which are for the national court to establish.

3. Articles 59 and 60 of the EEC Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television — as they prohibit the broadcasting of advertisements by television — if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is established.

   Indeed, in the absence of any harmonization of the relevant national laws, a prohibition of this type falls within the residual power of each Member State to regulate, restrict or even totally prohibit television advertising in its territory on grounds of general interest, even if that prohibition extends to such advertising originating in another Member State.

4. National rules prohibiting the transmission by cable television of advertisements cannot be regarded as constituting either a disproportionate 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.

5. Differences in situation, which are due to natural phenomena, cannot be described as "discrimination" within the meaning of the EEC Treaty; the latter regards only differences in treatment arising from human activity, and especially from measures taken by public authorities, as discrimination. The Community has no duty to take steps to eradicate differences which are the consequence of natural inequalities.

In Case 52/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Correctionnel [Criminal Court] of Liège for a preliminary ruling in the proceedings pending before that court between

PROCUREUR DU ROI [Director of Public Prosecutions]

and

MARC J. V. C. DEBAUVE, Liège,

PAUL H. A. G. DENUIT, Grez-Doiceau,

HENRI J. Ph. M. LOHEST, Liège,

S.A. CODITEL, Liège,

ASSOCIATION LIÉGEOISE D'ÉLECTRICITÉ (A.L.É.), Liège,

Appellant civil parties:

FÉDÉRATION NATIONALE DU MOUVEMENT COOPÉRATIF FÉMININ, a non-profit making consumer association, Brussels,

FÉDÉRATION BELGE DES COOPÉRATIVES ("FEBECOOP"), a non-profit making body, Brussels,

VIE FÉMININE, a non-profit making body, Brussels,

RADIO TÉLÉVISION BELGE DE LA COMMUNAUTÉ FRANÇAISE (RTBF), Brussels,

FRANÇOISE VANDER BEMDEN AND OTHERS,

on the interpretation of Articles 59 and 60 of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

In Belgium the broadcasting monopoly, which includes television, is governed by law and is conferred upon two Belgian broadcasting corporations, one responsible for broadcasts in French, the other for broadcasts in Dutch.

The Law of 18 May 1960, an organic law governing those corporations, prohibits them from making broadcasts in the nature of commercial advertisements.

Cable diffusion of television is regulated by the Law of 26 January 1960 on licence fees for radio and television receivers (Moniteur Belge of 6 February 1960) as amended by the Law of 7 August 1961 (Moniteur Belge of 6 September 1961). Article 21 of the Royal Decree of 24 December 1966 on networks diffusing broadcasts to the homes of third parties (Moniteur Belge of 24 January 1967), adopted in implementation of that law, provides:

"Subject to the conditions laid down in international conventions, a distributor may transmit broadcasts by any other television broadcasting station authorized by the country in which it is established; however, the transmission of any broadcast in the nature of a commercial advertisement is prohibited."

After complaints had been lodged by consumer associations proceedings were started on the basis of those provisions against the cable diffusion companies.

The accused put forward several submissions in their defence before the Tribunal de Police [Police Court], Liège, including one defence based upon the incompatibility of Article 21 of the Royal Decree of 24 December 1966 with Articles 59 to 66 of the EEC Treaty. The judgment of the Tribunal de Police, Liège, delivered on 14 December 1978 upheld that defence.

The civil parties and the Procureur du Roi appealed to the Tribunal Correctionnel, Liège.

By a judgment of 23 February 1979 that court stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

"1. Having regard to the judgment of the Court of Justice of 30 April 1974 in Case 155/73, *Sacchi*, must Article 59 of the Treaty of Rome be interpreted as prohibiting all national rules which prohibit the transmission of advertisements by cable television distribution companies even though it is still possible and lawful to receive such advertisements naturally within the receiving zones of foreign broadcasting stations, having regard in particular to the fact that:

(a) such rules would introduce discrimination based on the geographical locality of the

foreign broadcasting station which would be able to transmit advertisements only within its natural receiving zone, as these zones may, because of the differences in density of population, be of very different interest from the advertising point of view,

(b) such rules would introduce a restriction disproportionate to the objective in view because that objective — in other words, a prohibition on television advertising — could never be wholly achieved because of the existence of the natural receiving zones;

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

In the grounds for its judgment making the reference, the Tribunal Correctionnel said in particular:

"In order to conform to the system to which the national institutions are subject, Article 21 of that royal decree prohibits the retransmission of advertising sequences.

It is however appropriate to recall that until the law of 26 June 1960 the distribution of television broadcasts from a common aerial escaped the rules; a distribution network for television broadcasts was established under this system at Namur, Liège and Verviers.

In practice, distributors have disregarded this prohibition and have retransmitted foreign programmes without cutting the advertising sequences; this practice is moreover permitted by the Government which has not imposed any penalties and has not withdrawn any authorization; the technical, psychological and legal reasons for that concession have been stated publicly by the Minister for Communications.

Moreover, a large proportion of viewers continue to receive foreign programmes without the help of the relay broadcasts established by the distribution companies and it is clear that the Belgian rules do not prohibit this; this is one of the reasons why the competent authority has not challenged the distributors.

In addition, the application of the prohibition might have repercussions on the provision of services at the Community level; the foreign broadcasting institutions subsist wholly or in part on the income obtained by advertisers and the cutting of the advertisements in Belgium might prompt these advertisers to restrict or discontinue their commercial advertising; moreover, the success of advertisers, traders or manufacturers situated in neighbouring countries in reaching the Belgian market at which they had been aiming their advertisements and to which they had been offering their services hitherto would be limited."

The judgment making the reference was received at the Court Registry on 3 April 1979.

In accordance with Article 20 of the Protocol on the Statue of the Court of Justice of the European Economic Community written observations were lodged by Mr Debauve, Mr Denuit, Mr Lohest, Coditel and the Association Liégeoise d'Électricité, all represented by J. M. Defourny and E. Rigaux, of the Liège Bar, and by A. Braun and G. Kirschen, of the Brussels Bar; by Radio Télévision Belge de la Communauté Française, represented by H. Mackelbert and P. Foriers, of the Brussels Bar; by the Fédération Nationale du Mouvement Coopératif Féminin, a consumer association, the Fédération Belge des Coopératives (Febecoop), Vie Féminine/ and Françoise Vander Bemden and Others, represented by R. Graetz and P. Martens, of the Liège Bar; by the Government of the French Republic, represented by M. Dandelot, acting as Agent; by the Luxembourg Government represented by J. Hostert, acting as Agent; by the Government of the Federal Republic of Germany, represented by M. Seidel, acting as Agent; and by the Commission of the European Communities, represented by P. Leleux, acting as Agent.

Upon the hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

Mr Debauve, Mr Denuit and Mr Lohest, Coditel and the Association Liégeoise d'Électricité (A.L.É.) (hereinafter referred to as "the respondents in the main procceedings") first of all explain the situation with regard to cable diffusion of television in Belgium. Their statement is essentially as follows.

From 1961 more and more extensive networks started to spread in Belgium, mainly in order to make available programmes from foreign stations and with the secondary aim of improving the quality of reception of Belgian programmes in view of the fact that certain regions experienced greater reception difficulties due to obstacles and geographical location (in valleys, for example).

Starting in 1968 a public company, the inter-communal Association Liégeoise d'Électricité, took the initiative in extending the benefits of cable television not just to urban districts or towns but practically to an entire province.

At the outset some cable television distributors cut out the advertisements. But because the number of foreign channels had increased and various channels had begun one after the other to broadcast advertisements it subsequently became impossible to cut out advertising material.

They in fact viewed their task as one of making available to the population as wide a choice of programmes as possible. They consider that there has never been any question of their interfering, directly or indirectly, in the content of programmes which they distribute. Cable television distributors are legally obliged not to interfere with programmes transmitted. They must only act as intermediaries in the technical link between the producers and the users.

In spite of themselves the cable television distributors find themselves implicated by

virtue of Article 21 of the Royal Decree of 26 December 1966 regulating cable television, which prohibits them from transmitting "broadcasts in the nature of commercial advertisements" on their networks.

Clearly, foreign broadcasting corporations are the owners of their programmes. It is no secret that the neighbouring countries (the Federal Republic of Germany, France and the Netherlands for example) have installed transmitters near the Belgian frontier: Metz, Lille, Hirson, Mézières, Longwy, Aix-la-Chapelle, Montjoie, Schnee-Eiffel, Maestricht, Hulsberg, and so on, thereby demonstrating their clear intention to transmit beyond their own frontiers far into Belgium. With a small aerial on his roof any Belgian television viewer can receive advertisements broadcast from at least one foreign station. And so, even without cable television, the Royal Decree of 1966 has already failed in its object.

At the international level, the rights of foreign corporations are defined and laid down in the "European Agreement on the Protection of Television Broadcasts", signed at Strasbourg on 22 June 1960 and ratified by Belgium. Under that agreement broadcasting organizations may prohibit the retransmission of programmes via cable networks. This gives foreign broadcasting organizations a considerable weapon against cable television distributors who treat their programmes in a manner which they consider to be unacceptable. The respondents in the main proceedings refer here to a letter sent by the French Ambassador to Belgium on 8 October 1966 concerning the authorization by the ORTF for the distribution of its programmes over the network serving the Liège area.

They point out the technical, practical and economic problems entailed in the excising of advertising material. Such an exercise would in particular create problems as regards the criteria to be applied. Furthermore, this form of "censorship" would in itself cause annoyance to the television viewers.

The first question

The *respondents in the main proceedings* point out that the three economic activities referred to by the court making the reference, namely, the activities of broadcasting corporations, advertisers and cable television distributors, must be examined to see whether they are covered by provisions of the Treaty relating to the freedom to provide services.

The activities of non-Belgian broadcasting corporations and advertisers appear to be covered by the definition contained in Article 59, but a distinction must be drawn as regards the *activity of cable television distributors.* That activity comprises in fact the provision of *two* services: first, in relation to the domestic and foreign broadcasting corporations and, secondly, in relation to television viewers. The first service is expressly covered by Article 59, since the provider of the service and the recipient thereof reside in different Member States. That is not the case in regard to the provision of services by cable television distributors for television viewers.

However, Article 59 envisages the very *freedom to provide services* beyond intra-

Community frontiers. There can be no doubt that the transmission by a Belgian cable television distributor to viewers living in Belgium of programmes broadcast from other Member States is in the nature of the free movement of services. Any restrictions upon those transmission activities constitutes on any view a restriction upon the freedom of foreign broadcasting organizations and advertisers to provide services.

The respondents in the main proceedings then consider the infringement of the prohibition on discrimination and of the principle of proportionality.

An examination to establish whether the national measures conform to Community law must cover not only the Royal Decree of 24 December 1966 prohibiting the retransmission of broadcasts in the nature of commercial advertising but also the individual steps taken to apply it [1], particularly in view of the fact that for eleven years the Belgian authorities expressly indicated that infringements of the national rules would be tolerated.

The effects of measures to prohibit commercial broadcasts retransmitted by cable are multifarious.

1. Viewers would have to accept that programmes emanating from broadcasting organizations which are completely or partly commercial would be jammed at regular or even irregular intervals.

2. Broadcasting organizations would suffer a reduction in the quality of their services since they would have to tolerate the interruption of their programmes when they were jammed; this would have a disastrous psychological effect.

In these two respects national broadcasting organizations would without doubt have an advantage over foreign broadcasting organizations. The general reduction in the quality of broadcasts due to the interruptions would pass on the discrimination in favour of the Belgian organizations to the market for non-commercial programmes, in other words, in relation to the competitive position of broadcasting organizations when purchasing broadcasting or transmitting rights for programmes.

3. Commercial broadcasts would have their "effective range" curtailed to their natural diffusion areas, with the result that advertisers would either have to approach several broadcasting organizations instead of encouraging competition between them, or have to settle for coverage of only part of the territory.

At the same time certain Belgian advertisers, public or semi-official bodies having commercial objectives and therefore subject to the rules of the Treaty, could continue with impunity to obtain publicity on national channels in connexion with the provision of "cultural" broadcasts. SABENA is a case in point.

4. There would also be a discriminatory effect at the Community level. The objective of the Treaty is to establish

1 — Judgment in Case 36/75, *Rutili*, [1975] ECR at page 1230; judgment in Case 30/77, *Bouchereau*, [1977] ECR at pages 2011 to 2012.

and maintain a single market. In the light of that objective undertakings in each Member State must be able to compete with one another on equal competitive terms.

It is accepted that restrictions may be imposed, especially those which may originate in the application of national rules justified by the general interest which are binding upon any person established in the State in which the service is provided (judgment in Case 33/74, *Van Binsbergen*, [1974] ERC 1299, paragraph 12). However, such rules must still be applied in accordance with the principle of proportionality: a measure must be "objectively justified" by the need to achieve the desired result (Joined Cases 110 and 111/78, *Van Wesemael*, [1979] ECR 35, paragraph 29).

In the opinion of the respondents in the main proceedings, compliance with that principle implies that

a) restrictions are required in order to achieve the objective of general interest;

b) such restrictions are confined to measures having the least constraining effect upon the freedom to provide services;

c) they are adequate to achieve that objective;

d) they are not out of proportion to the end to be achieved.

In view of the particular facts of this case the respondents in the main proceedings contend that the measures taken in implementation of the Royal Decree of 24 December 1966 are not objectively justified by the need to achieve the intended objective and blatantly contravene the principle of proportionality.

The respondents in the main proceedings reply to the question whether national measures may be justified on the ground of public policy (Articles 56 and 66 of the Treaty) by referring to the judgment in Case 33/77, *Bouchereau* ([1977] ERC 1999 at p. 2015, paragraph (3) of the operative part), in which the Court ruled that: "In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society."

Those conditions are not fulfilled in this case.

In conclusion, the respondents in the main proceedings propose that the Court should answer the first question as follows:

"Article 59 prohibits any national rules or measures taken in implementation of national rules prohibiting the transmission of advertisements by cable distribution companies, where the broadcasting of such television commercials is already governed in the Member State of origin by rules based upon the same desire to protect the general interest and where the application of those rules in the Member State in which the service is provided affects only the persons providing and receiving the service, who

are nationals or established in other Member States, while in other respects that restriction is not suited to achieving satisfactorily the intended objective of general interest".

Radio-Télévision Belge de la Communauté Française (hereinafter referred to as "RTBF"), an appellant civil party, first examines the service provided by a broadcasting organization.

The service of broadcasting a television advertisement is provided when it is put out on the air. The service of broadcasting is completed once the advertisement has been transmitted; it is exhausted in the natural reception zone of the transmitter.

The person who commissions the advertisement, in this case the advertiser, cannot ask the broadcasting station to do anything more than reach the people in the natural reception zone of its transmissions.

In this respect, each provider of services is bounded by its own limitations depending on either the rules to which television broadcasts are subject or the technical means at its disposal.

The service performed by a broadcasting station therefore consists in the assistance which it provides in sending an advertisement over the air to potential recipients.

The service performed by a cable television distributor consists in *receiving* the broadcast and then *transmitting* it to television viewers. The cable television distributor aims at two categories of television viewers.

First, it aims at television viewers who, being within the natural zone of the broadcasting station's transmitter, can receive broadcasts direct from the transmitter. In that case free movement of television broadcasts is extraneous to any intervention by the cable television distributor.

Secondly, it aims at television viewers who are not within the natural zone of the broadcasting stations's transmitter and who cannot receive broadcasts direct from the broadcasting station. In this case, since the service provided by the broadcasting station is naturally exhausted, there can be no question of the free movement of the service provided by the broadcasting station. In this case therefore a *new service is provided.* The provision of that service is specific and identifiable, particularly because it involves remuneration paid by the television viewer to the cable television distributor.

Consequently, it is not possible to link the broadcast to cable television distribution without distorting the problem; the real problem is solely to ascertain whether national rules on cable television distribution are such as to prevent freedom of movement in relation to the provision of *another service,* that specifically provided by the cable television distributor.

The question is therefore whether a national authority may regulate the provision of a service which takes place in its own territory.

It has never been disputed that rules governing the pursuit of a trade or profession applicable to those who are actually within the territory of a Member State are within the competence of the national authorities. The *Van Binsbergen* judgment (Case 33/74, [1974] ECR 1299) extended that principle to those whose activity is entirely or mainly directed towards the territory of that State although they are not established

there. The only restriction is that the Member State should not exercise its competence in order to introduce particular requirements which are out of proportion to the aim pursued.

For reasons concerned mainly with public policy the Belgian legislature has for a long time been opposed to both the broadcasting and the diffusion by cable television of advertisements. By so acting it is defending a specific form of communal life which represents one of the fundamental interests of society (Case 33/77, *Bouchereau*, [1977] ECR 1999).

It is the service, defined by the Royal Decree of 24 December 1966, which the cable television distributor may *lawfully* provide. The service thereby defined is not impeded in any way. Nor does the applicable system of rules cause discrimination because it applies to cable television distributors, irrespective of their nationality, operating in Belgium.

Nor is there any discrimination based upon the geographical location of the foreign broadcasting station. The doubt expressed in this case by the Tribunal Correctionnel is irrelevant since the freedom of movement which is in issue is not that of the broadcast material but that of the service provided by the cable television distributor. But even supposing that the question were relevant in this case, the reply must be quite categorical: the location of a broadcasting station is one particular element of competition which cannot be eliminated without thereby distorting competition between broadcasting stations; such competition is one of the fundamental aims of the Treaty (Articles 3 (f) and 85 of the Treaty). Indeed, as Community law now stands, geographical location is a factor which cannot be eliminated without adversely affecting the competitive capacity of undertakings which are *ex hypothesi* better situated.

The comment in paragraph (b) of the first question is also irrelevant. First of all there is an error of law in relating the effectiveness of a rule of law to its lawfulness. There is also an error of fact. As regards people who are in the natural reception zone of the foreign broadcasting station, the aim of the rules is achieved in part if the cable television organization cannot receive and transmit advertising material by cable, since the television viewer must take the necessary steps himself. As regards those who are not in the natural reception zone, the aim is completely achieved.

In conclusion, RTBF proposes that the Court should reply to the first question as follows:

"Article 59 of the Treaty of Rome does not prohibit all rules against the transmission of advertisements by cable distribution companies where the natural reception of such advertisements in the reception zones of foreign broadcasting stations remains possible and lawful."

The *Fédération Nationale du Mouvement Coopératif Féminin*, the *Fédération Belge des Coopératives*, *Vie Féminine* and *Mrs Françoise Vander Bemden and Others* first state that the situation in Belgium is different from that which led to the *Sacchi* judgment (Case 155/73, [1974]

ECR 409). RTBF and BRT do not have the right to broadcast advertisements and cannot therefore claim to have the slightest monopoly in this field. The Royal Decree of 24 December 1966 was intended to ensure compliance by cable television distributors with the rule to which the broadcasting corporations are subject.

Furthermore, the services performed by the Belgian broadcasting corporations are not provided in return for remuneration and cannot therefore be regarded as services within the meaning of Article 60 of the Treaty.

In view of the *Sacchi* judgment and considering the situation in Belgium, it is futile to claim that the national rules against the transmission by cable television distribution companies of advertisements coming from broadcasting stations located outside national territory have a harmful effect upon the movement of goods when natural reception of those advertisements is still possible in the respective reception zones of such broadcasting stations.

Article 21 of the Royal Decree of 24 December 1966 does not discriminate between persons providing the same service on the basis of domicile or nationality. Consequently it cannot contravene Articles 59 and 60 of the Treaty.

Furthermore, Article 21 is part of a dual system which is the expression of a fundamental political choice taken by the Belgian legislature. The other side of the coin is the prohibition on the broadcasting of advertisements which Belgian broadcasters are bound to observe. Apart from the fact that it cannot be founded upon any discriminatory practice, the refusal to apply Article 21 to the accused on the pretext that they are retransmitting foreign broadcasts has the immediate effect of creating discrimination on the basis of nationality or domicile, to the detriment of Belgian persons providing the service contemplated. The judgment in Case 39/75, *Coenen* ([1975] ECR 1547), applies the principle of proportionality in the matter of the provision of services and at the same time lays down the limits of that principle. The effect of that judgment is that if the Court considered that the broadcasting of television advertisements by a company established within the territory of a Member State and their retransmission by cable by another company, constituted under the law of another Member State, is one service, it should rule that that type of activity is akin to those upon which the Court placed restrictions in the *Coenen* judgment.

In the opinion of the *Government of the French Republic* the authority of Case 155/73, *Sacchi*, (cited above) should be adhered to in the present case.

It points out that the differences between the situations in which television broadcasting stations find themselves due to their geographical location cannot constitute discrimination within the meaning of Article 7 of the Treaty.

On the other hand, a situation caused by the application of legal rules which modify the natural reception zones of broadcasts unequally as between broadcasting stations does represent discrimination.

The French Government takes the view that it is better that the retransmission of broadcasts via a cable network should be a "passive" retransmission, in other words, having no effect upon the content of the broadcasts. Such retransmission may be either total or non-existent but should not give rise to any interruption in or alteration to any programme which is retransmitted (including advertisements).

For its part the French Government sets great store by the observance of such a principle at the national and European level, as being the only way to avoid, first, partial excisions involving an alteration to programmes hitherto freely broadcast or possibly leading to censorship itself, and, secondly, the risk of the practice already observed in other countries whereby unscrupulous distributors retransmit only part of the programmes and take advantage of their television audience to replace the parts left out with advertisements or other parts of programmes of their own, and, thirdly, leaving to technicians the task of making cuts which would sometimes be very difficult to decide upon and distinguish in programmes as a whole whose value would thus be diminished for listeners or television viewers, thereby causing an indirect but definite discrimination which is censured by the Treaty.

The *Luxembourg Government* observes that because of the national rules in issue broadcasting organizations in other Member States are prevented from broadcasting their programmes by way of the cable television networks in Belgium to the extent to which those programmes contain commercial advertisements.

Since the relevant Belgian provisions were introduced after the EEC Treaty came into effect they constitute "new restrictions" forbidden by Article 62 of the EEC Treaty. It is established case-law of the Court of Justice that such a "stand-still" clause has direct effect in the Member States and that it may be relied upon by individuals before national courts.

However, even if the restriction upon the free movement of services rested upon provisions existing before the EEC Treaty came into force, individuals could rely upon Article 59 of the Treaty before national courts.

Basically, Articles 59 and 62 of the Treaty contemplate only discrimination against foreigners. Since the prohibition on advertising affects national and foreign broadcasts alike, a literal interpretation rules out the application of Articles 59 and 62 of the Treaty here.

The Luxembourg Government wonders, however, if it is not best to apply an interpretation more favourable to the integration of the Community by analogy with the case-law of the Court as to the words "quantitative restrictions and measures having equivalent effect" contained in Article 30 of the Treaty. According to the case-law of the Court all trading rules enacted by a Member State which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitute measures having an effect equivalent to quantitative restrictions. It is therefore irrelevant whether this is a case of material discrimination, still less of strict discrimination; all that matters is

the effect which the rules have upon trade between Member States.

However, such measures may be justified by virtue of Article 36 of the Treaty on specific grounds relating to the public interest.

If that case-law is transposed to the free movement of services there does not seem to be any particular grounds relating to the public interest such as to justify the prohibition on advertising contained in Article 21 of the Belgian Royal Decree of 24 December 1966. The fact that the Belgian Government has not in practice secured observance of that prohibition but that it has even expressly tolerated and gone so far as to justify its non-observance, demonstrates that the ban does not serve essential public interests.

If this argument by analogy is not accepted there are perhaps still, despite the apparently equal treatment of Belgian nationals and those of other Member States, grounds for questioning whether there is not in reality a restriction upon the freedom to provide services, or discrimination.

In this respect the Luxembourg Government refers to the judgment of the Court of 7 February 1979 (Case 136/78, *Auer*, [1979] ECR 437) which specifies that equal treatment with nationals is not sufficient in itself to guarantee freedom of establishment if all the other hindrances, apart from non-possession of the nationality of the host country, are maintained.

The cases in point here are those where the effects of the differing conditions required to be fulfilled prior to the exercise of an activity or the provision of a service in the various Member States amount to an obstacle to the free movement of persons.

The Treaty prohibits not only overt discrimination but also all covert forms of discrimination which, by applying other differing criteria, have the same effect in practice (judgment in Case 152/73, *Sotgiu*, [1974] ECR 153; judgment in Case 61/77, *Commission* v *Ireland*, [1978] ECR 417).

On the basis of that case-law one can say that although the letter of the prohibition on the diffusion of advertisements by cable television networks is directed at broadcasts by Belgian and foreign broadcasting organizations alike, in practice it only affects broadcasting stations in other Member States whose programmes contain advertising.

The Luxembourg Government dwells upon the problems caused by the interruption of broadcasts by cable television distributors.

In conclusion, it proposes that the Court should answer the questions referred by the national court as follows:

"Any rules of a Member State which, although strictly applying to national and foreign organizations alike, directly or indirectly prevent, or appreciably impede, the transmission of radio and television broadcasts coming from other Member States, constitute discrimination under the first paragraph of Article 7 and a restriction upon the free movement of services under Articles 59 and 62 of the EEC Treaty, unless those rules are absolutely necessary for the protection of essential public interests in the State concerned and those interests cannot be

protected by a measure which is less restrictive upon the free movement of services."

The *Government of the Federal Republic of Germany* believes that the answer to the first question should be in the negative. The Treaty does not prohibit Member States from resisting the broadcasting within the territory coming under their sovereignty of advertising material by television stations, by radio waves or cable, even when it is still possible to receive such advertising material broadcast by foreign stations in the territory in question.

The question is whether the rules in issue do or do not in fact impede the free movement of services *across frontiers*, which is all that Article 59 guarantees.

Freedom to provide services within the meaning of Article 59 *et seq.* presupposes, however, that some sort of legal or commercial relationship exists between the person providing a service and the person receiving it, or at least, where there is unilateral provision of a service, deliberate conduct on the part of the person providing the service. The fact that goods cross a frontier "fortuitously", whether owing to circumstances of *force majeure* or to any other cause, does not constitute "trade". The diffusion of television broadcasts can only be regarded as a service extending beyond the purely national level within the meaning of Article 59 *et seq.* if the broadcasts are in fact meant to reach viewers beyond the frontier. The German Government believes that if the crossing of a frontier by a broadcast is but the unavoidable, incidental effect of a broadcast directed at the national territory alone, then one cannot speak of the provision of services intended for "nationals of another Member State", as Article 59 does.

The television programmes in question are in fact meant to be picked up within the national frontiers; in the Federal Republic of Germany, in particular, they are directed so as to cover the national territory.

Rules such as those in this case are to be regarded as a limitation, upheld by Community law, upon the freedom to provide services. Under Article 60 of the Treaty the provision of services which extend beyond the national boundaries of a country shall be provided "under the same conditions as are imposed by that State on its own nationals". The fact that Articles 56 and 66 of the Treaty taken together leave Member States the power to maintain discriminatory restrictions to the detriment of those who provide services extending beyond national boundaries must be understood to mean that Member States are all the more justified in adopting general rules which are not discriminatory, as in this case.

Next, national rules restricting the provision of services are not acceptable in Community law if they are not based on any convincing ground or if the burdens which they impose are out of proportion to the objective pursued. Those conditions do not however obtain in the case of restrictions imposed on television advertising. In the Federal Republic of Germany, as in other Member States, there are detailed rules governing the broadcasting of such advertising, specifying for example, the proportion of each working day which it may occupy.

In particular, if radio and television are regarded in a Member State as being a public service and are consequently organized in a particular way, a corresponding general prohibition on advertising must not be capable of being

challenged under Community law *(Sacchi* judgment, cited above).

The objective pursued by Belgian legislation is largely achieved by the existing rules The fact that a legal measure, which is in principle justified on grounds of a superior public interest, does not fully achieve its objective, is not on any view injurious if that objective cannot be fully achieved without unreasonable accompanying measures

Furthermore, the rules in question are justified by Articles 56 and 55 taken together with Article 66 of the Treaty.

In conclusion, the German Government proposes that the first question should be answered in the negative.

The *Commission* begins by determining the services likely to be affected by the disputed rules.

Whilst there is no doubt that the broadcasting of television programmes constitutes the provision of a service under Article 59 *et seq.* of the Treaty *(Sacchi* judgment, cited above), it is necessary to ascertain whether the conditions for the application of those articles, especially of the first paragraph of Article 60, are fulfilled; those conditions relate to the *transnational* and *non-gratuitous* nature of the service

There is no need to examine whether a service is provided between the foreign broadcasting station and the Belgian cable television distributors in the absence of payment of remuneration by the latter to the former. It is in fact sufficient to establish that in the case of a television broadcast in the nature of an advertisement, there is always at least a "classic" provision of services between the *television broadcasting station* (the provider of the service) and the *advertiser* (the recipient) in return for payment

There is sufficient proof of the transnational nature of that service since it is well-known that television broadcasting stations in countries neighbouring Belgium broadcast advertisements commissioned by advertisers established in countries other than that of the broadcasting station

There can be no doubt that the disputed Belgian rules form an obstacle to the provision of services thus defined. The service which the broadcasting undertaking (public or private) may offer advertisers and the remuneration which it may secure in return quite clearly vary with the extent of the territory which a broadcast may reach. Thus, in the situation at issue here, a Belgian advertiser, for example, would be much less interested in a broadcast publicising his products if it reached only a small part of Belgian territory (natural reception zones) than if it reached the whole of that territory with the help of cable television. And the broadcasting station, the provider of the service, could therefore only obtain a considerably lower price. The *offer of services* would therefore be seriously affected, leading to the conclusion that there was a restriction upon the broadcaster's activity as a provider of a service falling under Article 59 of the EEC Treaty.

Can the fact that the disputed rules are applicable "without distinction" justify their application to the provision of services of the type in question? Those services are in fact entirely performed outside the territory where the rules apply; they may even be said to be legal relationships between parties none of

whom is established in the country, and their residual effect upon that territory is not the result of any direct action by the provider or recipient of the services, but is rather a purely physical phenomenon which they are quite happy to exploit. The answer to this question is fundamental to the determination of the scope of application of Article 59, on the one hand, and of the third paragraph of Article 60, on the other.

There are many situations in which the provider of a service performs the service entirely in his country.

Consequently, the question which the Court should answer is whether national rules which prohibit the broadcasting of television advertisements may not only be applied to any television company which broadcasts from the territory of the country in question, but may also *extend beyond the frontiers* so as to impede the formation of contracts for services which are perfectly legal for a provider of services established abroad, and only because the *effect* of that service can be felt in the territory of the country which introduced those national rules. The problem is to decide whether, in a common market, each Member State must or must not "recognize" the laws of the others, provided that reasons concerned with public *international* law do not lead to the application of that foreign law being excluded.

Here, the prohibition on television advertising is not based upon a principle so fundamental to Belgian society that it must inevitably take precedence. The attitude of the Belgian governmental authorities speaks for itself in this respect.

The Court has already made it clear that discrimination is not the only type of restriction prohibited by the Treaty (judgment in Case 23/74, *Van Binsbergen*, [1974] ECR 1299, paragraph 10). In its case-law it has evolved a principle which is not written into the Treaty, recognizing that each Member State has the right, without violating Article 59, to impose "specific requirements" upon the person providing a service established in another Member State which are justified by the general interest and are indentical or comparable to those imposed upon any person established within the territory of the State where the service is provided *(Van Binsbergen* judgment, cited above, paragraph 12; Case 39/75, *Coenen*, [1975] ECR 1547; Joined Cases 110 and 111/78, *Van Wesemael and Follacchio*, [1979] ECR 35). The objective of that principle is to reconcile the freedom to provide services with the protection of recipients thereof and to ensure that the rules on the exercise of the activity in question are observed.

However, the Commission points out that those judgments concern situations in which the person providing the service *moved into* the country where the service was performed, or, at all events, the service was performed in the country of the recipient, and those judgments were delivered purely in the light of those facts. One cannot therefore deduce therefrom an absolutely general rule which applied even in the absence of any activity carried on by a provider of services in the Member States which has rules on the exercise of the activity in question.

Case 15/78, *Koestler*, ([1979] ECR 1971) has not altered that principle.

The Commission therefore thinks that the application of the disputed laws to services (as between broadcasters and advertisers) performed entirely outside the territory of the State which has adopted those laws and which only impinge upon that territory as a result of the natural laws of physics, is contrary to Article 59 of the EEC Treaty.

In the opinion of the Commission, the reservation regarding public policy in its strict sense and that regarding public security (Article 56 of the Treaty) may be disregarded because those problems do not arise in this case.

Supposing, however, that the disputed rules are in principle applicable, their aim of preventing the diffusion by television of commercial advertisements in Belgium cannot be achieved. Therefore the constraints placed upon the provision of services by television broadcasting stations in adjacent countries are not justified as being the most suitable way of achieving that objective.

Nor is there discrimination between broadcasting stations in the various adjacent countries on the ground that, because of their respective geographical locations, they cover natural reception zones of greatly varying interest from the advertising point of view.

Assuming that the disputed prohibition is lawful, the fact that it constrains some more than others is attributable not to any conscious intention of the authors of the rule but to natural geographical factors over which they have no influence. It is therefore impossible to ensure that their economic effects are equal for everyone. The Treaty does not prohibit natural inequalities but it does prohibit the deliberate treatment of some differently from others.

In conclusion, the Commission proposes that the first question should be answered as follows:

"1. Article 59 prohibits national rules against the transmission by cable television distributors of advertisements broadcast by an undertaking operating a television station established outside the national frontiers, which are broadcast from that station by way of a service to advertisers established in a Member State other than that where it carries on its activity, subject only to the requirements of public policy and public security, as provided by Article 56.

2. There is *a fortiori* such a prohibition if the rules in question cannot prevent reception within the country of the same advertisements — without the intervention of cable television distributors — by an appreciable number of the television viewers, since the rules thereby impede the provision of the services in question without achieving the intended objective.

3. In the alternative, there is no prohibited discrimination by reason of the fact that foreign broadcasting stations enjoy natural reception zones in the State which has introduced the rules which are of different economic interest depending on their location."

The second question

The respondents in the main proceedings contend that the answer to this question

is to be found in the judgments in *Sotgiu* (Case 152/73, [1974] ECR 164), *Thieffry* (Case 71/76, [1977] ECR 765) and *Van Wesemael and Follacchio* (Joined Cases 110 and 111/78, [1979] ECR 35).

The effect of those cases is that national rules which are neither strictly nor materially discriminatory may be contrary to Article 59 if they are not objectively justified.

In the case of material discrimination resulting from national rules introduced after the EEC Treaty came into force, the respondents in the main proceedings recall that Article 62 of the Treaty prohibits Member States from introducing new restrictions after the Treaty came into force. The direct effect of that "stand-still" clause cannot be called into question.

The respondents in the main proceedings propose that the Court should answer the second question as follows:

"Articles 59 and 60 of the EEC Treaty prohibit with direct effect not only national measures constituting strict discrimination on grounds of nationality or residence but also those constituting material discrimination on the same grounds or those which are not objectively justified by the need to achieve the intended objective of public interest."

RTBF points out that the rules in dispute do not cause any strict or material discrimination between providers of services, the latter being actual or potential cable television distributors. Moreover, the prohibition on the retransmission of advertisements is not a hindrance to the free movement of the services lawfully provided by cable television distributors.

Consequently, it proposes that the answer to the second question should be that where national rules against the transmission of advertisements by cable television companies over wires do not cause any strict discrimination against the provider of that service because of his nationality or residence, they fall outside the sphere of application of Articles 59 and 60 of the Treaty.

The *Government of the Federal Republic of Germany* is of the opinion that to the extent to which the rules stated in Article 59 and 60 of the Treaty produce effects going beyond the elimination of discrimination, they cannot be said to have unlimited direct effect.

To the extent to which Articles 59 and 60 further aim at restrictions upon the freedom to provide services which result from rules which are in themselves applicable without distinction, to attribute direct effect to those articles would result in rendering the national rules in question quite simply inapplicable. The idea of direct effect, which, owing to the precedence of Community law, makes the national rules inapplicable, may be entertained where the national rules may be replaced by other requirements which have less material effect upon the freedom to provide services.

On the other hand, if the national rules cannot be replaced, the condition contained therein relating to the freedom to provide services which requires that a provider of services which extend beyond national boundaries be placed on an equal footing from a material point of view can only be satisfied by the adoption, by the national legislature, of supplementary rules to that effect. The scheme contemplated by Articles 59 and 60 does not merely require total abstention of the Member State; it requires that if necessary that State should take positive legislative action.

The condition imposed by the Court as regards the direct applicability of Article 59 *et seq.*, namely that there should be a clear obligation not to act, is not fulfilled in this case.

Consequently, the answer to the second question could be in the affirmative only if it is made subject to the proviso indicated, namely that the system contemplated by Articles 59 and 60 of the EEC Treaty does not require any supplementary legislative measure in this regard.

The *Commission* contends that if the term "restriction" in Article 59 covers restrictions other than mere discrimination on grounds of nationality or residence, there is no reason for refusing to recognise the direct effect of Article 59.

In the *Van Binsbergen* judgment, cited above, the Court attributed such direct effect to the first paragraph of Article 59 and the third paragraph of Article 60, "at least in so far as they seek to abolish any discrimination ...", which indicates that the Court, delivering judgment upon the facts of that case, merely refrained from saying any more than was necessary to enable the court making the reference to give its judgment, while leaving the way open for the discovery of other types of restriction falling within the scope of Article 59.

It proposes that the second question should be answered as follows:

"Article 59 has direct effect in regard to all types of restriction which fall within the scope of that provision."

III — Oral procedure

At the sitting on 13 and 14 November 1979, Mr Debauve, Mr Denuit and Coditel, represented by G. Kirschen and A. Braun, of the Brussels Bar, and J. M. Defourny, of the Liège Bar, Mr Lohest and the Association Liégeoise d'Electricité, represented by A. Braun, of the Brussels Bar, and by E. Rigaux, of the Liège Bar, the Fédération Nationale du Mouvement Coopératif Féminin, the Fédération Belge des Coopératives (Febecoop), Vie Féminine and Mrs Françoise Vander Bemden and Others, represented by P. Martens, of the Liège Bar, the RTBF, represented by P. Foriers, of the Brussels Bar, the Luxembourg Government, represented by J. Loesch, of the Luxembourg Bar, and by J. Reuter, acting as Agent, the Government of the Federal Republic of Germany, represented by M. Seidel, acting as Agent, and the Government of the United Kingdom, represented by R. Jacob, Barrister of Gray's Inn, instructed by A. D. Preston, of the Treasury Solicitor's Department, acting as Agent, submitted oral argument.

During the sitting *Mr Debauve and Mr Denuit* as well as *Coditel* observed that there are two principal colour reception systems in Europe, the P.A.L. system and the S.E.C.A.M. system. In Belgium television sets are designed for the P.A.L. system. Where cable television distributors receive colour picture signals transmitted via the French S.E.C.A.M. system they convert them into signals which can be received by a P.A.L. set. There is no actual decoding of the signal into pictures and sounds but the nature of the signal is changed.

The Advocate General delivered his opinion at the sitting on 13 December 1979.

Decision

1 By a judgment of 23 February 1979, which was received at the Court on 3 April 1979, the Tribunal Correctionnel, Liège, referred two questions under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Articles 59 and 60 of the Treaty with regard to certain problems concerning the transmission of commercial advertisements by cable television distributors.

2 Those questions have arisen out of criminal proceedings brought before the Tribunal de Police, Liège, against three persons for infringement of a prohibition on the transmission of television broadcasts in the nature of commercial advertising and implicating two Belgian companies, vicariously liable in civil law for the three accused, who are officers of those companies. Those proceedings were begun on the particular initiative of three associations representing consumers or cultural interests and by a certain number of natural persons who intervened as civil parties before the Tribunal de Police. When that court acquitted the accused and the companies liable in civil law, the three associations and certain other civil parties as well as the Ministère Public appealed to the Tribunal Correctionnel.

3 It is apparent from the file that the two companies in question provide, with the authority of the Belgian administration, a cable television diffusion service covering part of Belgium. Television sets belonging to subscribers to the service are linked by cable to a central aerial having special technical features which enable Belgian broadcasts to be picked up as well as certain foreign broadcasts which the subscribers cannot always receive with a private aerial, and which furthermore improve the quality of the pictures and sound received by the subscribers.

4 The prosecutions relate to the diffusion in Belgium by means of the system of cable television installed there of broadcasts effected by broadcasting stations established outside Belgium to the extent to which they contain commercial advertising material. Belgian legislation prohibits national radio and television broadcasting organizations, which have a legal monopoly on broadcasting, from making broadcasts in the nature of commercial advertising. In regard to cable television, Article 21 of the Royal Decree of

24 December 1966 (Moniteur Belge of 24 January 1967) also prohibits the transmission of broadcasts in the nature of commercial advertising.

5 The judgment making the reference states that in practice cable television distributors have disregarded that prohibition and have transmitted foreign programmes without excising advertisements; this practice has been tolerated by the Belgian Government, which has not imposed any penalty or withdrawn any authorizations; it also states that a large number of Belgian television viewers can pick up foreign programmes without the help of the relay systems set up by the cable television diffusion companies.

6 It is in the light of those factual circumstances that the Tribunal Correctionnel has formulated its questions relating to Articles 59 and 60 of the Treaty. It believes that the application of the prohibition in question might have an affect upon the freedom to provide services at the Community level. In fact, according to the Tribunal, foreign broadcasting organizations derive an appreciable part of their revenue from advertising placed with them by advertisers so that the excision of advertisements in Belgium might cause those advertisers to restrict or discontinue their commercial advertising; furthermore, advertisers, whether traders or manufacturers, established in neighbouring countries would obtain a more restricted coverage of the Belgian market to which they hitherto directed their advertising and on which they offered their services.

7 The questions asked by the Tribunal Correctionnel are worded as follows:

"1. Having regard to the judgment of the Court of Justice of 30 April 1974 in Case 155/73, *Sacchi*, must Article 59 of the Treaty of Rome be interpreted as prohibiting all national rules which prohibit the transmission of advertisements by cable television distribution companies even though it is still possible and lawful to receive such advertisements naturally within the receiving zones of foreign broadcasting stations, having regard in particular to the fact that:

(a) such rules would introduce discrimination based on the geographical locality of the foreign broadcasting station which would be able to

transmit advertisements only within its natural receiving zone, as those zones may, because of the differences in density of population, be of very different interest from an advertising point of view,

(b) such rules would introduce a restriction disproportionate to the objective in view because that objective — in other words, a prohibition on television advertising — could never be wholly achieved because of the existence of the natural receiving zones;

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

8 Before examining those questions the Court recalls that it has already ruled in its judgment of 30 April 1974 (Case 155/73, *Sacchi*, [1974] ECR 490) that the broadcasting of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services. There is no reason to treat the transmission of such signals by cable television any differently.

9 However, it should be observed that the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State. Whether that is the case depends on findings of fact which are for the national court to establish. Since the Tribunal Correctionnel has concluded that in the given circumstances of this case the services out of which the prosecutions brought before it arose are such as to come under provisions of the Treaty relating to services, the questions referred to the Court should be examined from the same point of view.

10 The central question raised by the national court is whether Articles 59 and 60 of the Treaty must be interpreted as prohibiting all national rules against

the transmission of advertisements by cable television to the extent to which such rules do not make any distinction based on the origin of the advertisements, the nationality of the person providing the services or his place of establishment.

11 According to the first paragraph of Article 59 of the Treaty restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States of the Community. The strict requirements of that provision involve the abolition of all discrimination against a provider of services on the grounds of his nationality or of the fact that he is established in a Member State other than that where the service is to be provided.

12 In view of the particular nature of certain services such as the broadcasting and transmission of television signals, specific requirements imposed upon providers of services which are founded upon the application of rules regulating certain types of activity and which are justified by the general interest and apply to all persons and undertakings established within the territory of the said Member State cannot be said to be incompatible with the Treaty to the extent to which a provider of services established in another Member State is not subject to similar regulations there.

13 From information given to the Court during these proceedings it appears that the television broadcasting of advertisements is subject to widely divergent systems of law in the various Member States, passing from almost total prohibition, as in Belgium, by way of rules comprising more or less strict restrictions, to systems affording broad commercial freedom. In the absence of any approximation of national laws and taking into account the considerations of general interest underlying the restrictive rules this area, the application of the laws in question cannot be regarded as a restriction upon freedom to provide services so long as those laws treat all such services identically whatever their origin or the nationality or place of establishment of the persons providing them.

14 A prohibition of the type contained in the Belgian legislation referred to by the national court should be judged in the light of those considerations. It must be stressed that the prohibition on the transmission of advertisements by cable television contained in the Royal Decree referred to above cannot be examined in isolation. A review of all the Belgian legislation on broadcasting shows that that prohibition is the corollary of the ban on the broadcasting of commercial advertisements imposed on the Belgian broadcasting organizations. This is also the way in which the judgment making the reference sets out the relevant legislation, indicating that the Royal Decree prohibits the transmission of advertisements in order to maintain conformity with the scheme imposed on the national broadcasting organizations.

15 In the absence of any harmonization of the relevant rules, a prohibition of this type falls within the residual power of each Member State to regulate, restrict or even totally prohibit television advertising on its territory on grounds of general interest. The position is not altered by the fact that such restrictions or prohibitions extend to television advertising originating in other Member States in so far as they are actually applied on the same terms to national television organizations.

16 The answer must therefore be that Articles 59 and 60 of the Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television — as they prohibit the broadcasting of advertisements by television — if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is established.

17 In view of that answer the question concerning the consequences which may arise from the direct applicability of Articles 59 and 60 of the Treaty where there is conflict between those provisions and national legislation has become devoid of object.

18 The national court further asks if rules prohibiting the transmission of advertisements by cable television are not a measure which is dispro-

portionate in relation to its intended purpose owing to the fact that the prohibition on the broadcasting of commercial advertising by television remains relatively ineffective in view of the existence, in the Member States concerned, of the natural reception zones of certain foreign stations.

19 Since the transmission of television signals by cable television enables them to be diffused over a wider area and improves their penetration, restrictions or prohibitions imposed on television advertising within its territory by a Member State do not lose their justification because of the fact that reception of foreign broadcasting stations is also possible throughout the national territory, or in certain areas thereof, without the intervention of any cable television system. The answer to the question asked must therefore be in the negative.

20 Finally, the national court wishes to know whether national rules prohibiting the transmission of advertisements by cable television create discrimination against foreign broadcasting stations owing to the fact that their geographical location allows them to broadcast their signals only within the natural reception zone.

21 The national court is referring in this question to the spatial limits on the diffusion of television programmes depending, on the one hand, on the natural relief of the ground and of built-up areas and, on the other, on the technical features of the broadcasting systems used. These natural and technical factors undoubtedly lead to differences as regards reception of television signals in view of the correlation between the location of broadcasting stations and television receivers. However, such differences, which are due to natural phenomena, cannot be described as "discrimination" within the meaning of the Treaty; the latter regards only differences in treatment arising from human activity, and especially from measures taken by public authorities, as discrimination. Moreover, it should be pointed out that even if the Community has in some respects intervened to compensate for natural inequalities, it has no duty to take steps to eradicate differences in situations such as those contemplated by the national court.

22 The answer must therefore be that national rules prohibiting the transmission by cable television of advertisements cannot be regarded as constituting either a disproportionate 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.

Costs

23 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Grand Duchy of Luxembourg, the Government of the United Kingdom, the Government of the French Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Correctionnel, Liège, by judgment of 23 February 1979, hereby rules:

1. **Articles 59 and 60 of the EEC Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television — as they prohibit the broadcasting of advertisements by television — if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is established.**

2. **National rules prohibiting the transmission by cable television of advertisements cannot be regarded as constituting either a dispro-**

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