Netherlands applying the laws of that country took the new that **TV10**, though established in Luxembourg, was so established to avoid the Netherlands laws and was therefore liable to comply with the applicable laws in that country. That conclusion was informed by the following facts: the management of **TV10** was in the hands of Netherlands citizens, the programmes were intended to be transmitted by cable networks primarily in Luxembourg and Netherlands; contracts were executed between **TV10** and cable network operators in the two countries and no other among the European community member states; the broadcasting of programmes, directing and final editing were effected in Luxembourg; the broadcast target audience was the Dutch public; most employees engaged in the programming were from Netherlands and advertisements were made in the Netherlands.

94. The views of the Regulator were accepted by the courts in the Netherlands, save that there were two questions of law that were referred to the European Community Court, which in its judgment stated the following on pages I-4829-I-4833 paragraphs 10-21:

> *"10 The Raad van State referred to the judgments in Case 33/74 Van Binsbergen v Bedrijfsvereniging voor de Metallnijverheid [1974] ECR 1299 and Case 52/79 Procureur du Roi v Debauve [1980] ECR 833 and stated inter alia that a Member State has the right to take measures to prevent the exercise by a person providing*

services whose activities are entirely or principally directed toward its territory of the Treaty provisions on the freedom to provide services for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that Member State. However, in view of the judgment in Case 79/85 Segers v Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen [1986] ECR 2375, the Raad van State was uncertain how to assess "activities directed from another Member State by a broadcaster whose undertaking has been constituted under the laws of that other Member State and is formally established there".

11 *It therefore considered it necessary to request a preliminary ruling on the following two questions:*

"1. Where a broadcaster not eligible for access to the cable network in Member State A transmits programmes from Member State B with the manifest purpose, as shown by objective circumstances, of thereby avoiding the legislation of the Member State to which the programmes are primarily but not exclusively transmitted, is that a case of provision of services with a relevant cross-border element for the purposes of Community law?

2. Are restrictions imposed by the receiving Member State on the provision of the services described in Question 1, whereby a broadcaster is regarded as a domestic organization despite the fact that it has chosen to establish itself in another Member State and is therefore denied access for its programmes to the national cable network if they do not comply with the access conditions applicable to domestic broadcasters ° relying on the fact that the broadcaster established in another Member State is seeking to evade the legislation of the receiving Member State designed to maintain the pluralist and non-commercial character of national broadcasting ° compatible with Community law, having regard inter alia to Articles 10 and 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms?"

Applicability of the rules on freedom to provide services

12 *By Question 1 the national court essentially asks whether the concept of "provision of services" referred to in Articles 59 and 60 of the Treaty covers the transmission, via cable network operators established in one Member State, of television programmes supplied by a broadcasting body established in another Member State, even if that body established itself there in order to avoid the legislation applicable in the receiving State to domestic broadcasters.*

13 *Before considering that question, the Court notes that it has already held in Case 155/73 Sacchi [1974] ECR 409, paragraph 6, that the transmission of television signals comes, as such, within the rules of the Treaty relating to the provision of services.*

In Debauve, cited above, paragraph 8, the Court stated that there was no reason to treat the transmission of such signals by cable television any differently.

14 *Also in Debauve the Court observed, however, that the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State. Whether that is so in a particular case depends on findings of fact which are for the national court to establish. In the present case, the Raad van State has established that TV10 was constituted in accordance with Luxembourg law, that the seat of the company is in the Grand Duchy of Luxembourg and that its intention was to broadcast to the Netherlands.*

15 *The circumstance that, according to the Raad van State, TV10 established itself in the Grand Duchy of Luxembourg in order to escape the Netherlands legislation does not preclude its broadcasts being regarded as services within the meaning of the Treaty. That is distinct from the question of what measures a Member State may take to prevent a provider of services established in another Member State from evading its domestic legislation. The latter point is the subject of the Raad van State' s second question.*

16 *The answer to Question 1 must therefore be that the concept of "provision of services" referred to in Articles 59 and 60 of the Treaty covers the transmission, via cable network operators established in one Member State, of television programmes supplied by a broadcasting body established in another Member State, even if that body established itself there in order to avoid the legislation applicable in the receiving State to domestic broadcasters.*

The lawfulness of certain restrictions on freedom to provide services

17 *By Question 2 the national court essentially asks whether the provisions of the Treaty on freedom to provide services are to be interpreted as precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State.*

18 *The Court has held in Case C-288/89 Collectieve Antennevoorziening Gouda v Commissariaat voor de Media [1991] ECR I-4007, paragraphs 22 and 23, Case C-353/89 Commission v Netherlands [1991] ECR I-4069, paragraphs 3, 29 and 30, and Case C-148/91 Veronica Omroep Organisatie v Commissariaat voor de Media [1993] ECR I-487, paragraph 9, that the Mediawet is intended to establish a pluralist and non-commercial radio and television broadcasting system and thus forms part of a cultural policy whose aim is to safeguard the freedom of expression in the*

audiovisual sector of the various components, in particular social, cultural, religious and philosophical ones, of the Netherlands.

19 *It also follows from those three judgments that such cultural policy objectives are objectives of general interest which a Member State may lawfully pursue by formulating the statutes of its own broadcasting bodies in an appropriate manner.*

20 *Moreover, the Court has already held in connection with Article 59 of the Treaty on the freedom to provide services that a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State (see van Binsbergen, cited above).*

21 *It follows that a Member State may regard as a domestic broadcaster a radio and television organization which establishes itself in another Member State in order to provide services there which are intended for the first State' s territory, since the aim of that measure is to prevent organizations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law, in this case those designed to ensure the pluralist and non-commercial content of programmes."*

95. The next are joined cases from the European Economic Community dealing with the prohibition of misleading advertising directed at children that was broadcast from one-member state into the territory of the other member state, in ***Konsumentombuds mannen (KO) v. De Agostini (Svenenka) Foorlag AB*** (C-34/95 and ***TV ShopiSverige AB*** (C35/95 and C-36/95. The judgment concerns three cases that were combined, a referral from a member state to the community court to render the interpretation of Articles 30 and 59 of the EC Treaty and of the Council Directive 89/552/EEC of 3 October 1989 on "Television without Frontiers".

The facts are that TV3, a broadcasting entity established in the U.K beamed its television programmes by satellite from the U.K to Denmark, Sweden and Norway. TV4 and Home Shopping Channel were channels that operated in Sweden duly registered in accordance of the broadcasting laws of that country. The advertising in issue was being retransmitted to Sweden by satellite from the U.K and shown on TV3. The same was also broadcasting on TV4 in case C-34/95 and on Home Shopping Channel in cases C-34/95 and on Home Shopping Channel in cases C-35/95 and C-36/95 without prior broadcast from another member state. As the purpose for which this case is being cited is rather limited as previously explained in citing the first case above, I will leave the details out. The regulator in Sweden was not happy with the advertisement and sought to restrain same based on the domestic law. The judgment seeks to determine the distribution of the powers of control between member states over the activities of a broadcasting entity who is established in one member state but whose activities has a potentially negative impact in another member state in the light of ECC law on broadcasting.

95. I reproduce below the exposition of the applicable law by the court at paragraphs 33-38 on pages I-3888 to I-3889 of the judgment delivered on 9 July 1997:

> *"33. Although the Directive provides that the Member States are to ensure freedom of reception and are not to impede retransmission on their territory of television broadcasts coming from other Member States on grounds relating to television advertising and sponsorship, it does not have the effect of excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes.*
> *34. Thus the Directive does not in principle preclude application of national rules with the general aim of consumer protection provided that they do not involve secondary control of television broadcasts in addition to the control which the broadcasting Member State must carry out.*
> *35. Consequently, where a Member State's legislation such as that in question in the main proceedings, which, for the purpose of protecting consumers, provides for a system of prohibitions and restraining orders to be imposed on advertisers, enforceable by financial penalties, application of such legislation to television broadcasts from other Member States cannot be considered to constitutes an obstacle prohibited by the Directive.*
> *36 According to De Agostini, TV-Shop and the Commission, the principle that broadcasts are to be controlled by the State having jurisdiction over the broadcaster would be seriously undermined in both its purpose and effect if the Directive were held to be inapplicable to advertisers. They argue that a restriction relating to advertising affects television broadcasts, even if the restriction concerns only advertising.*
> *37 in response to that objection, it is sufficient to observe that Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17), which provides in particular in Article 4(1) that Member States are to ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public, could be robbed of its substance in the field of television advertising if the receiving Member State were deprived of all possibility of adopting measures against an advertiser and that this would be in contradiction with the express intention of the Community legislature (see, to this effect, the judgment of the Court of the European Free Trade Association of 16 June 1995 in Joined Cases E-8/94 and E-9/94 Forbrukerombudet v Mattel Scandinavia and Lego Norge, Report of the EFTA Court, 1 January 1994 – 30 June 1995, 113, paragraphs 54 to 56 and paragraph 58).*
> *38 It follows from the foregoing that the Directive does not preclude a Member State from taking, pursuant to general legislation on protection*

of consumers against misleading advertising, measures against an advertiser in relation to television advertising broadcast from another Member State, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State".

96. The 3rd and final European case to consider involving cross border broadcasting is the joined cases of ***Mesopotamia Broadcast A/S METV*** (c-2440) and ***Roji TV a/s (c-245/10) v. Bundesrepublik Deutschland***. The 2 broadcasters operated from Denmark but beamed their broadcast signal by satellite across several nations including Germany where the broadcast programme elicited a prohibition from the authorities there. Mesopotamia Broadcast was the holding company and the licenced broadcaster in Denmark but operated the television through Roj TV, that in turn broadcast by satellite mainly using Kurdish language throughout Europe and the Middle East. Further programmes were commissioned from, among others, a German established company. In 2006 and 2007, Turkey lodged a complaint with the Danish Regulatory Authority on the basis that Roj TV was in support of the Kurdish Workers party (the P.K.K) objectives, an entity that was considered to be a terrorist organization by the European Union. The complaint was rejected by the Danish Authorities who found the programmes not objectionable on the

grounds of incitement of hatred by reason of race, sex, religion or nationality. It was further opined that the broadcast programmes were expressive of information and opinions and the violent images were presumed to be reflective of a reality in Turkey and the Kurdish territories.

97. On the other hand on 13 June 2008, the German Authorities concluded that the foregoing activities of Roj TV were incompatible with the principles of international understanding and contrary to the laws of Germany, and proceeded to prohibit the broadcast of the objectionable material. The broadcasters sort relief from the German Court alleging that in terms of the existing rules of the European Community, the regulation of the broadcasting activities falls purely within the powers of the Denmark Authorities and that any other control was prohibited. The German Court having viewed the programmes in question, concluded that the same were biased in favour of P.K.K and largely militaristic and violent in nature; that the broadcast in effect had adopted the views of P.K.K of settling differences by violent means and promoting terrorist activities as heroic and martyrdom and consequently creating a recruiting ground in Turkey and heightening tension between the

Turks and Kurds living in Germany. The court concluded that such activity amounted to the infringement of the principles of international understanding within the terms of their national laws. However, not being certain of the applicable rules of the European Community referred the question to the Court of Justice.

98. The question referred for determination is as follows;

> *"Does and, if so, under what circumstances, national legislation concerning the prohibition of an association for infringement of the principles of International Understanding fall within the filed, and is it thus precluded by Article 2(a) of the Directive."*

99. The European Court of Justice made, at paragraphs 35-37 pages I 8812 the following observations:

> *"35. The Directive establishes, therefore, the principle of recognition, by the receiving Member State, of the control function of the Member State of origin with respect to the television broadcasts from broadcasters falling within its competence. Article 2a (1) of the Directive provides that Member States are to ensure freedom of reception and must not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by the Directive.*
>
> *36 In that connection, the Court stated that it is solely for the Member State from which television broadcasts emanate to monitor the application of the law of the originating Member State applying to such broadcasts and to ensure compliance with Directive 89/552, and, second, that the receiving Member State is not authorised to exercise its own control for reasons which fall within the fields coordinated by the Directive (see, to that effect, Case C-11/95 Commission v Belgium [1996] ECR I-4115, paragraphs 34 and 86, and De Agostini and TV-Shop, paragraph 27).*

37 *However, it is clear from the non-exhaustive character of the Directive with regard to areas relating to public order, public morality or public security that a Member State is free to apply to the activities carried out by broadcasters on its territory generally applicable rules concerning those fields, in so far as those rules do not hinder retransmission."*

100. After holding that the broadcast material in issue fell within the meaning the of "***incitement of hatred***" as embodied in Article 22(a) of the Directive, the Court concluded, at paragraphs 47-51 at page I-8815.

"*47. In order to enable the referring court to decide the dispute before it in the light of the interpretation of Article 22a of the Directive set out above, it is appropriate to refer to the judgment in De Agostini and TV-Shop, with respect to the relationship between the provisions of that directive concerning television advertising and sponsorship and national rules other than those specifically referring to the broadcast and distribution of programmes.*

48 *In paragraphs 33 and 34 of that judgment, the Court held that although the Directive provides that the Member States must ensure freedom of reception and are not to restrict retransmission on their territory of television broadcasts coming from other Member States on grounds relating to television advertising and sponsorship, it does not have the effect of completely and automatically excluding the application of such rules. Thus the Directive does not in principle preclude the application of national rules with the general aim of consumer protection provided that they do not involve secondary control of television broadcasts in addition to the control which the broadcasting Member State must carry out.*

49 *In paragraph 38 of that judgment, the Court also stated that the Directive does not preclude a Member State from taking, pursuant to general legislation on protection of consumers against misleading advertising, measures against an advertiser in relation to television advertising broadcast from another Member State, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State.*

50 *That reasoning also applies to the legislation of a Member State which does not specifically concern the broadcast and distribution of programmes and which, in general, pursues a public policy*

objective without however preventing retransmission per se, on its territory, of television broadcasts from another Member State.

51 *In that connection, it is apparent from the file submitted to the Court by the referring court and the explanations provided by the German Government during the oral discussion before the Court that the Vereinsgesetz does not specifically refer to broadcasters or to the broadcast or distribution of television programmes as such but concerns the activities of associations in general. Moreover, the operative part of the decision of the Federal Interior Ministry of 13 June 2008, which is based on that law, read in conjunction with the Basic Law, contains 11 points. In particular, it is clear from that decision that the operation of the television broadcaster Roj TV by Mesopotamia Broadcast infringes the principles of international understanding, that the television broadcaster Roj TV could no longer act within the territorial scope of the Vereinsgesetz and that that broadcaster was prohibited within the territorial scope of that law."*

101. A review of the foregoing European cases leads us to the conclusion that even within the regulated nations of Europe, cross border broadcasting is under tight control to mitigate against negative effects including protection of domestic broadcasters and other domestic national interests. The promotion of the free provision of broadcasting services across the nations of Europe is counter balanced with the interests of paramount national importance. It is clear from the above cited authorities that not only has the European Convention and the Directive on Trans-Frontier Broadcasting or Television without Frontier permitted the broadcast receiving member states some control over what is broadcast in their territories but it is also recognised that there is a residual power of control by a member state where the

Convention and the Directive are silent in line with the domestic law and public policy provided the same is of general application to all persons.

102. It cannot hardly be disputed that in the absence of any internationally binding principle of law or conventional obligations, the Republic of Botswana is at liberty to regulate any activity taking place or having effect in her territory. It has not been suggested that **DStv** is not being broadcast for viewing by the public in Botswana or a part thereof and it is not disputed that the broadcasters do derive income within the jurisdiction. The Legislature, given the clearly expressed objects of the Act, intended that the Regulatory Authority should have control over what takes place within the regulated communication sector in this country.

103. It seems the broadcasting policy and the regulatory regime in Europe as first effected through the Television without Frontiers Directive as supplemented by other directives including the satellite and Cable Directive No. 93/83, apparently "***intended to break down national barriers***" with the resultant enhancement of free broadcasting of television programmes throughout the

European Union. According to Professor P. Bernt Hugenholtz of the University of Amsterdam in the article entitled, "***SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive***", IRIS Plus, 2008-2009 Issue, European Audio Visual Observatory, Strasbourg, France 2009, the intended purpose of achieving harmonised regulation had not been achieved. The author makes a very important observation at page 9 of the article that the introduced European regulatory regime sought to bring about a change from the traditional regulatory regime whereby each country of Europe had its own regulatory regime resulting in multiple licensing to a regime where regulatory power including the issuance of a licence is done in one country only from which the uplink programme carrying signal is effected. However, even with the more homogeneous regulatory regime, the limitations brought about by the regulation of intellectual property undermined the advocated open reception of the broadcast signal across national boundaries. I reproduce from page 9 of the article:

> *"**3. Satellite Broadcasting***
> *The first part of the Directive deals with broadcasting via satellite and its centrepiece constitutes a legal novelty: a Community-wide right of communication to the public by satellite. According to Art. 1(2)(b), a satellite broadcast will amount to communication to the public only in the country where the uplink of the programme-carrying signal occurs. Thus, the Directive departs from the so-called "Bogsch theory", named after former WIPO Director-General Dr. Arpad Bogsch that held that a satellite broadcast is a restricted act in all countries within its "footprint" and*

therefore requires licences from all right holders in that geographical area. Since the transposition of the Directive, only a licence in the country of origin of the satellite broadcast is needed. Thus, at least in theory, a pan-European audiovisual space for satellite broadcasting is facilitated.

Notion of "Satellite"

Art. 1(1) of the Directive defines the term "satellite" in a broad and technology-neutral way. The term encompasses both satellites broadcasting on frequencies intended for satellite broadcasting (Direct Broadcasting Satellites) and communications satellites using other frequencies (Fixed Services Satellites), but serving as broadcasting satellites nonetheless. ***From a copyright perspective, these technical distinctions, that stem from the domain of telecommunications law, are basically irrelevant. What is relevant is whether the signals transmitted by satellite can be received by the general public****. As the Court of Justice of the European Communities (ECJ) has held in its Lagardère ruling, if a communications satellite is used to transmit encoded programme carrying signals that can be received only by technical means that are available solely to professionals, and not to the general public, the satellite does not qualify as a "satellite" within the meaning of Art. 1(1) and the provisions of the Directive do not apply.9 In its holding, the Court expressly referred to the interpretation it had previously given to the notion of "public" in the "Television without Frontiers" Directive in the Mediakabel case.*

Communication to the Public by Satellite

According to Art. 1(2)(b) of the Directive, communication to the public by satellite is a relevant act only in the Member State where the signals originate, as set out in Art. 1(2)(a). A broadcasting organisation will need to acquire licences only from right holders in the Member State of origin of the signal. However, Art. 1(2)(b) does not rule out that licence fees and other contractual conditions take into account the size of the footprint (i.e. the number of countries reached) of the satellite broadcast. On the contrary, Recital 17 instructs the parties concerned to "take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version".

Art. 1(2)(b) precludes that right owners divide the right of communication to the public by satellite into territorially defined parts. ***However, parties remain free to contractually agree on obligations to apply encryption or other technical means so as to avoid reception by the general public of programme-carrying signals in countries for which the broadcast is not intended. By limiting the making available of decoders, territorial exclusivity can still be achieved, notwithstanding the aim of the Directive to create an internal market for transfrontier satellite broadcasting****.*

Art. 1(2)(c) confirms that communication to the public takes place even if the programme carrying signals are encrypted. Therefore, transmitting copyright protected works over satellite based pay television services is a restricted act. However, in line with the definition of "satellite"as interpreted by the ECJ in Lagardère, communication to the public occurs only if the means for decrypting the broadcast are provided to the public

by the broadcasting organisation or with its consent. Therefore, as the Supreme Court of the Netherlands recently held in the case of BUMA and STEMRA v. Chellomedia, a transmission via satellite of encrypted television programmes that can be received only by cable operators, does not qualify as a communication to the public.12 Art. 2 instructs Member States to provide for an exclusive right, under copyright law, to communicate to the public by satellite. This provision is the necessary counterpart to the country of- origin rule of Art. 1(2)(b). If in the country of origin of the satellite broadcast no such right existed, right holders across the European Union would have no right to authorise or prevent it. The act of communication to the public by satellite and place in which it occurs are defined in Art. 1(1) and 1(2). Art. 2 has been largely superseded by Art. 3 of Directive 2001/29/EC, the so-called Information Society ("InfoSoc") Directive,13 which provides for a generally-phrased right of communication to the public, that certainly includes acts of satellite broadcasting."[**My Emphasis**]

104. It is noteworthy that in Europe for the purpose of copy right protection, communication to the public by satellite takes place where reception is effected by a broadcaster or otherwise takes place with the broadcaster's authority. In the instant case, as previously stated above, the uplink of the programmes carrying signal is effected elsewhere and beyond the borders of this republic at the instance of **MCA,** and it is in turn beamed by satellite to, among other countries of Southern Africa, Botswana in encrypted form which render it unintelligible to the public in Botswana unless certain measures are put in place to render the programmes intelligible and accessible. In my opinion up until decryption of the coded material here in Botswana, it will be absurd to speak of any viewing public in Botswana. Even though

some people with the technical knowhow or some average understanding may be aware that there are programmes signals floating around, in the absence of deployment of information and technologies and broadcasting equipment as defined in the Botswana legislation, one cannot legitimately talk of television broadcasting. In terms of Section 2 of CAP:03, "***Television***" means:

> "***The conveyance of visual information together with one more channels of associated audio or more channels of associated audio or suitably encoded textual information or both.***"

105. Section 5(1)(b) of CAP 72:03 tasks the Regulatory Authority with the responsibility to "promote and ensure universal access with respect to provision of communications services and the latter includes among other things, broadcasting. Section 6(1) of the Act takes the matter of universal access further by charging the Board with responsibility to facilitate, throughout Botswana, the provision of "safe, reliable, efficient and affordable services in the regulated sectors" which is inclusive of broadcasting services. It seems to me that the target of regulation includes accessibility to the services in terms of quality, quantity and pricing of the services offered and that is done in the interests of consumers and users here in Botswana. In terms of the envisaged regulatory regime, the

tasks of the Board cover the assessment of the fitness and/or capacity and resources of the service operators to meet reasonable public demand for the services and products. It is also clear that section 6(2) of CAP 72:03 casts the net wider to cover issues of the cost of production and distribution of the communications services as well as profitability, sustainability and competitiveness thereof.

106. The Applicant engages in the provision of subscription management services that according to the definition section of the Act "***enables consumption of a subscription broadcasting service***" here in Botswana. The same provision regards such a service as a broadcasting service. Likewise, the Applicant trades in broadcasting equipment here in Botswana, in particular, devices such as set top boxes and receivers that are used to receive broadcasting services. Such devices constitute a critical link between the satellite and the intended audience as they are able to capture the broadcast programmes signal and render it potentially available at the press of a button to the viewers provided of course the process is completed by the enablement of the broadcast equipment to communicate the same in an intelligible manner to the television set. That process is done through the enablement of

a smart card, another product sold by the Applicant that currently can only be activated at the premises of the Applicant situate within the jurisdiction upon the customer bringing the set top box or receiver, and on payment of a predetermined subscription fee, to the Applicant's officials, who in turn connect such equipment to its broadcasting equipment or telecommunications equipment that is linked to the broadcasting equipment or telecommunication equipment of **MCA,** a step that completes a broadcasting system cycle. It is during this time that information is exchanged from the Applicant to **MCA** and vice versa by means of electronic communication (all the technical terms are defined in the Act) and through the deployment of information and communication technologies.

107. The place and role of subscription management service is so central and critical to the process of subscription broadcasting such that it completes the entire process of broadcasting and constitutes an indispensable part thereof. The fact that Naspers Ltd, a South African Company, has set up a member of companies in which it holds controlling shareholding stake who in turn have a division of labour amongst themselves bears evidence of the

importance thereof and explains why it was necessary for the Botswana legislation to focus on the overall process of broadcasting and the entire organisational structure instead of merely on individual legal entities even as single or several activities of any of the components of the said structure are qualified by the word broadcasting. On page 17 paragraphs 33-33.3 of the supplementary affidavit filed on behalf of the Applicants, Naspers Ltd holds 100% of shares in both **MCA** Ltd which in turn operates **DStv** and in MIH Holdings (Pty) Ltd, that in turn holds 51% shareholding in **MCB** (Pty)Ltd that provide subscription management service. The latter generates no income of its own but has a lifeline in the operator of **DStv** alone who derives income from the services provided by the former and in turn is paid a commission for the same. The Botswana regulatory regime avoids the chasing of shadows trying to locate the entity with overriding control of the broadcasting process. Once the activity has been categorised as a broadcasting activity that is taking place or having effect in Botswana, the focus shifts to the completed process of broadcasting and the body whose actions have been so characterised is held responsible for the broadcast without attempting to assign the individual efforts to each and

every entity in the overall organisational structure for indeed to do otherwise in a complicated undertaking such as satellite broadcasting where there are many players often situate in different places even abroad would be an attempt to do the impossible. What happens between closely associated legal entities is like what happens in private between marital spouses and only the participants know the truth. However, it is the outward public manifestation of the relationship between the associated legal entities that the law targets such that the very services that are rendered by the Applicant, the subscription management service is by operation of the law declared to be a broadcasting service and accordingly requiring a broadcasting licence issued pursuant to Section 31(1) to be carried out lawfully in Botswana. By seeking to be so licenced, the provider of the regulated broadcasting service undertakes or is obliged to comply with the regulatory rules and policies for and on behalf of the collective.

108. In my humble view to read the Act any other way so as to afford the provider of a subscription management service escape route would be to render the Act not only ineffective but to defeat its very purpose of achieving an equitable and uniform regulation of the

broadcasting service in Botswana. The regulatory regime is not intended to be discriminatory but to bring about a fair and balanced provision of services in such manner that it is both reasonably accessible to the public in Botswana and profitable to the service providers wherever they may be situated. The opposing view seeks to defeat this noble idea in favour of advantaging that part of broadcasters who are situate beyond the borders of this country by extending to them free access to the Botswana market without corresponding obligations not to harm the public and/or not to overreach them whilst afforded a free hand to make super profits at minimum costs here in Botswana. The resultant outcome will be that the domestic broadcasting industry would have to bear the burdens of regulation alone and in turn become unprofitable. The further negative effect of such interpretation is to undermine the facilitation of the growth of the domestic broadcasting industry as well as to discourage the growth of investment, technological development and the creation of job opportunities here.

109. The spirit of the regulatory regime in Botswana is the same as the one behind the European regulatory regime as identified by

Professor P. Bernt Hugenholtz on page 10 of his article cited above wherein it is stated:

> "***Satellite Broadcasting from Outside the EU***
> *Art. 1(2)(d) extends the definition of communication to the public by satellite (Art. 1(2)(b)) to cover two situations where the communication actually occurs outside the European Union.* ***The provision seeks to discourage broadcasting organisations from relocating their operations outside the European Union to avoid the application of the Directive (Recital 24). If an act of communication to the public occurs outside the European Union, but either the signal is uplinked from within the EU or a broadcasting organisation established in the EU has commissioned the transmission, the communication shall be deemed to have occurred in the Member State where the uplink has taken place or where the broadcasting organisation is established.*** *This legal fiction, however, applies only if the non-EU State where the communication actually occurs does not offer the level of protection provided under Chapter II (most importantly, an exclusive right of communication to the public by satellite). For example, if a broadcaster established in Luxembourg were to use a satellite network owned and operated by an African State, to broadcast to European audiences, the broadcast would be deemed to occur in Luxembourg, unless the copyright law of the African State provided for an exclusive right of communication to the public by satellite. With respect to satellite broadcasts from outside the EU not covered by Art. 1(2)(d), Member States remain free to apply the "Bogsch" (country of reception) theory."*

110. The Botswana regulatory regime seeks to regulate the broadcasting activity that impacts the public in Botswana and the domestic economy. The ultimate test is whether one or more of the broadcasting activities take place or has effect here in Botswana and it matters not where the other broadcasting activities take place beyond the jurisdiction. In this sense therefore any evasive action on the part of some of the actors would be settled at the

point where they have effect. The distribution of the various broadcasting activities to several entities registered in different jurisdictions by Naspers Ltd to avoid regulation in the countries targeted for broadcasting has not born the desired results especially in Botswana. The problem arises from the same source as happened in Europe though from a different angle. Just as in Europe, the film distributors were unwilling to grant licences to be effective across the nations of Europe, the Legislature did not give up its power to regulate what takes place here whilst at the same time letting the participants in the regulated sector to network across the nations of the world. This limiting factor is discussed by Professor P. Bernt Hugenholtz on page 11 of his article as follows:

> *"The main problem here is that the European ideal of a pan-European television market and the reality of the market simply do not match up. Film distributors rarely allow the licensing of broadcasts of their films on the pan-European level, but cherish the principle that national markets within the European Union have their own dynamics, depending on national cultural characteristics and audience preferences. Consequently, movies are released at varying times and television broadcasts occur in "windows" that differ from country to country. Preservation of this so-called "media chronology" appears to be an almost sacred principle of the film industry.*
> *The corresponding legal reality is that film producers and distributors have continued to split rights along national borderlines and impose the use of encryption techniques upon broadcasting organisations to avoid "spill-over" across national borders.*
> *Concomitantly, most broadcasters in Europe do not seem to be interested in a pan-European right of satellite broadcasting. Broadcasting in Europe is still very much steeped in national culture, language and tradition, so there is little incentive for a broadcaster to pay a (much) higher licence fee*

to acquire "European" rights when its market or public service mandate is limited to a single Member State.
In its review report, the European Commission protests against the ongoing process of market fragmentation by means of contract and encryption, but offers no real solutions:
"Complete application of the principle of the Directive, which involves moving beyond a purely national territorial approach, should therefore be encouraged in order to allow the internal market to be a genuine market without internal frontiers for right holders, operators and viewers alike."
But a true pan-European television broadcasting market will occur only if there is sufficient supply and demand in the first place, as is emphasised by the FIAPF's Legal Committee, in response to the Commission's report:
"The Commission's concern seems to stem from a vision of the broadcast sector's development that is at least ten years out of date. It is clear that the main inhibitory factor to the growth of pan-European broadcasters is not so much the right holders' lack of willingness [...] to license for multiple territories, as the conclusion drawn by leading broadcasting organisations that pan-European services only make economic sense in very narrow segments of the TV market. It is baffling to think that an issue that seems of concern to no one in the industry itself, should thus be selected as a high priority by the Commission."

111. The Article ends by making observation on the complexity of the broadcasting process arising from the convergence of technology and continuous evolving communications sector on page 17 at paragraphs 2 to 4 as follows:

"Clearly, the Commission's trust in a system of collective rights management has been somewhat undermined, in favour of freedom of contract. This may spell good news for broadcasters and cable operators, but not for the authors and artists who rely on collecting societies to receive adequate remuneration.
5. Conclusions
More than fifteen years after the adoption of the Satellite and Cable Directive it is clear that the Directive's goals have only partially been realised. The market for satellite broadcasting services in the EU remains as fragmented as it was in the early 1990s when the Directive was conceived. Contractual licensing practices combined with signal encryption techniques have allowed broadcasters and right holders to continue segmenting broadcasting markets along national borderlines. As a result, as the Commission laments in its report, large numbers of European citizens are still being deprived of the possibility of accessing

and viewing broadcasting and pay-television services directed at domestic audiences.
Moreover, the process of convergence that comes with the increasing digitisation of media and platforms threaten to undermine the Satellite and Cable Directive's "dedicated" regimes for satellite broadcasting and cable retransmission. Convergence is occurring at all levels: analogue television services are "going digital"; radio and television programmes are being "simulcast" over the Internet; cable operators are reinventing themselves as providers of broadband video services and converting television signals into digital files using the Internet Protocol. The future of the cable retransmission provisions of the Directive looks especially bleak now that traditional over the- air broadcasting is gradually disappearing, particularly in countries with high cable penetration where programme-carrying signals are injected directly into cable networks. What will remain of the Satellite and Cable Directive if satellite broadcasting and cable retransmission services can no longer be distinguished from other media, including Internet-based services, to which the normal copyright rules of the Information Society Directive apply? The special ("vertical") rules of the Satellite and Cable Directive are indeed quite different from the "horizontal" provisions of the Information Society Directive of 2001, which apply to all media, digital or analogue, across the board. Whereas the Satellite and Cable Directive mandates a Community-wide right of communication to the public by satellite, the Information Society Directive requires Member States to provide for a general right of communication to the public, including a right to make content available online, that is supposed to be exercised at the national level. Whereas rights for satellite broadcasting have to be cleared only in the country of origin, rights for webcasting need to be licensed for every territory where a work is made available.

112. Moving from a regional regulatory framework to a broader international one, reference may be made to the study by Mr. Scott Minehane entitled, Regulatory Challenges and Opportunities in the New ICT Ecosystem, commissioned by the International Telecommunications Union (ITU) (C) ITC 2018. It appears to me that there is great similarity between the regulatory approach of the Botswana legislation and what is recommended in this study. The report is comprehensive and too detailed but I will just quote

a passage from the Executive Summary thereof at pages' iv-v paras 4 and 7:

> *"In reality, OTT services are no longer over-the-top in terms of their contribution to the telecommunication/ICT sector future. Although seen as disruptive to previous business models and markets, they have become an integral and important part of the global move to the app economy. In the media sector, the drain on revenues that began with the rise of the Web in the 1990s has been catalysed by the emergence of the app economy and new business models. Falling advertising revenues for newspapers and magazines have now spread to commercial free-to-air television as the video streaming revolution including players like Netflix delivers on-demand choices to televisions, tablets and even smartphones making the 'appointment viewing' model of the broadcasters suddenly anachronistic.*
>
> *The breadth of social and economic issues arising from this technology-driven upheaval is daunting. Many of these issues such as the fate of professional news reporting and journalism, the quality of political reporting and commentary, and the problem of 'fake news' are beyond the scope of this report. Even so, the nature and scope of regulatory issues encompassed by the impact of the app economy on traditional telecommunications and media, particularly broadcasting, seems at best challenging and at worst baffling.*
>
> *The starting point in defining regulatory responses to the app economy often calls for a more level playing field. In some areas, perhaps most obviously relating to inequalities in the taxation of online service providers and network operators, what 'a level playing field' actually means can at least be conceptualised. In other areas, universal service, for example, it is difficult to identify what a level playing field even means, let alone to define operational policy and regulatory measures. In areas such as consumer rights and privacy, the app economy heightens already well-established concerns that originated in the shift online that began in the 1990s. Other traditional telecommunication-centric regulatory interventions such as interconnection requirements and quality of service do not have obvious or practically enforceable analogues on the world of online services.*
>
> *Given this regulatory complexity and ambiguity, it is tempting to adopt a reactive and piecemeal approach to the rise of the app economy. This approach, however, runs the risk of being inadequate and potentially running into regulatory dead ends. This report suggests that a better approach is to develop an overarching conceptual and analytical framework for understanding the app economy that will enable the development of a more holistic approach to regulation."*

112. The report ends by making the following observations at page 48:

> *"In order to achieve these goals, it is critical that regulators have the appropriate tools to protect consumer interests and industry regulators have the ability to balance, if required, the – often global – market power of the app economy and other players in the new ICT ecosystem. Progressively effective regulation will need to consider its effects across sectors and industries and this will require collaborative regulation between the regulators of various sectors (as well as economy-wide regulators including, but not limited to, central banks, competition and tax authorities) who have traditionally not needed to work together. Further, international co-operation between governments and regulators will be necessary to address global issues such as taxation and the market power of MNEs. The search for the right regulatory measures recipe is a significant challenge and is ongoing.*
> *Importantly, as highlighted by some regulators, "While specific changes can facilitate particular services and resolve individual problems, incremental changes risk creating fragmented, rather than coherent, regulatory schemes."*

113. I have come to the conclusion that in terms of the Botswana legislation the offering of subscription management service to the public or a part thereof or to subscribers to a subscription broadcasting such as **DStv** is deemed to be a broadcasting activity and indeed the Applicant is so registered. In my respectful view isolating the phrase, "***to enable consumption of***" appearing in the definition of "***subscription management service***" and disregarding the definition of the other terms such as "***broadcasting service***" that incorporates subscription management service therein and the definition of "***television***" which in turn incorporated "***convergence***" of technologies that is also defined in the Act is too restrictive and distorts the real

meaning envisaged by the Legislature as to defeat the very objects of the Act. One would have to close his or her eyes to the fact that the very equipment that the Applicant trades in is deemed to be broadcasting equipment which equipment is used to receive television broadcasting. Such an approach will also have to pay a blind eye to the fact that the definition of the word "***broadcasting***" is seen as a process that involves two major parts, transmission of a signal and reception of the signal by the target audience, and it is at the later part that the programme signal is made intelligible and that is where the Applicant plays a critical role. This is where "***information***" as defined in the Act is put together and input into networked computers and "***information and technology***" is deployed and thus completing a "***broadcasting system***". The resultant outcome of the Applicant's actions, is that the broadcast programmes signal that could not be accessed by the public or any part thereof is then rendered available for viewing by the subscribers.

115. I now turn to the question whether it is within the power of the regulatory authority to demand compliance with section 90 (2) of CAP. 72:03 that reads:

"90 (2) A licensed service provider or supplier of a service or a product in a regulated sector shall submit a proposal in writing to the Authority in respect of the tariff which it intends to apply for the different services and or products"

116. In terms of the foregoing provision a service provider or product supplier within the controlled sector such as a subscription management service, which is deemed to be a broadcasting service, ought to submit the intended tariff for the different services and products offered. In my opinion such tariff cannot be anything other than those related to the services and products deemed by the Act to be part of the broadcasting process, inclusive of subscription management service, as the Applicant would otherwise prefer. When the Respondent attached the conditions complained of, it was merely restating a statutory obligation. The Applicant, it cannot be reasonably disputed, is making available and accessible to the public in Botswana or a part thereof or the subscribers to a subscription television, a broadcasting service named and styled **DStv** with the assistance of associated companies within the meaning section 90 (2) of **CAP 72:03** and consequently is obliged to furnish a tariff for the entire service. In my opinion that tariff is what is chargeable to the subscribers in Botswana otherwise called subscription fees inclusive of equipment for receiving and decrypting the broadcast material. It

is common cause that the Applicant charges and collects no other fees for rendering its services to **DStv** subscribers, and the breakdown of the fees being levied, if any, is only known by the collective group associated with **DStv**.

117. I am satisfied therefore that the "***subscription fees***" referred to in clauses 13.1 and 13.2 and the "***rates***" under reference in clause 13.2 of the Applicant's licence are in fact the same as the tariff referred to in section 90(2) of **CAP 72:03**, and as stated above such tariff relate to the broadcasting of **DStv** programmes in Botswana, which as a matter of fact are different from other countries. In clause 4 of the licence, it is recognised that the licenced entity may need to initiate business associations in order to properly and effectively carry out the licenced activity and it is made clear that the ultimate responsibility lies with the licensee. Further the service offered (the subscription management service) must relate to an authorised commercial broadcasting service that, in terms of the Act, may be either free or by subscription. I reproduce clauses 4 to 4.5 of the licence:

> "*4.0* ***Licence Package***
> *4.1* *Subject to the terms and conditions provided for in this License,* ***the License is hereby authorised to provide Subscription Management Service for commercial broadcasting service***

authorised by the Botswana Communications Regulatory Authority.

4.2 ***The rights granted in Clause 4.1 above may be exercised partially through agents of Licensee, provided that the Licensee shall be responsible for the acts or omissions of such agents executed in the course of their duties as agents of the licensee.***

4.3. *With regard to the Licensee's relationship to any agent or contractor:*

4.3.1 The actions or omissions of an agent will not absolve the licensee from any liability in the event of any contravention of a license condition by such agent or contractors.

4.3.2 Should an agent or contractor of the License commit any act or omission in violation of a condition of this License, the License shall upon becoming aware thereof notify the Authority and act as expeditiously as possible to remedy or mitigate any such contravention.

4.4 *Nothing contained herein shall be construed or understood to relieve or exempt the Licensee from the obligation to comply with the provisions of this License, the Act, the Regulations or any other Botswana law, to the extent that they may be applicable.*

4.5 *The Licensee shall at all times observe the provisions of any applicable international treaties, such as those ITU treaties to which Botswana is a signatory to the extent that the may be applicable.*

[**My Emphasis**]

118. It is clear from the information furnished by the Applicant to the Regulatory Authority that the subscription management services undertaken by the former relate to **DStv** and the use of satellites was appreciated and this is reflected in the licence in clauses 9 and 10 where the satellite foot-print and the programming are referred to. In my view clause 13 sub clauses 1 and 2 flow from this scenario. Schedule 5, [**Page 67, Vol I Bundle of Documents**] referred to in clause 10 of the licence reads:

*"**Schedule 5: Programming Format (Clause 10)***

1. ***The Licensee is authorised to provide Subscription Management Services which will enable through subscription access to different channels which may include but not limited to Educational, entertainment, sports, news and information channels.***
2. *The Licensee shall notify the Authority 30 days prior to addition of any new channels to the enabled service.*
3. *The notification shall include:*
   3.1 The name of the channel
   3.2 The genre of the channel
   3.3 ***A statement indicating broadcasting rights for the territory of Botswana has been cleared.***
4. *The Licensee's office hours shall operate for a minimum of eight (8) hours with a call centre operating for at least 12 hours during week, and for at least 8 hours on the weekends and public holidays.*
5. *The Licensee is required to submit to the Authority the proposed Service Level Agreement for approval which shall not be unreasonably denied. The Agreement should be submitted to the Authority within a period of ninety (90) days from the License Date.* **[My Emphasis]**

119. In section 33 of the Act, the person who is licensed in terms of section 31, a licensee, is required to secure approval from a copy right-owner to broadcast any material or programme where the licensee is not the owner thereof without any distinction being made between any possible differences of broadcasters. The provision reads:

"33. A license shall not broadcast or re-broadcast –

(a) Any material or programme of which he or she is not the copyright owner unless with the permission of the copyright owner; or

(b) Any broadcasting signal received by him or her for the purpose of broadcast or re-broadcasting, unless he or she has, prior to the broadcast or re-broadcast, obtained a written permission of the copyright owner of the material, programme, or broadcast or re-broadcasting signal to do so.

120. Whilst one may recognise that one licensee may be able to be solely responsible for the up-link to a satellite of the signal carrying broadcast television programmes that has Botswana within its foot-print, either encrypted or not and in turn make the same intelligibly accessible in Botswana, another licenced person may not have the capacity but may join together with others who may or may not be residing in Botswana. In terms of the Act the two categories of persons will be regulated more or less in the same way with the latter bearing responsibility for the group associated with him or her or it as the case may be. Subscription management service such as involved in the instant case is treated in the same way and no undue advantage is derived from the fact that the other participants in the process of broadcasting are situated beyond the borders of the Republic as far as regulation is concerned. That this so is buttressed by the provisions of sections 36 and 37 of the Act, reproduced below, that require a licensee, irrespective of the individual characteristics, to account for what is being broadcast at least within a defined period:

> *"36. A license shall –*
> *(a)* ***Keep and store sound and video recordings of all programmes broadcast or re-broadcast for a minimum period of three months after the date of transmission of the broadcast or re-broadcast****, or for such further period as may be directed by the Board; and*

(b) On demand by the Board, produce such material that has been broadcast for examination or reproduction.

37. Without prejudice to the provisions of section 178 of the Penal Code a licensee shall, ***where a programme to be broadcast or re-broadcast is not suitable to be exhibited to children, advise or warn members of the public accordingly.*** *"* **[My Emphasis]**

121. In my view to grant the sought declaratory order would be an attempt to legalise what the Legislature in its wisdom chose to proscribe and effectively to bring the regulatory regime upside down. I accordingly think that the order sought must be declined without hesitation. With this conclusion in mind, it is not hard to see that the alternative relief anchored on review grounds cannot see the light of the day as well. Under this relief, the Applicant seeks to have the decision of the Respondent as relates to clauses 13.1 to 13.4 of the licence reviewed and set aside on the grounds of illegality, irrationality and unreasonableness.

122. Given the broad ground already traversed and my position on the nature of the services provided by the Applicant in the light of the existing legislative framework, it will serve no purpose to analyze the grounds upon which the review is sought at some length. The very foundation upon which the challenge is based is faulty for the reason that where the Act says the Applicant is undertaking the offering of a broadcasting service, the Applicant avers that the

activities undertaken fall short of broadcasting. I have stated before that the enablement of the consumption of a subscription broadcasting service [subscription management service] is irrebuttably deemed to be a broadcasting service that ought to be licenced in terms of section 31(1) of the Act and the operator thereof is required to apply for a broadcasting licence in terms of section 31 (3) of the Act. I have also stated above that the Applicant is the provider of broadcasting equipment to the public in Botswana and is the provider or creator of the "***information***" central to commercial subscription broadcasting which exercise entails, among other things, the marketing of the **DStv**, and is in charge of its commercial aspects in Botswana including the collection of subscription fees and the deployment of "***information and communications technologies***" to link the devices and smart cards sold to the public in Botswana to **MCA** by means of "***network interconnection***". This latter step completes what in the terms of the Act is called a "***broadcasting system***"

123. Consequently, the Applicant as seen above is viewed by the Act as a Broadcaster and is licenced as such, with the Regulatory Authority empowered by Section 32 of the Act to impose the

conditions on the licence. Once so licenced, the service provider is referred to as a licensee and the statutory obligations are imposed on him or her or it without distinction in sections 33, 35, 36, 37, 85, 86 and 90 (2) of the Act. Where the Act, wanted to deal with each individual sector within the communications sectors that has been stated clearly. I have already found that the obligation to submit a tariff is imposed by section 90 (2) of the Act and likewise the obligation to comply with intellectual property rights is imposed by the Act itself in section 33 notwithstanding the Applicant's disclaimer that it is not broadcasting or rebroadcasting; the very act of enabling the enjoyment of the broadcasting programme is deemed to be a broadcasting service. The Broadcasting Regulations, made in terms of the repealed Broadcasting Act are still applicable to the extent compatible with **CAP. 72:03** and the words "***broadcaster***" and "***broadcasting licence***" are defined in such manner that the Applicant is not excluded as it plays a critical role in the distribution of **DStv** progemmes to the public in Botswana:

> *"Broadcaster means any person who composes or distributes television or radio programme services for reception by subscribers to such services or members of the public;*
> *Broadcasting License means a license granted to a person and issued by the Board, for the purpose of providing a broadcasting service;"*

124. After a thorough review of the Botswana legislation and the more or less unitary European regulatory regime, I came to the conclusion that what is proposed in clause 13 not only is in accord with the relevant legislation but conveys the same spirit as the latter regime. It is therefore clear that what the Regulatory Authority sought to do and/or achieve by clause 13 of the license is neither illegal nor irrational and is clearly reasonable and an expressive of the very text and objectives of the enabling legislation. In the light of this conclusion, there is no need to consider the counter application. Consequently, I make the following order:

a. The Application is dismissed and the interdict issued on 20 October 2017 is hereby discharged.

b. The issue of costs for the interdict and the substantive matter shall be argued on a date to be set by the Registrar after the agreement by the parties provided the date is suitable to the court.

DELIVERED IN OPEN COURT THIS 10TH DAY OF AUGUST 2018.

HON. MOTSWAGOLE J

JUDGE