REPORT FOR THE HEARING
in Case C-353/89 *

I — Facts and relevant legislation

A — *Subject of the application*

The application relates to two independent provisions of the Netherlands Law of 21 April 1987 governing the supply of radio and television programmes, radio and television licence fees and press subsidies (*Staatsblad*, 1987, 249, hereinafter referred to as 'the Mediawet'), which came into force on 1 January 1988.

The Commission takes issue with two aspects of this law: first, the obligation imposed on Dutch broadcasting bodies to use a Dutch undertaking for the production of their radio and television programmes and, secondly, the conditions imposed for the retransmission of advertisements contained in radio or television programmes broadcast from the territory of other Member States.

B — *System instituted by the Mediawet*

In the Netherlands, most of the air time available for national radio and television broadcasting is shared between bodies called 'omroepverenigingen'.

The said omroepverenigingen are associations of listeners or viewers which have legal personality, whose object is to represent a particular social, cultural, religious or philosophical persuasion enshrined in their statutes and to endeavour to satisfy the social, cultural, religious or philosophical needs of the Netherlands by means of their programmes. Such an association is regarded as representative if it has at least 150 000 members.

The air time allocated to each omroepvereniging depends on the number of its members.

In principle, these associations have complete freedom with regard to their programming. They may buy programmes ready made in the Netherlands or in other countries or make their own broadcasts.

In the latter case, associations which have air time on the national network are under a duty to use the technical resources (recording studios, set workshops, technicians, etc.) of the Nederlandse Omroepproduktie Bedrijf ('the NOPB'), a company incorporated under Dutch law. Those technical resources are made available to the associations in accordance with a tariff established by the NOPB itself.

* Language of the Case: Dutch.

The Mediawet provides that the associations must use them for all their radio programmes; with regard to the production of television programmes, they are obliged to use the NOPB only for a certain percentage of their requirements.

More specifically, Article 61 of the Mediawet provides:

'In order to ensure that the means of production are maintained, associations 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.'

Article 154 provides, moreover, that 'when the percentage mentioned in Article 61 is fixed for the first time, the percentage in question shall be 75%'.

The funds necessary for the production of the associations' national programmes are derived partly from a radio and television licence fee and partly from the revenue from radio and television advertising.

However, the associations may not incorporate in their programmes advertisements from third parties. A monopoly covering the broadcasting of such advertisements is attributed to a foundation, the Stichting Etherreclame ('the STER'). The STER, which is independent of the associations, does not itself produce the advertisements. They are produced by the advertisers themselves. The STER merely sells advertising time. The STER's revenue is used partly to subsidize the broadcasting associations and partly to subsidize the press.

In the Netherlands, most radio and television programmes can be received domestically solely via cable networks.

The cable-network operators are obliged to transmit the national radio and television programmes. They are also permitted to transmit foreign programmes. However, apart from cases where these programmes can be received by means of an ordinary individual aerial, Article 66 of the Mediawet permits their retransmission, if they contain commercial advertising specifically intended for the Dutch public, solely if two groups of conditions are fulfilled.

One group relates to the advertisements themselves, which must be recognizable as such, may not exceed 5% of the total air time and may not be broadcast on Sundays.

The other group relates to the broadcasting body, which must not be profit-making, must not enable a third party to make a profit and must entrust the management of the advertising activity to a legal person separate from the programme supplier.

More specially, Article 66 provides *inter alia* that:

'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 are clearly separated from other parts of the programme 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 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.'

C — *Background to the case*

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

By letter dated 21 December 1987 the *Commission* informed the Netherlands Government that, by reserving all the orders of Dutch radio broadcasting bodies and 75% of those of Dutch television broadcasting bodies to the NOPB, it had failed to fulfil its obligations under Articles 30, 52 and 59 of the EEC Treaty.

In its letter the Commission pointed out that, according to Directive 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970(1), p. 17) measures which 'favour domestic products or grant them a preference' (last sentence of Article 2(2)) and 'encourage, require or give preference to the purchase of domestic products only' (Article 2(3)(k)) are to be regarded as measures having an effect equivalent to quantitative restrictions on imports contrary to Article 30 of the EEC Treaty.

The Commission therefore considered that the Mediawet restricted the opportunities for undertakings in other Member States:

to take advantage of the free movement of goods as provided for in Article 30 of the EEC Treaty, since those undertakings could no longer provide any radio programme for Dutch broadcasting bodies and could provide only a limited quantity of television programmes;

to take advantage of the freedom of establishment afforded by Article 52 of the Treaty, since it was more difficult for them to become established in the Netherlands in order to carry out their activities there; and

to exercise the freedom to provide services provided for in Article 59 of the Treaty, since they could not provide any radio broadcasting services for Dutch bodies and could provide for them only a limited portion of their television broadcasting services.

By letter dated 29 April 1988 the *Kingdom of the Netherlands* replied that the obligation to use the services of the NOPB for the production of programmes had nothing to do with the free movement of goods and therefore did not fall within Article 30 of the EEC Treaty. The activities of the NOPB consisted in the provision of services. Its main task was to make technical resources, such as studios and staff, available to broadcasting bodies. Moreover, the broadcasting bodies were free to buy the media of programmes already made, such as films, cassettes, tapes, etc., in the Netherlands or abroad.

The Kingdom of the Netherlands added that Article 61 of the Mediawet was not incompatible with Article 52 of the EEC Treaty. It said that the Mediawet did not place any restriction on the establishment of enterprises providing services similar to those provided by the NOPB. The obligation to use the NOPB applied solely to bodies set up on the national level and not to regional and local broadcasting bodies, which could use the undertakings of their choice for the production of their broadcasts. Moreover, the national bodies had the same freedom to the extent of 25% of their financial resources. Furthermore, even if there were any restrictions on the freedom of establishment, they applied without discrimination to both Dutch undertakings (other than the NOPB) and foreign undertakings.

The Kingdom of the Netherlands also stressed that the obligation laid down in Article 61 of the Mediawet, which was only temporary, could not have any effect on the freedom to provide services. It did not

create any discrimination between Dutch undertakings other than the NOPB and undertakings in the programme-production sector in the other Member States which might wish to offer their services in the Netherlands. Moreover, broadcasting bodies or undertakings other than those set up at the national level were able to use the technical resources of companies of their choice.

Finally, the Netherlands Government considered that Article 90 of the EEC Treaty permitted the Member States, acting on account of non-economic considerations in the public interest, to exclude certain economic activities from the field of free competition and to grant the exclusive right to conduct those activities to one or more companies. Among such considerations of public interest in the present case were the necessity to provide the broadcasting bodies which represented the various facets of Dutch society with good-quality technical resources at the least possible cost and the need to maintain the physical resources which embodied the cultural policy pursued by the Netherlands Government in a concrete form: orchestras, choirs, sound and visual archives.

The *Commission* was not satisfied with this response and delivered a reasoned opinion on 27 January 1989.

It was not convinced by the argument of the Kingdom of the Netherlands regarding Article 30. It maintained that the obligation imposed on Dutch broadcasting bodies to spend 75% or 100% of their financial resources with the NOPB restricted their possibilities of purchasing audio-visual works from foreign undertakings.

On the other hand, it accepted the Dutch authorities' arguments to the effect that the application of Article 52 of the Treaty should be excluded.

Finally, it maintained that the obligation laid down in Article 61 of the Mediawet was contrary to Article 59 of the Treaty.

It therefore concluded that, by reserving all or some of the orders of the Dutch national broadcasting bodies to a Dutch undertaking, the Kingdom of the Netherlands had failed to fulfil its obligations under Articles 30 and 59 of the EEC Treaty.

The Commission asked the Netherlands to take the necessary measures to comply with its reasoned opinion within a period of 30 days.

The Kingdom of the Netherlands replied on 4 July 1989. It asked the Commission to show understanding. It explained that the provisions in question were temporary protection measures intended to enable the NOPB to reorganize itself in order to adapt to the changing market. It gave an assurance that the Netherlands policy was to achieve the rapid abolition of the system of compulsory utilization of the technical resources of the NOPB. It stated that the obligation would be reduced to 50% as of 1 January 1990 and to 0% as of 1 January 1991. However, it mentioned political difficulties

The *Commission* brought this application for failure to fulfil obligations on 17 November 1989.

2. *The conditions imposed with regard to the transmission of advertisements contained in radio or television programmes broadcast from other Member States*

By letter dated 10 February 1988 the *Commission* informed the Dutch authorities that the rules restricting the distribution by cable in the Netherlands of radio and television programmes from other Member States were incompatible with Article 59 of the Treaty.

The Commission considered that the measure adopted by the Netherlands Government limited the opportunity for broadcasters in other Member States to earn revenue in the Dutch advertising market and restricted the free movement of radio and television programmes in a discriminatory manner. Through the revenue of the STER, which was ultimately intended for them, the Dutch broadcasting bodies benefited from the profits from the advertising intended for the Dutch public, whilst broadcasters in other Member States did not have access to that source of income. Moreover, the possibilities for Dutch undertakings to ask broadcasters in other Member States to broadcast advertisements intended specifically for the Dutch public were reduced.

Furthermore, the criteria relating to the advertising content of programmes had a discriminatory effect to the detriment of imported programmes, which could be re-transmitted solely if the legislation of the country in which the broadcast was made was compatible with the Dutch legislation.

The Commission considered that the reason for the restriction in question was purely economic. By restricting the access of broadcasters in other Member States to the Dutch advertising market the rules in question protected Dutch broadcasting bodies.

The *Netherlands Government* responded by a letter dated 22 April 1988.

It maintained that to limit the cable distribution of programmes from other Member States which could not be received directly and contained advertisements specifically intended for the Dutch public was not incompatible with Article 59 of the EEC Treaty.

It considered, first, that Article 59 was not applicable to this case. No cross-border element was involved. The distribution of advertisements covered by Article 66 of the Mediawet was confined within a single Member State, the Netherlands. In support of this argument it cited the judgment in Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833. Moreover, Article 59 did not apply to that provision of services for another reason: it was not provided for remuneration. The Dutch viewer or listener did not pay any fee to the foreign broadcaster.

Secondly, the Netherlands Government maintained that, in the event that Article 59 were regarded as applicable, the provisions in question were based on considerations of public interest and were not discriminatory. It relied in this respect on the judgment on the operations of insurance companies in

Case 205/84 *Commission* v *Germany* [1986] ECR 3755. Under the Dutch system, foreign broadcasting bodies had to submit, to a limited extent, to the requirements in force in the Netherlands or, if they failed to do so, to refrain from broadcasting any advertisements intended specifically for the Dutch public.

Thirdly, the Netherlands Government argued that those restrictions were also justified by the Court's case-law under which a Member State could adopt provisions to prevent any abuse of the freedom to provide services (Case 33/74 *Van Binsbergen* [1974] ECR 1299).

Fourthly, it maintained that, in the event that the provisions in question were regarded as discriminatory, that discrimination was justified in the light of the provisions of Article 56 of the Treaty. In this respect it cited the judgment in Joined Cases 60 and 61/84 *Cinéthèque* v *Fédération Nationale des Cinémas Français* [1985] ECR 2605, where the Court purportedly held that restrictive measures might be justified by the objectives of Member States' cultural policy, even if certain economic considerations also played a part.

Fifthly, it contended that the rules complied with the principle of proportionality. They were not more restrictive than was necessary and, wherever it was possible to do so, they allowed the widest freedom to distribute foreign programmes.

The *Commission* considered that the explanations furnished by the Netherlands Government regarding this matter were no more satisfactory than those relating to the first complaint. It therefore delivered the aforementioned reasoned opinion of 27 January 1989.

In its reasoned opinion it considered that it was unnecessary to go back over the arguments put forward by the Netherlands Government in its letter of 22 April 1988, since in the judgment of 26 April 1988 in Case 352/89 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085 the Court had subsequently recognized the transfrontier character of the various services entailed by broadcasting and that such services were provided for remuneration.

On the remaining points the Commission developed arguments which it subsequently reproduced in its application to the Court.

In its response of 4 July 1989 the *Netherlands Government* stated that, in view of the Court's judgment in the *Bond van Adverteerders* case, cited above, it had decided to take the Commission's objections into account and to amend Article 66 of the Mediawet. That amendment will abolish the conditions imposed on foreign broadcasting bodies, that is to say the obligation to have the advertising activity managed by a separate legal person, the compulsory allocation of the revenue from advertising and the prohibition of profit-making. It mentioned, however, that there were political difficulties.

The *Commission* brought this application on 17 November 1989.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

However, it submitted a request for documents to the Netherlands Government, which complied with this request within the prescribed period.

II — Forms of order sought

The *Commission* claims that the Court should

(i) declare that

by reserving to a Dutch undertaking all or some of the orders from Dutch national broadcasting bodies

and by restricting the transmission in the Netherlands of programmes from other Member States containing commercial 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;

(ii) order the Kingdom of the Netherlands to pay the costs.

The *Kingdom of the Netherlands* claims that the Court should

(i) dismiss the Commission's application for a declaration that the obligation imposed on national broadcasting bodies to place all or some of their orders with the Nederlands Omroepproduktie Bedrijf (NOPB) is incompatible with Article 59 of the EEC Treaty;

principally because that obligation is not incompatible with Article 59 of the EEC Treaty; or, alternatively, because the privileged position attributed to the NOPB by means of the obligation in question is justified under Article 90(1) of the EEC Treaty;

(ii) dismiss the Commission's application regarding the provisions contained in Article 66 of the Mediawet relating to the distribution of programmes broadcast by a foreign broadcasting body and containing advertisements specifically intended for the Dutch public, because those provisions are not incompatible with Article 59 of the Treaty;

(iii) order the Commission to pay the costs.

III — Arguments of the parties

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

The *Commission* considers that the fact that the present situation is temporary cannot enable the Netherlands Government to evade the strict application of Article 59. It points out that the transitional period mentioned in the Treaty expired on 31 December 1969. The national legislature is therefore not permitted to introduce a

fresh period. The Commission consequently maintains that Article 61 of the Mediawet must be assessed on its own merits, regardless of the temporary nature of the obligations laid down therein.

It maintains that, for the same reason, the fact that under the previous legislation the obligation to have television programmes made by the NOPB was absolute, whereas under the Mediawet it is limited, is not sufficient to exempt that law.

The Commission argues that Article 61 of the Mediawet is discriminatory. By reserving to the NOPB most of the orders relating to television programmes and all of those relating to radio programmes, the Mediawet ensures that a very large proportion of national needs will be met by a Dutch provider of service. The Commission compares this situation to the Irish provisions under which importers of petroleum products had to obtain part of their supplies from a refinery installed in the national territory, which the Court considered in its judgment in Case 72/83 *Campus Oil Ltd* v *Minister for Industry and Energy* [1984] 2727. Although that case was concerned with the free movement of goods, the Commission maintains that the Court's assessment should be applied to the provision of services, namely that such a measure 'has a protective effect by favouring national production and, by the same token, works to the detriment of producers in other Member States'. The Commission likewise considers that in the Netherlands the obligation imposed on the broadcasting associations to use the NOPB restricts the opportunities for foreign enterprises to provide their own services.

The importance of competition is all the greater and this restriction all the more serious because in the Netherlands, apart from the NOPB, there are virtually no undertakings which could provide such services.

The Commission adds that discriminatory restrictions on the freedom to provide services may be justified solely on grounds mentioned in Article 56 of the Treaty, which do not include cultural policy.

The Commission maintains that although in its judgment in Case 155/73 *Sacchi* [1974] ECR 409, cited by the Netherlands Government, the Court held that the Member States may remove certain economic activities from the field of competition for non-economic considerations in the public interest, this reference is irrelevant. In fact, the public interest is not opposed to competition as such in the Netherlands, since a limited degree of competition is permitted by the Mediawet.

The Commission adds that there is no connection between the obligation in question and the interest of enabling the broadcasting system to have access to high-quality technical resources. First, if the NOPB had competitors the supply of services for broadcasting bodies would be expanded. Secondly, if the broadcasting bodies genuinely had an interest in using the services of the NOPB they would do so in the absence of any legal obligation. There would be no point in putting them under such an obligation, unless there was a risk that they would go elsewhere. The sole purpose of the obligation to use the NOPB is to maintain the NOPB in existence. Therefore it is not in the public interest.

Moreover, the fact that the NOPB has a cultural role in maintaining sound or film archives or an orchestra is irrelevant, since those activities are financed by the State and could therefore continue after the abolition of the obligation laid down in Article 61.

Thus, since no public interest is served by the obligation at issue, it is futile for the Netherlands Government to claim that it is consistent with the public interest and cultural-policy objectives.

The *Netherlands Government* states, first, that the present situation is temporary and necessitated by the need to ensure a smooth transition from the previous system, where the technical resources required for the production of broadcasting programmes belonged to the public sector, to a system in which the rules of the market will apply in full. This process leading to the independence of the NOPB can be accomplished acceptably only if it is phased in. It is necessary, on the one hand, to avoid the financial collapse of the NOPB and mass redundancies and, on the other hand, to preserve the cultural attainments of the previous period, such as the pluralism of Dutch society. Without a transitional phase, the NOPB might have encountered serious financial difficulties, possibly leading to its disappearance, which would have prevented the broadcasting bodies from having access to its technical resources and jeopardized the continuity of the system.

The Netherlands Government states that this transitional stage is going to come to an end and that it has decided to present a proposal to the States General to abolish the obligation contained in Article 61 of the Mediawet with effect from 1 January 1991, with regard to television programmes, and with effect from 1 January 1992, with regard to radio programmes.

It contends that the advantages at present accorded to the NOPB are compatible with Article 59 of the Treaty. In response to the Commission's contention that the present situation cannot be regarded as a transitional period because the transitional period provided for in Article 59 of the Treaty expired on 31 December 1969, the Netherlands Government maintains that this ignores the actual situation. The Mediawet must be seen not as a series of protectionist measures but as an element in a process of gradual liberalization. It enables the broadcasting associations to obtain 25% of their requirements for television technical resources in the free market, and this in itself constitutes the beginnings of a stimulus to that market.

Since this obligation is temporary, the Commission's argument that it resembles the obligation condemned by the Court in the Irish case, *Campus Oil*, cited above, is wrong. That obligation, whereby importers of petroleum products were compelled to obtain a proportion of their supplies from an Irish refinery, was permanent. Moreover, the case was concerned with the free movement of goods and not with the freedom to provide services.

The Netherlands Government further maintains that the Court has consistently held that derogations from Article 59 are lawful if they are justified by the general

good and are applied in a non-discriminatory manner (Case 279/80 *Webb* [1981] ECR 3305, paragraph 17).

The general good, which includes cultural policy, requires the pluralist and non-commercial character of radio and television broadcasting to be maintained. In this respect, the Netherlands Government refers to the *Cinéthèque* judgment, cited above, where the Court held that restrictions on the marketing of films recorded on videocassettes were permissible where their sole purpose was to encourage the financial exploitation of the films in cinemas. This decision shows, first, that objectives of cultural policy must be included among the interests that may justify restrictive measures. It also shows that such measures may be of an economic nature.

The importance of the NOPB in Dutch cultural policy resides in the fact that it makes technical resources available to the broadcasting associations at a cost supervised by the State.

The survival of the NOPB could not be guaranteed temporarily by any means other than its monopoly status. In those circumstances it was precisely the public interest which necessitated the transitional measures. Other measures, such as an increase in the television and radio licence fee, were ruled out, because it was also necessary in the public interest to 'control the amount of the licence fee payable by Dutch citizens'.

Moreover, the NOPB performs specific tasks in the public interest, such as maintaining sound and film archives and managing an orchestra and choirs. Although those tasks are funded entirely by the State, they also enable programmes of high quality to be made. It would be very difficult, therefore, to distinguish them from the role of making technical resources available to the broadcasting associations.

For those reasons the Netherlands Government considers that the obligation to use the technical resources of the NOPB is proportional to the objective pursued.

Alternatively, the Netherlands Government maintains that the privileged position of the NOPB is justified by Article 90 of the EEC Treaty. It relies on the *Saachi* decision, cited above, and argues that for non-economic considerations in the public interest Member States may exclude certain economic activities from the scope of free competition, such as the production of radio and television programmes, by granting a monopoly to certain undertakings.

It therefore contends that the existence of a partial monopoly in favour of an undertaking to which a Member State grants exclusive rights is not, as such, incompatible with the provisions of the Treaty.

In the case of the NOPB the removal of certain activities from the scope of free competition is justified by the public interest. In this respect it invokes the same grounds of public interest which it put forward by way of its main argument to

justify the restrictions on the freedom to provide services, namely the continuity of the broadcasting system, the preservation of pluralism in the media, the broadcasting bodies' interest in access to quality technical resources and the performance by the NOPB of non-profit-making cultural tasks.

It maintains that the Commission's argument that the sole purpose of this restriction on competition is to prolong the survival of the NOPB is wrong.

Similarly, it denies the Commission's claim that a mere partial exclusion of certain services from competition shows that the public interest is not opposed to competition. In fact, Article 90 permits not only an absolute monopoly but also partial privileged positions.

2. *The conditions imposed with regard to the transmission in the Netherlands of advertisements contained in radio or television programmes broadcast from other Member States*

The *Commission* maintains that the restrictions imposed on the cable transmission from other Member States of television programmes containing advertising specifically intended for the Dutch public are incompatible with Article 59 of the EEC Treaty.

First, it draws a distinction between the conditions imposed on broadcasting bodies (which may not be profit-making, may not enable a third party to make a profit and must attribute the management of the advertising activity to an independent legal person) and the conditions relating to the advertisements (which may not exceed 5% of air time, must be clearly identifiable as such and separate from the rest of the programme and must not be broadcast on Sundays).

It says that the conditions imposed on foreign broadcasting bodies may appear to be the same as those imposed on Dutch broadcasting bodies. However, by extending to foreign broadcasters the system applicable to Dutch broadcasting the Mediawet makes the formers' task impossible, since they cannot transmit their programmes unless they are established in a Member State which has based its legislation on that of the Netherlands. The Commission maintains that once it is ensured that the national system adequately reflects the facets of Dutch society without contamination from advertising and thus guarantees its pluralism, any foreign programme, regardless of the advertising that it contains, can only enrich the pluralism which the Dutch public enjoys. On that view, once television advertising is permitted in the Netherlands, it must also be open to residents of other Member States and they may not be required to renounce all profit.

The Commission maintains that even though the conditions relating to the advertisements are applicable indiscriminately, they should be justified by considerations of the public interest, such as that of protecting the viewer or listener from excessive advertising. It observes that those conditions do not have to be observed if the advertising is not specifically intended for the Dutch

public. It concludes from this that their sole purpose is to protect the Dutch advertising market from foreign competition for the benefit of the Dutch broadcasting system.

Finally, the Commission stresses the differences between this case and the case which culminated in the judgment in *Van Binsbergen*, cited above, upon which the Netherlands Government relies. That judgment was motivated by a concern to preserve the applicability of professional rules intended to protect the recipients of the service. The aim was to ensure that a person providing a service established abroad did not fall outside the rules imposed on a provider of services established within the country, for example those regarding organization, qualifications, professional ethics, supervision and liability. Article 66 of the Mediawet is not based on any such concern. The prohibition in the Mediawet is not confined to the examples mentioned by the Court. Moreover, the *Van Binsbergen* case was concerned with a provider of services who was established in a Member State and whose activity was 'entirely or principally directed towards' another Member State. Such a situation is not found in the present case. The essential objective of foreign broadcasting bodies is not to court the favour of the Dutch public.

In sum, the Commission considers that the criteria laid down in Article 66(1)(b) of the Mediawet are either discriminatory and do not come within the scope of public policy or not discriminatory but are not justified by the public interest. The Commission maintains that the sole purpose of the conditions laid down in the Mediawet is to close the Dutch radio and television advertising market to foreign competition. Such a protectionist measure may not be used to safeguard a cultural objective.

The *Kingdom of the Netherlands* maintains that the application should be dismissed.

First, it compares the Mediawet with the previous legislation, the Kabelregeling.

It observes that the Mediawet preserves the fundamental principles of the Dutch broadcasting system which, like the daily press, safeguards both freedom of expression and the Dutch cultural identity. It says that the aim of Dutch policy is to enable the various social, cultural, religious and philosophical components of Dutch society to express their views. Such a system conflicts with the notion that access to the media should depend on commercial considerations. The Mediawet therefore imposes certain conditions on the broadcasting bodies (number of members, programmes provided, prohibition on all advertising, etc.).

With regard to the transmission of foreign programmes and the use of cable networks, the Netherlands Government stresses the differences between the Mediawet and the Kabelregeling. Unlike the latter, the Mediawet does not contain any prohibition on subtitling. The absolute prohibition on the broadcasting of programmes containing advertising specifically intended for the Dutch public has also been abandoned. The Mediawet now permits cable-network operators to transmit advertising programmes of this kind, provided that the conditions laid down in Article 66 are fulfilled. Those conditions are intended to safeguard the objectives of the Dutch system. They impose on foreign broad-

casting bodies the most essential requirements of the Dutch system.

The Netherlands Government observes that the provisions of the second sentence of Article 66(1)(b) also apply to Dutch broadcasting bodies. It stresses that those bodies are also subject to conditions regarding the procurement of air time and the composition of programmes which are not imposed on foreign broadcasters.

Consequently, it denies that the combined conditions contained in that article may lead, in practice, to the same result as an absolute prohibition on foreign broadcasting bodies to transmit programmes intended for the Dutch public. In support of this contention, it observes that a commercial television programme, RTL Véronique, and two commercial radio programmes, Radio 10 and Sky Radio, broadcast by foreign stations, satisfy the requirements of Article 66 and are transmitted by cable in the Netherlands without any restriction.

It then examines each of the conditions laid down in the Mediawet.

With regard to the first requirement, namely that advertisements should be produced by a legal person separate from the programme producer, it states that it is intended to prevent advertising producers from influencing the content of programmes. Under the Dutch system this objective is the reason for the separation between the broadcasting bodies and the STER. The Netherlands Government does not require that such a distinction should be laid down by the legislation applicable in the Member State from which the broadcast is made. It is sufficient if, in the broadcasting body concerned, the programme production department and the department which sells advertising time are legally separate.

With regard to the second requirement, namely that advertisements must be clearly identifiable as such and clearly separated from other parts of the programme, the Netherlands Government states that it is contained in Articles 10 and 11 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the pursuit of television broadcasting activities (Official Journal 1989 L 298, p. 23) and in Articles 13 and 14 of the Council of Europe's Convention on Transfrontier Television. Similarly, the prohibition on broadcasting advertising on Sundays was accepted by the Court as an objective requirement in its judgment in *Bond van Adverteerders*, cited above (paragraph 37).

The third requirement, regarding the maximum percentage of air time earmarked for advertising, was also expressly mentioned by the Court as an objective requirement in the same case (paragraph 37).

The fourth requirement, namely that foreign broadcasting bodies must not enable a third party to make a profit, is intended to safeguard the non-commercial nature of broadcasting. In fact, it prevents funds that should be used for the operation of the broadcasting system from being diverted elsewhere. The Netherlands Government states that this requirement does not prevent 'third parties from making a normal profit'.

Finally, with regard to the condition relating to the use of advertising revenue, the Netherlands Government states that the purpose of this is to 'provide opportunities for foreign broadcasting bodies at least similar to those available under the Dutch system'. Under that system, most of the advertising revenue of the STER is used to cover the operating costs of broadcasting and the balance is used to subsidize the press. Since the latter expenditure is imposed only in the Dutch system, foreign broadcasting bodies are, in reality, placed in a more advantageous position.

The Netherlands Government points out that the Court has held that in view of the special nature of certain services, such as the broadcasting of television advertisements, specific requirements justified by the public interest are compatible with the Treaty, if they are imposed equally on all persons or undertakings established in the territory of the receiving Member State (*Procureur du Roi* v *Debauve*, cited above).

In addition, the Member States have wide powers to assess not only what is necessary or desirable in the public interest but also the most appropriate means of serving that interest. The Netherlands Government maintains that the public interest predicates the preservation of a pluralist and non-commercial broadcasting system.

It adds that the Court has consistently held that a Member State is entitled to adopt provisions to prevent the freedom guaranteed by Article 59 of the EEC Treaty from being used by a person who provides services whose activity is entirely or mainly directed towards its territory and who seeks to evade the special rules which would be applicable to him if he were established in the territory of that State (*Van Binsbergen*, cited above; Case 205/84 *Commission* v *Germany*, cited above; Case 130/88 *Van de Bijl* [1989] ECR 3039).

Nevertheless, it ended by stating that it intends to amend Article 66 of the Mediawet so that special requirements would no longer be imposed on foreign broadcasting bodies which insert advertisements specifically intended for the Dutch public into their programmes. However, it added that this proposal was not based on the idea that Article 66 of the Mediawet was contrary to the EEC Treaty.

IV — Question put by the Court to the Netherlands Government

In response to a request made by the Court, the Netherlands Government submitted the bill on commercial broadcasting which was presented to the Dutch Parliament on 18 May 1990.

With regard to the stage reached in the progress of this bill, the Netherlands Government submitted comments, which are included in the report for the hearing in Case C-228/89 *Stichting Collectieve Antennevoorziening Gouda.*

R. Joliet
Judge-Rapporteur