OPINION OF ADVOCATE GENERAL JACOBS
delivered on 24 June 1999 *

1. The dispute in this case concerns the interruption by advertisements of films shown on television: specifically, the method by which, under the 'Television without frontiers' directive, [1] the permissible number of such interruptions is to be calculated.

The facts and the main proceedings

2. The applicants are eleven public law broadcasting institutions of the German Länder grouped together in the Arbeitsgemeinschaft Deutscher Rundfunkanstalten ('the ARD'). Under the German Basic Law, television broadcasting falls within the competence of the Länder. Those institutions are collectively responsible for the ARD television channel. The defendant, PRO Sieben Media AG ('Pro Sieben'), is a private television broadcaster.

3. The dispute arises from the wording of Article 11(3) of the directive, which provides that the permissible number of interruptions by advertisements of films shown on television is to be calculated by reference to a period referred to as the 'programmed duration' (or 'scheduled duration').

4. Under the 'gross' principle, which is supported by Pro Sieben, the duration of the advertisements is to be included in the duration of time according to which the permissible number of interruptions is calculated. Under the 'net' principle, which is supported by the ARD, the advertisements are not to be included in such time: that is, the relevant duration relates only to the length of the film itself. The difference is that, in certain circumstances, application of the gross principle would permit a greater number of interruptions than would be allowed by the net principle.

5. The ARD has raised the issue before the German courts by taking proceedings against Pro Sieben for unfair competition.

* Original language: English.

1 — Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L 298, p. 23. Amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, OJ 1997 L 202, p. 60: see paragraph 8 below.

Two other private television broadcasters, SAT 1 Satellitenfernsehen GmbH and Kabel 1, K1 Fernsehen GmbH, have intervened in the German proceedings in support of Pro Sieben. In October 1996 the Landgericht (Regional Court), Stuttgart, interpreting the relevant German legislation on the subject,[2] ordered Pro Sieben not to interrupt films more frequently than would be permitted by application of the net principle. On appeal to the Oberlandesgericht (Higher Regional Court), Stuttgart, Pro Sieben argued that, even if German legislation prescribed the net principle, that legislation was contrary to the directive and to primary Community law.

6. The Oberlandesgericht, Stuttgart stayed proceedings in November 1997 and referred the following questions to this Court for a preliminary ruling:

'(1) Does Article 11(3)[3] of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC ("the Television Amending Directive") or the identical Article 11(3) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ("the Television Directive") prescribe the gross principle or the net principle?

(2) On the assumption that Article 44(4) of the Dritter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (Third Treaty amending Treaties on Broadcasting Law, Annex B 33, p. 437 of the case-file) prescribes the net principle, is that then compatible with Article 11(3) in conjunction with Article 3(1) of the Television Directive or with primary Community law (Articles 5, 6, 30 et seq., 59 et seq. and 85 et seq. of the EC Treaty and the general principle of equality)?'

Question 1

7. On the first question, the Member States which have presented observations to the Court are divided: France, Netherlands and Portugal advocate the net principle; Italy, Luxembourg and the United Kingdom advocate the gross principle, as does the Commission. Sweden answers only the second question.

2 — Article 26(4) of the Staatsvertrag der 16 Bundesländer über den Rundfunk im vereinigten Deutschland of 31 August 1991. That provision was replaced by Article 44(4) of the Dritter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge, which entered into force on 1 January 1997.

3 — This reference to Article 11(3) is incorrect: the new text of Article 11(3) of Directive 89/552 was introduced by Article 1(13) of Directive 97/36.

The Television Directive

8. The Television Directive was adopted on 3 October 1989 and its provisions were to be implemented by 3 October 1991.[4] It was amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 which was to be implemented by 31 December 1998.[5] Although the litigation in the present case commenced before the latter directive was adopted, the Order of the Oberlandesgericht, Stuttgart, referring the case to this Court, was not made until December 1997 and is accordingly phrased in terms of both directives. The latter directive amended, by Article 1(13), Article 11 of the original directive, but did not alter significantly the wording of Article 11(3) which is at issue in the present case. Citations from the directive in this Opinion are, unless otherwise stated, from the directive as amended.

9. The directive was adopted pursuant to Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC) and Article 66 (now Article 55). It appears from the preamble to the directive that it was envisaged as establishing the legal framework for television broadcasting in the internal market, the adoption of common rules for broadcasting being seen as contributing in particular to the realisation of the freedom to provide services. The common rules include, as a substantial part of the directive, common rules on advertising, and these are contained in Chapter IV of the directive, entitled 'Television advertising, sponsorship and teleshopping' (Articles 10-20).

10. Advertising should be readily recognisable as such and should be separate from the programmes (Article 10(1)). It should generally appear between programmes; it may be inserted during programmes only on condition that 'the integrity and value of the programme, taking into account natural breaks in and the duration and nature of the programme, and the rights of the rights holders are not prejudiced' (Article 11(1)). It is apparent that the directive seeks to achieve in these provisions a balance between a number of potentially conflicting interests: those of viewers, of broadcasters, of advertisers on whom broadcasting is financially dependent, and of the makers of the programmes.

11. Article 11(2) makes special provision for programmes which fall naturally into separate parts, such as the televising of sporting events: here advertising must take place in the intervals, e.g. at half-time.

4 — Article 25 of the directive.

5 — Article 2 of the amending directive.

12. Article 11(3) provides as follows:

'The transmission of audiovisual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries), provided their scheduled duration is more than 45 minutes, may be interrupted once for each period of 45 minutes. A further interruption shall be allowed if their scheduled duration is at least 20 minutes longer than two or more complete periods of 45 minutes.'

13. In general, advertising slots within a programme must be separated by a period of at least 20 minutes (Article 11(4)).

14. Article 11(5) provides:

'Advertising and teleshopping shall not be inserted in any broadcast of a religious service. News and current affairs programmes, documentaries, religious programmes, and children's programmes, when their scheduled duration is less than 30 minutes, shall not be interrupted by advertising or teleshopping. If their scheduled duration is 30 minutes or longer, the provisions of the previous paragraphs shall apply.'

15. Articles 12 to 20 contain other provisions on advertising and sponsorship, to certain of which it will be necessary to refer below.

16. The effect of Article 11(3) will depend on whether the gross principle or the net principle applies. If for example a film lasts 40 minutes, on the net principle it could not be interrupted by advertisements, while on the gross principle it could be interrupted by six minutes of advertisements. But that is subject to the overall limits prescribed by Article 18: Article 18(2), for example, governs the maximum length of advertising within a one-hour schedule. Thus, although application of the net principle would permit fewer interruptions than the gross principle, there will be no effect on the total volume of advertising if the maximum prescribed by Article 18 is exploited to the full. Thus the issue may be between more frequent, but shorter, interruptions on the gross principle and less frequent, but longer, interruptions on the net principle. Nevertheless the issue is one of much concern in several Member States, and appears to be of considerable importance both commercially and as a matter of broadcasting policy.

17. In order to determine whether Article 11(3) prescribes the gross or the net principle, I shall consider successively (as did the representative of the French Government at the hearing) first the literal

interpretation, second the legislative history, third the systematic interpretation, and fourth the aims of the directive.

Literal interpretation

18. Both the proponents of the gross principle and the proponents of the net principle rely heavily on the text of Article 11(3).

19. A first argument advanced in support of the net principle is that, in several although not all language versions of Article 11(3), the duration is expressed to relate to the audio-visual works (the films) themselves, as distinct from the *transmission* of the film. It is argued that by referring to the duration of the films, the provision should be understood as specifying the film excluding any advertising breaks, whereas a reference to the transmission of the film might more readily be understood as comprising the film together with the advertising breaks. [6]

20. Against that, an argument based on the wording of Article 11(3) in support of the gross principle is that it refers not merely to the 'duration' of the works but to their 'scheduled duration'. The argument is that that expression must refer to the duration of the programme as it appears in the programme schedule of the broadcaster, and thus as including advertising time. It is argued that, if that were not the case, the term 'scheduled' would be redundant.

21. However, other explanations have also been advanced for the use of that term. One explanation is that feature films made for the cinema are transmitted on television at a slightly different speed: it was necessary therefore to specify that it was not the duration of the original work, but the duration of the film as scheduled for television, that was decisive. A different explanation, which is perhaps at least as plausible, is that the term 'scheduled' was necessary to provide for the possibility that the version of the film as transmitted might turn out to be shorter than as scheduled, owing to cuts or other modifications which it might not have been possible to foresee; it was considered that the broadcaster should not be subject to the risk of penalties for minor divergences of that kind, and so the relevant criterion should be the duration as scheduled, not the duration as transmitted. Both of those explanations are consistent with the net principle; consequently I do not think it would be safe to attach too great importance to the term 'scheduled' as supporting the gross principle.

22. Significance was also attached to the fact that the amending directive replaced the term 'programmed duration', used in

6 — See Matthias Pechstein, 'Brutto- bzw. Nettoprinzip bei der Unterbrecherwerbung', EuZW, 1994, p. 583.

the English version of the original directive, with the term 'scheduled duration'. It seems likely however that 'programmed duration' was initially adopted as a literal, but infelicitous, translation of the French 'durée programmée', and that the opportunity was taken in the amended directive to improve the English version. In any event there is in my view no relevant difference of meaning involved.

23. The final argument to be considered at this stage is suggested by a normal, common-sense reading of Article 11(3). It may seem paradoxical to read the expression 'scheduled duration', which is laid down by that provision as the yardstick for deciding the permissible number of interruptions, as including the interruptions themselves. Logically it may seem that one first needs to ascertain the length of the film itself, and only then can one determine how many interruptions there may be.

24. At first sight that may seem a strong argument in support of the net principle. It has to be recognised, however, that the provision can be read, and has been read, the other way. Moreover, elsewhere in the directive the basis for calculating the advertising breaks includes the advertisements themselves. That is so, for example, with Article 18(2) which governs the limits of advertising within a one-hour schedule.

25. In conclusion, the arguments based on the wording of Article 11(3), taken separately or together, provide no clear guidance on whether that provision prescribes the gross or the net principle. I now turn to consider the legislative history.

Legislative history

26. The legislative history of a Community instrument has not been very frequently used by the Court as a guide to its meaning, and is generally regarded as only a supplementary means of interpretation. The Court has placed greater emphasis on the scheme of the instrument and its legislative context (systematic interpretation) and on the aims and purposes of the instrument. Nevertheless the Court has accepted that the legislative history can provide helpful guidance; and in the *RTI* case [7] the Court referred, in examining the legislative history of the directive in issue in the present case, to the same elements as are invoked in the present case, namely the European Convention on Transfrontier Television and the position taken by the Community institutions during the legislative process.

7 — Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 *RTI and Others* v *Ministero delle Poste e Telecomunicazioni* [1996] ECR I-6471.

The European Convention on Transfrontier Television

27. The first item relied upon to throw light on the legislative history of the directive is the European Convention on Transfrontier Television, [8] adopted within the Council of Europe shortly before the directive was enacted, and containing very similar provisions. Work on both instruments had proceeded simultaneously, and the European Council, meeting at Rhodes on 2 and 3 December 1988, stated:

'The European Council considers it important that the Community's efforts should be deployed in a manner consistent with the Council of Europe Convention.' [9]

Moreover the Convention is referred to in the preamble to the directive.

28. Article 14(3) of the Convention is in identical terms to Article 11(3) of the directive, except that it refers to 'duration' rather than 'scheduled duration'. The same difference appears in both the authentic texts of the Convention, namely in the English and French versions.

29. It is possible to draw different conclusions from the relationship between the directive and the Convention. On the one hand it may be said that the difference of wording must reflect a difference in the intended meaning. On the other hand it may be said that the difference of wording should be overlooked, since it is unlikely that the same States, negotiating at the same time (admittedly in the somewhat wider framework of the Council of Europe and including also other States which are parties to the European Cultural Convention), would have agreed on inconsistent provisions.

30. Although Article 14(3) of the Convention does not speak of the 'scheduled duration', the explanatory report to the Convention (which is not authoritative) does so. [10] Moreover the Convention has recently been amended by a Protocol [11] so as to refer to the 'scheduled duration' in Article 14(3); according to the Commission's observations in the present case, that amendment is designed to facilitate accession by the Community to the Convention. In any event, the amendment certainly

8 — European Treaty Series No 132.

9 — EC Bulletin, No 12/1988, p. 8 at p. 10.

10 — Transfrontier television: explanatory report on the European convention (5 May 1989), paragraph 191. However, paragraph 192 refers to the duration of the film. The explanatory reports of Council of Europe conventions are adopted by the intergovernmental committee which adopts the text of the convention in question, but are not adopted by the Committee of Ministers of the Council of Europe and are expressed not to be authoritative.

11 — Protocol amending the European Convention on Transfrontier Television, European Treaty Series No 171, 1 October 1998.

suggests that the term 'scheduled' was regarded as significant.

The declaration by the Council and Commission

31. The Commission and the United Kingdom Government refer to the minutes of the Council of 3 October 1989 [12] (the date upon which the original directive was adopted), which as quoted by them contain a declaration by the Council and Commission that the durations provided for by paragraphs 3 and 5 of Article 11 must be calculated on the basis of the scheduled duration of the broadcasts. The Court has generally been reluctant to rely upon such a declaration to interpret a legislative provision unless the content of the declaration is reflected in the text of the provision being interpreted. [13] In the present case the declaration closely reflects the text. Indeed it may be said that the declaration begs the question of what 'scheduled duration' means, which is precisely the issue at stake in the present case. Again it shows, however, the significance attached to the term. Moreover the declaration refers to the scheduled duration of the *broadcasts* ('la durée programmée des émissions') which as pointed out above might more readily be understood as comprising the film together with the advertising breaks.

The European Parliament's proposed amendment

32. As part of the legislative history, reliance is placed on an amendment to Article 11(3) proposed by the European Parliament on 14 February 1996 during the procedure which led to the adoption of the amending directive. The proposed amendment was as follows:

'The transmission of audiovisual works such as feature films and films made for television (excluding series, serials, entertainment programmes and documentaries) may be interrupted once for each complete period of 45 minutes. A further interruption is allowed if their scheduled duration, *exclusive of all interruptions*, is at least 20 minutes longer than two or more complete periods of 45 minutes' (emphasis added). [14]

Thus it appears that the Parliament wished to make it clear that the net principle

12 — Cited by the Commission and the United Kingdom as Council document SN 3063/89. In the French original the text reads: 'Le Conseil et la Commission déclarent que les durées prévues aux paragraphes 3 et 5 doivent être calculées sur la durée programmée des émissions'.

13 — See Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18 of the judgment; compare Case C-106/96 *United Kingdom* v *Commission* [1998] ECR I-2729, paragraph 29.

14 — Proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1996 C 65, p. 96, at p. 107.

applied, at least in respect of the 'further interruptions' contemplated.

33. The Commission's response [15] on this point was that it could not accept the part of the amendment indicating that the basis for calculating the permitted number of interruptions should be the scheduled duration 'exclusive of all interruptions'. That would impose an unnecessary restriction which would have a very negative impact on the receipts of broadcasting organisations.

34. It is not possible, in my view, to read much into the above incidents in the legislative history of the amended directive. The Parliament's proposed amendment shows that the Parliament sought to achieve some explicit recognition of the net principle.

35. The Commission's reply shows that it considered that the phrase 'scheduled duration' can include interruptions by advertisements. It shows also that the Commission favoured the gross principle. The Commission had taken the same position previously, as was illustrated in May 1995 in its report on the application of the directive, [16] in which it stated that, in its opinion, the gross principle was the minimum provision necessary for the purposes of the directive.

36. In conclusion, although I would not attach great weight to the legislative history, it does show that the Parliament failed to achieve a partial recognition of the net principle, and perhaps suggests that the legislation deliberately maintained an ambiguous formula which was regarded by the Commission and by some Member States as allowing for the gross principle.

Systematic interpretation

37. Under the head of systematic interpretation it might seem useful to interpret Article 11(3) in the light of Chapter IV of the directive ('Television advertising, sponsorship and teleshopping') taken as a whole. The provisions of the other articles, however, do not seem material.

38. The main argument, which was stressed in particular by the Netherlands in its written observations and by France at the hearing, concerns the relationship between Article 11(1) and Article 11(3). It will be recalled that Article 11(1) lays down the general rule that advertisements are to be inserted between programmes, but accepts that, provided the conditions set

15 — Amended proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM(96) 200 final.

16 — Report on application of directive 89/552/EEC, COM(95) 86 final.

out in paragraphs 2 to 5 of the article are fulfilled, advertisements 'may also be inserted during programmes in such a way that the integrity and value of the programme ... and the rights of the rights holders are not prejudiced'.

39. The Netherlands and France argue that, since Article 11(1) sets out the general rule that advertisements should be inserted *between* programmes, the interruption of programmes permitted by Article 11(3) constitutes an exception, which, as a derogation from a general rule, must be interpreted narrowly, that is, according to the net principle.

40. I do not think that that conclusion follows. In concrete terms, what is in issue is essentially, as explained above, a choice between the possibility of more frequent, but shorter, interruptions and less frequent, but longer, interruptions. A general argument based on the principle of restrictive interpretation of derogations does not in my view go far to resolve that specific issue.

41. In any event the premiss itself seems doubtful. A derogation should certainly be interpreted narrowly where it derogates from a fundamental freedom. In other circumstances it may be more correct to give a derogation whatever scope is appropriate in the light of its own terms and its own object and purpose. And in the present case it is, if anything, the gross principle which seems more consistent with the realisation of a basic freedom: it is the net principle which imposes a greater restriction on the freedom of the broadcaster and of the advertiser. Such restrictions may of course be desirable for the protection of the viewer, among other reasons; but they cannot be justified, in my view, merely on the principle of interpretation which has been invoked.

42. However, there is in my view another conclusion to be drawn from a systematic interpretation. Since Article 11(1) lays down a general rule, it seems to me that, whether it is the gross principle or the net principle which applies under Article 11(3), advertisements which interrupt the transmission of films under that provision must in all circumstances comply with the requirements that the integrity and value of the film are respected and that the rights of those holding rights in the film are not prejudiced.

43. A further structural argument relies on the use of the same term 'scheduled duration' in Article 11(5) of the directive, on the footing that the term should be interpreted in the same way in both provisions. That argument is advanced in particular by the United Kingdom Government, whose main argument in relation to Article 11(5) raises somewhat different issues from those which are the focus of the present case. It submits that the effect of the net principle as applied to Article 11(5) would be to undermine the scheduling policy of UK commercial broad-

casters, which is to schedule many news and current affairs programmes and documentaries for half-hour slots and to provide for a single advertising break in the middle of such programmes. For reasons which will emerge below, it may not be necessary to examine the implications of that argument, in particular for the legitimate expectations of those concerned. I would however accept that the term 'scheduled duration' must be given the same meaning in Article 11(3) and Article 11(5).

Teleological arguments: the aims of the directive

44. I turn finally to the aims of the directive. Arguments based on the aims of the directive, as set out in its preamble, are adduced on both sides. Thus, pursuant to the 27th recital of its preamble, the directive seeks to ensure that the interests of consumers as television viewers are fully and properly protected, and therefore that television advertising is subject to a certain number of minimum rules and standards. That is said to justify a narrow interpretation of Article 11(3) and so to support the net principle.

45. On the other hand, Pro Sieben argues that the directive is based on the premiss of freedom of economic activity, and in particular freedom of broadcasting activity. It cites, among others, the sixth and seventh recitals of the preamble, which mention respectively that television broadcasting constitutes a service within the meaning of the Treaty and that the Treaty provides for free movement of all services normally provided against payment. The preamble also invokes the principle of freedom of expression as enshrined in Article 10(1) of the European Convention on Human Rights.

46. Various other economic goals are mentioned in the preamble, such as the establishment of fair competition [17] and the promotion of European productions. [18] Thus the directive has a variety of competing concerns. Moreover, it is far from clear whether the net principle or the gross principle would best further the various objectives, and economic arguments have been advanced on both sides.

47. It is argued, for example, that the gross principle would harm consumers because it would permit programmes to be interrupted more frequently for advertisements. In addition the wider availability of potentially cheaper advertising space would reduce the remaining demand on the part of advertisers. That would create a high barrier to entry for potential new broadcasters, whose revenues would necessarily

17 — Third recital.

18 — 20th, 22nd and 24th recitals.

have to come from advertising. The European broadcasting industry, as well as producers and viewers, would accordingly suffer, thus limiting the pluralism which the directive seeks to promote.

48. Pro Sieben and the United Kingdom Government on the other hand contend that application of the net principle would have a negative economic impact on private television broadcasters and advertisers. Their reasoning is based on the premiss that, as explained above, the net principle would allow for fewer, but longer, advertising breaks.

49. According to a study commissioned by Pro Sieben, interruptions of such a length would have two effects: first, viewers would tend to change to other channels once such breaks began, and secondly, the recognition factor of single advertising spots within such breaks would be lost. [19] That would mean that, in practice, broadcasters would have to reduce the volume of advertising in order to make their interruptions acceptable both to viewers and to advertisers. The reduction in advertising volume would have a negative impact on the revenues of private broadcasters. On the other hand from the standpoint of the advertisers — and here there may be some contradiction in the analysis — it is suggested that there would be a decrease in the supply of advertising space, leading to higher prices. Moreover, European producers and viewers would suffer because broadcasters would be less able to finance a variety of programming.

19 — Publieurope International Ltd, Memorandum zu den Auswirkungen des Nettoprinzips auf ausländische Werbetreibende, p. 3.

50. In the light of the above arguments based on the aims of the directive it seems once again that no clear guidance emerges on the choice between the gross and the net principle. It is therefore unnecessary in my view to seek to evaluate the economic arguments which have been invoked.

Assessment

51. No clear conclusion emerges from the arguments that have been adduced, whether based on textual analysis, on the legislative history, on a systematic interpretation, or on the aims or possible effects of the directive. Although the legislative history perhaps favours the gross principle, the arguments are by no means conclusive.

52. As a consideration of principle, in those circumstances it seems to me that, where a directive is open to two interpretations, it would be wrong to adopt the more restrictive interpretation. Where a legislative measure seeks to impose a restriction on an activity, such a restriction should be clearly expressed. That principle must have greater force where the activity in question

is an exercise of both a fundamental freedom of the Treaty — the freedom to provide services — and a fundamental right under the European Convention on Human Rights — the freedom of expression, both freedoms being specifically invoked by the preamble to the directive.

53. That principle seems in any event particularly appropriate in the present case, where the provision in question appears to be, in the light of the arguments advanced on both sides, not only equally open to two conflicting interpretations, but perhaps deliberately ambiguous. An ambiguity — and particularly a deliberate ambiguity — cannot be invoked to restrict a fundamental freedom.

54. In the absence of clear indications to the contrary, that would suggest that the provision should be interpreted as prescribing the gross principle on the ground that it is less restrictive.

55. But that consideration of principle is, I think, reinforced by one important feature of the directive which has not received sufficient attention.

56. It is important to bear in mind that the directive is expressed to lay down minimum standards only and that such standards expressly envisage that programmes transmitted within a single Member State will be subject to different legal regimes. That feature of the directive has been emphasised by the case-law of the Court on the interpretation of other provisions of the directive relating to advertising: see in particular *Leclerc-Siplec*, *RTI* and *De Agostini*. [20]

57. The preamble to the original directive states:

'... this Directive lays down the minimum rules needed to guarantee freedom of transmission in broadcasting ... [21]

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

20 — Case C-412/93 *Leclerc-Siplec* v *TFI Publicité and M6 Publicité* [1995] ECR I-179; *RTI*, cited in note 7; and Joined Cases C-34/95, C-35/95 and C-36/95 *Ko* v *De Agostini and TV-Shop* [1997] ECR I-3843.

21 — 13th recital.

sion broadcasters under their jurisdiction'. [22]

58. Furthermore, the preamble to the amending directive states:

'... the approach in Directive 89/552/EEC and this Directive has been adopted to achieve the essential harmonisation necessary and sufficient to ensure the free movement of television broadcasts in the Community;... Member States remain free to apply to broadcasters under their jurisdiction more detailed or stricter rules in the fields coordinated by this Directive ...'. [23]

59. It is clear from those recitals, as well as from Article 3(1) of the directive, considered below, that the directive is concerned with minimal harmonisation only and contemplates the possibility that Member States may adopt different legal regimes for broadcasters under their respective jurisdictions.

60. On the basis of the above arguments I conclude, in answer to Question 1, that Article 11(3) must be interpreted as prescribing the gross principle, although interruptions must in any event comply with the general requirements laid down by Article 11(1).

61. In view of the conclusion I have reached, it is unnecessary to consider the disruptions which might be caused, and the potential effect on existing contracts and on the legitimate expectations of those affected, if Member States which have hitherto adopted the gross principle were required to introduce the net principle. If however I had reached the opposite conclusion, it would have been necessary to consider what limitations should be imposed on the ruling to be given by the Court so as to protect any such legitimate expectations, especially in view of the position which the Commission has consistently taken in support of the gross principle. [24]

Question 2

62. By the second question, the national court asks, in effect, whether it is compatible with Article 11(3) in conjunction with Article 3(1) of the directive, or with primary Community law, for a Member State to prescribe the net principle.

22 — 27th recital.

23 — 44th recital.

24 — See paragraph 35 above; on the relevance of the Commission's position to the issue of legitimate expectations, see Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, paragraphs 72 and 73 of the judgment.

63. A negative answer to that question is advocated only by Pro Sieben. An affirmative answer is advocated by the applicants, by the French, Italian, Netherlands, Swedish and United Kingdom Governments, and by the Commission.

64. The second question can be considered in two parts: (a) whether Article 11(3) in conjunction with Article 3(1) of the directive permits Member States to prescribe the net principle; and (b) whether the net principle is compatible with primary Community law.

The second question, first part

65. There are currently two provisions in the directive, Article 3(1) and Article 20, which authorise Member States to establish different conditions from those laid down elsewhere in the directive. (The original text contained two additional provisions: Article 8, which dealt with language policy, and Article 19, which allowed for stricter rules 'than those in Article 18 for programming time and the procedures for television broadcasting ...'.)

66. Article 20 provides as follows: 'Without prejudice to Article 3, Member States may, with due regard for Community law, lay down conditions other than those laid down in Article 11(2) to (5)... in respect of broadcasts intended solely for the national territory which may not be received, directly or indirectly, in one or more other Member States.' It appears that Article 20 cannot apply to the facts of the present case since the broadcasts of Pro Sieben can be received in other Member States.

67. Article 3(1) provides more generally that 'Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive'. The wording of that general provision might seem conclusive.

68. Pro Sieben argues, however, that Article 3(1) cannot apply in the present case on the ground that the rules at issue fall within the subject-matter of Article 11 (the timing of advertising interruptions) and that, since Article 20 refers to Article 11, Member States have the right to lay down additional rules of the type laid down in Article 11 only in the circumstances provided by Article 20 — namely when the broadcasts in question can be received only in the national territory.

69. In my view, however, it suffices to note that Article 20 is expressly stated to be 'without prejudice to Article 3'. Moreover

the fact that Article 20 concerns conditions 'other than' those in Article 11 suggests that it is intended to deal with a different type of rule from that authorised by Article 3(1), which contemplates 'more detailed or stricter' rules. That view is supported by the wording of the 27th and 28th recitals of the preamble to the original directive which draw a distinction between 'more detailed or stricter rules' and 'different conditions'.

70. As the Court observed in *Leclerc-Siplec*,[25] in relation to Article 19 of the original directive, neither the recitals in the preamble nor the objective of the directive requires the directive to be interpreted as divesting Member States of the freedom conferred on them by Article 3(1);[26] moreover, the attainment of the directive's objective of ensuring freedom to provide broadcasting services complying with the minimum rules it lays down is in no way affected where Member States impose stricter rules on the television broadcasters under their jurisdiction.[27]

71. I accordingly consider that Article 3(1) of the directive affords Member States the possibility of applying a regime, such as the net principle, which is stricter than the gross principle, to broadcasters under their jurisdiction provided that that regime is compatible with other relevant provisions of Community law.

The second question, second part

72. Having established that the adoption of the net principle by a Member State in relation to television broadcasters under their jurisdiction would not be contrary to the terms of the directive, I turn to the question whether the adoption of that principle would be compatible with the Treaty and with general principles of law.

73. The Oberlandesgericht, Stuttgart, refers to Articles 5, 6, 30, 59, and 85 of the Treaty (as they were then numbered) and to the general principle of equality.

74. Although Article 3(1) of the directive permits the adoption of more detailed or stricter rules (and hence the net principle) in the areas covered by the directive only in relation to broadcasters under the jurisdiction of the State wishing to impose such rules, the adoption of the net principle by one Member State pursuant to Article 3(1) might be argued to have a cross-border effect on services and goods for the following reasons.

25 — Case C-412/93, cited in note 20.
26 — Paragraph 42 of the judgment.
27 — Paragraph 44 of the judgment.

75. First, the lesser number of attractive slots for advertisements, and the increase in the price of such advertisements likely to result from such a reduction, may arguably affect the ability of sellers of goods and services established abroad to advertise their goods or services in that State.

76. Secondly, the case-law of the Court has established, and the preamble to the directive recognises, that the provision of broadcasting services in general and the broadcasting of television advertisements in particular come within the Treaty rules relating to services.[28] The ability of the broadcasters to offer their broadcasting services for the purposes of relaying advertisements for clients (i.e. advertisers) established in other Member States is arguably affected if the number of attractive slots which they are entitled to offer is limited. A broadcaster under the jurisdiction of a State which imposes the net principle might be said to be placed at a competitive disadvantage in comparison with a broadcaster under the jurisdiction of a State practising the gross principle (assuming that both broadcasters can transmit into each other's States) since he will have a lesser number of attractive advertising slots to offer. Because of that lesser availability they are also likely to be more expensive.

77. However, the arguments that the Treaty is thereby infringed can be dismissed fairly summarily. To turn first to Article 30 (now, after amendment, Article 28 EC), it will be recalled that in *Leclerc-Siplec*[29] the Court ruled that a prohibition of televised advertising in a particular sector (distribution) did not fall within the scope of that article. Since the restriction on advertising in question in the present case is of a similar kind to that at issue in *Leclerc-Siplec*, but of a lesser extent, I conclude that the application of the net principle does not fall within the scope of that article.

78. As for the application of Article 59 (now, after amendment, Article 49 EC), to the extent that the net principle restricts the freedom to provide services within the meaning of that article, such restrictions are in any event, in my view, capable of justification on the grounds of consumer protection.

79. The Court has already accepted that certain restrictions on the broadcasting of advertisements, including a limitation of

28 — See in particular the early Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6 of the judgment; see also Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini*, cited in note 20, paragraph 48 of the judgment and paragraph 106 of my Opinion.

29 — Case C-412/93, cited in note 20.

the duration or frequency of advertisements, may be justified by overriding reasons relating to the general interest if they are imposed in order to protect consumers against excessive advertising or, as an objective of cultural policy, in order to maintain a certain level of programme quality, or to maintain pluralism: see *Collectieve Antennevoorziening Gouda*. [30]

80. According to the ARD, protection of consumers and artistic works are indeed objectives of the net principle. The Commission on the other hand suggests that the purpose of applying the net principle in Germany is to prevent the cost of advertising from falling so as to maintain the revenue of public broadcasting authorities. The objectives, according to the Commission, are the preservation of plurality in the media, in the interests of cultural policy, and also the protection of fair competition.

81. It is clear in my view that the net principle can be justified on grounds of the protection of consumers. It is true that the directive itself already contains certain safeguards against excessive advertising in the interests of consumers. That, however, cannot be regarded as necessarily removing the possibility for Member States to justify their stricter rules on consumer protection grounds since the directive is expressed in terms of minimal harmonisation only. If Member States had no such choice then, as the Commission observed at the hearing, minimal harmonisation directives would effectively be turned into total harmonisation directives imposing maximum standards.

82. Moreover, as the Commission submits, the application of the net principle cannot be said to infringe the principle of proportionality, since its effects on the freedom to provide services, in comparison with the effects of the gross principle, do not appear substantial, and are plainly not disproportionate to the aims of the national measure.

30 — Case C-288/89 [1991] ECR I-4007, paragraphs 27 and 23 of the judgment respectively.

83. There is no discrimination on grounds of nationality within the meaning of Article 6 of the Treaty (now, after amendment, Article 12 EC). Any difference between the treatment by Germany of its domestic broadcasters and the more favourable treatment by other Member States of their broadcasters does not fall within the scope of that article, since that article does not require a Member State to treat its own broadcasters in the same way as other Member States treat their broadcasters. [31]

84. Nor can it be said that the general principle of equality is infringed. Although broadcasters in different Member States may be subject to different conditions, with the result that some inequalities persist in the conditions of competition, such inequalities seem an inherent feature of legislation providing for minimum standards. Indeed in other contexts the Court has accepted that such consequences are a necessary feature of harmonisation provisions which lay down minimum requirements and cannot be regarded on that account as unlawful. [32]

85. Finally, it is difficult to see how Article 85 (now Article 81 EC) and Article 5 (now Article 10 EC) might be relevant since an agreement between undertakings has not been identified. It has not been suggested that the application of the net principle would require or encourage the conclusion of an agreement between undertakings or reinforce the effects of such an agreement, nor has it been suggested that the contested law delegates responsibility for regulating television advertising to private undertakings.

31 — See, for example, Joined Cases C-251/90 and C-252/90 *Wood and Cowie* [1992] ECR I-2873, paragraph 19 of the judgment.

32 — See Case C-128/94 *Hönig* v *Stadt Stockach* [1995] ECR I-3389, paragraph 17 of the judgment.

Conclusion

86. Accordingly the questions referred by the Oberlandesgericht, Stuttgart, should in my opinion be answered as follows:

(1) Article 11(3) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities in its original version and as amended by Article 1(13) of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 must be interpreted as prescribing the gross principle, that is to say that in calculating the period of 45 minutes for the purpose of determining permissible interruptions by advertisements in the transmission of audiovisual works such as feature films and films made for television, the duration of the advertisements should be included in that period. Such interruptions are however permissible only on condition that the integrity and value of the work are respected and that the rights of those holding rights in the work are not prejudiced.

(2) Subject to the same conditions Member States are free, pursuant to Article 3(1) of the directive, to provide with regard to broadcasters under their jurisdiction for the net principle, that is, to provide that, in calculating that period, the duration of the advertisements should be excluded.