OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 11 June 1991 *

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Mr President,
Members of the Court,

1. The questions submitted for a preliminary ruling by the High Court, Dublin, ('the national court') arose in proceedings brought by The Society for the Protection of Unborn Children Ireland Ltd (hereinafter referred to as 'the SPUC' or 'the plaintiff in the main proceedings') against a number of persons in their capacity as representatives of one of three students associations, namely the Union of Students of Ireland (hereinafter 'the USI'), the University College Dublin Students Union (hereinafter 'the UCDSU') and the Trinity College Dublin Students Union (hereinafter 'the TCDSU').

* Original language: Dutch.

Factual and legal background

2. The SPUC is a company incorporated under Irish law whose purpose is to prevent the decriminalization of abortion and, more generally, to protect the rights of unborn life from the moment of conception.

The UCDSU and the TCDSU each publish an annual guidebook for students. In common with the previous edition the 1989/90 edition of each of the two guidebooks includes a section containing information for pregnant students. Abortion is mentioned as one possible option in the event of an unwanted pregnancy. In that connection, the guidebooks provide the names, addresses and telephone numbers of a number of clinics in the United Kingdom where medical termination of pregnancy is available.

The USI publishes a monthly publication for students entitled 'USI News'. Information is provided in particular in the February 1989 issue on the possibility of having an abortion in the United Kingdom and on the way of contacting the agencies concerned.

3. The dispute between the SPUC and the representatives of the students associations must be seen in the context of the Irish legislation relating to abortion. Section 58 of the Offences against the Person Act 1861, makes it a criminal offence for the pregnant woman herself or another unlawfully to attempt to procure her miscarriage. Section 59 of that Act also makes it a criminal offence to provide unlawful assistance to that end. On the basis of, *inter alia*, those provisions the Irish courts have recognized the right to life of the unborn as from the moment of conception.

Following a referendum in 1983 an express acknowledgment of the right to life of the unborn was inserted in the Irish Constitution. The new third subsection of Article 40, Section 3, of the Constitution reads as follows:

'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.'

In a judgment of 16 March 1988 in *The Attorney General at the relation of The Society for the Protection of Unborn Children Ireland Ltd* v *Open Door Counselling Limited and Dublin Wellwoman Centre Limited*,[1] the Supreme Court ruled *inter alia* as follows:

'The Court doth declare that the activities of the defendants, their servants or agents *in assisting pregnant women* within the jurisdiction to travel abroad *to obtain abortions* by referral to a clinic; by the making of their travel arrangements, or *by informing them of the identity and location of and method of communication with a specified clinic or clinics are unlawful*, having regard

1 — [1988] I. R. 593.

to the provisions of Article 40, s. 3, sub-s. 3 of the Constitution' (emphasis added).

4. In September 1989 the SPUC drew the attention of the students associations mentioned above to that judgment of the Supreme Court and requested them to undertake not to include in their publications during the 1989/90 academic year information as to the identity and location of and method of communication with abortion clinics. The students associations gave no such undertaking.

On 25 September 1989 the SPUC brought proceedings in the High Court against the representatives of the three students associations (to whom I shall refer as 'the defendants in the main proceedings') for a declaration that any publication of the aforementioned information is contrary to Article 40, s. 3, sub-s. 3 of the Constitution. At the same time, the SPUC sought from the same court an interlocutory injunction until the full hearing of the action, restraining the publication of such information.

During the proceedings for the interlocutory injunction, the defendants in the main proceedings argued that pregnant women residing in Ireland might, by virtue of Community law, travel to another Member State where abortion was permitted in order to have their pregnancies terminated using the medical facilities provided in that country. They further argued that as a corollary to that right derived from Community law there was a right for interested women in Ireland to obtain information as to the identity and location of abortion clinics in other Member States and the manner of contacting them. Lastly, they stated that that right of information on the part of pregnant women resident in Ireland also gave rise to a right under Community law for the defendants to distribute the relevant information in Ireland.

On 11 October 1989 the High Court decided in the proceedings on the motion for an interlocutory injunction to refer a number of questions (which were not then specified) to the Court of Justice for a preliminary ruling. The High Court, however, did not rule on the SPUC's request for an injunction restraining publication. The SPUC appealed against that judgment to the Supreme Court, which, on 19 December 1989, granted the injunction sought until the trial of the action. The Supreme Court did not interfere with the High Court's decision to refer a number of questions to the Court of Justice for a preliminary ruling. However, it gave the parties leave to apply to the High Court in order to vary the injunction restraining publication in the light of the preliminary ruling to be given by the Court of Justice.

5. It was not until after the Supreme Court gave that judgment that the High Court, following on from its judgment of 11 October 1989, decided on 5 March

1990 to refer the following three questions to the Court of Justice for a preliminary ruling:

'1. Does the organized activity or process of carrying out an abortion or the medical termination of pregnancy come within the definition of "services" provided for in Article 60 of the Treaty establishing the European Economic Community?

2. In the absence of any measures providing for the approximation of the laws of the Member States concerning the organized activity or process of carrying out an abortion or the medical termination of pregnancy, can a Member State prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another Member State where abortions are performed?

3. Is there a right at Community law in a person in Member State "A" to distribute specific information about the identity, location and means of communication with a specified clinic or clinics in Member State "B" where abortions are performed, where the provision of abortion is prohibited under both the Constitution and the criminal law of Member State "A" but is lawful under certain conditions in Member State "B"?'

Jurisdiction of the Court

6. The Commission observes in its observations that it is not clear whether the High Court's preliminary questions are referred in the context of the interlocutory proceedings or in that of the main proceedings.

I agree with the Commission's view that that uncertainty is not of such a nature as to cast doubt on the Court's jurisdiction to entertain the request for a preliminary ruling, having regard to the judgment in *Pardini*.[2] If the questions have been referred in connection with the main proceedings they are certainly relevant to the decision to be taken by the referring court. However, they are relevant equally if they are referred in connection with the interlocutory proceedings. It is true that the interim measure sought in the interlocutory proceedings has since been granted by the Supreme Court. But since the Supreme Court gave the parties leave to apply to the High Court, once the preliminary ruling has been given, to vary the injunction granted, the reference for a preliminary ruling is relevant in that case too.

7. The plaintiff in the main proceedings and the Irish Government take the view that no question of Community law arises in these proceedings. The issue is whether the defendants, that is to say the representatives of the students associations, are entitled to distribute the information in question to pregnant women. Since the information is distributed free of charge and the defendants do not operate as agents for the abortion clinics named by them, no

2 — Judgment of 21 April 1988 in Case 338/85 *Fratelli Pardini SpA* v *Ministero del commercio con l'estero and Banca toscana* [1988] ECR 2041.

economic activity can be involved within the meaning of Article 2 of the EEC Treaty. They add that, in any event, the provision of information by the defendants took place entirely within Ireland and therefore lacks any cross-border element, as a result of which the Treaty provisions on the freedom to supply services cannot apply.

The defendants in the main proceedings disagree. As has already been mentioned (in section 4) they consider that they can derive from Community law a right to provide information which is a corollary to the right to information of pregnant women resident in Ireland which ensues from their freedom guaranteed by the Treaty to go to another Member State to receive medical services. The information provided by the defendants can therefore not be seen in isolation from the economic services provided in another Member State.

8. The defendants' view seems to me to be correct. The questions raised by the national court seek to establish whether the activities of abortion clinics constitute services within the meaning of Article 60 of the EEC Treaty and, if so, whether the Treaty provisions on the freedom to supply services preclude a national rule prohibiting the provision of information concerning abortion services carried out in another Member State. The second part of the question therefore relates to the provision of information to pregnant women residing in one Member State who may wish to go to another Member State in order to receive certain services. Construed thus, the questions do not relate to activities 'whose relevant elements are confined within a single Member State'.[3] The prohibition on the provision of information in Ireland may result in a smaller number of women being acquainted with the services performed in the other Member State and therefore making less use of them. This may have an adverse effect on intra-Community trade in services.[4] Consequently, the questions do have a Community-law dimension.

Services within the meaning of Article 60 of the EEC Treaty

9. By its first question the national court wishes to know whether the 'organized activity or process of carrying out an abortion or the medical termination of pregnancy' is to be regarded as a service within the meaning of Article 60 of the EEC Treaty.

There can in my view be no doubt that 'the medical termination of pregnancy' covers a cluster of services which, if — as none of the parties in this case dispute — they are 'normally provided for remuneration', constitute services within the meaning of Article 60 of the EEC Treaty. That the term 'services' includes such services is already clear from the wording of the second paragraph of Article 60, which mentions as

3 — Judgment of 18 March 1980 in Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833, paragraph 9.

4 — See, as regards trade in goods, the judgments of 15 December 1982 in Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 15, and of 7 March 1990 in Case C-362/88 *GB-Inno-BM* [1990] ECR I-667, paragraph 7.

being services 'activities of the professions'. In any event, in the judgment in *Luisi and Carbone*[5] the Court expressly mentioned (in paragraph 16) 'persons receiving medical treatment' as being recipients of a service within the meaning of Article 60. Furthermore, Article 57(3) of the EEC Treaty (on establishment), to which Article 66 (on services) refers, expressly mentions the medical and allied professions.

10. The SPUC takes the view that the medical termination of pregnancy should nevertheless fall outside the scope of Article 60 on the ground that as a result the life of a third party, the unborn child, is destroyed, which is unlawful in Ireland as a result of the constitutional protection of the life of the unborn[6] and the prohibition of intentional abortion. Abortion is also prohibited in principle in other Member States but permitted, more specifically during the initial period of pregnancy, under particular conditions and circumstances which vary from one Member State to another. Moreover, it appears from the national court's third question that the court has in mind a situation in which the relevant service about which information is provided in Ireland is performed in the other Member State (in this case, the United Kingdom) in accordance with the legal conditions in force there.

In those circumstances I do not have to consider the question which has been raised on several occasions in connection with trade in goods in previous cases which have come before the Court,[7] namely whether unlawful services fall outwith the scope of the Treaty provisions on the provision of services. In the light of the questions referred by the national court, the services involved in this case are services for the medical termination of pregnancy which are lawfully provided in the country where they are performed (see also section 14 below) and which, as has already been shown (in section 8), are also of a cross-border nature.

Consequently, I propose that the first question should be answered as follows:

'The medical operation, normally performed for remuneration, by which the pregnancy of a woman coming from another Member State is terminated in compliance with the law of the Member State in which the operation is carried out is a (cross-border) service within the meaning of Article 60 of the EEC Treaty.'

Scope and context of the second and third questions

11. By its second question the national court wishes to establish whether, in the present state of Community law, a Member State may prohibit the distribution of specific information about the identity and location of clinics in another Member State where pregnancies are medically terminated

5 — Judgment of 31 January 1984 in Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377.

6 — Subject, according to Article 40, s. 3, sub-s. 3 of the Irish Constitution, quoted in section 3 above, to the equal right to life of the mother (and to the proviso 'as far as practicable').

7 — See in particular the judgment of 5 February 1981 in Case 50/80 *Horvath* v *Hauptzollamt Hamburg-Jonas* [1980] ECR 385, concerning the importation of drugs. See also the judgment of 6 December 1990 in Case C-343/89 *Witzemann*, not yet published in the European Court Reports, concerning the importation of forged currency.

and about means of communicating with such clinics. It appears from its connection with the first question that the national court has the provisions on the supply of services in mind. It is therefore a matter of establishing whether a Member State may, consistently with the Treaty provisions on the freedom to supply services, impede access to medical abortion services lawfully carried out in another Member State by prohibiting the provision of information about those services.

12. In its third question the national court asks whether a person in Member State A has a right at Community law to distribute such information about abortion clinics in Member State B when the provision of abortion is prohibited under both the Constitution and the criminal law of Member State A but is lawful under certain conditions in Member State B. It appears from the documents of the main proceedings that the information in question is provided in Member State A by persons who are not paid for providing it and who have no connections with the clinics in Member State B. Do those persons — the national court asks itself — have a right under Community law, that is to say the Treaty provisions on the freedom to provide services, to distribute the information in question?

In addition, it seeks to establish — hence the emphasis on the difference between the law in Member State A (Ireland) and in Member State B (United Kingdom) [8] — whether, in the event that a prohibition on the provision of information of the type described is contrary to the Treaty provisions on the freedom to supply services, the situation is different if the prohibition ensues from fundamental provisions in the Constitution and the criminal law of the first Member State. In other words, can such a national rule nevertheless be justified on grounds of considerations of a mandatory nature or of public policy enshrined in national constitutional or criminal-law provisions?

13. It may appear from the above and from what follows that the national court's questions do not have to do directly with the compatibility with Community law of the actual prohibition of the provision of abortions to pregnant women but with the compatibility with Community law of the prohibition on third parties giving assistance, more specifically, information, to pregnant women wishing to undergo an abortion in another Member State. Yet the prohibition of abortion is indirectly relevant, that is to say as the ground justifying the ban on the distribution of information (on this point see sections 26 and 33).

The national court's questions refer to the prohibition of the distribution of 'specific information about the identity, location and

8 — The British Abortion Act 1967, which authorizes the medical termination of pregnancy in certain circumstances, does not apply in Northern Ireland. In that part of the United Kingdom abortion is forbidden. It is not apparent from the written or oral submissions made to the Court whether a problem similar to that raised in the main proceedings arises with regard to the provision in Northern Ireland of information about abortion activities authorized elsewhere in the United Kingdom.

means of communication with' British clinics in which abortions are carried out. That definition closely tallies with the words used by the Irish Supreme Court in the *Open Door Counselling* case to which I have already referred (see section 3 above) and in which the distribution of information and referral and making travel arrangements to foreign clinics were held to be unlawful means of assisting pregnant women in Ireland to obtain abortions. In its written observations, the Commission rightly emphasizes that the prohibition of the provision of assistance is a general one which applies in Ireland to every provider of services and/or person providing information irrespective of his nationality or his place of establishment and that pregnant women in Ireland, regardless of their nationality, are impeded from making use of the services concerned both in Ireland and in other Member States alike.

The national court's questions do not extend beyond the legality of the relevant prohibition on the provision of assistance and information. More specifically, they are not concerned with any penalty which may be imposed in Ireland on pregnant women who undergo an abortion abroad. For that matter it is not sufficiently clear from the information before the Court or from the statements of the parties whether or not Irish law provides for the imposition of any penalty in those circumstances. However, it is stated in the written observations of the defendants in the main proceedings that Ireland does not prohibit or seek to prevent a pregnant woman from exercising her right to travel and receive services of termination of pregnancy abroad.

14. I would refer to a further point. As I have already observed, the questions are concerned with medical termination of pregnancy carried out in another Member State in compliance with the laws of that State. I assume that this likewise signifies — as does not appear to be contested in this case — that the information distributed in Ireland by the defendants in the main proceedings complies with the rules which apply in the United Kingdom with regard to the cases in which pregnancies may lawfully be terminated in that country. Indeed, in those Member States where abortion is permitted under certain conditions, there are frequently requirements laid down with regard to advice and counselling, which are designed to prevent abortion becoming routine and commercialized [9] or to ensure that the information is provided only by authorized persons [10] and that the decision to carry out an abortion is taken with knowledge of the facts, that is to say with the necessary advice and counselling. [11]

I assume therefore that the distribution of information in Ireland remains within the limits of what is allowed in the Member

9 — See, for example, Paragraph 219(b) of the German Strafgesetzbuch (Criminal Code), which in principle prohibits any public offer of abortion services.

10 — See, for example, the rule laid down in Articles L 162-3, L 645 and L 647 of the French Code de la Santé Publique (Public Health Code) under which the medical professions and specialized centres have a monopoly of the provision of information on abortion.

11 — See, for example, Article 350 of the Belgian Criminal Code, which authorizes abortion only in an insitution to which an advisory service is attached which receives the pregnant woman and advises her in depth on all the possibilities for care for the child.

State in which the service originates. This detail is important, because the right to provide information which the defendants in the main proceedings claim may in no case extend beyond the freedom to provide services on the part of the actual provider of services established in another Member State, of which, the defendants in the main proceedings argue, that right is the corollary. This is in fact related to the general rule that only goods or services which are duly 'produced' or 'brought into circulation' in the Member State of origin may be freely traded in the context of intra-Community trade in goods or services.

15. It appears from the foregoing that the second and third questions are closely related to each other and, in conjunction, must read as follows:

'Do the Treaty provisions on the freedom to provide services preclude a Member State where abortion is prohibited both by the Constitution and by criminal law from prohibiting anyone, whether he be the provider of the service or a person completely independent of the provider of the service and irrespective of his nationality or place of establishment, from providing women residing in that State, regardless of their nationality, with assistance with a view to the termination of pregnancy, more specifically through the distribution of information about the identity and location of and the manner of communication with clinics established in another Member State where abortions are performed, even though the services of medical termination of pregnancy and the provision of information relating thereto comply with the law in force in that other Member State?'

In answering this question I shall deal with three distinct points. I shall first consider, in the light of the Court's case-law on the freedom to supply services, whether the prohibition on the provision of information which is at issue falls within the scope of the Treaty provisions on the freedom to supply services (sections 16 to 21). Secondly, I shall examine whether, in the event that the first question is answered in the affirmative, the prohibition can nevertheless be justified under Community law on the ground of imperative requirements of public interest in theory (sections 22 to 24) and in practice (sections 25 to 29). Lastly, I shall consider whether the Court is entitled to examine the prohibition on the provision of information which is at issue in the light of the general principles of Community law with regard to fundamental rights and freedoms (sections 30 and 31) and, if it is so entitled, the result of such examination (sections 32 to 38).

Does the prohibition of the distribution of information fall within the scope of Articles 59 and 60 of the EEC Treaty?

16. Articles 59 and 60 of the EEC Treaty have been directly applicable since the expiry of the transitional period.[12] The fact that the Member States' legislation on the medical termination of pregnancy has not been approximated, as is mentioned by the national court in the second question, does not stand in the way of the direct applicability of the Treaty provisions.

12 — See the judgment of 3 December 1974 in Case 33/74 *van Binsbergen* [1974] ECR 1299.

17. As the Court has consistently held,[13] Article 59 of the EEC Treaty requires the abolition of any restriction which has the aim or effect of treating a provider of services established in a Member State other than the Member State where the service is provided less favourably on account of his nationality or of his place of establishment than a provider of services who is established in that Member State.

But even where the provider of the service is established in the same Member State where the service is provided and it is the recipient of the service who goes to that country from another Member State, Article 59 of the EEC Treaty requires the abolition of any restrictions which that recipient of services might encounter on account of his nationality or of the fact that he is established in a Member State other than that to which he goes in order to receive the service. The Court gave this answer in paragraph 10 of the judgment in *Luisi and Carbone* (cited above):

'In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided is established or else the latter may go to the State in which the person providing the service is established. Whilst the former case is expressly mentioned in the third paragraph of Article 60, which permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, the latter case is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital.'

In paragraph 16, the Court drew the following conclusion from this:

'the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments'.

In paragraph 15 of the judgment in *Cowan*[14] the Court expressly confirmed that conclusion.

It follows from this case-law that not only providers of services who do so by way of trade or profession derive rights from the Treaty provisions on freedom to provide services, but also Community citizens who wish to receive services derive rights therefrom, and more specifically the right to go to another Member State in order to receive a service provided there.

18. The question now is whether that right of Community citizens to receive services in another Member State encompasses the right to receive, unimpeded, information in one's own Member State about providers of services in the other Member State and about how to communicate with them. I consider that that question must be answered in the affirmative.

13 — See most recently the judgments of 26 February 1991 on the services of tourist guides (Case C-154/89 *Commission* v *France*, paragraph 12; Case C-180/89 *Commission* v *Italy*, paragraph 15; and Case C-198/89 *Commission* v *Greece*, paragraph 16, not yet published in the European Court Reports).

14 — Judgment of 2 February 1989 in Case 186/87 *Cowan* v *Trésor public* [1989] ECR 195, at 220 and 221.

In the judgment in *GB-Inno-BM*[15] the Court emphasized, in connection with offering goods for sale, the interest of consumer information. It stated (in paragraph 8) that consumers' freedom to shop in another Member State is compromised if they are deprived of access in their own country to advertising available in the country where purchases are made. I can see no reason why the position should be otherwise with regard to information provided about a service: individuals' freedom to go to another country in order to receive a service supplied there may also be compromised if they are denied access in their own country to information concerning, in particular, the identity and location of the provider of the services and/or the services which he provides.

19. In my view, the answer given also holds good where the information comes from a person who is not himself the provider of the services and does not act on his behalf. The freedom recognized by the Court of a recipient of services to go to another Member State and the right comprised therein to access to (lawfully provided) information relating to the services and the provider of those services ensue from fundamental rules of the Treaty to which the most extensive possible effectiveness must be given. As a fundamental principle of the Treaty, the freedom to supply services must — subject to limitations arising out of imperative requirements or other justifying grounds, which I shall discuss later — be respected by all, just as it may be promoted by all, *inter alia* by means of the provision of information, whether or not for consideration, concerning services which the provider of information supplies himself or which are supplied by another person.

15 — Cited in footnote 4.

Moreover, such an interpretation of Community law is consistent with Article 10 of the European Convention on Human Rights ('the European Convention'), the underlying principles of which the Court accepts as forming part of the Community legal order, and with Article 5 of the European Parliament's Declaration of Fundamental Rights and Freedoms.[16] According to those provisions, everyone has the right, subject to restrictions prescribed by law, 'to receive and to impart information and ideas without interference by public authority and regardless of frontiers' (European Convention on Human Rights, Article 10(1)). The protection afforded by that provision is aimed in particular at information intended to influence public opinion but also applies to 'information of a commercial nature'.[17] These provisions will be dealt with more extensively later (section 34 below).

20. As has already been mentioned (in section 13), the prohibition on the provision of information on abortions carried out abroad is a measure derived from the Constitution which applies generally in Ireland and affects domestic and foreign providers of services and information or recipients of services alike and in a non-discriminatory manner. The Commission argued before the Court that that non-discriminatory rule fell outside Articles 59 and 60 of the EEC Treaty. It sought support for that view in the Court's judgments in *Koestler*[18] and in *Debauve*.[19]

16 — OJ 1989 C 120, p. 51.

17 — See Eur. Court H. R. *Markt Intern Verlag GmbH and Klaus Beermann*, judgment of 20 November 1989, Series A no. 165.

18 — Judgment of 24 October 1978 in Case 15/78 *Société Générale Alsacienne de Banque* v *Koestler* [1978] ECR 1971.

19 — Cited in footnote 3.

It is true that the Court has not yet expressly ruled that Article 59 of the EEC Treaty is applicable to non-discriminatory measures which impede (actually or potentially) intra-Community trade in services. But neither has it restricted the scope of Article 59 to (overt or covert) discriminatory measures. One explanation for the emphasis on discrimination in the cases doubtless lies, according to Mr Advocate General Jacobs in his recent Opinion in *Säger*,[20] in the fact that most of the cases are concerned with a situation in which the provider of services has moved to another Member State where he is confronted with national rules which affect the provider of services from another Member State more severely than the domestic provider and, as a result, they have a 'discriminatory' (that is to say, adverse) effect on the foreign provider as compared with the domestic provider of services.

In his Opinion, Mr Advocate General Jacobs expresses the view that non-discriminatory restrictions on the provision of services should be treated in the same way as non-discriminatory restrictions on the free movement of goods under the 'Cassis de Dijon' line of case-law. According to the Advocate General, that analogy is particularly appropriate where the provider of the service does not move physically between Member States.[21] To require the provider of services in such a situation to comply with the often detailed legislation of each Member State where the service 'moves' by post or telecommunications (or, *a fortiori*, with the legislation of the Member State from which the recipient of the services originates) would severely impede the attainment of a single market in services in the Community.[22] In this Opinion Mr Advocate General Jacobs associated himself with the view already adopted by a number of advocates general.[23]

I entirely agree with this view. To allow measures which are non-discriminatory but detrimental to intra-Community trade in services to fall *a priori* outside the scope of Article 59 of the EEC Treaty would detract substantially from the effectiveness of the principle of the free movement of services, which in an economy in which the tertiary sector is continuing to expand will increase in importance. It would also give rise to an undesirable divergence between the Court's case-law on trade in goods and that on trade in services in situations in which only the service or the recipient of the service crosses the internal frontiers of the Community and which do not genuinely differ from situations in which goods or purchasers cross frontiers, and in situations in which services, for instance in the financial sector, are frequently presented as 'products'.

20 — Opinion delivered on 21 February 1991 in Case C-76/90 *Säger* v *Dennemeyer*, not yet published in the European Court Reports.

21 — Section 24 of the Opinion, where reference is made to P. J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, Second Edition, edited by L. W. Gormley, 1989, pp. 443-452.

22 — Sections 23 and 27 of the Opinion.

23 — See the Opinion of Mr Advocate General Warner in the *Debauve* and *Coditel* cases [(1980] ECR 860, at 870 to 873, and 905), who reached that conclusion on the basis of a thorough analysis of the Treaty provisions, the Opinion of Advocate General Sir Gordon Slynn in *Webb* [(1981] ECR 3328, at 3330 to 3333), who refers in particular to Article 65 of the EEC Treaty, from which it appears that Article 59 also covers restrictions other than restrictions entailing discrimination on grounds of nationality or place of residence, and the Opinion of Mr Advocate General Lenz in the cases on tourist guides to which I have already referred (sections 26 to 30). Since then, this view has also been adopted by Mr Advocate General Tesauro in his Opinion of 18 April 1991 in Case C-353/89 *Commission* v *Netherlands*, and in Case C-288/89 *Gouda* (section 12).

In addition, now the prohibition of discrimination has already been so broadly stretched in the case-law of the Court that it covers a situation in which providers of services from one Member State are placed, as a result of a disparity between the legislation of the Member States concerned, in a less favourable position in so far as they are subjected as a result of that disparity to a heavier burden if they should wish to exercise their trade or profession in another Member State.[24] If the broad interpretation of Article 59 which is advocated herein is accepted, a more heavy burden of that kind will naturally be regarded as a barrier, without its being necessary to place undue emphasis on the prohibition of discrimination.[25]

21. My conclusion is, therefore, that national rules which, albeit not discriminatory, may, overtly or covertly, actually or potentially, impede intra-Community trade in services fall in principle within the scope of Articles 59 and 60 of the EEC Treaty. I say 'in principle' advisedly, because such national rules may nevertheless be compatible with the said Treaty provisions where they are justified by imperative requirements of public interest (see section 22 et seq., below). In addition, I conclude that in principle Community citizens derive from Articles 59 and 60, where they are applicable, the right to obtain information regarding services lawfully provided in another Member State just as they derive the right therefrom to distribute such information, whether or not for remuneration.

Imperative requirements of public interest which may justify limitations on the freedom to supply services

22. The Court has consistently held, in particular in its judgment in *Webb*[26] (in paragraph 17, which refers to the judgment in *Van Wesemael*[27]), that

'regard being had to the particular nature of certain services, specific requirements imposed on the provider of the services cannot be considered incompatible with the Treaty where they have as their purpose the application of rules governing such activities. However, the freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good [intérêt général] and which are imposed on all persons or undertakings operating in the said State in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the Member State of his establishment'.

In the judgment in *Commission* v *Germany*[28] the Court made it clear that specific requirements imposed on the provider of services on account of the particular nature of the (insurance) services concerned

24 — See, for example, the judgment of 3 February 1982 in Joined Cases 62 and 63/81 *Seco* v *EVI* [1982] ECR 223, paragraphs 8 and 9.

25 — The same tendency to put such a broad construction on discrimination also occurs in the field of the right of establishment. See the discussion of the case-law in my Opinion of 28 November 1990 in Case C-340/89 *Vlassopoulou*, paragraph 6 et seq. (judgment given on 7 May 1991, not yet published in the European Court Reports).

26 — Judgment of 17 December 1981 in Case 279/80 *Webb* [1981] ECR 3305.

27 — Judgment of 18 January 1979 in Joined Cases 110 and 111/78 *Van Wesemael* [1979] ECR 35.

28 — Judgment of 4 December 1986 in Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

'must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected' (paragraph 27),

to which it added the further proviso that

'the same result cannot be obtained by less restrictive rules' (paragraph 29).

Recently in the 'tourist guide' judgments[29] the Court restated the case-law as follows:

'The requirements are therefore to be regarded as compatible with Articles 59 and 60 of the Treaty only if, in the sphere of the activity in question, there appear to be grounds of public interest justifying the restrictions on the freedom to provide services, that interest is not already safeguarded by the rules of the State of establishment and the same result cannot be achieved by less restrictive rules.'

As appears from the paragraph from the judgment in *Webb* which is quoted above, the national rules referred to in this case-law are rules which are applicable without distinction, that is to say 'which are imposed on all persons or undertakings operating in the said State' (including those which, as a result of a disparity in legislation, may constitute a heavier burden for providers of services from other Member States and are in that sense 'discriminatory': see section 20 above). National rules which are *per se* (overtly or covertly) discriminatory as regards providers of services from other Member States may also, under Article 56(1) in conjunction with Article 66 of the EEC Treaty, be justified 'on grounds of public policy, public security or public health'.[30]

23. There is a great temptation to draw a parallel between the case-law which has been cited on the supply of services and the case-law relating to imperative requirements (Article 30 of the EEC Treaty) or grounds of public interest (Article 36 of the EEC Treaty).

In view of the complexity of the subject-matter I shall have no difficulty in resisting this temptation and shall confine myself to a few observations designed to place the concept of imperative requirements of public interest in the general context of Community law.

29 — See the judgments cited in footnote 13 in Case C-154/89, paragraph 15, Case C-180/89, paragraph 18, and Case C-198/89, paragraph 19.

30 — Unlike Article 36 of the EEC Treaty, Article 56(2) incorporates a duty of coordination, pursuant to which the Council adopted Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117). That provision has arisen in the case-law of the Court chiefly in connection with the possibility of Member States to impose restrictions on the right of free movement in individual cases (see the judgments of 8 April 1976 in Case 48/75 *Royer* [1976] ECR 497, paragraph 29, and of 5 February 1991 in Case C-363/89 *Roux*, not yet published in the European Court Reports, paragraph 30). In the judgment of 26 April 1988 in Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraphs 31 to 39, the Court nevertheless investigated whether a general national rule was justified on grounds of public policy.

In both areas (supply of goods and supply of services) the reasons or grounds which may justify (as the case may be, discriminatory or non-discriminatory) national rules must be justified under Community law. In the case of the free movement of goods, the Court will adhere, as regards the 'Article 36' justifications, to the exhaustive list set out in the Treaty, while, as regards the 'Article 30' imperative requirements, the Court accepts in its case-law a limited set of unvarying reasons (namely consumer protection, fair trading practices and market transparency, environment protection, protection of working conditions, effectiveness of fiscal supervision). In contrast, in the sphere of the freedom to supply services, the Court appears — leaving aside the grounds mentioned in Article 56 in conjunction with Article 66 — to have delimited the cluster of imperative requirements of public interest less precisely. Nevertheless, here too the grounds in question are similar to those set out in Article 36 (protection of intellectual property [31] and of artistic and archaeological treasures [32]) and/or to the grounds coming under Article 30 (protection of workers [33] and consumers, in particular policy-holders [34]).

In both areas, the Court also appears to be prepared, according to recent case-law, to subsume under the 'Article 30' imperative requirements or under the 'Article 59' public interest grounds also grounds which 'reflect certain political and economic choices' and are connected with 'national or regional socio-cultural characteristics, [which], in the present state of Community law, is a matter for the Member States'. [35] In the field of trade in goods, this found expression in the *Cinéthèque* judgment [36] (where an objective of a cultural nature, namely promotion of the film industry, was involved) and in the various 'Sunday-trading' judgments [37] (which were concerned with the distribution of working and rest days and hence with a socio-recreational objective). As far as the provision of services is concerned, an indication was therefore already apparent earlier in judgments such as *Koestler* [38] (in which a non-discriminatory national measure which precluded the recovery by legal action of debts arising out of a wagering contract for reasons founded on the 'social order', and therefore on grounds of an ethical/political nature, was held to be acceptable) and *Debauve* (in which a national ban which was applicable 'without distinction' to cable television advertising on grounds of the general interest — the ban was intended essentially to ensure the survival of a pluralistic written press [39] — was held to be justified).

It is inevitable that the Court should have been moved to do this in a context of

31 — See the judgment of 18 March 1980 in Case 62/79 *Coditel* [1980] ECR 881, paragraph 15.

32 — See the judgments on tourist guides cited in footnote 13.

33 — See the judgment in *Webb* cited in footnote 26 (at paragraph 18), the judgment in *Seco* cited in footnote 24 (at paragraph 14) and the judgment of 27 March 1990 in Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, at paragraph 18.

34 — See the judgment in *Commission* v *Germany*, cited in footnote 28 (at paragraphs 30 to 33).

35 — Judgment of 23 November 1989 in Case C-145/88 *Torfaen Borough Council* v *B & Q* [1989] ECR 3851, paragraph 14.

36 — Judgment of 11 July 1985 in Joined Cases 60 and 61/84 *Cinéthèque and Others* v *Fédération nationale des cinémas français* [1985] ECR 2605.

37 — The judgment in *Torfaen Borough Council* v *B & Q* (cited in footnote 35) and the judgments of 28 February 1991 in Case C-312/89 *Conforama*, and C-332/89 *Marchandise*, not yet published in the European Court Reports.

38 — Cited in footnote 18.

39 — That objective was not expressly mentioned in the judgment in *Debauve*, cited above, but is clear from the *Bond van Adverteerders* judgment which concerns a similar national rule (cited in footnote 30).

contemporary society in which the authorities have responsibility for the public interest in all kinds of policy areas, many of which are not covered, or only covered indirectly, by Community law. The important point is that attention is paid to ensuring that such public interest aims and the practical effects of the general national rules prompted by those aims are compatible with Community law. Hence the Court's emphasis on the need for the national rule to pursue *aims* which are justified under Community law, which means that where the rule relates to objectives within the scope of Treaty provisions, it should be in keeping with the objectives pursued by those provisions or, where it relates to objectives outside the scope of the Treaty, it may not be directed against objectives pursued by Treaty objectives, in particular the establishment of a single market. Hence, too, the emphasis placed by the Court on the requirement, in order to check that the national rule does not conflict with the Community aim of free trade, that it should go no further than is objectively necessary in order to attain the interest which it pursues, which presupposes that that interest is not already safeguarded by a rule having the same objective in the Member State of origin (of the product or of the provider of the service) and that the same result could not be achieved as well using means which restrict the Community interest less.

24. It is in the light of this frame of reference (which is similar for trade in goods and trade in services) that the national rule at issue must, in my opinion, be considered. The questions arising in this connection are whether the rule pursues an objective which is justified under Community law, that is to say whether it can rely on imperative requirements of public interest which are consistent with or not incompatible with the aims laid down in the Treaty provisions, and whether that rule has no effects beyond those which are necessary and, in particular, is not disproportionate, that is to say whether it satisfies the test of the principle of proportionality.

Assessment of a national rule prohibiting the distribution of information concerning medical abortion services

25. As I pointed out earlier, the national rule at issue sets out a general prohibition, which in no respect discriminates on grounds of nationality or place of establishment, on distributing in the Member State concerned information affording assistance to potential recipients residing in that Member State about services of medical termination of pregnancy lawfully performed in another Member State, services which I have accepted as falling in principle within the scope of Articles 59 and 60 of the EEC Treaty.

I would further recall that that prohibition on the provision of information is, according to the Irish Supreme Court, the result of a provision incorporated into the Irish Constitution in 1983 after a referendum with a view to protecting the life of the unborn, with due regard to the equal right to life of the mother, an aim which, according to the provision, is to be defended 'as far as is practicable'. In other

words, two rules which stem from fundamental rights come into conflict in this case: the freedom of the defendants in the main proceedings to distribute information, which I have accepted as being the corollary of the Community freedom to provide services vested in the actual providers of the services (see section 19 above), and the prohibition to assist pregnant women, by providing information, which, according to the Irish Supreme Court, results from the constitutional protection of unborn life.

26. It is undeniable that the prohibition of the provision of assistance — in this case in the form of information — is promoted by an objective which is regarded in the Member State concerned as an imperative requirement of public interest. The protection of the unborn enshrined in the national Constitution (and the prohibition of abortion inherent therein) and likewise the resultant need to prevent abortions — naturally only within the jurisdiction of the Member State concerned — by prohibiting the distribution of information thereon in its territory are regarded in that Member State as forming part of the basic principles of society.

Without prejudice to the question which I shall be considering later with regard to fundamental rights and freedoms (section 32 below), such an objective is justified under Community law, since it relates to a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member States and in respect of which they are entitled to invoke the ground of *public policy* referred to in Article 56 read together with Article 66 (and also in Article 36) of the EEC Treaty (a ground which can even justify discriminatory measures), in other words, according to the definition which has been adopted by the Court, 'a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'.[40] Although the scope of the concept of public policy 'cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community', nevertheless, as 'the particular circumstances justifying recourse to the concept of public policy may vary from one country to another', it is necessary 'to allow the competent national authorities an area of discretion within the limits imposed by the Treaty and the provisions adopted for its implementation'.[41] There can, in my estimation, be no doubt that values which, in view of their incorporation in the Constitution, number among 'the fundamental values to which a nation solemnly declares that it adheres'[42] fall within the sphere in which each Member State possesses an area of discretion 'in accordance with its own scale of values and in the form selected by it'.[43]

27. However, it is not sufficient for a national rule to be in pursuance of an imperative requirement of public interest which is justified under Community law, it must also not have any effects beyond that which is necessary. In other words, it must comply with the principle of proportionality.

40 — Judgment of 27 October 1977 in Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999.

41 — *Regina* v *Bouchereau*, paragraphs 33 and 34, which refer to the Court's judgment of 4 December 1974 in Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, at 1350.

42 — *Per* Mr Advocate General Darmon in his Opinion (paragraph 21) in the *Groener* case (judgment of 28 November 1989 in Case C-379/87 *Groener* v *Minister of Education* [1989] ECR 3967) which was concerned with a constitutional provision recognizing an official language of the State.

43 — As held by the Court in connection with the concept of public morality in the judgment of 11 March 1986 in Case 121/85 *Conegate* v *HM Customs & Excise* [1986] ECR 1007, paragraph 14.

That principle has two aspects. *First*, in order for a national rule to be justified under Community law it must be objectively necessary in order to help achieve the aim sought by the rule: that means that it must be *useful* (or relevant) and *indispensable*, in other words, it must not be capable of being replaced by an alternative rule which is equally useful but less restrictive of the freedom to supply services.[44] *Secondly*, even if the national rule is useful and indispensable in order to achieve the aim sought, the Member State must nevertheless drop the rule, or replace it by a less onerous one, if the restrictions caused to intra-Community trade by the rule are *disproportionate*, that is to say if the restrictions caused are out of proportion to the aim sought by or the result brought about by the national rule.[45]

28. Although it is not for the Court of Justice but the national court to rule on the compatibility of a national rule with Community law, the Court of Justice must provide the national court with all the information so as to make sure that the assessment which it carries out remains within the limits of Community law which are the same for all Member States. Relevant aspects of Community law include the principle of proportionality, which, in order to be of use to the national court, should be related by the Court as specifically as possible to the relevant national rule and to the facts of the case; on the understanding, however, that the Court must adhere strictly to the description of the national rule and to the facts held in the national proceedings to be relevant and proven, as they appear in the order for reference and in the documents enclosed therewith.

29. Can a national rule prohibiting the provision of information to pregnant women satisfy the test of the principle of proportionality? In this respect, it appears to me that a Member State is entitled, within its area of discretion, to regard such a prohibition, in so far as it concerns only information which *assists* pregnant women[46] to terminate unborn life (which I shall refer to as 'information by way of assistance'), as being useful and indispensable and not disproportionate to the aim sought, since that aim is intended to effectuate a value-judgment, enshrined in its Constitution, attaching high priority to the protection of unborn life. Admittedly, such a prohibition does entail a potential restriction of intra-Community trade in services, in so far as the prohibition might possibly decrease the number of pregnant women who might otherwise have gone abroad. As against this, however, the prohibition does not ban all information but only information which is provided by way of assistance and the aim sought is based on a value-judgment as to the necessity to protect unborn human life which is regarded as fundamental in the Member State concerned. Measures which would be disproportionate — in as much as they would excessively impede the freedom to supply services — would include for

44 — This implies that the national rule must take account of, and not repeat, that which is already ensured in another Member State with a view to the achievement of the same aim of public interest.

45 — Such disproportionality may arise, for instance where the rule gives rise to serious screening off of the market. See in this connection my Opinions in *Torfaen Borough Council* v *B & Q*, sections 17 to 25, and in the *Conforama* and *Marchandise* cases, section 12 (cited in footnote 37).

46 — See the judgment of the Irish Supreme Court in the *Open Door Counselling* case quoted in section 3 above.

example a ban on pregnant women going abroad or a rule under which they would be subjected to unsolicited examinations upon their return from abroad. However, nothing of this nature is raised in the preliminary questions.

It could be objected that it appears from the limited scope of the prohibition that the national authorities in question have not taken *every* possible measure in order to prevent abortions and hence have not themselves given maximum effect to the high priority attached to the protection of unborn life, but such an objection would not hold good: the national authorities cannot be reproached for keeping the measures which they have taken to protect unborn life within certain proportions, since Community law itself imposes a requirement of proportionality upon them. The authorities' decision to concentrate the prohibition on practices — namely in this case the distribution of information by way of assistance — which they consider transgress most plainly that high priority value-judgment seems therefore to me to satisfy the test of proportionality.

Appraisal of national rules under Community law in the light of fundamental rights and freedoms

30. As has already been mentioned (in section 15) it remains to be considered whether the prohibition on the provision of information which is at issue in this case is compatible with the general principles of Community law with regard to fundamental rights and freedoms, assuming, as will be examined hereinafter (in section 31), that the Court has jurisdiction to appraise a national rule in this way.

The Court has consistently held that

'fundamental rights form an integral part of the general principles of law, the observance of which [the Court] ensures.

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law'. [47]

Among the 'international treaties' mentioned towards the end of that passage, special importance attaches to the European Convention on Human Rights, as has been expressly recognized in the preamble to the European Single Act. [48] That case-law of the Court and the principles which it derived from the constitutional traditions of the Member States and from the said international treaties also lie behind the

47 — Judgment of 14 May 1974 in Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13.

48 — OJ 1987 L 169, p. 1. See also the Joint Declaration of 5 April 1977 of the European Parliament, the Council and the Commission (OJ 1977 C 103, p. 1) and the judgment of 15 May 1986 in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18).

Declaration of Fundamental Rights and Freedoms which was adopted by the European Parliament on 12 April 1989.[49]

A feature of this case-law is that it does not confer direct effect in the Community legal order on the provisions of the abovementioned international treaties but regards those treaties, together with the constitutional traditions common to the Member States, as helping to determine the content of the general principles of Community law. This stance enables the Court, in establishing general principles in the particular (socio-economic) context of Community law, also to take into account the imperatives of the fundamental freedoms and of the Community market organizations, which are intended to bring about the integration of the market.[50] However, it does not prevent the Court from enforcing these fundamental rights and freedoms introduced into Community law in the form of general principles in the same way as it enforces specific provisions where it is a question of assessing acts of the Community institutions in the light of those principles and declaring those acts void or invalid if the Court finds that they are incompatible therewith.

31. One question which has so far not been settled is to what extent it is competent to the Court to appraise national rules in the light of the aforementioned general principles of Community law with regard to fundamental rights and freedoms.[51]

In the judgment in *Cinéthèque*[52] the Court stated as follows with regard to Article 10 of the European Convention on Human Rights, which is concerned with freedom of expression:

'Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator' (paragraph 26).

In the later judgment in *Demirel*[53] the Court reformulated the last phrase quoted above as follows:

'[... the Court] has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law' (paragraph 28).

In the still more recent case of *Wachauf*,[54] the Court examined whether a Community

49 — Cited in footnote 16.

50 — The Community freedoms frequently give an additional dimension to the 'traditional' fundamental rights, as for instance in the case of the judgment of 28 October 1975 in Case 36/75 *Rutili* [1975] ECR 1219, or in that of the judgment in *Johnston*'s case, cited above. In contrast, the rules underlying the Community market organizations may come into conflict with the 'traditional' fundamental rights: see for instance the judgment of 13 December 1979 in Case 44/79 *Hauer* [1979] ECR 3727. With regard to the judgment in *Hauer*'s case, see also section 35 below.

51 — In this connection, see J. Weiler, 'The European Court at a Crossroads: Community Human Rights and Member State Action', in *Du droit international au droit de l'intégration, Liber Amicorum Pierre Pescatore*, 1987, p. 821 et seq., which contains a reference on pp. 836-837 to the United States, where this problem has also arisen.

52 — Cited in footnote 36.

53 — Judgment of 30 September 1987 in Case 12/86 *Demirel* v *Stadt Schwäbisch Gmünd* [1987] ECR 3719.

54 — Judgment of 13 July 1989 in Case 5/88 *Wachauf* v *Germany* [1989] ECR 2609.

rule was compatible with the requirements of the protection of fundamental rights and added that

'those requirements are also binding on the Member States when they implement Community rules' (paragraph 19).

It appears from this case-law that a national rule adopted to implement a Community legal provision will be reviewed by the Court from the point of view of its compatibility with fundamental rights and freedoms. In the present case it cannot be said that the ban on the provision of information which is derived from a national constitutional provision implements Community law. However, the *Demirel* judgment provides a broader formulation, since in that judgment it is regarded as being sufficient for the national rule to lie inside the scope of Community law. The question now is: must it not be assumed that a national rule which in order to show that it is compatible with Community law has to rely on legal concepts, such as imperative requirements of public interest or public policy — which the Court considers may not be determined unilaterally by the Member States (see section 26 above) — falls 'within the scope' of Community law? Admittedly, those concepts may be defined to a considerable degree by the Member States. Yet that does not mean that they should not be justified and delimited in a uniform manner for the whole Community under Community law and therefore taking into account the general principles in regard to fundamental rights and freedoms which form an integral part of Community law and the observance of which the Court is to ensure.

On a strict view, that interpretation does not conflict with the view expressed by the Court in *Cinéthèque*. In that case, it was stated that the Court's power of review did not extend to 'an area which falls within the jurisdiction of the national legislator', a statement which, generally speaking, is true. Yet once a national rule is involved which has effects in an area covered by Community law (in this case Article 59 of the EEC Treaty) and which, in order to be permissible, must be able to be justified under Community law with the help of concepts or principles of Community law, then the appraisal of that national rule no longer falls within the exclusive jurisdiction of the national legislature. [55]

Compatibility of the prohibition of the distribution of information with the general principles of Community law with regard to fundamental rights and freedoms

32. If the above reasoning is accepted, it must now be considered once again — this time in the light of the general principles of Community law with regard to fundamental rights and freedoms — whether the fact that a general prohibition is in force in the territory of a Member State on the provision of information by way of assistance to pregnant women regarding abortions lawfully carried out abroad can be justified under Community law. Under this new approach two aspects now have to be covered by the inquiry: first, is the aim pursued by the national rule, that is to say the promotion of an ethical value-judgment

55 — The same view is taken by J. Weiler in the article cited in footnote 51 on pp. 840-841, where it is also pointed out that the Court already appraises such national rules in the light of Community law and, more specifically, in the light of the principle of proportionality.

relating to the protection of unborn life which is enshrined in the Constitution of the State concerned, compatible with the said general principles; secondly, is the freedom of expression, which forms part of Community law and exists in parallel to the freedom under Community law to supply services on an intra-Community basis (which covers receiving such services and providing information about them), restricted impermissibly by the national rule at issue.

33. The national court did not ask the Court (see section 13 above) — and there has been no exchange of arguments before the Court between the parties on the matter — whether a national rule which protects the life of the unborn by means of a far-reaching ban on abortion is compatible with the general principles of Community law with regard to fundamental rights and freedoms. Moreover, no legal or factual particulars have been submitted to the Court relating to the scope and application of the rules on abortion which are applicable in the Member State concerned (more specifically concerning the way in which the equal right to life of the mother, expressly referred to in Article 40, s. 3, sub-s.3 of the Irish Constitution, is taken into account). I therefore assume that, as far as the prohibition on the provision of information which is at issue in this case — which aims to preclude the provision of assistance in procuring an abortion — is concerned, it cannot be maintained that that prohibition is in furtherance of an objective which, itself, is incompatible with the said general principles of Community law.

For completeness' sake, I would also point out that the European Court of Human Rights has not yet had occasion to rule on the compatibility of rules on abortion with the European Convention but the European Commission of Human Rights has made some pronouncements on this question. In its rulings the European Commission of Human Rights has refrained from making a general pronouncement on whether or not Article 2 of the Human Rights Convention protects the right to life of the foetus and, if so, to what extent.[56] It has indicated only that, having regard to the protection of the mother's life which is obviously guaranteed by the Convention, the foetus cannot be entitled to an absolute right to life (as was claimed by a man who complained that national legislation did not prevent his wife from having an abortion).[57] On an earlier occasion the European Commission of Human Rights dismissed a complaint brought by two women on the basis of Article 8 of the European Convention to the effect that national legislation under which abortion was permissible only within a specified period and/or subject to specified conditions, was to be regarded as an infringement of the right to respect for family life.[58]

It appears therefore that so far the European Commission for Human Rights has refrained from — and the European Court of Human Rights has not yet had any occasion for — instructing the individual States to adopt a particular degree of

56 — See, in this connection, W. Peukert, 'Human Rights in international law and the protection of unborn human beings', in *Protecting Human Rights: The European Dimension. Studies in honour of Gerard Wiarda*, 1988, p. 511 et seq., and particularly P. van Dijk and G. van Hoof, *De Europese conventie in theorie en praktijk*, 1990 (third revised edition), on p. 243 et seq. A second edition of an English version of this book was published in 1990 under the title *Theory and Practice of the European Convention on Human Rights*, to which reference is made later in this Opinion; the issue with which we are concerned here is discussed therein on p. 218 et seq.

57 — Application No 8416/79, *X.* v *United Kingdom*, Collection of Decisions 19 (1980), p. 244.

58 — Application No 6959/75, *Brüggemann and Scheuten* v *Federal Republic of Germany*, Collection of Decisions 10 (1978), p. 100.

protection for unborn life, *in so far as* the mother's right to life is guaranteed by the relevant national rules.

34. The question remains whether it is consonant with the general principles of Community law with regard to fundamental rights and freedoms for a Member State to prohibit the provision and receipt of information by way of assistance about abortions lawfully carried out in other Member States, thereby infringing individuals' freedom of expression. It is a question here of *balancing* two fundamental rights, on the one hand the right to life as defined and declared to be applicable to unborn life by a Member State, and on the other the freedom of expression, which is one of the general principles of Community law on the basis of the constitutional traditions of the Member States and the European and international treaties and declarations on fundamental rights, in particular Article 10 of the European Convention on Human Rights.

It is clear that such a prohibition infringes the freedom of expression, as set out *inter alia* in Article 10 of the European Convention, from paragraph 1 thereof, which guarantees everyone the right 'to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. As has already been mentioned (in section 19) it appears from the case-law of the European Court and the European Commission of Human Rights on Article 10 of the European Convention that commercial information qualifies for protection under Article 10 and *a fortiori* information intended to influence public opinion. The information at issue in this case is not distributed by the providers of services established in Great Britain themselves but by Irish students associations, which distribute the information in Ireland without remuneration, because of their conviction that a pregnant woman is entitled to be given useful information about clinics where she can have an abortion.

It appears, however, from the wording of Article 10(2) and from the case-law of the European Court and the European Commission of Human Rights that such restrictions may be imposed on freedom of expression by individual States 'as are prescribed by law' (which covers unwritten law, provided that it is adequately accessible to citizens, who must be able to regulate their conduct accordingly, and formulated with sufficient precision; see also section 36 below)[59] provided that the restrictions are 'necessary in a democratic society [...] for the prevention of disorder or crime, for the protection of health or morals, for the protection of the [...] rights of others [...]'. In this connection, the individual States have a margin of appreciation, which they exercise, however, under the supervision of the courts;[60] in the course of that supervision the European Court of Human Rights checks whether the national measures pursue a legitimate aim and whether they are necessary in a democratic society to achieve that aim, that is to say they must correspond to a 'pressing social need' and be proportionate to the legitimate aim pursued.[61]

59 — See Eur. Court H. R. *The Sunday Times case*, judgment of 26 April 1979, Series A no. 30, pp. 30, 31.

60 — See the judgment of the European Court of Human Rights in the case of *Markt Intern*, cited in footnote 17.

61 — See, for instance, Eur. Court H. R. *The case of Silver and Others*, judgment of 25 March 1983, Series A no. 61, pp. 37, 38.

In parallel to Article 10(1) of the European Convention, Article 5 of the European Parliament's Declaration of Fundamental Rights and Freedoms provides that everyone has the right to freedom of expression, which includes 'freedom of opinion and the freedom to receive and impart information and ideas, particularly philosophical, political and religious [, regardless of frontiers] *'. By virtue of the general limits set out in Article 26, this freedom may be 'restricted within reasonable limits necessary in a democratic society only by a law which must at all events respect the substance of such rights and freedoms'.

35. It appears from the above that in a case such as the present in which fundamental rights conflict with each other a criterion is employed in the case-law on the European Convention which is analogous to the principle of proportionality used in Community law. This is also reflected in the judgment of the Court of Justice in *Hauer*, [62] where there was a conflict between a Community objective of general interest (implementation of structural policy measures in the context of a market organization) and the right to property guaranteed by the general principles of Community law. In assessing the (in that case, Community) rule, the Court examined whether the restrictions introduced thereby could be regarded as lawful (paragraph 22 of the judgment) and whether they corresponded

'to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property' (paragraph 23).

I assume that the Court, in accordance with its general approach with regard to questions arising in connection with fundamental rights (see section 30 above), as regards the application of the principle of proportionality, will take into account in particular the way in which that principle is employed in the European Convention and in the case-law of the European Court of Human Rights and of the European Commission of Human Rights. However, that will not be difficult, since, leaving aside subtle differences, [63] the main elements of the principle of proportionality as it is used in the European Convention and in Community law appear to be the same. In the context of the issues under discussion here and having regard to these main elements, I consider that the following points should be considered on the basis of the principle of proportionality. First, does the prohibition on the provision of information which is at issue pursue a legitimate aim of public interest which fulfils a imperative social need? Secondly, is that aim being realized using means which are necessary (and acceptable) in a democratic society in order to achieve that aim? Thirdly, are the means employed in proportion to the aim pursued and is the fundamental right concerned, in this case freedom of expression, impinged upon as a result?

* Translators note: the phrase in square brackets was omitted from the English version of the declaration.

62 — Cited in footnote 50.

63 — See, for instance, with regard to the meaning of the word 'necessary' in Article 10(2) of the European Convention on Human Rights, van Dijk and van Hoof, cited in footnote 56, pp. 588-589 of the English edition.

36. At this point in my Opinion I must turn my attention to the case which, following the judgment of the Irish Supreme Court of 16 March 1988 referred to in section 3 above in *Open Door Counselling*, was brought before the European Commission of Human Rights in connection with the compatibility with (*inter alia*) Article 10 of the European Convention of the Irish prohibition on the provision of information which is at issue in this case.

After declaring the applications to be admissible by decision of 15 May 1990, the European Commission of Human Rights adopted a report on 7 March 1991 on the substance. However, the report provides little guidance concerning the application of the principle of proportionality. It is true that the European Commission did hold that there was a restriction of the freedom of expression guaranteed by Article 10(1) of the European Convention and that Article 10(2) was inapplicable, but it based its decision (paragraph 52 of its report) on the consideration that the restriction in question was not 'prescribed by law' 'at the material time', that is to say 'prior to the Supreme Court judgment' (of 16 March 1988). This is true both of those paragraphs (44 to 53) of the report which relate to the applications of two counselling centres and of two employees of one of those centres and of those paragraphs (54 to 57) which relate to the applications of two individual (but not pregnant) women. As far as the first two applications are concerned, the Irish Government conceded that there was a restriction within the meaning of Article 10(1) of the European Convention; however, it denied that there was any such restriction as regards the second category of applications. As regards both categories of application, the European Commission of Human Rights accepts that freedom of expression (including the freedom to receive information) was indeed restricted *and* that the restriction was not permissible under Article 10(2), *because* at the material time it was not 'prescribed by law' (which includes an unwritten rule of law) in a sufficiently accessible and precise manner. As a result, the European Commission did not proceed to an assessment of the necessity and/or the proportionality of the contested measure or to an appraisal of the legitimacy of the aim pursued by the measure (see paragraph 52 *in fine* in conjunction with paragraph 43 of the report).

However, it appears from the report of the European Commission that — since in its judgment of 16 March 1988 in the *Open Door Counselling* case the Irish Supreme Court has laid down in a sufficiently accessible and precise manner the consequences of Article 40, s. 3, sub-s.3 of the Irish Constitution — the national prohibition in question now[64] is sufficiently 'prescribed by law' (namely by a now established unwritten rule of common law). As a result, it is not necessary to go into that point here.

37. Whereas no special difficulties arise in connection with the formulation of the principle of proportionality (see section 35 above), its application raises quite another question: that of the extent of the Member States' discretion in assessing what is a necessary and proportional — and therefore

64 — Now, that is to say, at the time of the facts at issue in the main proceedings, in which the plaintiff, the SPUC, specifically relied on the Supreme Court's judgment of 16 March 1988 in order to bring its action against the defendants (see sections 3 and 4 above).

permissible — restriction of one of the fundamental rights, such as those protected by Articles 8 to 11 of the European Convention. In the case-law of the European Commission and Court of Human Rights the answer given to this question depends very much on the subject-matter at issue. [65]

The question is all the more delicate when it is a matter, as in this case, of assessing two fundamental rights which are as sensitive as, on the one hand, freedom of expression, whose fundamental nature in a democratic society is stressed by the European Court of Human Rights, and, on the other, the right to life, as it is applied to unborn life in the Member State in question on the basis of a fundamental ethical value-judgment enshrined in Constitution. As far as ethical value-judgments are concerned, however, the European Court of Human Rights has consistently held that, in the absence of a uniform European conception of morals,

'[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of the protection of morals] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them'. [66]

As far as the protection of unborn life is concerned, such a uniform moral conception is lacking (except as regards respect for the mother's right to life), as between the Member States and within each Member State, as regards the conditions under which abortion is or should be permitted and likewise there is no case-law of the European Commission or (subject to the reservation concerning the mother's right to life) of the European Court of Human Rights to serve as a guide (see section 33 above). This is also clear from the numerous individual opinions of members of the European Commission appended to the report discussed in section 36 above, which express conflicting views on this point. [67]

In those circumstances, I consider that with respect to the case at issue the individual States must be allowed a fairly considerable margin of discretion. This follows too from the case-law of this Court as regards the area of discretion allowed to each Member State in determining, within the limits set by Community law, what is to be understood by public policy and public morality. It is for each Member State to define those concepts in accordance with its 'own scale of values' (see section 26 above).

38. It remains for me to examine, in relation to the actual national rule at issue, whether a Member State is entitled to take the view, within the limits of its fairly

65 — See van Dijk and van Hoof, cited in footnote 56, at pp. 583 to 606 of the English edition, in particular at pp. 604 to 606.

66 — See Eur. Court H.R. *Handyside case*, judgment of 7 December 1979, Series A no. 24, p. 22; see also Eur. Court H.R. *Müller and Others* v *Switzerland*, judgment of 24 May 1988, Series A no. 133, paragraph 35.

67 — Three members take the view, as regards the issue of necessity and proportionality, that the prohibition on the provision of information is not a permissible restriction, four members consider that it is permissible.

considerable margin of discretion, that a general prohibition (which at the material time was sufficiently accessible and precise) on the provision within its territory of information by way of assistance on abortion in other Member States is a necessary and not disproportionate restriction of the freedom of expression, having regard to the ethical value-judgment as to the high degree of worth to be attached to protecting unborn life which that restriction pursues and which is regarded in the Member State concerned as fundamental. I consider that a Member State is entitled to take that view on the basis of the application of the principle of proportionality, of which I shall now examine the three main elements (described in section 35).

The legitimacy of the aim pursued by the prohibition on the provision of information which is at issue is not in question in these proceedings (see section 33 above). Moreover, that is disputed in none of the opinions appended to the report of the European Commission of Human Rights discussed above (in section 36), since even those members of the European Commission who considered that the national rule was incompatible with Article 10(2) of the European Convention as a result of the application of the principle of proportionality [68] regarded the protection of morality as a permissible justification. In my estimation, the correct justification under general principles of Community law is public policy and/or public morality, because the rule at issue here is justified by an ethical value-judgment which is regarded in the Member State concerned as forming part of the bases of the legal system [69] and was incorporated in the Constitution after the views of the population were canvassed in a referendum in 1983. It also appears from this that the aim in question is an aim of public interest which satisfies an imperative requirement.

As far as the requirement is concerned that the restriction imposed must be necessary in a democratic society in order to achieve the aim pursued, I take the view, having regard to what has been said in the previous section and to the description given of the national rule and of the factual background in the request for a preliminary ruling, [70] that the relevant national authorities are entitled to consider that a prohibition on the provision of information by way of assistance is necessary in order to effectuate the value-judgment contained in the Constitution with regard to the need to protect unborn life. In view of the limited nature of the prohibition (see below) and of its basis, that is to say, a constitutional provision on unborn life which was adopted after a referendum, it appears to me that the national authorities are entitled to take the view that the prohibition is acceptable in a democratic society.

68 — H. G. Schermers, paragraph b of his 'concurring opinion'; Sir Basil Hall, paragraph 9 of his 'partly concurring and partly dissenting opinion'.

69 — See the Court's definition of public policy: section 26 above. In the European Convention on Human Rights that expression is not unambiguous: see van Dijk and van Hoof, cited in footnote 56, English edition, p. 584 et seq.

70 — In its assessment the Court is not entitled to take into consideration factual arguments, such as those adduced by the defendants in the main proceedings — namely to the effect that the result of the prohibition on the provision of information is that abortions are carried out at a later stage in the pregnancy involving more risks to the woman's health —, which the national court did not bring to the Court's notice as being established facts.

Also as regards the requirement for the relevant national rule not to be disproportionate to the aim pursued, the national authorities were, in my view, entitled to assume that that is the case with a prohibition such as that at issue here, which, according to the information brought to the Court's notice, is confined to prohibiting the provision of information by way of assistance and does not prevent the provision of other information, which does not impede the freedom to express opinions about the permissibility of abortion and does not extend to measures restricting the freedom of movement of pregnant women or subjecting them to unsolicited examinations.

Decision and discussion of Article 62 of the EEC Treaty

39. In view of the foregoing, I consider that the Treaty provisions with regard to the freedom to provide services do not prevent a Member State where the protection of unborn life is recognized in the Constitution and in its legislation as a fundamental principle from imposing a general prohibition, applying to everyone regardless of their nationality or place of establishment, on the provision of assistance to pregnant women, regardless of their nationality, with a view to the termination of their pregnancy, more specifically through the distribution of information as to the identity and location of and method of communication with clinics located in another Member State where abortions are carried out, even though the services of medical termination of pregnancy and the information relating thereto are provided in accordance with the law in force in that second Member State. It appears from the above examination that this conclusion is not incompatible with the general principles of Community law with regard to fundamental rights and freedoms.

40. In the light of that conclusion I can deal quite briefly with the argument that the defendants in the main proceedings seek to derive from Article 62 of the EEC Treaty. Article 62 provides as follows: 'Save as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of entry into force of [the EEC] Treaty'. The defendants in the main proceedings consider that that provision of the Treaty has a bearing on the interpretation of the provision introduced into the Irish Constitution in 1983 on which the Irish Supreme Court based the prohibition on the distribution of information which is at issue in this case. In their view, that constitutional provision may not be interpreted so as to give rise to a new restriction on the provision of services relative to the position when Ireland acceded to the Community.

It is sufficient to observe in this connection that Article 62 cannot apply to national rules containing a restriction on the provision of services, such as the prohibition on the provision of information at issue in this case, which fall outside the scope of Articles 59 and 60 of the EEC Treaty for the imperative reasons of public interest mentioned earlier. The position would be

otherwise only if the newly introduced national rule nevertheless brought the national rule within the scope of those articles, but, according to the investigation carried out above, this is not the case.

For the sake of completeness. I would point out that Article 62 of the EEC Treaty, like for that matter Article 53 of the EEC Treaty on the right of establishment, must be interpreted in the same way as the first paragraph of Article 32 of the EEC Treaty. Under that provision Member States are to refrain from making more restrictive quotas and measures having equivalent effect which were in existence at the date when the Treaty entered into force. In its judgment in *Motte*[71] the Court held as follows in that regard:

'The sole purpose of that provision was to prevent the Member States from making more restrictive during the transitional period measures which had to be abolished by the end of that period at the latest. Since the expiry of the transitional period the abovementioned provision adds nothing to Articles 30 and 36 of the Treaty.'

In my view Article 62 of the EEC Treaty has the same aim as Article 32, that is to say to prevent Member States from making measures which had to be abolished at the very latest by the end of the transitional period more restrictive in the course of that period. Since the end of the transitional period, Article 59 of the EEC Treaty, which requires the abolition of restrictions on the freedom to supply services, has had direct effect.[72] Since then, Article 62 adds nothing more to the Treaty provisions on services. For those reasons too, the argument of the defendants in the main proceedings based on Article 62 cannot succeed.

Proposed answers

41. I therefore propose that the Court should answer the questions put by the national court in the following terms:

'1. The medical operation, normally performed for remuneration, by which the pregnancy of a woman coming from another Member State is terminated in compliance with the law of the Member State in which the operation is carried out is a (cross-border) service within the meaning of Article 60 of the EEC Treaty.

71 — Judgment of 10 December 1985 in Case 247/84 *Motte* [1985] ECR 3887, paragraph 15.

72 — Judgment of 3 December 1974 in Case 33/74 *Van Binsbergen* [1974] ECR 1299.

2. The Treaty provisions with regard to the freedom to provide services do not prevent a Member State where the protection of unborn life is recognized in the Constitution and in its legislation as a fundamental principle from imposing a general prohibition, applying to everyone regardless of their nationality or place of establishment, on the provision of assistance to pregnant women, regardless of their nationality, with a view to the termination of their pregnancy, more specifically through the distribution of information as to the identity and location of and method of communication with clinics located in another Member State where abortions are carried out, even though the services of medical termination of pregnancy and the information relating thereto are provided in accordance with the law in force in that second Member State.'