OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 18 February 1993 *

Mr President,
Members of the Court,

1. The Tribunal Supremo de España, Sala de lo Contencioso-Administrativo (Sección Tercera) (Supreme Court of Spain, Third Chamber for Contentious Administrative Proceedings, hereinafter 'the Tribunal Supremo') is asking the Court as to the compatibility with Community law of Spanish rules regarding the granting of licences for dubbing films from third countries. These rules impose the condition that for the distribution in Spain of a dubbed version of such films into one of the official languages of Spain the distribution undertaking applying for a licence must enter into an agreement to distribute a Spanish film at the same time. The Tribunal Supremo is raising this question in the course of an application for annulment brought by the Federación de Distribuidores Cinematográficos (Fedicine), a Spanish association of film distributors.

Background to the case

2. There were in force in Spain until its accession to the European Communities particularly strict rules in the field of films. The rules involved a condition of nationality for film producers established in Spain and for undertakings dubbing films and in addition provided for a licence for the dubbing and distribution of foreign films — the distribution of a Spanish film being a condition for the granting of a licence — and finally laid down the proportion of foreign and Spanish films which might be exhibited or distributed by television or the cinema. [1]

After accession to the Community Spain adapted its film legislation by Royal Decree-Law 1257/1986 of 13 June 1986 (hereinafter 'the Decree-Law'), [2] the sole article of which contains two rules with regard to the distribution of non-Spanish films. [3] *Films produced in other Member States* of the Community may be freely distributed by the legally established distribution undertakings. For *films from third countries* on the other hand the Decree-Law repeats the previous rules in so far as the distribution of such films in a dubbed version remains subject to a prior licence. For every Spanish film which they have agreed to distribute the distribution undertakings receive a maximum of four dubbing licences. They must by contract accept the following conditions: (i) the first licence is issued as soon as the competent authority (the Instituto de la Cinematografía y de las Artes Audiovisuales, hereinafter 'the ICAA') is informed that filming of the Spanish film which the distributor has undertaken

1 — In its written observations the Commission goes into detail as regards these former Spanish rules.

2 — *Boletin Oficial del Estado* No 153 of 27 June 1986, p. 23427.

3 — See the Report of the Judge-Rapporteur for the text of that article.

* Original language: Dutch.

to distribute has begun; [4] (ii) the second, third and fourth licences are granted on proof that the Spanish film concerned has generated certain levels of receipts (PTA 30m, 60m and 100m respectively).

It may also be stated that the Spanish Government, following a question from the Court, confirmed in a letter of 28 December 1992 that a fresh amendment of its film legislation was being prepared, 'still with a view to adapting it to Community law'.

3. Fedicine brought before the Tribunal Supremo an application for the annulment of the Decree-Law, which, it claims, lays down protectionist rules and discriminates against films of other Member States, since it compels the film distributors to give preference to the distribution of Spanish films. The Tribunal Supremo thought it appropriate to refer the following question to the Court for a preliminary ruling:

'Is a measure making the grant of licences to dub films from non-member countries, with a view to their distribution in Spain in a version dubbed into one of the official languages of Spain, subject to a prior contractual undertaking by the distributor applying for the licence to distribute a Spanish film compatible with Community law?'

4 — That licence is automatically cancelled if the film is not submitted within 200 days from the commencement of filming. The ICAA may extend that period upon a reasonable request from those concerned.

4. In view of the way in which the Tribunal Supremo formulates its question it seems to me appropriate to call attention once more to the fact that in the context of a reference for a preliminary ruling the Court cannot decide as to the compatibility of national rules with Community law. Nevertheless the Court has consistently held that it may 'extract from the wording of the questions formulated by the national court, and having regard to the facts stated by the latter, those elements which concern the interpretation of Community law for the purpose of enabling that court to resolve the legal problem before it'. [5]

The Community law applicable

5. For a correct answer to the question raised by the Tribunal Supremo I must in the first place, in view of the general manner in which that court raises the question of compatibility with Community law, consider which Community rules are applicable to this case.

Before the national court Fedicine claimed that the Spanish rules at issue were contrary to Articles 30 to 36, 59 and 92 of the Treaty, to Directives 63/607/EEC and 65/264/EEC [6] as well as to the General Agreement on Tariffs and Trade (GATT). In its observations to the Court it challenges the legality of the Decree-Law solely on the basis of Articles 30 and 36 of the Treaty, that is, the Community rules on *movement of goods*. The Spanish Government and the Commission on the

5 — See *inter alia* the judgment in Case 14/86 *Pretore di Saló* v *Persons unknown* [1987] ECR 2545 at paragraphs 15 and 16; see most recently the judgment in Joined Cases C-330/90 and 331/90 *López Brea and Hidalgo Palacios* [1992] ECR I-323 at paragraph 5.

6 — For the precise references to these directives see footnote 9 *infra*.

other hand think that the compatibility of the Decree-Law with Community law must be approached from the point of view of Article 59 of the Treaty, in other words the provisions with regard to *provision of services*. I must therefore consider first whether the provisions of the Treaty with regard to movement of goods or those with regard to the provision of services are applicable to this case.

6. As I mentioned, Fedicine in its observations to the Court takes the view that the rules contained in the Decree-Law constitute a measure having an effect equivalent to a quantitative restriction on imports contrary to Article 30 of the EEC Treaty, since they give preference to the distribution of Spanish films by means of the system of licences previously outlined and thus make the distribution of films from another Member State less attractive. Fedicine's assumption in this connection is clearly that films are goods within the meaning of the Treaty.

The Commission, on the other hand, contends that in this case it is solely the *conditions of exploitation* of films of Spanish origin or those from other Member States or from third countries which are at issue. The exploitation of a film must in its view be regarded as a service in the sense of Article 59 of the EEC Treaty. Although the importation of at least one copy of a film is necessary in order to proceed to the commercial exploitation of a film made outside Spain, the essential characteristic of the exploitation of films as an economic activity, according to the Commission, is that the producer authorizes the distributor to exhibit his film to the public and obtains from the distributor, in consideration for that permission, remuneration which may consist in a lump sum or in a percentage calculated on the basis of the film's takings.

7. It is obvious that the recording of a cinematograph film presupposes the *manufacture* of a material base for the film, the film band, which may be the original of a film or a copy thereof. This film band undoubtedly constitutes 'goods' within the meaning, as specified by the Court, of the Treaty provisions regarding movement of goods, namely 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions'. [7] That was also the view taken by the Court in the *Cinéthèque* judgment with regard to the production of video-cassettes. It declared that:

'it is not possible to regard the process of production of video-cassettes as the provision of "services" within the meaning of the Treaty since the services of a manufacturer of such products result directly in the manufacture of a material object which is, moreover, the subject of classification in the Common Customs Tariff (heading 37.07). According to Article 60 of the Treaty services are only to be considered as such if they are provided for remuneration "in so far as they are not

7 — Judgment in Case 7/68 *Commission* v *Italy* [1968] ECR 423, in particular at p. 428; see more recently the judgment in Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431 at paragraphs 23 and 26; see the description of 'goods' in Advocate General Jacobs's Opinion of 19 September 1991 in that case at paragraph 18.

governed by provisions relating to freedom of movement for goods"'. [8]

8. However, that by no means indicates that the *exploitation* of films falls under the Treaty provisions with regard to movement of goods. Although the exploitation in one Member State of a cinematograph film produced in another Member State presupposes a trans-frontier movement of goods in the sense that at least one copy of the film must be imported into the country of exploitation, [9] I too think that the essential feature of the exploitation of a film does not lie in that physical trade in film bands. [10] As the Court confirmed in the *Coditel* judgments, the cinematograph film differs from other cultural products which depend on the circulation in great numbers of the material form of the works (books, compact discs, video-cassettes). In fact:

'the film belongs to the category of literary and artistics works made available to the public by performances which may be infinitely repeated and the commercial exploitation of which comes under the movement of services, no matter whether the means whereby it is shown to the public be the cinema or television'. [11]

9. The essential aspect of the exploitation of a film therefore lies in the producer's making available the rights to distribution in a specific market together with the temporary transfer of the right of public exhibition in that market. [12] The (trans-frontier) transfer of the material base of a film is only a logical outcome of that, so that it is not possible to speak of movement of goods within the meaning of the Treaty. The fact that this represents a supply of services against remuneration — normally a given percentage of the receipts from screenings — seems to me obvious, so that this aspect of the Community concept of services in Article 60 of the Treaty also applies. [13]

8 — Judgment in Joined Cases 60/84 and 61/84 *Cinéthèque* v *Fédération Nationale des Cinémas Français* [1985] ECR 2605 at paragraph 10. Cf. also the judgment in Case 18/84 *Commission* v *France* [1985] ECR 1339 at paragraph 12 in which the Court refused to describe printing work as a service 'since it leads directly to the manufacture of a physical article which, as such, is classified in the Common Customs Tariff ...'.

9 — That is why, in the realization of the common market, Community action was directed first towards the elimination of *import quotas* for films from another Member State: see in particular Articles 5 to 10 of Council Directive 63/607/EEC of 15 October 1963 implementing in respect of the film industry the provisions of the General Programme for the abolition of restrictions on freedom to provide services (OJ, English Special Edition 1963-1964, p. 52). The second directive adopted in this sector requires the Member States by 31 December 1966 at the latest to abolish *all* import quotas for films of one or more Member States: Article 7 of the Second Council Directive of 13 May 1965 implementing in respect of the film industry the provisions of the General Programmes for the abolition of restrictions on freedom of establishment and freedom to provide services (OJ, English Special Edition 1965-1966, p. 62). The third paragraph of Article 7 makes it clear that abolition of import quotas gives the right to import prints, dupes and advertising material without restriction.

10 — Intra-Community trade in materials, sound-recording media, films and other material products necessary for the *production* of a film naturally comes under the Treaty provisions with regard to movement of goods: see, with regard to products used for the transmission of television signals, the judgment in Case 155/73 *Sacchi* [1974] ECR 409 at paragraph 7; see also the judgment in Case C-260/89 *Elliniki Radiophonia Tileorassi (ERT)* [1991] ECR I-2925 at paragraph 14. Moreover 'Photographic and cinematographic goods', including cinematograph film are the subject of a special chapter of the Common Customs Tariff, namely Chapter 37: see Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1, at pp. 249 to 252.

11 — Judgment in Case 262/81 *Coditel* v *Ciné-Vog Films* ('Coditel II') [1982] ECR 3381 at paragraph 11, which refers to the judgment in Case 62/79 *Coditel* v *Ciné-Vog Films* ('Coditel I') [1980] ECR 881 at paragraph 12.

12 — See the definition of 'distribution and renting of films' in Article 2(2) of Council Directive 68/369/EEC of 15 October 1968 concerning the attainment of freedom of establishment in respect of activities of self-employed persons in film distribution, OJ, English Special Edition 1968 (II), p. 520.

13 — As regards the aspect of remuneration or consideration as a characteristic of the Community concept of services and more generally of the concept of economic activity within the meaning of the EEC Treaty see in particular the judgments in Case 13/76 *Donà* v *Mantero* [1976] ECR 1333 at paragraph 12; in Case 196/87 *Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159 at paragraph 14; and in Case C-159/90 *Society for the Protection of Unborn Children Ireland* v *Grogan* [1991] ECR I-4685 at paragraphs 16 to 21.

10. None of this necessarily means that the Treaty provisions with regard to movement of services will always be applicable. It is necessary in addition (according to the first paragraph of Article 59 of the EEC Treaty) for the persons who provides the services to be a national of a Member State established in the Community and for the services provided by him to be of an intra-Community nature. The latter aspect is present, according to the case-law of the Court, when (i) the person supplying the services moves to another Member State to perform them; [14] (ii) the person for whom the services are intended goes to another Member State to receive the services; [15] (iii) neither of the two goes to another Member State but the service is supplied by a person established in a Member State other than that of the person for whom the services are intended. [16]

11. It seems to me that the exploitation in one Member State of films produced in another Member State falls mostly within the latter category since for such a supply of services neither the producer (person supplying the services) nor the distributor-exploiter (person for whom the services are intended) needs to cross internal Community frontiers.

However, I should like to mention also that if the foreign producer maintains a constant economic presence in the country in which the services are provided — whether by means of a branch office, by an independent agent or in some other form — it is not the Treaty provisions with regard to the provision of services which will apply but those relating to the right of establishment (Articles 52 to 58 of the Treaty). [17] That is clear from the priority rule set out in Article 60 of the EEC Treaty which makes the rules with regard to provision of services applicable only in so far as the provisions relating *(inter alia)* to free movement of persons are not applicable.

Is the Decree-Law contrary to the Treaty provisions with regard to provision of services?

12. Under the conditions referred to above I therefore agree that this case must be approached in the context of the Treaty system with regard to provision of services. The specific question therefore is whether rules such as those contained in the Decree-Law represent a restriction of freedom to provide services contrary to Article 59 of the Treaty.

As the Court has consistently held, such incompatibility exists when there is discrimination against a person providing services on grounds of his nationality or of the fact that he is established in a Member State other than that in which the service must be

14 — Article 59 is also applicable, according to the so-called 'tourist guide' judgments, where the person supplying the services and the person for whom they are intended are established in the same Member State, but the services themselves are offered on the territory of another Member State: judgments in Case C-154/89 *Commission* v *France* [1991] ECR I-659 at paragraph 10, in Case C-180/89 *Commission* v *Italy* [1991] ECR I-709 at paragraph 9 and in Case C-198/89 *Commission* v *Greece* [1991] ECR I-727 at paragraph 10.

15 — Judgments in Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377 at paragraph 10; and in Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195 at paragraph 15.

16 — Judgment in Case C-76/90 *Säger* [1991] ECR I-4221 at paragraph 13.

17 — See the judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755 at paragraph 21; see also the judgment in Case C-221/89 *Factortame and Others* ('Factortame II') [1991] ECR I-3905 at paragraph 20.

provided. [18] In the *Säger* judgment the Court added that Article 59 requires in addition the elimination of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services. [19]

13. Is there in this case discriminatory treatment of persons providing services from another Member State or some other restriction on provision of services? It is hard to deny that the Decree-Law gives preference to producers of Spanish films over producers of films from other Member States: the system of licences with regard to the dubbing and distribution of films from third countries is exclusively dependent on the filming and distribution of a *Spanish* film. In practice that gives a considerable advantage to producers of Spanish films, as may be seen from the statistics from the ICAA quoted by the Commission. More than 40% of the total number of films distributed in Spain come from the United States and these American films represent more than 70% of total cinema box-office takings. More than two thirds of these American films are circulated in a dubbed version. The contested Decree-Law means that at least one Spanish film must be distributed for every four dubbing-licences for these films. In these circumstances it cannot be denied that the Decree-Law places producers of films from *other Member States* in a more unfavourable position than Spanish producers since the former are deprived of the advantage of the distribution requirement and the relevant levels of takings.

14. The foregoing consideration at once negates the Spanish Government's argument to the effect that the Decree-Law does not have any restrictive effect on the exploitation of films from other Member States: to the same extent as the Decree-Law has a protective effect in favour of film producers-providers of services established in Spain, it is prejudicial to producers-providers of services established in another Member State. [20] Since their films are excluded from the system of compulsory distribution which, as stated, applies only to Spanish films, the provision of services of producers from other Member States is less encouraged and is therefore hampered: both the distribution and the promotion of their films in Spain are impeded as a result. Moreover this handicap is of a discriminatory nature since a well-defined advantage available to producers of Spanish films is withheld from producers of films from other Member States.

15. The Court has consistently held that national rules involving discriminatory treatment as regards provision of services from another Member State can be compatible with Community law only if they can be

18 — Cf. the judgment in Case 33/74 *Van Binsbergen* [1974] ECR 1299 at paragraph 25; see more recently *inter alia* the judgment in *Commission* v *Germany* cited in the previous footnote, at paragraph 25; the so-called 'tourist guide' cases previously cited, *Commission* v *France* at paragraph 12, *Commission* v *Italy* at paragraph 15 and *Commission* v *Greece* at paragraph 16; the judgment in *ERT*, cited in footnote 10, at paragraph 19; the 'Mediawet' judgments in Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069 at paragraph 14 and Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007 at paragraph 10; and in Case C-106/91 *Ramrath* [1992] ECR I-3351 at paragraph 27.

19 — *Säger* judgment at paragraph 12.

20 — Cf. the 'Mediawet' judgment *Commission* v *Netherlands* at paragraph 23.

brought within the scope of an express derogation of the Treaty. [21]

The only derogative provision which Spain can invoke lies in Article 66 of the Treaty in conjunction with Article 56, which allows discriminatory rules justified on grounds of public policy, public security or public health. It seems to me that of those only the first ground of justification, public policy, might possibly be considered.

Can the rules be justified on grounds of public policy?

16. The Spanish Government, which moreover does not consider that there is any discriminatory aspect to the Decree-Law, contends that the contested rules pursue an objective of cultural policy which is justified under Community law, namely the protection of the national film-making industry of a Member State. In the absence of Community rules the Member States are free, it is claimed, within the limits authorized by Community law, to lay down policy objectives and to define the necessary instruments for the attainment of such objectives.

The fact that the cinematograph film constitutes an integral part of the Community cultural heritage and accordingly deserves protection to the same extent as other aspects of that heritage has already been confirmed by the European Parliament in a report of 1983. [22]

Nevertheless the question arises at legal level how far there is room in the concept of public policy within the meaning of Article 66 of the Treaty in conjunction with Article 56 for national or regional rules which, with a view to the protection of the national film industry within the framework of a policy directed towards the preservation of the cultural heritage, grants to domestic film producers an important competitive advantage to the detriment of producers from other Member States.

17. It may be seen from present Community case-law that there is very little chance of that. The Court makes a *strict interpretation* of the concept of 'public policy' within the meaning of Article 56 of the EEC Treaty: according to the *Bouchereau* judgment, invoking grounds of public policy presupposes: 'in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'. [23]

From early days the Court has stated in the context of movement of goods that reasons of economic policy fall in all respects outside this concept — referred to in Article 36 of the Treaty. [24] The Court has confirmed this also in the matter of provision of services. Thus the Court declared in the *Bond van Adverteerders* judgment:

21 — Cf. judgments in Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085 at paragraph 32; in *Collectieve Antennevoorziening Gouda* at paragraph 11; in *Commission* v *Netherlands* at paragraph 15.

22 — Apparently the report referred to is the 'Rapport fait au nom de la commission de la jeunesse, de la culture, de l'éducation, de l'information et des sports sur la promotion du cinéma des pays de la Communauté', drawn up by Mrs Marie-Jeanne Pruvot, *Parlement européen, Documents de Séance 1983-1984*, 15 July 1983, PE 76.975/final.

23 — Judgment in Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999 at paragraph 35.

24 — See the judgment in Case 7/61, *Commission of the EEC* v *Italy* [1961] ECR 317, in particular at p. 329. For more recent confirmations of this principle, see *inter alia* the judgments in Case 238/82 *Duphar* v *Netherlands* [1984] ECR 523 at paragraph 23; in Case 288/83 *Commission* v *Ireland* [1985] ECR 1761 at paragraph 28; and in Case 103/84 *Commission* v *Italy* [1986] ECR 1759 at paragraph 22.

'that economic aims, such as that of securing for a national public foundation all the revenue from advertising intended especially for the public of the Member State in question, cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty'. [25]

However, that does not mean that the application of Article 36 (and, one may assume, 56) is excluded by reason of 'the mere fact that national provisions, justified by objective circumstances corresponding to the needs of the interests referred to therein, enable other objectives of an economic nature to be achieved as well'. [26] This applies even more when the economic objective must make possible the realization of an objective mentioned in that provision (in that case the protection of health). [27]

However, even if the condition as to content laid down in the *Bouchereau* judgment is fulfilled, the Court still imposes a strict *requirement of proportionality*: in *Bond van Adverteerders* it pointed out that

'the measures taken by virtue of that article must not be disproportionate to the intended objective. As an exception to a fundamental principle of the Treaty, Article 56 of the Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard.' [28]

18. The strict definition of the concept added to the requirement of proportionality mean that for national rules, in so far as they have an effect *überhaupt* on provision of services between Member States, it is only exceptionally possible to invoke the concept of public order. Although the content of the concept may to a certain extent vary between one Member State and another, [29] it actually refers exclusively to 'genuine and sufficiently serious threat(s) ... affecting one of the fundamental interests of society'. Moreover it does not extend to economic objectives, which means that national or regional rules which, in the guise of protection of fundamental interests, pursue exclusively or principally an economic aim, are not covered by it. Finally, even if the rules actually seek to uphold public policy they can be accepted only on condition that that aim cannot be achieved by means of less restrictive, that is, less discriminatory or non-discriminatory, rules.

With regard to provision of services in the audiovisual sector all this was made clear in the *Bond van Adverteerders* judgment and in the recent judgment concerning the Flemish cable decree.

19. The first of those cases concerned Netherlands rules which at that time prohibited the distribution by cable of radio and television programmes transmitted from other Member States containing advertising intended especially for the public in the Netherlands or subtitles in Dutch. The right to broadcast advertising was reserved to an organization whose receipts were used by the State to subsidize national broadcasting organizations and the press. The Netherlands

25 — Judgment in *Bond van Adverteerders*, paragraph 34; see also the 'Mediawet' judgments: the *Collectieve Antennevoorziening Gouda*, paragraph 11 and the *Commission* v *Netherlands* judgment, paragraph 15.

26 — Judgments in Case 118/86 *Openbaar Ministerie* v *Nertsvoederfabriek Nederland* [1987] ECR 3883 at paragraph 15; and in Case 72/83 *Campus Oil Limited* v *Minister for Industry and Energy* [1984] ECR 2727 at paragraph 36; see also the Opinion of Advocate General Mancini in Case 238/82 *Duphar* v *Netherlands* [1984] 546 at pp. 549 and 550.

27 — Judgment in *Nertsvoederfabriek Nederland*, paragraph 15.

28 — Judgment in *Bond van Adverteerders*, paragraph 36.

29 — Judgment in Case 41/74 *Van Duyn* [1974] ECR 1337 at paragraph 18; *Bouchereau* judgment, paragraph 34.

Government had contended that those prohibitions sought a non-economic objective of public policy, namely the maintenance of the non-commercial and pluralistic nature of the national broadcasting system. The Court did not reject that argument but at once applied the aforesaid requirement of proportionality. According to what the Netherlands Government had itself admitted, that requirement was not met: the objectives previously mentioned could in all respects be achieved in other less restrictive and non-discriminatory ways. [30]

20. In the case of the Flemish cable decree the Belgian Government received even shorter shrift. A decree of the Flemish Community prohibited television organizations from broadcasting on their channels sound and television programmes from other Member States which were not in one of the languages of the Member State in which the broadcasting organization was established. To justify that discriminatory restriction the Belgian Government had invoked objectives of cultural policy, particularly the maintenance of pluralism in the printed media (the direct recipients of a part of the advertising revenue of the national television organizations, the preservation and development of the artistic heritage and the viability of the national broadcasting organizations. The Court did not seem convinced by these arguments and on the contrary found in them (particularly in the first and third of them) an indication that the rules at issue had the aim of restricting actual competition to the national organizations in order to protect the advertising revenue of those institutions. [31] Moreover, the Court added, following the Advocate General: [32]

'the justifications put forward by the Belgian Government do not come under any of the exceptions to freedom to provide services permitted by Article 56, namely public policy, public security or public health'. [33]

21. If I apply that case-law to this case, I must conclude that rules such as those contained in the Decree-Law cannot lay any claim to the exception in Article 56 regarding public policy. The Decree-Law does not represent any protection against 'a genuine and sufficiently serious threat' affecting one of the fundamental interests of society. Moreover it seems to me, as in the case of the Flemish cable decree, to be largely dictated by motives of economic policy. Although the Decree-Law may actually have the objective *inter alia* of promoting films in one of the official languages of Spain, it seems to have in view above all the preservation of the national film industry, [34] since the advantage of adequate distribution is offered only to producers of Spanish films.

30 — *Bond van Adverteerders* judgment, paragraph 37.

31 — Judgment in Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757, paragraph 9.

32 — See the Opinion of Advocate General Tesauro in this case, delivered on 24 November 1992, section 5, [1992] ECR I-6769.

33 — Judgment in *Commission* v *Belgium*, paragraph 10.

34 — That may also be seen clearly from the passage, quoted by the Commission in its written observations, from the statement of the reasons on which the draft of Law No 3/80 was based, that is, the predecessor of the Decree-Law.

Can the rules be justified by reference to the protection of the cultural heritage?

22. In today's Community increasing importance is attached to the development of the cultures of the Member States and their regions. It therefore seems to me appropriate to consider also whether, for rules such as those in this case, it is not possible to find in Community law some other ground of justification than public policy, in particular reference to an overriding reason of general importance connected with the protection of the cultural heritage.

The importance attached to the cultural heritage will further increase when the Treaty on European Union has come into force. I should like to point out that that Treaty charges the Community to make a contribution 'to the flowering of the cultures of the Member States', [35] a task which, according to the new Article 128(1) of the Treaty, must be fulfilled while respecting the 'national and regional diversity' of the Member States 'and at the same time bringing the common cultural heritage to the fore'. In addition Article 128(4) prescribes that the Community in its action *under other provisions of the Treaty* is to take 'cultural aspects' into account.

As regards that last aspect attention may be drawn, by way of example, to the new Article 92(3)(d) of the EEC Treaty envisaged in the Treaty on European Union. Under that provision

'aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest' may be regarded as compatible with the common market.

23. The diversity of cultures undoubtedly constitutes one of the riches of the Community notwithstanding the inherent difficulties. Many judgments show that the Court too is not insensitive to this diversity and the specific requirements of policy which the effort to preserve cultural individuality involves.

In the field of *provision of services* I may point to the 'tourist guide' cases in which the Court emphatically recognized 'the conservation of the national historical and artistic heritage' [36] and 'the proper appreciation of places and things of historical interest and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country' [37] as overriding reasons of general interest such as might justify a restriction on free movement of services.

Still more recently the Court has recognized in its 'Mediawet' judgments that a national cultural policy aimed at preserving freedom of expression of the various social, cultural,

35 — Article 3(p) of the EEC Treaty, as amended by Article G of the Treaty on European Union. The text of the Treaty was published in OJ 1992 C 191, p. 1.

36 — Judgment in *Commission* v *Italy*, previously cited in footnote 14, at paragraph 20; confirmed by the Court in the 'Mediawet' judgments: in *Collectieve Antennevoorziening Gouda* at paragraph 14 and in *Commission* v *Netherlands* at paragraph 18.

37 — Judgment in *Commission* v *France*, previously cited in footnote 14, at paragraph 17; judgment in *Commission* v *Greece*, previously cited in footnote 14, at paragraph 21; since then also confirmed in the 'Mediawet' judgments in the same paragraph of the grounds of judgment as those referred to in the preceding footnote.

religious and philosophical trends in a Member State (in that case the Netherlands) is aspiring to a goal with is justified from the Community point of view:

'A cultural policy understood in that sense may indeed constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services. The maintenance of the pluralism which that Dutch policy seeks to safeguard is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order ...'. [38]

24. In the field of *free movement of workers* too the Court shows its understanding with regard to national and regional rules which seek to preserve the cultural identity of a people, as may be seen in the *Groener* judgment in which the Court, in answer to a question with regard to the compatibility with Community law of Irish rules making appointment as a lecturer in a public educational institution conditional upon proof of an adequate knowledge of the Irish language, declared as follows:

'The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States'. [39]

25. Finally the Court's case-law on the *free movement of goods* also reflects this open attitude towards objectives of cultural (and more broadly speaking socio-cultural) policy which are not in principle discriminatory.

In the Cinéthèque judgment the Court decided that a national system which, 'in order to encourage the creation of cinematographic works irrespective of their origin, gives priority, for a limited initial period, to the distribution of such works in the cinema', is seeking to attain an objective which is justified with regard to Community law. In so far as barriers to intra-Community trade arising from the application of that prohibition do not exceed what is necessary for attaining that objective, Article 30 is not applicable to such a system. [40]

In the recent Sunday-closing cases too the Court confirmed that it was for the Member States to make choices relating to national or regional socio-cultural characteristics with due regard to the requirements resulting

38 — Judgment in *Collectieve Antennevoorziening Gouda* at paragraph 23; judgment in *Commission* v *Netherlands* at paragraph 30; that paragraph has been expressly confirmed by the Court: judgment in Case C-148/91 *Vereniging Veronica Omroep Organisatie* [1993] ECR I-487, at paragraphs 9 and 10.

39 — Judgment in Case C-379/87 *Groener* v *Minister for Education and the City of Dublin Vocational Education Committee* [1989] ECR 3967 at paragraph 19.

40 — *Cinéthèque* judgment, paragraphs 23 and 24.

from Community law and in particular to the principle of proportionality. [41]

26. It follows from this case-law that rules within the framework of the cultural policy of national or regional authorities may where appropriate be warranted by *an overriding reason of general interest* recognized by Community law justifying certain restrictions to the movement within the Community of persons, goods or services. That applies to measures intended to ensure the preservation and appreciation of historical and artistic treasures or the dissemination of knowledge of the arts and culture ('tourist-guide' judgments), [42] which are directed towards preserving the freedom of pluralistic expression of the various social, cultural, religious and philosophical trends in a country ('Mediawet' judgments) or towards the protection of a national language (*Groener* judgment). These overriding reasons of general interest may, I think, be described in general as the protection, development and dissemination of a Member State's own cultural heritage or that of a region thereof, in a *pluralist* context *and* as a *component part of* a cultural *heritage common* to the Member States (hereinafter referred to for the sake of brevity as 'the protection of the cultural heritage').

However, it is clear that such an overriding reason cannot justify obstacles which go further than is objectively necessary to attain the intended aim. [43] Moreover such rules may not seek to attain objectives of an economic nature (even though secondary economic aims need not be totally excluded). [44] Finally, as the Court stated in the *Groener* judgment (section 24 above), implementing measures for such a cultural (in that case linguistic) policy must not lead to discrimination against nationals of other Member States.

27. As regards that last condition, namely the non-discriminatory nature of the measure, a certain flexibility of the case-law must not, I think, be excluded. Measures adopted for the protection of the cultural heritage of a Member State or a region thereof will not infrequently involve a direct or indirect advantage for its own artists or cultural institutions (for example, the establishment of a film or literature prize or other encouragement of artists or artistic societies). [45] Even when such measures concern the provision

41 — Judgment in Case C-169/91 *B&Q* [1992] ECR I-6635 at paragraph 11; cf. the similar, but slightly different expression in the previous Sunday-closing judgments: those in Case C-145/88 *Torfaen Borough Council* v *B&Q* [1989] ECR 3851 at paragraph 14; in C-312/89 *Conforama and Others* [1991] ECR I-997 at paragraph 11; and in Case C-332/89 *Marchandise and Others* [1991] ECR I-1027 at paragraph 12.

42 — It may be recalled that in accordance with Article 27(1) of the Universal Declaration of Human Rights, all persons are entitled to 'participate freely in the cultural life of the Community' and to 'enjoy the arts'. The Court has consistently held that it may draw inspiration from such 'guidelines' provided by 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories': see the judgment in Case 4/73 *Nold* v *Commission* [1974] ECR 491 at paragraph 13; *ERT* judgment, paragraph 41.

43 — See also, with regard to this proportionality test, apart from the passages previously quoted from the *Groener* and *Cinéthèque* judgments, the judgments in *Collectieve Antennevoorziening Gouda* at paragraphs 24 and 25 and in *Commission* v *Netherlands* at paragraphs 31, 42 and 43.

44 — See *supra* section 17 and the judgments cited in footnote 26. See also the judgment in *Veronica Omroep Organisatie*, previously cited, where the use of an economic prohibition was accepted as a means of attaining an objective of cultural policy, at paragraph 10 et seq.

45 — The position remains, however, that it is appropriate to arrange for such measures to be as far as possible of a trans-frontier nature, for example by establishing literature or film prizes for a linguistic area common to various Member States. By such means the stress is placed, as required by the Treaty on European Union, (section 22 above) on the manner in which a country's own culture forms part of a common cultural heritage.

of services falling within the field of application of Article 59 of the EEC Treaty — that is, in so far as the cultural pursuit in question constitutes an economic activity such as referred to in Article 60 of the EEC Treaty and in addition it is not exclusively internal as regards a given Member State [46] — they may where appropriate still be considered for justification under Community law.

The basis of this may be found in an analogous application, to national measures concerning the provision of services, of the ground of protection of 'national treasures possessing artistic, historic or archaeological value' mentioned in Article 36 — with reference to movement of goods. Such an analogous application finds support in the case-law of the Court, [47] in the Opinions of Advocates General [48] and in academic writings. [49] I see no difficulty in the fact that the ground of justification set out in Article 36 is narrower than the protection of a country's own cultural heritage, although the Court has accepted that the list in Article 36 is restrictive. [50] This view cannot prevent significance being attached to the grounds of justification mentioned in Article 36 in conformity with the evolution of Community law previously mentioned (section 22 et seq.). [51]

28. However that may be, the rules in question in this case cannot in my view be justified by the overriding reason of protection of the cultural heritage since it has not been shown that the contested Decree-Law seeks in the first place to preserve and promote Spain's own culture. As already stated (section 21) the Decree-Law is essentially inspired by motives of economic policy since it tends to lead to the distribution of *as many* Spanish films *as possible* and in the absence of any quality control is not of such a nature as to promote the production of *high quality films*. To bring that about I can imagine other measures of a genuinely cultural nature and less obstructive to intra-Community provision of services, such as the creation of prizes to promote films of high quality.

46 — See, as regards the first aspect, the references in footnote 13. With regard to the second aspect reference may be made *inter alia* to the judgments in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979 at paragraphs 37 to 39; in the *López Brea* case referred to in footnote 5, at paragraph 7; and in Case C-60/91 *Batista Morais* [1992] ECR I-2085 at paragraph 7.

47 — See the 'Coditel I' and 'Coditel II' judgments at paragraphs 14 and 15 and paragraph 13 respectively.

48 — See Advocate General Warner's Opinion in the first *Coditel* case and Case 52/79 *Debauve* [1980] ECR 860, at p. 878; cf. the Opinion of Advocate General Sir Gordon Slynn in the *Cinéthèque* case [1985] ECR 2606, at p. 2615.

49 — L. Defalque, 'Les restrictions quantitatives et les mesures d'effet équivalent' in *Commentaire Mégret. Le droit de la CEE*, I, Brussels, Editions de l'Université de Bruxelles, 1992, (201), pp. 272 and 273; P. J. G. Kapteyn and P. VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen*, Deventer, Kluwer, 1987, p. 294; see also the English edition of that book by L. W. Gormley: *Introduction to the Law of the European Communities*, Deventer-Boston, Kluwer Law & Taxation, 1989, p. 450.

50 — In my view a similar enlargement may be made with regard to the ground of the protection of the health and life of humans, animals or plants set out in Article 36, which is covered by the wider ground of protection of the environment. Cf. from that point of view the judgment in Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431, in which the solution might perhaps also have been based on this broadly conceived exception to Article 36.

51 — In the *'Coditel II'* judgment previously cited, the Court itself stated that the protection of 'artistic and intellectual property' is to be assimilated to the narrower expression of protection of 'industrial and commercial property' used in Article 36.

29. Since the foregoing examination has led me to the conclusion that the Decree-Law is incompatible with Article 59 of the Treaty it does not seem to me necessary to go any further into the other Community rules which Fedicine has claimed in the main proceedings have been infringed (section 4 *supra*).

30. I suggest that the Court should reply as follows to the question referred to it by the Tribunal Supremo:

National rules which make the dubbing of films from third countries subject to a system of licences which imposes on the distributor the obligation of entering into a contract for the distribution at the same time of a film from the Member State in question constitute discrimination against film producers from other Member States contrary to Article 59 of the Treaty for which, since the rules pursue principally economic objectives, it is not possible to demonstrate any ground of justification recognized by Community law.