ordre public ou aux lois belges;

b) contraires aux bonnes mœurs;

c) susceptibles de constituer un outrage aux convictions d'autrui ou une offense à l'égard d'un État étranger."

Article 41 of the Arrêté Royal provides that any infringement of its provisions may result in the temporary or permanent withdrawal of a licence. That is expressed to be without prejudice to the provisions of a statute of 26 January 1960, under which fines may be imposed.

The relevant Belgian law of copyright is stated in the Order for Reference made by the Cour d'Appel of Brussels. The Cour d'Appel there says that the position of cable diffusion undertakings is governed in Belgium by Article 11 bis of the Berne Convention on the Protection

of Literary and Artistic Works in its "Brussels version" of 26 June 1948, which was ratified by a Belgian statute of 26 June 1951. Paragraph 1 of Article 11 bis reads:

"Authors of literary and artistic works shall have the exclusive right of authorizing:

(i) the radiodiffusion of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public, whether over wires or not, of the radiodiffusion of the work, when this communication is made by a body other than the original one;

(iii) . . ."

The Cour d'Appel says that subparagraph (ii) is in point inasmuch as a Belgian cable diffusion undertaking is a body other than the original broadcaster and inasmuch as the diffusion of a broadcast by such an undertaking to its subscribers is a "communication to the public . . . over wires". That being so the author of any literary or artistic work that is the subject-matter of a broadcast has the exclusive right of authorizing its diffusion by such an undertaking. As I understand it, the same principle holds good, in the view of the Cour d'Appel, whether the original broadcast was made in Belgium or elsewhere.

In my opinion this Court cannot go behind the Cour d'Appel's ruling on that because, on a reference under Article 177 of the Treaty, any question of interpretation of national law is a matter for the national Court.

Also of some relevance in these cases are Articles 1 and 6 (1) of the European Agreement on the Protection of Television Broadcasts of 22 June 1960, made under the auspices of the Council of Europe (the "Strasbourg Agreement"). So far as the Member States of the Community are concerned that Agreement is in force as between Belgium, Denmark, France, the Federal Republic of Germany and the United Kingdom. The Agreement has not, so it seems, been ratified by Ireland, Italy, Luxembourg, or the Netherlands.

Article 1 is, so far as material, in these terms:

"Broadcasting organizations constituted in the territory and under the laws of a Party to this Agreement or transmitting from such territory shall enjoy, in respect of all their television broadcasts:

1. in the territory of all Parties to this Agreement, the right to authorize or prohibit:

   (a) . . .

   (b) the diffusion of such broadcasts to the public by wire;

. . ."

Article 6 (1) provides:

"The protection provided for in Article 1 shall not affect any rights in respect of a television broadcast that may accrue to third parties, such as authors, performers, film makers, manufacturers of phonographic records or organizers of entertainments."

I turn now to the facts of the cases before the Court, and first to those of Case 52/79.

The facts of Case 52/79

The effect of Article 21 of the Arrêté Royal of 24 December 1966, on the face of it, is that cable diffusion undertakings in Belgium are required to blot out any commercial advertisements in foreign television programmes that they relay. By virtue of Article 23 they are required to blot out other categories of material too, but Case 52/79 is only about advertisements.

We were told of the difficulties that such blotting out would entail if the requirements of Articles 21 and 23 of the Arrêté Royal were enforced. They seem to be of three kinds.

Firstly it would mean that each diffusion network would have to employ a person to watch each foreign programme that was being relayed for the whole time that that programme was being broadcast, so that he could switch off when forbidden material came on screen and switch on again when it had gone. This would involve an enormous increase in staff, entailing a corresponding increase in subscriptions to the service. We were told that, at present, once a network has been installed, all the equipment operates automatically, so that staff are needed only for management and for maintenance.

Secondly, staff recruited so to monitor and censor programmes would inevitably make errors of judgment. The borderline between material "revêtant un caractère de publicité commerciale" and that which does not can be a hazy one. We were told of difficulties that the RTBF and the BRT had had and still have in drawing the distinction. The example was given to us of a monitor watching a football match and seeing on his screen an advertisement exhibited in the stadium. Should he or should he not at once switch the network off?

Thirdly, the effect of switching the network off was to produce an unpleasant noise in subscribers' sets and what was described as "snow" on their screens. This caused annoyance to subscribers who were left wondering whether the trouble lay in their sets, in the diffusion network, or in the broadcast itself.

Nor, because of Article 22 of the Arrêté Royal, was the diffusion undertaking able to insert a signal of its own explaining the break in service.

It appears to be common ground that after an initial period of compliance, the cable diffusion undertakings, because of those difficulties and of the rapid growth of television advertising in the countries bordering on Belgium, came to ignore Article 21 of the Arrêté Royal and to relay foreign television programmes in their entirety. To that general non-compliance with the Article the authorities adopted the policy of turning a blind eye. So much is clear from the Ministerial statements to which we were referred and from the fact that the prosecution in Case 52/79 is the first ever to have been brought for infringement of Article 21.

The initiative in bringing that prosecution was taken by three associations which describe themselves as "consumer associations", namely the ASBL "Fédération Nationale du Mouvement Coopératif Féminin, Organisation de Consommateurs", the ASBL "Fédération Belge des Coopératives" and the ASBL "Vie Féminine". Why women's organi-

zations should be so involved was explained to us at the hearing by their Counsel. They consist mostly of mothers and school teachers who are concerned about the effect of television advertisements on children.

At all events those associations laid complaints before the prosecuting authorities ("ministère public") at Brussels, Antwerp and Liège. The only reaction came from the authorities at Liège, where the prosecution was instituted before the Tribunal de Police.

The undertakings at whose activities the prosecution is aimed are a company in the well-known "Coditel" group and the "Association Liégeoise d'Électricité" (or "ALÉ"). Between them, the Coditel company and the ALÉ provide a cable diffusion service covering the city and province of Liège. The actual accused are three individuals (Messrs. Debauve, Denuit and Lohest) who are members of the management staffs of the Coditel company and of the ALÉ. The Coditel company and the ALÉ themselves are cited in the proceedings as civilly liable ("civilement responsable").

The three associations who set the proceedings in motion have intervened in them as "civil parties" ("parties civiles") as have done a large number of individuals and the RTBF.

We were told that before the Tribunal de Police the "ministère public" submitted that the defendants should be acquitted.

At all events the Tribunal de Police did acquit them. In a judgment dated 14 December 1978, after recalling that Article 21 was expressed as having effect "sous réserve des conventions internationales", it held it inapplicable for two reasons. The first was that the Strasbourg Agreement gave foreign broadcasting stations a right to forbid the cable diffusion of their broadcasts if their programmes were altered. (There was indeed placed before us a letter dated 8 October 1966 from the French Embassy in Belgium to what seems to be the parent company of the Coditel group authorizing the diffusion in Liège of the ORTF's television broadcasts on terms *inter alia* that "la distribution devra être effectuée sans coupures" — Annex I to the Observations of M. Debauve and others). The Tribunal's second reason was that, this Court having held in Case 155/73 the *Sacchi* case [1974] 1 ECR 409, at p. 427, that the transmission of television signals, including those in the nature of advertisements, came within Articles 59 to 66 of the Treaty, the excision of advertisements from broadcasts from other Member States would be contrary to Community law, which took precedence over Article 21 of the Arrêté Royal to the extent of any incompatibility between them.

At the instance of the "parties civiles" (or of a majority of them) an appeal against the acquittal was lodged with the Tribunal Correctionnel of Liège. We are told that before that Court too the "ministère public" submitted that the defendants were entitled to be acquitted, essentially on the ground that Article 21 of the Arrêté Royal contravened the provisions of the Belgian Constitution safeguarding freedom of opinion and forbidding censorship.

By Order dated 23 February 1979, however, the Tribunal Correctionnel referred to this Court two questions, in the following terms:

"(1) Having regard to the judgment of the Court of Justice of 30 April 1974 in Case 155/73, *Sacchi*, should Article 59 of the Treaty of Rome be interpreted as prohibiting all national rules which forbid the transmission of advertisements by cable television diffusion companies even though it remains possible and lawful to pick up such advertisements naturally within the reception zones of foreign broadcasting stations, having regard in particular to the circumstances that:

(a) such rules would introduce discrimination based on the geographical location of the foreign broadcasting station which could transmit advertisements only within its zone of natural reception, such zones being susceptible, because of differences in density of population, of being of very different interest from an advertising point of view,

(b) such rules would introduce a restriction disproportionate to the purpose in view since that purpose — the prohibition of television advertising — could never be wholly attained because of the existence of the zones of natural reception;

(2) Having regard to the judgment of the Court of Justice of 3 December 1974 in Case 33/74, *Van Binsbergen*, should Articles 59 and 60 of the Treaty of Rome be interpreted as having direct effect as against all national rules in so far as such rules do not create any formal discrimination against a person providing services on the ground of his nationality or his place of residence (in the present instance, the prohibition of retransmitting advertisements)?"

The facts of Case 62/79

In Case 62/79 the facts are these.

By an agreement dated 8 July 1969 made between a French company, the SA "Les Films la Boétie" (which I shall call "La Boétie") and a Belgian company, the SA "Ciné Vog Films" (which I shall call "Ciné Vog") La Boétie granted to Cine Vog the exclusive right for a period of seven years to distribute in Belgium and Luxembourg a film called "Le Boucher" which had been produced by La Boétie. The agreement covered both cinema showings and television broadcasts. It provided however that the film was not to be shown on television in Belgium until the expiry of forty months after its first showing in a cinema there, nor was it to be shown on television in Luxembourg until the last year of the seven. The first showing of the film in a cinema in Belgium took place on 15 May 1970, so that according to the agreement it should not have been shown on television in Belgium until September 1973.

The right to distribute "Le Boucher" in Germany was granted by La Boétie to another French company called "Filmedis", or so we were told at the hearing by Counsel for Ciné Vog. Filmedis, it seems, was allowed under its agreement with La Boétie to exploit the German television rights in the film immediately, and it proceeded to do so. As a result the film was shown on German television on 5 January 1971.

The broadcast was picked up in Belgium by Coditel and relayed to its subscribers, but only — so I understood it to be alleged on behalf of Coditel — in the zone of natural reception of the German station. Coditel's subscribers in that zone thus saw the film (dubbed in German and without subtitles) only seven months after it had first been released to cinemas in Belgium.

Ciné Vog brought an action before the Tribunal de Première Instance of Brussels, in which it was joined as co-plaintiff by the ASBL "Chambre Syndicale Belge de la Cinématographie", against La Boétie and three companies in the Coditel group, including, as I understand it, the Liège company which is a defendant in Case 52/79. (I henceforth refer to those three companies simply as "Coditel"). An intervention in support of La Boétie by the "Chambre Syndicale des Producteurs et Exportateurs de Films Français" was allowed.

Ciné Vog's claim against La Boétie, which was based on breach of contract, was held by the Tribunal de Première Instance to be inadequately formulated, and so to fail.

Its claim against Coditel, however, based on breach of copyright, was upheld by the Tribunal. The Tribunal granted Ciné Vog an injunction restraining Coditel from showing "Le Boucher" in Belgium without Ciné Vog's licence; declared unlawful Coditel's showing of the film on 5 January 1971; ordered Coditel to pay to Ciné Vog damages of 300 000 BF and to its co-plaintiff nominal damages of 1 BF; gave leave to the latter to publish the judgment in two Belgian newspapers at Coditel's expense; and awarded costs against Coditel.

Coditel now appeals against that judgment to the Cour d'Appel of Brussels.

Interventions in the appeal by further parties were allowed by the Cour d'Appel. I mention them only because two of those interveners were independently represented before this Court, namely "Inter-Régies" and the "Union Professionnelle de Radio et Télédistribution" which appear to be associations representing, respectively, the public and the private bodies providing cable diffusion services in Belgium.

The Cour d'Appel held that, as a matter of Belgian copyright law, Coditel was not entitled to relay the broadcast of "Le Boucher" on 5 January 1971 without the licence of Ciné Vog, whether within the zone of natural reception of the German broadcast or beyond it. It then considered whether Article 85 of the EEC Treaty affected the position, and held that that Article did not in the circumstances apply. Finally the Cour d'Appel considered Article 59 of the Treaty in the light of Coditel's argument that Ciné Vog's action was incompatible with that Article, in so far as it would restrict the possibility for a broadcasting station in a country bordering on Belgium freely to provide a service for persons in Belgium.

After observing that:

"In answer to the twofold objection that could be raised against their argument that the restriction in question will affect not the person providing the service (namely the foreign broadcasting station) but intermediaries (the cable diffusion companies) and that thus the restriction

will operate only between nationals of the same Member State (Belgium), the appellants answer that Article 59 must be read as prohibiting restrictions on freedom to provide services and not only on the free activity of persons providing services, and that it encompasses all cases where the provision of a service entails or has entailed at an earlier stage or will entail at a later stage the crossing of a frontier within the Community"

the Court d'Appel ordered that there be referred to this Court the following questions:

"(1) Are the restrictions forbidden by Article 59 of the Treaty establishing the European Economic Community only those that hinder the provision of services between nationals established in different Member States, or do they include restrictions on the provision of services between nationals established in the same Member State which however concern services the substance of which originates in another Member State?

(2) If the first limb of the foregoing question is to be answered in the affirmative, is it in accordance with the provisions of the Treaty on freedom to provide services for the assignee of the performing right in a cinematographic film in one Member State to rely upon his right in order to prevent the defendant from showing that film in that State by cable diffusion where the film thus shown is picked up by the defendant in that State after having been broadcast in another Member State by a third party with the consent of the original owner of the right?"

It transpired at the hearing, as the result of questions put by some of Your Lordships, that Belgian cable diffusion undertakings have never so far paid a penny to the owners of the copyright in films of which they have relayed broadcasts and that the present action has been brought for the specific purpose of establishing their liability to make such payments. This is, in other words, a test action.

Minor points of Community law

I think it convenient to deal first, in order to get them out of the way, with three minor points of Community law, two of which are raised by the Tribunal Correctionnel of Liège's first question and one by the Cour d'Appel of Brussels's first question.

There is first the suggestion contained in paragraph (a) of the Tribunal Correctionnel's first question that the Belgian rule against the cable diffusion of advertisements (and the same would logically apply to the relevant rule of Belgian copyright law) might be regarded as creating discrimination between broadcasting stations in adjoining Member States because, owing to their different geographical locations, their zones of natural reception are different and not all equally densely populated. The underlying idea is, I apprehend, that such "discrimination" can only be avoided by allowing the entire programme of each of those

broadcasting stations to be freely relayed by cable throughout Belgium.

The point only arises of course in so far as the broadcasting stations in adjoining Member States are to be regarded, for the purposes of Articles 59 to 66 of the Treaty, as providing a service for Belgian viewers outside their respective zones of natural reception. That is a more difficult question, with which I shall deal later. Assuming however that such stations are to be so regarded, it appears to me clear that the "discrimination" between them envisaged by the Tribunal Correctionnel is not discrimination of a kind that the Treaty forbids. As was forcefully pointed out to us on behalf, in particular, of the RTBF, of the French Government and of the Commission, the provisions of the Treaty forbidding discrimination are concerned with discrimination artificially brought about by measures taken by Governments or other persons in positions of power. Those provisions are not designed to suppress competitive advantages enjoyed by particular undertakings owing to their geographical location or other natural factors. On the contrary the Treaty, where it adverts at all to such factors, does so by authorizing, exceptionally, aids to undertakings that are handicapped by them: see for instance Article 42 and Article 92.

The second point is that raised in paragraph (b) of the Tribunal Correctionnel's first question, as to whether the Belgian rule against the cable diffusion of advertisements (and again the same could apply to the relevant rule of Belgian copyright law) should be held incompatible with Community law on the ground that it introduces a restriction disproportionate to its purpose, in that the total prohibition of the reception of forbidden material in Belgium can never be achieved because of the existence of the zones of natural reception of foreign broadcasting stations.

That suggestion seems to me to be based on a misconception. Belgian law, as it has been explained to us, acknowledges the existence of the zones of natural reception of foreign broadcasting stations and does not seek to interfere with the freedom of viewers living within those zones to receive directly the programmes broadcast by those stations. What the Belgian rules here in question forbid is the relaying by Belgian cable diffusion undertakings of certain parts of those programmes, i.e. the diffusion of what I have called "forbidden material". Clearly the purpose of those rules is not, and it could not be, to exclude altogether the viewing of that material on Belgian territory. Their purpose is only to exclude the active spreading of it beyond, in the case of each programme, the circle of those able to receive it directly. In my opinion, the fact that the rules have only that limited purpose cannot, in itself, invalidate them.

Thirdly there is the point raised in the Cour d'Appel's first question as to whether Article 59 forbids only restrictions on the provision of services between persons established in different Member States or forbids also restrictions on the provision between persons established in the same Member

State of services the "substance" of which "originates" in another Member State.

In my opinion the answer to that question lies in the terms of Article 59 itself, according to which that Article applies to the provision of services by "nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended". Of course the word "established" there requires interpretation. In Case 33/74 the *Van Binsbergen* case [1974] 2 ECR 1299, Article 59 was held to apply where a Dutchman resident in Belgium provided his services in the Netherlands, and in Case 39/75 the *Coenen* [1975] 2 ECR 1547 it was held to apply where a Dutchman resident in Belgium, and having an office in the Netherlands, provided his services in the Netherlands. To have interpreted Article 59 as inapplicable to such situations would manifestly have been wrong, particularly in view of the reference in Article 65 to the application of restrictions to persons providing services "without distinction on grounds of nationality or residence". But one hunts through Articles 59 to 66 of the Treaty in vain for any reference or allusion there to a situation in which the substance or subject-matter of a service provided within a Member State originates in another Member State. Nor indeed is it surprising that the authors of the Treaty eschewed so imprecise a concept.

The answer to the question whether Article 59 can apply in the present cases does not therefore in my opinion depend on whether the "substance" of the service provided by Coditel for its subscribers "originates" in other Member States. It depends upon whether the restrictions imposed by Belgian law on the provision of that service (wholly within Belgium) indirectly restrict the provision of some other service by a person in one Member State to persons in another Member State.

Before, however, I turn to that crucial question, I must deal with the more general questions of interpretation of Articles 59 to 66 of the Treaty that were canvassed in argument and the answers to which must govern one's whole approach to these cases.

The scope of Articles 59 to 66 of the Treaty

Of those questions the first is whether, as some of those who submitted observations to the Court argued or assumed, the purpose of Articles 59 to 66 is only to abolish, as between providers of services, discrimination on grounds of nationality or residence, or whether, as others argued or assumed, those Articles have the wider purpose of, as it was expressed, creating "a common market in the provision of services".

There are judgments of this Court supporting each of those views. But before I advert to them I must, I think, consider the relevant provisions of the Treaty itself.

Articles 59 to 66 constitute Chapter 3 of Title III of Part Two of the Treaty.

Part Two is headed "Foundations of the Community".

Title III thereof is headed "Free movement of persons, services and capital". That reflects the wording of Article 3 (c) of the Treaty which provides for the inclusion among the activities of the Community of "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital". That wording makes it clear that, contrary to what is sometimes thought, the free movement of services was, in the minds of the authors of the Treaty, something distinct from the free movement of persons. Indeed, as the Commission is wont to point out, the provision of a service by a person in one Member State to a person in another Member State does not necessarily require that either of them should move at all.

Title III has four chapters, namely, Chapter 1 "Workers", Chapter 2 "Right of Establishment" (those two being obviously concerned with freedom of movement for persons), Chapter 3 "Services" and Chapter 4 "Capital".

Article 59, with which Chapter 3 opens, says nothing about discrimination. Its first paragraph provides in general terms:

"Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

The second paragraph of Article 59 merely empowers the Council to extend the provisions of Chapter 3 to "nationals of a third country who provide services and who are established within the Community".

The first paragraph of Article 60 is so worded as to confirm that freedom to provide services is to be regarded as distinct from "freedom of movement for goods, capital and persons".

The second paragraph of Article 60 is neutral on the present question.

One then comes to the third paragraph of that Article, which is the first provision of Chapter 3 to mention discrimination. It provides:

"Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals."

That seems to imply that, where the person providing a service does not go to the State where the service is provided, the conditions imposed by that State on its own nationals are not in point, or at least not a major consideration.

No subsequent provision of Chapter 3 mentions discrimination until one gets to Article 65, which reads:

"As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 59."

Thus discrimination on grounds of nationality or residence was forbidden even before the abolition of any restrictions pursuant to the first

paragraph of Article 59. That makes it difficult to hold that Article 59 is concerned only with the abolition of discrimination, for there would then be little, if anything, left to be abolished under its provisions that had not already been abolished by Article 65.

There remains Article 66 which renders the provisions of Articles 55 to 58 (in Chapter 2) applicable to the matters covered by Chapter 3. There is nothing however in those provisions that points at all clearly to the conclusion that Chapter 3 is concerned only with the abolition of discrimination.

There are two significant differences between the provisions of Chapter 3 and those of Chapter 2.

The first is that Article 52 (the first Article in Chapter 2) contains, in its second paragraph, a provision that is clearly concerned with discrimination. It reads:

"Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

As long ago as Case 6/64 *Costa* v *ENEL* [1964] ECR 585, at pp. 596-597 (Rec. 1964 pp. 1162-1163) the Court interpreted that paragraph as defining freedom of establishment and deduced from it that Chapter 2 is concerned only with discrimination. There is however no like provision in Article 59 or anywhere else in Chapter 3.

The other significant difference is that Chapter 2 contains no provision resembling Article 65.

One reason for those differences may be that in certain Member States some services are nationalized. Nationalization of a service in a State often has as its corollary that private persons may not establish themselves in that State to provide the same service. It would be logical for the authors of the Treaty to take the view that such a prohibition should apply to the nationals of other Member States as much as to the nationals of the nationalizing State itself, but that it should not extend to the provision of the service by a person established in another Member State so long as the provision of that service by him did not involve his actually going to the nationalizing State. Otherwise the nationalized undertaking would be able freely to provide its services to residents of other Member States while undertakings in those States were precluded from providing theirs to residents of the nationalizing State.

Be that as it may, I would conclude, from a consideration of the relevant provisions of the Treaty that, whatever may be the position under Chapter 2 as regards the right of establishment, those who argued that Chapter 3 was designed to create a common market in the provision of services, and not merely to abolish discrimination between providers of services, were right.

That appears to have been the view taken by the Court in the *Van Binsbergen* and *Coenen* cases, where it said:

"The restrictions to be abolished pursuant to this provision include all requirements imposed on the person providing the service by reason *in particular* of his nationality or of the fact that he does not habitually reside in the State where the service is provided, which do not apply to persons established within the national territory *or* which may prevent or otherwise obstruct the activities of the person providing the service."

(Paragraph 10 of the judgment in the *Van Binsbergen* case and paragraph 6 of the judgment in the *Coenen* case — my underlining).

So far as I can see, all the other judgments delivered by the Court on Articles 59 to 66 are consistent, or at least reconcilable, with that view, except one. That is the judgment in Case 15/78 *Société Générale Alsacienne de Banque* v *Koestler* [1978] ECR 1971, in which the Court unquestionably proceeded upon the view that those Articles were concerned only with the abolition of discrimination. The point does not, however, appear to have been fully argued in that case. In particular it does not appear that the attention of the Court was drawn to Article 65 or to its significance. The Court seems to have based its conclusions on a consideration of the third paragraph of Article 60 (referred to in the judgment as the second), although that paragraph had no application in the case, since no servant of the Société Générale went to Germany in connexion with the provision of the bank's services to Mr Koestler; and on a consideration of the General Programme adopted by the Council under Article 63, although (as I ventured to point out in Case 36/74 *Walrave & Koch* v *UCI* [1974] 2 ECR at p. 1425) the General Programme could not define the scope of Article 59 and did not purport to do so. The General Programme was not even essential for the implementation of Article 59 during the transitional period: see the opening words of Article 63 (2). It seems to me moreover that, if the provisions of Article 56 relating to public policy have, in so far as they apply for the purposes of Chapter 3 by virtue of Article 66, the effect that I think they have (a matter to which I shall come in a moment) they would have afforded in the *Koestler* case an alternative ground for reaching the same actual result. In the upshot I am of the opinion that Your Lordships should adhere to the view expressed by the Court in the *Van Binsbergen* and *Coenen* cases rather than to the view on which it proceeded in the *Koestler* case. Indeed I think that to do otherwise would be to contradict the express terms of the Treaty.

The extent of the direct effect of Article 59

The way in which the Tribunal Correctionnel of Liège's second question is framed, if nothing else, makes it necessary to consider next the extent to which Article 59 has direct effect. Happily, I can do that more shortly.

Clearly the second paragraph of Article 59 cannot have direct effect. So the problem relates only to its first paragraph.

The Court has held in at least three cases that that paragraph has direct effect "at all events" in so far as it seeks to abolish

any discrimination against a person providing a service by reason of his nationality or of his residence — a formula the use of which tends incidentally to confirm that Article 59 has also a wider purpose. I imagine that the Court used that formula in those cases in order to avoid having to go further than was necessary for their solution. The three cases are the *Van Binsbergen* case, the *Walrave & Koch* case and Case 13/76 *Dona* v *Mantero* [1976] 2 ECR 1333. There are also cases the judgments in which would be difficult to reconcile with the view that the first paragraph of Article 59 had direct effect only to that limited extent: see in particular Cases 110 & 111/78 *Ministère Public* v *Van Wesemael and Others* [1979] ECR 35.

I can see no ground upon which it could be held that the direct effect of that paragraph was so limited, nor was any such ground suggested by anyone who submitted observations to the Court in these cases.

I would therefore hold that the first paragraph of Article 59 had direct effect in all its aspects.

In saying that I do not overlook that, as was pointed out to us, the Arrêté Royal that is in question in Case 52/79 was promulgated in 1966, i.e. after the entry into force of the Treaty, so that its compatibility with Community law falls to be tested by reference to Article 62 (the "standstill" Article in Chapter 3) rather than by reference to Article 59 itself. In my opinion, however, the extent of the direct effect of Article 62 and of the first paragraph of Article 59 must be the same.

The services in question

So I turn to the question that I described earlier as crucial.

There can be no doubt that the prohibition of the cable diffusion of advertisements contained in Article 21 of the Arrêté Royal on the one hand, and the right of the owner of the copyright in a film to prevent its cable diffusion in Belgium on the other hand, would, in each case if enforced, constitute a restriction on Coditel's freedom to provide its service to its subscribers. Nor, however, can there be any doubt that the service provided by Coditel to its subscribers is, in itself, a service provided wholly within Belgium, so that it is not a service to which Article 59 can apply. It has been submitted by some (notably by the RTBF) that that is the end of the matter. I do not think however that it is simple as that, for the question remains whether the direct restrictions on Coditel's service to its subscribers operate indirectly as restrictions on some other service that is transnational.

I start with this simple case. It is the function of the RTBF to provide a television service for French-speaking people in Belgium. Its audience consists in part of those who receive its broadcasts directly and in part of those who receive them by cable diffusion. It would be artificial to hold, as we were in effect urged to hold, that the RTBF provided its service only for those,

including the cable diffusion undertakings, able to receive its broadcasts directly. The Coditel subscriber, when he watches an RTBF programme on his set, is the recipient of two services, the service provided by the RTBF in broadcasting it and the service provided by Coditel in relaying it to him. The first does not end where the second starts.

Is the position any different when the Coditel subscriber is watching a foreign programme? There are two grounds on which it might be held to be so.

The first was pressed upon us by the United Kingdom Government and even more strongly by the German Government. It rests on the use in Article 59 of the phrase "the person for whom the services are intended". A distinction must be drawn, it was argued, between the audience at which a broadcast is aimed and other people who are fortuitously able to pick it up. German television broadcasts are aimed, it was said, at the German public, and not at inhabitants of neighbouring countries. The fact some of the latter were able to receive those broadcasts did not make them persons for whom the broadcasts were intended and so did not render Article 59 applicable.

That would be an easy solution if one could assert that, as a rule at least, a television broadcasting station broadcasts only for people in its own country. But we know that that is not so. We were given examples such as that of the ORTF broadcasting programmes containing advertisements in which prices are given in Belgian francs, and of the RTL broadcasting programmes containing advertisements for shops in Liège. (Liège is, according to the map to which I referred earlier, outside the RTL's zone of natural reception).

How then are national courts before whom cases like these come to determine whether a particular broadcast is or is not intended for a particular audience? Clearly they cannot do so by receiving evidence from individual programme producers as to the audience they had in mind. Nor does it seem to me very practicable for those courts to watch recordings of the programmes in an endeavour to make an objective judgment from their content. For one thing recordings may not exist, and for another the content may be neutral as to its intended audience.

The common sense answer seems to me to be that a television broadcast must be taken to be intended for all those who are able to receive it, whether directly or by cable diffusion, whether or not those responsible for the broadcast had them consciously in mind.

I would add that, since, at all events in States bound by the Strasbourg Agreement, a cable diffusion undertaking may not relay a broadcasting organization's programmes without that organization's consent, it seems reasonable to say that a broadcasting organization that has given its consent to one of its programmes being relayed by a particular cable diffusion service must have the subscribers to that service in contemplation as part of its audience for that programme.

The other ground on which it might be held that a foreign broadcasting station does not provide for Coditel subscribers a service to which Article 59 applies rests

on the first paragraph of Article 60 in so far as it provides that:

"Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration . . ."

Of course, if cable diffusion companies normally made payments to broadcasting organizations for the right to relay their programmes, that provision would present no problem. The cost of the payments would be reflected in the subscriptions paid by their customers and it would then be manifest that the service in question was provided for remuneration. But it appears that in practice such payments are not made. Indeed we were told that the reason why BBC programmes are not relayed in Belgium is that the BBC will not give its consent to their being relayed without payment.

I have however been persuaded by an argument presented to us on behalf of the Commission that to regard the absence of any payment by cable diffusion undertakings to broadcasting organizations as relevant would be to misinterpret Article 60. The purpose of the definition of "services" in that Article is to identify the kinds of services to which the Treaty applies and in particular to exclude those that are normally provided gratuitously. Television broadcasting is financed in different ways. Some broadcasting organizations are financed wholly out of the proceeds of licence fees paid by viewers; others rely wholly on advertising revenue; and some look partly to the one and partly to the other. The question here is whether television broadcasting as such is a service of a kind to which the Treaty applies. The method of financing particular broadcasting organizations or particular broadcasts cannot be relevant to the answer to that question. The decisive fact is that television broadcasting is normally paid for, i.e. remunerated, in one way or another. The conclusion must therefore be that it is a service of a kind to which the Treaty applies, no matter from whom in any particular case payment may come or may not come. I think indeed that to hold otherwise might be to go back on what the Court said in the *Sacchi* case.

In the result I am of the opinion that broadcasting stations outside Belgium, in so far as their programmes are capable of being received by viewers in Belgium, whether directly or by cable diffusion, must be held to provide for those viewers a service to which Article 59 applies and that the restrictions here in question must be held to constitute restrictions on that service as much as on the service provided for their subscribers by Belgian cable diffusion undertakings.

That being my view on this, as I have ventured to describe it, crucial aspect of these cases, I do not think that I need take up Your Lordships' time to discuss the suggestions that were put forward in the course of argument as to the existence of other transnational services that might be affected by those restrictions, such as the service provided

by broadcasting stations outside Belgium for Belgian advertisers or the service provided by those stations for non-Belgian advertisers seeking to penetrate the Belgian market.

The last question is whether those restrictions, although thus, if I am right, *prima facie* prohibited by Article 59, can escape that prohibition through the "public policy" exception in Article 56 of the Treaty or otherwise. I propose to consider that question separately, first in relation to the restriction on advertisements and secondly in relation to the restriction applicable under the law of copyright.

The lawfulness of the restriction on advertisements

Article 56 (1) of the Treaty (rendered applicable to services by Article 66) provides, Your Lordships remember, that:

"The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

It was suggested that that provision could not apply here because foreign nationals were not subjected to "special treatment". The prohibition of the diffusion of advertisements broadcast by foreign stations was but an extention to them of the prohibition applicable to broadcasts by Belgian stations.

As was pointed out however by the German Government, Article 56, in allowing Member States to take, on grounds of public policy, public security or public health, measures providing for special treatment for foreign nationals, must *a fortiori* allow Member States to take on those grounds measures applying indiscriminately to foreign nationals and to their own nationals. (This is why I said earlier that I thought that Article 56 would have afforded in the *Koestler* case an alternative ground for reaching the same result).

In any case the enforcement of the prohibition of advertisements would in fact result in special treatment for foreign broadcasts in that only in their case would the blotting out of parts of the programmes be necessary. Moreover, if Article 21 of the Arrêté Royal is to be interpreted as requiring the blotting out from foreign programmes of advertising material of a kind that Belgian television stations are allowed to broadcast — I have in mind the advertisements by the SABENA and others, of which we were told — that too would constitute special treatment.

That the control of television advertising falls fairly and squarely within the scope of public policy I have no doubt. Belgium is not the only country where such control exists. We were told of the restrictions enacted in Germany, where, for instance, advertisements must be clearly distinguishable from other broadcast material, must not take up more than 20 minutes a day, may not be broadcast after 8 p.m., or at all on Sundays and public holidays, where the advertising of cigarettes and of vacant jobs is forbidden and that of medicines restricted, and where neither advertisers nor advertising agencies are allowed any influence on other parts of the programmes. We were told of restrictions in many respects similar in

the United Kingdom, and of restrictions at least on the advertising of medicines in Luxembourg.

It was argued on behalf of Coditel that the enforcement of Article 21 of the Arrêté Royal could not be public policy in Belgium because successive Governments and the ministère public had made it clear that it was not their policy to enforce it. To that it was retorted on behalf of the complainant associations that what was public policy in a country must be ascertained from its laws, not by reference to the views of its executive authorities. I do not think that what is public policy in a Member State within the meaning of the Treaty is necessarily to be ascertained exclusively by reference to its laws (consider Case 41/74 *Van Duyn* v *Home Office* [1974] 2 ECR 1337). However, in my opinion, the ascertainment of what is public policy in a Member State in that sense is in the ultimate resort a matter for its competent courts, not for this Court.

The lawfulness of the restriction in copyright law

No-one has suggested that the protection of copyright is within the scope of public policy. The German Government, but no-one else, suggested that Article 56 should be extended to it "by analogy".

In my opinion the German Government was on better ground when it submitted that the provision to be applied by analogy was Article 36. It was supported in that submission by others, including the Commission.

In Cases 137 and 138/77 *Frankfurt* v *Neumann* and *Ludwig* v *Hamburg* [1978] ECR at pp. 1641-1642 I considered with the authorities in this Court the application by analogy of provisions of Community law and concluded that it was permitted where there was an obvious lacuna, which must needs be filled, due to something in the nature of an oversight on the part of the authors of the relevant instrument and not to their deliberate intention. I think that the omission from Articles 59 to 66 of the Treaty of any provision for the protection of industrial and commercial property is much more likely to have been due to an oversight than to deliberate intention. An alternative view would be that the protection of such property was something that the authors of the Treaty intended should be dealt with under Article 57 (2), but that does not seem very probable. If I am right in the views that I expressed earlier about the scope of Articles 59 to 66, the Treaty's concept of the free movement of services is akin to its concept of the free movement of goods. The application by analogy of Article 36 thus appears appropriate.

It seems from the observations of Coditel and of the Commission that reference to Article 36 gives rise at the outset to a verbal difficulty as regards the text of that Article in some languages. The phrase "industrial and commercial property", which is used in the English text, is not, so far as I know, a term of art in English law. It is an expression of vague and general import, which takes its colour from the context in which it is found. In a context such as that of Article 36 I do not doubt that it is wide

enough to cover copyright. It seems that that is not so in the case of the corresponding phrases in other languages. French-speaking lawyers, for instance, do not readily regard "propriété industrielle et commerciale" as including copyright; they would more readily place copyright in a different category called "propriété littéraire et artistique". Coditel and the Commission both say, however, that in the context of Article 36 "propriété industrielle et commerciale" ought to be interpreted as including copyright. That seems to accord with the view of the great majority of academic writers, and I think it must be right.

The application by analogy of Article 36 raises, having regard to the decisions of the Court on the exercise of industrial and commercial property rights in relation to goods, the question of what is the specific subject-matter of the relevant right.

Here the relevant right is an element of copyright, namely performing right. Everyone who has submitted observations to the Court recognizes that one cannot apply in the domain of performing right the doctrine of "exhaustion" as it applies in the domain of the marketing of goods. It is of the essence of a performing right that it enables the owner of it to authorize or forbid each and every performance of the work to which it relates.

It is tempting to say that the owner of the performing right in a work must be taken, when he authorizes it to be broadcast, to authorize also the cable diffusion of the broadcast. There appear to be Member States where the law to a limited extent so provides. We were referred to section 40 (3) of the United Kingdom Copyright Act 1956 which so provides in the case of broadcasts by the BBC and the IBA, to the Irish Copyright Act 1963, which, by section 52 (3), so provides in the case of broadcasts by Radio Eireann, and to a decision of the Landgericht of Hamburg of 6 January 1978, upheld by the Oberlandesgericht of Hamburg on 14 December 1978, to the effect that German law so provides in so far as diffusion in the zone of natural reception of the broadcast is concerned. In such cases the payment received by the owner of the performing right from the broadcasting organization takes into account the fact that the broadcast will be relayed by cable diffusion.

Those are however exceptional cases. The comprehensive and very helpful analysis of the laws of the Member States made for us by the Commission (as corrected in minor respects concerning the law of the United Kingdom by the United Kingdom Government) shows that, in general, the right to authorize a broadcast and the right to authorize its cable diffusion are regarded as separate — as has been held to be the case in Belgium by the Cour d'Appel of Brussels. That being so, I do not think that this Court can hold that Community law denies to the owner of the performing right relating to a work such as a film the power — as part of the specific subject-matter of that right — to authorize or forbid the cable diffusion of a broadcast of the work.

Conclusions

In the result, I am of the opinion that, in answer to the questions referred to the Court by the Tribunal Correctionnel of Liège in Case 52/79 Your Lordships should rule that:

(1) Article 59 of the EEC Treaty is to be interpreted as forbidding all national rules restricting the cable diffusion of advertisements broadcast in other Member States except in so far as such rules are justified on grounds of public policy.

(2) The provisions of Article 59 have direct effect and may therefore be relied on before national courts.

I am of the opinion that, in answer to the questions referred to the Court by the Cour d'Appel of Brussels in Case 62/79, Your Lordships should rule that:

(1) Article 59 of the EEC Treaty forbids only restrictions on the provision of services by persons established in one Member State for those of another Member State.

(2) Where a cinematographic film is broadcast by television in one Member State with the consent of the owner of the performing right in that State, the provisions of the Treaty on freedom to provide services do not preclude the assignee of the performing right in another Member State from relying upon his right in order to prevent the cable diffusion of the broadcast in the latter State.