JUDGMENT OF THE COURT
25 July 1991 *

In Case C-288/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Administrative Appeal Section of the Raad van State (State Council), the Netherlands, for a preliminary ruling in the proceedings pending before that court between

Stichting Collectieve Antennevoorziening Gouda and Others

and

Commissariaat voor de Media

on the interpretation of Article 59 of the Treaty,

THE COURT,

composed of: G. F. Mancini, President of Chamber, acting as President of the Court, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco, (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: G. Tesauro,
Registrar: J.-G. Giraud,

after considering the written observations submitted on behalf of:

— Stichting Collectieve Antennevoorziening Gouda and the other nine appellants in the main proceedings, by B. H. ter Kuile and L. H. van Lennep, of the Bar at The Hague,

* Language of the case: Dutch.

— Commissariaat voor de Media, by G. H. L. Weesing, of the Amsterdam Bar,

— the Netherlands Government, by B. R. Bot, Secretary-General of the Ministry of Foreign Affairs, acting as Agent,

— the Portuguese Government, by Rui Assis Ferreira, Head of Division in the Directorate-General for Social Communication, Luís Inês Fernandes, Director of the Legal Department of the Directorate-General for the European Communities, and Antonio Goucha Soares, Legal Adviser in the Legal Department of the Directorate-General for the European Communities, acting as Agents, and

— the Commission of the European Communities, by René Barents and Giuliano Marenco, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument at the hearing on 21 February 1991 from Stichting Collectieve Antennevoorziening Gouda and the other nine appellants in the main proceedings, the Netherlands Government, represented by J. W. De Zwaan and T. Heukels, acting as Agents, the Belgian Government, represented by A. Berenboom, of the Brussels Bar, and the Commission,

after hearing the Opinion of the Advocate General at the sitting on 18 April 1991,

gives the following

Judgment

1 By decision of 30 August 1989, which was received at the Court on 19 September 1989, the Administrative Appeal Section of the Raad van State (State Council), the Netherlands, referred to the Court for a preliminary ruling three questions on the interpretation of the provisions of the EEC Treaty concerning the freedom to provide services, in order to assess the compatibility with Community law of

national legislation laying down conditions for the transmission by cable of radio and television programmes broadcast from other Member States which contain advertising specifically intended for the Dutch public.

2 Those questions were raised in proceedings between ten operators of cable networks and the Commissariaat voor de Media, the institution responsible for supervising the operation of cable networks, regarding conditions imposed by the Dutch Law of 21 April 1987 governing the supply of radio and television programmes, radio and television licence fees and press subsidies (*Staatsblad* No 249 of 4 June 1987, hereinafter referred to as 'the Mediawet') on the transmission of advertising contained in radio or television programmes broadcast from abroad. The cable network operators consider that these conditions are contrary to Article 59 et seq. of the EEC Treaty.

3 The conditions in question are contained in Article 66 of the Mediawet, which provides as follows:

'(1) The operator of a cable network may:

(a) transmit programmes which are broadcast by a foreign broadcasting body by means of a broadcasting transmitter and which may, most of the time, be received directly in the area served by the cable network by means of a normal individual aerial with a reasonable standard of quality;

(b) transmit programmes other than those mentioned in (a) which are broadcast by a foreign broadcasting body or a group of such bodies as broadcasting programmes, in accordance with the legislation in force in the broadcasting country. If such programmes contain advertisements, they may be transmitted solely provided that the advertisements are produced by a separate legal person, that they are clearly identifiable as such and clearly separated from other parts and are not broadcast on Sundays, that the duration of such advertisements does not exceed 5% of the total air time utilized, that the broadcasting body fulfils the conditions laid down in Article 55(1) and that the entire revenue is used for the

production of programmes. Nevertheless, if those conditions are not fulfilled, such a programme may also be transmitted provided that the advertisements contained therein are not specifically intended for the Dutch public;

...

(2) For the purposes of the application of paragraph 1(b), advertisements shall, in any event, be deemed to be intended specifically for the Dutch public if they are broadcast during or immediately after a portion of a programme or a coherent group of programmes containing Dutch subtitles or a portion of a programme in Dutch.

(3) Our Minister may grant an exemption from the prohibition contained in paragraph 1(b) in respect of programmes broadcast in Belgium intended for the Dutch-speaking public in that country.'

4 Article 55(1) of the Mediawet provides that in principle 'bodies which have obtained air time may not be used to enable a third party to make a profit ... '.

5 By decision of 6 January 1988 a fine was imposed by the Commissariaat voor de Media on each of the ten cable network operators on the ground they had transmitted programmes broadcast by foreign broadcasting bodies containing advertising entirely or partly in Dutch which did not fulfil the conditions laid down in Article 66(1)(b), set out above.

6 The cable network operators appealed against that decision to the Administrative Appeal Section of the Raad van State on the ground that Article 66(1)(b) of the Mediawet was contrary to Articles 56 and 59 of the EEC Treaty.

7 The Raad van State then decided that it was necessary to refer to the Court for a preliminary ruling three questions on the interpretation of Article 59 et seq. of the Treaty. Those questions read as follows:

'1. Must Article 59 of the Treaty be interpreted as meaning that there can be said to be an unlawful restriction on freedom to provide services, such as the distribution, by means of cable networks, by operators of cable broadcasting organizations of programmes (with or without advertisements) supplied to the managers from abroad via cable, over the air or by satellite, where such distribution of programmes is subjected under national rules to restrictions such as those contained in the second sentence of Article 66(1)(b) of the Mediawet which apply in the same manner to similar programmes broadcast within the Member State concerned?

2. If the Treaty provisions on freedom to provide services apply to the national rules referred to above, must such rules not only comply with the prohibition of discrimination but also be justified on grounds relating to the public interest and proportional to the objective to be achieved?

3. If Question 2 is answered in the affirmative, can objectives relating to cultural policy, designed to maintain a pluralistic and non-commercial broadcasting system and/or to safeguard diversity of opinion in broadcasting and the press constitute such justification?'

8 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the observations of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The field of application of Article 59 of the Treaty

9 By those questions the national court seeks to establish whether conditions such as those imposed by the Mediawet on the transmission by operators of cable networks of radio or television programmes broadcast from the territory of other Member States are covered by Article 59 of the Treaty and, if so, whether they may be justified.

10 In this respect, the Court has consistently held (see, most recently, the judgments in Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 12, Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraph 15, and Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 16) that Article 59 of the Treaty entails, in the first place, the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is provided.

11 As the Court held in its judgment in Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, at paragraphs 32 and 33, national rules which are not applicable to services without discrimination as regards their origin are compatible with Community law only if they can be brought within the scope of an express exemption, such as that contained in Article 56 of the Treaty. It also appears from that judgment (paragraph 34) that economic aims cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty.

12 In the absence of harmonization of the rules applicable to services, or even of a system of equivalence, restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation.

13 As the Court has consistently held (see, most recently, the judgments in *Commission* v *France*, cited above, paragraph 15; *Commission* v *Italy*, cited above, paragraph 18; and *Commission* v *Greece*, cited above, paragraph 18), such restrictions come within the scope of Article 59 if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the requirements embodied in that legis-

lation are already satisfied by the rules imposed on those persons in the Member State in which they are established.

14 In this respect, the overriding reasons relating to the public interest which the Court has already recognized include professional rules intended to protect recipients of the service (Joined Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35, paragraph 28); protection of intellectual property (Case 62/79 *Coditel* [1980] ECR 881); the protection of workers (Case 279/80 *Webb* [1981] ECR 3305, paragraph 19; Joined Cases 62/81 and 63/81 *Seco* v *EVI* [1982] ECR 223, paragraph 14; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18); consumer protection (Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 20; Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, paragraph 20; Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 30; Case 206/84 *Commission* v *Ireland* [1986] ECR 3817, paragraph 20; *Commission* v *Italy*, cited above, paragraph 20; and *Commission* v *Greece*, cited above, paragraph 21), the conservation of the national historic and artistic heritage (*Commission* v *Italy*, cited above, paragraph 20); turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country (*Commission* v *France*, cited above, paragraph 17, and *Commission* v *Greece*, cited above, paragraph 21).

15 Lastly, as the Court has consistently held, the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules (see, most recently, Case C-154/89 *Commission* v *France*, cited above, paragraphs 14 and 15; Case C-180/89 *Commission* v *Italy*, cited above, paragraphs 17 and 18; Case C-198/89 *Commission* v *Greece*, cited above, paragraphs 18 and 19).

16 It is in the light of those principles that it should be examined whether a provision such as Article 66(1)(b) of the Mediawet, which, according to the national court, is not discriminatory, contains restrictions on freedom to provide services and, if so, whether those restrictions may be justified.

The existence of restrictions on the freedom to provide services.

17 It must be noted at the outset that conditions such as those imposed by the second sentence of Article 66(1)(b) of the Mediawet contain a two-fold restriction on freedom to provide services. First, they prevent operators of cable networks established in a Member State from transmitting radio or television programmes supplied by broadcasters established in other Member States which do not satisfy those conditions. Secondly, they restrict the opportunities afforded to those broadcasting bodies to include in their programmes for the benefit in particular of advertisers established in the State in which the programmes are received advertising intended specifically for the public in that State.

18 Accordingly, the reply to be given to the national court's first question should be that conditions such as those set out in the second sentence of Article 66(1)(b) of the Mediawet constitute restrictions on the freedom to provide services covered by Article 59 of the Treaty.

The possibility of justifying those restrictions

19 As the Commission rightly pointed out, those conditions fall into two different categories. First, there are those relating to the structure of the broadcasters: they must entrust advertising to a legal person independent of the suppliers of programmes; they must use all their advertising revenue for the production of programmes; and they may not permit third parties to make a profit. Secondly, there are conditions relating to the advertisements themselves: they must be clearly recognizable as such and separated from the other parts of the programme; they may not exceed 5% of air time; and they must not be broadcast on Sundays.

20 In order to answer the national court's second and third questions, which essentially seek to establish whether such restrictions may be justified, those conditions should be examined separately.

A — The conditions relating to the structure of broadcasting bodies established in other Member States

21 As regards the conditions relating to the structure of broadcasting bodies established in other Member States, the Netherlands Government explains that these are identical to the conditions which Dutch broadcasting bodies must fulfil. Thus, the requirement that the advertisements must be produced by a legal person separate from the producers of the programmes corresponds to the prohibition imposed by the Mediawet on national bodies' broadcasting commercial advertising, as this is reserved to the Stichting Etherreclame (television advertising foundation) (hereinafter referred to as 'the STER'). The obligation imposed on broadcasting bodies in other Member States not to permit a third party to make a profit is intended to guarantee the non-commercial nature of broadcasting, which the Mediawet seeks to maintain for national broadcasting bodies. Lastly, the purpose of the requirement relating to the assignment of advertising revenue, namely that it must be reserved for the production of programmes, is to provide broadcasting bodies in other Member States with funds at least equivalent to those obtaining under the national system, where most of the STER's advertising revenue covers radio and television operating costs.

22 The Netherlands Government maintains that those restrictions are justified by imperatives relating to the cultural policy which it has implemented in the audiovisual sector. It explains that the aim of this policy is to safeguard the freedom of expression of the various — in particular social, cultural, religious and philosophical — components of the Netherlands in order that that freedom may be capable of being exercised in the press, on the radio or on television. It says that that objective may be jeopardized by the excessive influence of advertisers over the content of programmes.

23 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 (Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13).

24 However, it should be observed that there is no necessary connection between such a cultural policy and the conditions relating to the structure of foreign broadcasting bodies. In order to ensure pluralism in the audio-visual sector it is not indispensable for the national legislation to require broadcasting bodies established in other Member States to align themselves on the Dutch model should they intend to broadcast programmes containing advertisements intended for the Dutch public. In order to secure the pluralism which it wishes to maintain the Netherlands Government may very well confine itself to formulating the statutes of its own bodies in an appropriate manner.

25 Conditions affecting the structure of foreign broadcasting bodies cannot therefore be regarded as being objectively necessary in order to safeguard the general interest in maintaining a national radio and television system which secures pluralism.

B — The conditions relating to advertising

26 Contrary to the view advanced by the Commission, the Netherlands Government maintains that neither the prohibition on the broadcasting of advertisements on certain days, the limitation of their duration or the obligation to identify them as such and to separate them from other parts of programmes is discriminatory. The services provided by the STER are subject to the same restrictions. In this connection, the Netherlands Government referred to Article 39 of the Mediawet. It appears from that provision that the Commissariaat voor de Media allocates to the STER air time available on the national network, which must be allocated in such a manner that the programmes of the national broadcasting bodies are not interrupted. Moreover, under the same provision, no air time is to be allocated on Sundays.

27 In this respect, it must be observed in the first place that restrictions on the broadcasting of advertisements, such as a prohibition on advertising particular products or on certain days, a limitation of the duration or frequency of advertisements or restrictions designed to enable listeners or viewers not to confuse advertising with other parts of the programme, may be justified by overriding reasons relating to the general interest. Such restrictions may be imposed in order to protect consumers against excessive advertising or, as an objective of cultural policy, in order to maintain a certain level of programme quality.

28 Next, it should be observed that the restrictions in question relate solely to the market in advertising intended specifically for the Dutch public. That market was also the only market covered by the prohibition on advertising contained in the Kabelregeling which gave rise to the questions which were referred to the Court for a preliminary ruling in the *Bond van Adverteerders* case (cited above). Even if the advertising relates to products which may be consumed in the Netherlands, the restrictions apply only if the advertisements accompany programmes in Dutch or subtitled in Dutch. Moreover, the restrictions may be lifted with regard to programmes in Dutch broadcast in Belgium and intended for the Belgian Dutch-speaking public.

29 Unlike the Kabelregeling, the provisions of the Mediawet at issue in this case no longer reserve to the STER all the revenue from advertising intended specifically for the Dutch public. However, by laying down rules on the broadcasting of such advertisements they restrict the competition to which the STER may be exposed in that market from foreign broadcasting bodies. Accordingly the result is that they protect the revenue of the STER — albeit to a lesser degree than the Kabelregeling — and therefore pursue the same objective as the previous legislation. As the Court held in the *Bond van Adverteerders* case (cited above), at paragraph 34, that objective cannot justify restrictions on the freedom to provide services.

30 Accordingly, the reply to be given to the national court's second and third questions should be that restrictions of the kind at issue are not justified by overriding requirements relating to the general interest.

Costs

31 The costs incurred by the Netherlands Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Administrative Appeal Section of the Raad van State of the Netherlands by decision of 30 August 1989, hereby rules:

1. **Conditions such as those set out in the second sentence of Article 66(1)(b) of the Mediawet constitute restrictions on the freedom to provide services covered by Article 59 of the EEC Treaty;**

2. **Restrictions of the kind at issue are not justified by overriding requirements relating to the general interest.**

Mancini O'Higgins Moitino de Almeida Rodríguez Iglesias

Díez de Velasco Slynn Kakouris

Joliet Schockweiler Grévisse Zuleeg

Delivered in open court in Luxembourg on 25 July 1991.

J.-G. Giraud
Registrar

G. F. Mancini
President of Chamber,
acting as President of the Court