JUDGMENT OF THE COURT
25 July 1991 *

In Case C-353/89,

Commission of the European Communities, represented by Giuliano Marenco and René Barents, members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Guido Berardis, also a member of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by A. Bos, Legal Adviser, and J. W. De Zwaan, Assistant Legal Adviser, both in the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

defendant,

APPLICATION for a declaration that, by reserving to a Dutch undertaking all or some of the orders from Dutch national broadcasting bodies and by restricting the re-transmission in the Netherlands of programmes from other Member States containing advertising specifically intended for the Dutch public, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 59 of the EEC Treaty,

* Language of the case: Dutch.

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,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 21 February 1991, at which the Netherlands Government was represented by J. W. De Zwaan and T. Heukels, acting as Agents,

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

gives the following

Judgment

1 By application lodged at the Court Registry on 17 November 1989, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that, by reserving to a Dutch undertaking all or some of the orders from Dutch national broadcasting bodies and by restricting the re-transmission in the Netherlands of programmes from other Member States containing advertising specifically intended for the Dutch public, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 59 of the EEC Treaty.

2 The Commission challenges two mutually independent provisions: the first relates to the obligation imposed on national broadcasting bodies established in the

Netherlands to have all or some of their programmes made by a Dutch undertaking; the second relates to the conditions imposed on the transmission by cable of programmes broadcast from other Member States where they contain advertising specifically intended for the Dutch public. Those two provisions are contained in 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').

3 The Mediawet is intended to establish a pluralist and non-commercial radio and television broadcasting system. Under Articles 31 and 34 of that law, the air time available for programmes broadcast on the national radio and television network is allocated by the body responsible for supervising the implementation of the Mediawet, the Commissariaat voor de Media, in particular to broadcasting associations, associations of listeners or viewers which have legal personality and represent the main schools of thought in Dutch society.

4 In principle, those bodies have complete freedom to produce programmes themselves. However, they are under an obligation, which is less severe in the case of television than in the case of radio, to use the technical resources (recording studios, set workshops, technicians, etc.) of the Nederlandse Omroepproduktie Bedrijf ('the NOPB'), a public limited company incorporated under Dutch law.

5 This obligation is set out in Article 61 of the Mediawet, which provides as follows:

'In order to ensure that the means of production are maintained, bodies which have obtained air time on the national network must spend with the NOPB each year all the amounts allocated to them under Articles 101 and 102 with regard to the production of radio programmes and a percentage determined by decree with regard to the production of television programmes.'

6 Articles 101 and 102 of the Mediawet, which are cited in Article 61, deal essentially with the radio and television licence fees paid by listeners and viewers, which the Commissariaat voor de Media passes on to the broadcasting bodies.

7 In addition, Article 154 of the Mediawet provides that, as far as television is concerned, the percentage mentioned in Article 61 is to be 75%.

8 The second of the measures challenged by the Commission is contained in Article 66 of the Mediawet. That article relates to the transmission by cable in the Netherlands of radio and television programmes broadcast abroad. It 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.'

9 Article 55(1), which is mentioned in that provision, provides that in principle 'bodies which have obtained air time may not be used to enable a third party to make a profit . . . '.

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the pleas in law and arguments 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

11 The Commission maintains that the two measures implemented by the Kingdom of the Netherlands infringe the principle of the freedom to provide services laid down in Article 59 of the Treaty. For its part, the Netherlands Government claims that the measures are entirely justified.

12 Since the dispute relates to the field of application of Article 59, its scope and limits should be defined.

13 The first paragraph of Article 59 provides that restrictions on freedom to provide services within the Community are to be progressively abolished during the transitional period in respect of nationals of Member States who are established in a Member State of the Community other than that of the person for whom the services are intended.

14 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.

15 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.

16 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.

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

18 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).

19 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).

20 It is in the light of those principles that first the obligation imposed on national broadcasting bodies by Article 61 of the Mediawet to use the technical resources of the NOPB for the production of their radio and television programmes and secondly the conditions laid down in Article 66 of the Mediawet regarding the transmission in the Netherlands of advertisements contained in radio or television programmes broadcast from other Member States must be examined.

The absolute or partial obligation to use the technical resources of the NOPB for the production of radio or television programmes

21 The Commission criticizes Article 61 of the Mediawet on the grounds that it prevents undertakings established in other Member States from providing services for the production of radio programmes to national broadcasting bodies established in the Netherlands and reduces the opportunities of their providing services for the production of television programmes to such bodies to 25%.

22 It should be observed at the outset that the system set up by Article 61 of the Mediawet does in fact result in a restriction on the freedom to provide services within the Community within the meaning of Article 59 of the Treaty.

23 The obligation imposed on all national broadcasting bodies established in a Member State to use exclusively or to some extent the technical resources provided by a national undertaking prevents those bodies from using the services of undertakings established in other Member States or, in any event, limits their opportunities of doing so. It therefore has a protective effect for the benefit of a service undertaking established in the national territory and, to that extent, disadvantages undertakings of the same kind established in other Member States.

24 The Netherlands Government maintains that the restrictive effects of that preferential system affect service undertakings established in the Netherlands other than the NOPB and undertakings established in other Member States to the same extent.

25 In any event, that fact is not such as to exclude the preferential system enjoyed by the NOPB from the field of application of Article 59 of the Treaty. Moreover, it is not necessary for all undertakings in a Member State to be advantaged in comparison with foreign undertakings. It is sufficient that the preferential system set up should benefit a national provider of services.

26 The Netherlands Government also argues that it is necessary to ensure a smooth transition between the previous broadcasting system, in which the technical resources required for the production of programmes belonged to the public sector, and the introduction of a system of competition. It maintains that it was necessary, first, to preserve the cultural attainments of the previous period and, secondly, to avoid the collapse of the NOPB and mass redundancies. However, at the hearing it stated that the obligation in question had been abolished with effect from 1 January 1991 with regard to the production of television programmes and would be abolished with effect from 1 January 1992 with regard to the production of radio programmes.

27 As regards the argument based on the need to bring in a system of competition only gradually, it should be observed that the transitional period provided for in the Treaty expired on 31 December 1969 and that the requirements laid down in Article 59 of the Treaty became directly and unconditionally applicable on the expiry of that period (see the judgment in *Van Wesemael*, cited above, paragraph 26). Consequently, a national legislature cannot be authorized to introduce new time limits.

28 The recent adjustments to the preferential system in question are not such as to alter the assessments set out above. On the one hand, the obligation laid down in the Mediawet continues to exist as far as the production of radio programmes is concerned. On the other hand, the Court has consistently held (see, most recently, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 31, and Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 35) that the subject-matter of an action brought under Article 169 of the Treaty is fixed by the reasoned opinion of the Commission and that, even where the infringement has been eliminated after the period specified in the second paragraph of that article, the pursuit of the action retains an interest for the purpose of establishing the basis of a liability which a Member State may be in the position of incurring, as a result of its infringement, vis-à-vis other Member States, the Community or individuals.

29 The Netherlands Government further argues that derogations from Article 59 are lawful if they are justified on grounds relating to the general interest. In this respect, it states that the restrictions in question are justified by requirements relating to the cultural policy which it has introduced in the audio-visual sector. It

explains that the aim of the policy is to safeguard the freedom of expression of the various (in particular social, cultural, religious and philosophical) components making up the Netherlands, as it must also be available in the press, on the radio or on television. By making technical resources available to the various national broadcasting bodies, the NOPB enables the pluralist and non-commercial nature of the Dutch audio-visual system to be maintained. It adds that the NOPB also performs cultural tasks, such as managing a sound library, keeping film archives and managing an orchestra and choirs. It maintains that reasons of cultural policy such as those must be included among the considerations of the general interest which may justify restrictive measures, even if those measures are of an economic nature.

30 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).

31 However, in so far as it requires the national broadcasting bodies representing the social, cultural, religious or philosophical components of Dutch society to have all or some of their programmes produced by a Dutch undertaking, the Kingdom of the Netherlands goes beyond the objective pursued, that is to say protection of freedom of expression. In fact, pluralism in the audio-visual sector of a Member State cannot be affected in any way by allowing the various national broadcasting bodies to make use of providers of services established in other Member States. As the Commission rightly pointed out, if it is genuinely in the interest of those bodies to have recourse to the NOPB there is no need to put them under an obligation to do so.

32 Moreover, as the Netherlands Government itself admits, the cultural tasks performed by the NOPB are financed entirely by the State. They are therefore extraneous to the obligation imposed on the broadcasting bodies to spend all or a proportion of their funds with the NOPB and hence cannot be capable of justifying that obligation.

33 The Netherlands Government next referred to Article 90 of the Treaty. It infers from that provision that the Member States may exclude certain economic activities within their territory from free competition. It argues that in the context of the Dutch audio-visual system such a monopoly is justified by the reasons relating to the general interest set out above, namely maintenance of pluralism in the media, the interest of the national broadcasting bodies in having access to high-quality technical resources and the performance of non-profit-making cultural tasks by the NOPB.

34 In this connection, it is sufficient to observe that it appears from the judgment in Case C-202/88 *France* v *Commission* [1991] ECR I-1223, at paragraph 22, that even though Article 90 of the Treaty presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all the special or exclusive rights are necessarily compatible with the Treaty. Such compatibility must be assessed in the light of the different rules to which Article 90(1) refers.

35 It follows that, in order to establish whether a Member State may exclude the provision of certain services from free competition, it is a matter of determining whether the restrictions on the freedom to provide services thereby created can be justified on the grounds relating to the general interest set out above (paragraphs 17 and 18).

36 As was stated above (paragraphs 31 and 32), in the present case, the privileged system afforded to the NOPB by the Dutch authorities is not justified on any ground relating to the general interest.

37 It must therefore be held that, by obliging bodies which have obtained air time on the national broadcasting network to spend with the NOPB all the amounts made available to them for the production of radio programmes and a percentage determined by decree for the production of television programmes, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 59 of the Treaty.

The conditions imposed with regard to the transmission in the Netherlands of advertising contained in radio and television programmes broadcast from other Member States

38 As regards the conditions laid down in the second sentence of Article 66(1)(b) of the Mediawet concerning the transmission in the Netherlands of advertising contained in radio and television programmes broadcast from abroad, it must be observed from the outset that those conditions entail a two-fold restriction on the freedom to provide services. First, they prevent the operators of cable networks established in a Member State from transmitting radio or television programmes made available by broadcasters established in other Member States which do not satisfy those conditions. Secondly, they restrict the possibilities available to such broadcasters to include in their programmes advertisements intended specifically for the Dutch public for the benefit of advertisers established in particular in the State in which the programmes are to be received.

39 As the Commission rightly pointed out, the conditions laid down in Article 66 of the Mediawet 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. Those conditions must therefore be considered separately.

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

40 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.

41 The Netherlands Government justifies those restrictions on the ground that their aim is to prevent advertisers' having an excessive influence over the preparation of programmes, which might jeopardize the cultural policy that it has established in the audio-visual sector.

42 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.

43 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*

44 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.

45 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.

46 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.

47 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 Kabel-

regeling — 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.

48 It must therefore be held that, by prohibiting operators of cable networks established in its territory from transmitting radio or television programmes containing advertisements intended specifically for the Dutch public which are broadcast by broadcasting bodies established in the territory of another Member State if certain conditions relating to the structure of those bodies or advertising contained in their programmes which is intended for the Dutch public are not fulfilled, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 59 of the Treaty.

Costs

49 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the defendant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by obliging bodies which have obtained air time on the national broadcasting network to spend with the NOPB all the amounts made available for the production of radio programmes and a percentage determined by decree for the production of television programmes and by prohibiting operators of cable networks established in its territory from transmitting radio or television programmes containing advertisements intended specifically for the Dutch public which are broadcast by broadcasting bodies established in the territory of**

another Member State if certain conditions relating to the structure of those bodies or advertising contained in their programmes which is intended for the Dutch public are not fulfilled, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 59 of the EEC Treaty;

2. Orders the Kingdom of the Netherlands to pay the costs.

Mancini O'Higgins Moitinho 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