OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 18 April 1991 *

Mr President,
Members of the Court,

1. This Opinion relates to two separate cases: an action brought by the Commission against the Kingdom of the Netherlands (Case C-353/89) and a request for a preliminary ruling made by the Raad van State, The Hague (Case C-288/89).

Both cases raise issues which are to some extent identical as regards the consistency with Community law of Dutch legislation concerning the production and broadcasting of radio and television programmes. More specifically, the questions submitted for a preliminary ruling relate to the conditions laid down in Article 66 of the Mediawet [1] for the re-transmission of programmes originating in other Member States containing advertising specifically intended for the Dutch public; in addition to those conditions, the direct action brought by the Commission relates to the obligation imposed on broadcasting bodies by Article 61 of the Mediawet wholly or partly to use the services of a Dutch undertaking for the production of their programmes.

For reasons of economy I shall therefore present a single Opinion. I shall deal first with the application brought by the Commission and then derive from that case the answers to the questions put by the Dutch court in Case C-288/89.

2. With regard to Case C-353/89, the Commission asks the Court for a declaration that by reserving, entirely or partly, the production of programmes for the Dutch radio broadcasting bodies to a Dutch undertaking and by imposing certain conditions on foreign broadcasters regarding the re-transmission of programmes containing advertising specifically intended for the Dutch public, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 59 of the Treaty.

3. As I have said, the two provisions challenged are contained in the Mediawet, which came into force on 1 January 1988. Like its predecessor, that law is intended to safeguard a pluralistic, non-commercial broadcasting system, and it is precisely in relation to that objective that the main provisions embodying the system are formulated, in particular those concerning the right to broadcast and advertising.

In order to ensure that the range of broadcasts reflects the various political, social and religious components of Dutch society, most of the national air time is distributed among the '*omroepverenigingen*'

* Original language: Italian.

1 — The Law of 21 April 1987 regarding the financing of radio and television programmes, the radio and television licence fee and press subsidies (*Staatsblad* No 249 of 4. 6. 1987).

(to which I shall refer as the 'national broadcasting bodies'), which are associations of listeners or viewers with legal personality, consisting of at least 150 000 members. In addition, a limited amount of air time (about 8%) is allotted to political parties, religious groups and cultural minorities.

The Nederlandse Omroep Stichting (Dutch Foundation for the Broadcasting of Radio and Television Programmes) is responsible for coordinating programmes broadcast nationally and for producing broadcasts of common interest (e.g. television news).

In principle, the domestic broadcasting bodies have a broad measure of freedom with regard to their own broadcasts. They may buy programmes ready made in the Netherlands or in other countries or produce their own.

However, under Article 61 of the Mediawet, where they produce their own programmes they must use the facilities and technical resources (recording studios, set workshops, technicians, orchestra, etc.) of the Nederlandse Omroepproduktie Bedrijf (NOPB), a company governed by Dutch law, which provides its services at controlled prices. This obligation applies to all radio programmes and to 75% of television programmes.

4. Broadcasting bodies are also prohibited from inserting into their programmes advertisements coming from third parties. In fact, a monopoly over the broadcasting of such advertisements is attributed to the Stichting Etherreclame (STER), a public body independent of the bodies which have the right to broadcast. Essentially, the STER simply sells advertising time. The resulting revenue is received by the State and used to subsidize the broadcasting bodies themselves and (to a lesser extent) the press.

In the Netherlands most programmes may be received solely through cable distribution. Distributors are authorized to transmit foreign programmes. Nevertheless, apart from cases where such programmes may be received by means of an individual aerial, if they contain advertising specifically intended for the Dutch public, Article 66 of the Mediawet permits their retransmission solely if certain conditions are fulfilled.

One group of conditions relates to the broadcasting body itself: it may not be profit-making; it may not enable a third party to make a profit; and it must attribute the management of the advertising activity to a separate legal person.

The other conditions relate to the actual advertisements: they must be recognizable as such; they may not exceed 5% of total air time; and they may not be broadcast on Sundays.

Advertisements are regarded as being intended 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

sub-titles or a portion of a programme in Dutch'.

I shall now turn to the two complaints formulated by the Commission.

A — The monopoly granted to the NOPB (Article 61 of the Mediawet)

5. The Commission claims that Article 61 of the Mediawet is incompatible with Article 59 of the Treaty on the ground that that provision prevents undertakings in other Member States from providing services relating to the production of radio programmes and restricts considerably (namely to 25%) the possibility of providing services for the production of television programmes.

The Dutch Government maintains, first, that the obligation laid down in the Mediawet is temporary and stems from the concern to guarantee a smooth transition from the previous system, in which the technical resources belonged to the public sector and the obligation in question was absolute, to a system in which the rules of the market apply in full.[2] The Dutch Government maintains that a period of transition is essential in order to avoid the collapse of the NOPB and mass redundancies and to preserve the cultural experience of the previous system, first and foremost pluralism. Without a transitional system the NOPB would have had serious financial difficulties which could have caused it to disappear and thus deprived the broadcasting bodies of access to its technical resources, and consequently jeopardized the continuity of the system.

In this respect, the Dutch Government's case is essentially not based on legal arguments since it is merely arguing that proceedings under Article 169 are inappropriate at such a delicate time and reveal a lack of understanding on the part of the Commission.

In this connection I would merely observe, in common with the Commission, that the fact that the present situation is temporary cannot justify the failure to observe the prohibition laid down in Article 59.

6. Consequently, the compatibility of Article 61 of the Mediawet with Article 59 of the Treaty must be considered without taking account of the temporary nature of the situation.

In this respect, the Dutch Government maintains that the provision in question is not incompatible with Article 59: it does not, in fact, entail any discrimination between Dutch undertakings other than the NOPB and undertakings in other Member States. Moreover, undertakings or bodies not operating at the national level may use the technical resources of their choice; furthermore, as far as the production of television programmes is concerned, it is obviously possible to use undertakings in other Member States to the extent of 25%.

2 — The Dutch Government has, in fact, presented a draft law to the Dutch parliament amending the Mediawet, whereby the obligation laid down in Article 61 would be abolished from 1 January 1991 with regard to television and from 1 January 1992 with regard to radio. This amendment has not yet been adopted. However, as far as television programmes are concerned, it is already in operation *de facto*, since the obligation in question has been set at 0%.

The Dutch Government's argument cannot be accepted. In fact, it is undeniable that the provision in question favours a Dutch undertaking by guaranteeing that it can cover most domestic needs. It therefore restricts considerably — or even excludes — the possibility for undertakings in other Member States to provide services in the Netherlands.[3] Moreover, the fact that the provision in question similarly disadvantages the other Dutch undertakings cannot be regarded as capable of legitimizing the restriction vis-à-vis providers of services in other Member States.

A national provision restricting the freedom to provide services, which, as the Court has held on several occasions, is a *fundamental freedom* guaranteed by the Treaty, cannot be regarded as compatible with Article 59 simply because its restrictive effects do not favour all national undertakings of the type in question.

I am convinced that this reasoning — even though it was adopted by the Court in a case concerning the free movement of goods[4] — is equally valid with regard to the freedom to provide services. In view of the level of Community integration which has now been attained, the scope of Article 59 cannot be defined as being different from and more limited than that of Article 30, even without taking account of the fact that in the recent 'telecommunications' case[5] the Court stated that the scope of Article 30 must be defined in relation to a 'system of undistorted competition' which entails 'equality of opportunity . . . as between the various economic operators'. I do not think that this can be limited to operators trading in goods.

7. These considerations lead me to conclude that the Dutch provision in question is discriminatory and therefore reasons based on public interest cannot be invoked in order to justify it. As the Court has consistently held, 'national rules which are not applicable to services without distinction as regards their origin and which are therefore discriminatory are compatible with Community law only if they can be brought within the scope of an express derogation'.[6]

Consequently, the only derogation that could apply in the present case is that contained in Article 56 of the Treaty (to which Article 66 refers), whereby any discriminatory provisions may be justified on grounds of public policy, public security or public health.

I do not think that safeguarding the pluralistic and non-commercial nature of the Dutch radio and television system can come

3 — In this respect I would refer to the judgment in Case 72/83 *Campus Oil* [1984] ECR 2727, in which the Court stated, with regard to a national measure obliging all importers to purchase a certain percentage of their requirements for petroleum products from a national refinery, that such an obligation 'limits to that extent the possibility of importing the same product. It thus has a protective effect by favouring national production and, by the same token, works to the detriment of producers in other Member States' (paragraph 16). The Court held that the measure was therefore incompatible with Article 30.

4 — Case C-21/88 *Du Pont de Nemours* [1990] ECR I-889, paragraphs 11 to 14.

5 — Case 202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 51.

6 — Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraph 32.

within the scope of Article 56 or, in particular, that such an objective can be regarded as a 'public policy' ground in view of the Court's restrictive case-law on that concept.[7]

8. Moreover, even if it were to be considered that the Dutch provision is not based on aspects of formal discrimination on grounds of nationality and that the resulting restrictions are therefore, in principle, justifiable on grounds of the general interest, the result would still be the same.

In fact, although the protection of cultural objectives, such as safeguarding the pluralistic and non-commercial nature[8] of the Dutch radio and television system, in principle numbers among grounds of the general interest,[9] the requirements invoked in the present case (relating to the general interest) are not such as to justify any derogation from the freedom to provide services. In this respect I would observe that the Dutch Government maintains that the provision in question is necessary to safeguard the broadcasting bodies' access to high-quality technical resources, and therefore the continuity of the system, and the performance of the cultural tasks entrusted to the NOPB.

Since the Dutch Government itself acknowledges that the provision in question is 'in fact intended to ensure the survival of the NOPB' (page 5 of the rejoinder), I would point out straight away that the survival of the NOPB is not necessary in order to guarantee the pluralism and the non-commercial nature of the system itself or the specific requirements relating to the safeguarding of that objective. In this connection, it is sufficient to observe that if the Dutch broadcasting bodies considered it expedient to use the NOPB in order to be able to utilize high-quality technical resources at a low cost, they would do so even in the absence of a legal obligation; the restriction is therefore pointless in this respect. With regard to the fact that certain cultural tasks are entrusted to the NOPB (maintenance of physical resources, such as an orchestra, choirs, sound and film archives), I agree with the Commission that since the performance of these tasks is financed entirely by the State it may continue even after the abolition of the obligation laid down in Article 61 of the Mediawet, if it is lawful in other respects.

Lastly, the very fact that the restriction in question has in fact already been abolished, at least with regard to the production of television programmes, suggests that the survival of the NOPB is not indispensable in order to safeguard the pluralism of the Dutch system. Moreover, the Dutch Government's statement that the NOPB

7 — The Court has held on several occasions that since Article 56 contains a derogation from a fundamental principle of the Treaty (Article 3(c)), it must be interpreted restrictively and therefore does not apply unless there is 'a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society' (Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35) and the measures adopted must be proportionate and strictly necessary with regard to the interests which it is sought to safeguard (Joined Cases 115 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 9).

8 — In this respect I would observe that, in any event, the non-commercial nature of a broadcasting system cannot be regarded *per se* as an overriding requirement capable of justifying a restriction on the freedom to provide services; it is merely a means of guaranteeing pluralism. Consequently, the non-commercial nature of a broadcasting system may justify restrictions solely in so far as they are essential in order to pursue an objective that is worthy of protection at the Community level, such as an objective of cultural policy designed to ensure pluralism.

9 — See, for example, Case 180/89 *Commission* v *Italy* [1991] ECR I-709, where the Court held that 'the general interest . . . in the conservation of the national historical and artistic heritage can constitute an overriding reason justifying a restriction on the freedom to provide services' (paragraph 20).

would have been in danger of collapsing, with the loss of 3 000 jobs, if the restriction at issue had been abolished without any transitional phase confirms the fact that the provision in question is closely connected with economic considerations.

9. The Dutch Government maintains in the alternative that the system instituted by Article 61 of the Mediawet is permitted by Article 90(1) of the Treaty, which is based precisely on the assumption that the existence of undertakings with special or exclusive rights is lawful.

In this respect I would merely point out, without its being necessary to determine whether and to what extent the restriction laid down in favour of the NOPB constitutes special or exclusive rights, that in the 'telecommunications' judgment cited above [10] the Court rightly held that even though Article 90 '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. That depends on different rules, to which Article 90(1) refers.'

Essentially, the Court has interpreted Article 90(1) as a reference provision; this means that in the present case the compatibility with the Treaty of Article 61 of the Mediawet must be tested against Article 59, in so far as it permits derogation from the principle of freedom to provide services.

10 — Case C-202/88 *France* v *Commission*, cited above, paragraph 22.

As I have already found, the restriction granted in favour of the NOPB cannot be justified on the basis of the derogations mentioned in Article 56 of the Treaty or on the basis of overriding requirements or, if a terminology differing from that of Article 30 is preferred, on the grounds of the general interest. Consequently, the provision in question is incompatible with Article 59 of the Treaty.

B — The conditions laid down in Article 66

10. Article 66 of the Mediawet permits the retransmission of foreign programmes containing advertising specifically intended for the Dutch public if a number of conditions (which are also imposed on the Dutch broadcasting bodies) are fulfilled. If all of these conditions are not fulfilled, the foreign programmes may be retransmitted only if they do not contain advertising specifically intended for the Dutch public.

Three of the six conditions in question relate to the broadcasting bodies (they must be non-profit-making; they must not enable a third party to make a profit; and the management of the advertising activity must be entrusted to a separate legal person) and the other three to the advertisements (which may not exceed 5% of air time, must be clearly recognizable and separate from the rest of the programme and may not be transmitted on Sundays).

Before I deal with the question of the compatibility of those conditions with Article 59 of the Treaty I shall make a few general observations on the restrictions on

the freedom to provide services resulting from the application of provisions applicable generally.

11. Firstly, the first paragraph of Article 59 does not prohibit only restrictions based on nationality, but more generally *'restrictions on freedom to provide services within the Community... in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'*. Moreover, provisions containing special arrangements for foreign nationals are applicable solely if they are justified 'on grounds of public policy, public security or public health' (Article 56, to which reference is made by Article 66).

12. As I have already shown, as a result of the terminology employed and its substance, this system corresponds to a large extent to that of the free movement of goods in view of its prohibition of all restrictions (Articles 30 to 34) and the derogations permitted by Article 36. Consequently, in my view, as in the case of the free movement of goods, any restrictions on the freedom to provide services (even if they are not discriminatory) are in principle incompatible with Article 59. [11]

The previous decisions of the Court do not seem to contradict this conclusion, at least not in principle. In fact, from the *Van Binsbergen* case [12] onwards the Court has held that Articles 59 and 60 on the freedom to provide services became directly applicable on the expiry of the transitional period and that 'their applicability [was] not conditional on the harmonization or the coordination of the laws of the Member States'. [13]

The Court has also stated that Articles 59 and 60 'require the removal not only of all discrimination against a provider of a service on the grounds of his nationality but also all restrictions on his freedom to provide services imposed by reason of the fact that he is established in a Member State other than that in which the service is to be provided'. [14] The Court added that 'in particular, the Member State cannot make the performance of the services in its territory subject to the observance of all the conditions required for establishment; were it to do so the provisions securing freedom to provide services would be deprived of all practical effect'. [15]

13. The scope of the freedom to provide services is therefore defined in very wide terms, at least in principle. In particular, it is evident, from the statements that I have quoted, that the prohibition of discrimination on grounds of nationality does not play an absolute and conclusive role as it does in the case of freedom of establishment. Indeed, since the crossing of

11 — See to this effect the Opinion of Mr Advocate General Jacobs in Case C-76/90 *Säger*, delivered on 21 February 1991 and the Opinion of Mr Advocate General Lenz in the 'tourist guide' cases (Case 154/89 *Commission* v *France*; Case 180/89 *Commission* v *Italy*; Case 198/89 *Commission* v *Greece* [1991] ECR I-727). The Opinion of Mr Advocate General Van Gerven in Case C-340/89 *Vlassopoulou*, delivered on 28 November 1990, also contains interesting observations on this point, although that case concerns the right of establishment.

12 — Judgment in Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299.

13 — See, most recently, Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 25.

14 — Judgments in Case 205/84 *Commission* v *Germany*, cited above, paragraph 25, and in Case 180/89 *Commission* v *Italy* [1991] ECR I-709, paragraph 15.

15 — *Commission* v *Italy*, cited above, paragraph 15.

frontiers is not coupled, in the case of the provision of services, with the creation of a permanent establishment, the principle of national treatment might be liable to give rise to spontaneous restrictions with regard to that aspect of the supply of services. By imposing on foreigners, despite what has been said above, the same conditions as those imposed on nationals, which presuppose a permanent connection with the State, the State would end up by substantially nullifying the freedom to provide services and its special features as compared with the freedom of establishment. [16]

Admittedly the Court has introduced major limitations on the wide scope of the prohibition contained in Article 59 by holding that restrictions affecting nationals and Community nationals in the same way as a result of the application of national provisions which are designed to protect general interests and hence are binding on all, are lawful.

14. However, the Court has stressed the exceptional nature of the possibility of derogation and stated that since the freedom to provide services is a fundamental principle of the Treaty it may be restricted solely:

by rules justified in the general interest which are applied, without distinction, to all persons and undertakings operating in the territory of the State where the service is provided;

in so far as the general interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State in which he is established;

in so far as such requirements are objectively justified, that is to say provided that the same result cannot be achieved by less restrictive rules. [17]

I shall now examine the conditions laid down in the Mediawet. For practical reasons I shall deal first with those relating to the broadcasting bodies and then with those concerning advertising.

— Conditions relating to the broadcasting bodies

15. The Commission maintains that, by extending to foreign broadcasters the system applicable to Dutch broadcasters, the Mediawet makes the retransmission of their programmes in the Netherlands impossible *de facto* if they contain advertising intended specifically for the Dutch public, essentially since in order to fulfil the relevant conditions the foreign bodies would have to be established in a State whose legislation was modelled on that applicable in the Netherlands.

Indeed, although on the formal level, they are applicable indiscriminately, the

16 — Tizzano, 'La libera circolazione dei servizi nella CEE. Profili generali' *Professioni e servizi nella CEE* (ed. Tizzano), Padua, 1985, p. 20 et seq.

17 — With regard to the three conditions mentioned see Joined Cases 110 and 111/78 *Van Wesemael* [1979] ECR 35; Case 279/80 *Webb* [1981] ECR 3305; Case 205/84 *Commission* v *Germany*, cited above, paragraphs 27 and 29; and most recently, Case 180/89 *Commission* v *Italy*, cited above, paragraphs 17 and 18.

provisions in question are, by virtue of their very nature, in fact discriminatory. Since the other Member States do not have a broadcasting system similar to that in force in the Netherlands, foreign broadcasters cannot in any event be in the same position as domestic broadcasters. The 'substantive' discrimination essentially arises from the fact that situations which are in fact not comparable are treated in an identical manner.

16. In this respect, it should be observed that, according to the Court's case-law, 'not only overt discrimination based on the nationality of the person providing a service but also all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result', [18] are prohibited.

The conditions imposed by the Mediawet on foreign broadcasters seem to constitute a paradigm case of covert discrimination. This means that they cannot, in any event, reasonably be regarded as being justified on grounds of the general interest. In the final analysis, they make the retransmission of programmes coming from other Member States impossible in practice, without, moreover, having any effect on the Dutch Government's declared objectives, namely safeguarding the pluralism and non-commercial nature of the broadcasting system.

17. Indeed, requirements that foreign broadcasters should not enable a third party to make a profit in order (as the Netherlands Government maintains) to prevent funds that would otherwise be used to finance broadcasting from being diverted and that such broadcasters should not have a profit-making object and that therefore advertising revenue should be used solely to finance broadcasting in order 'to provide foreign broadcasters with opportunities at least similar to those existing in the Dutch system' (page 24 of the defence) do not make any sense in relation to the objective pursued. It is obvious that the observance (or non-observance) of those conditions has no effects on the Dutch broadcasting system as such.

In fact, the conditions in question do not affect programme content. It is true that in so far as they prevent foreign broadcasters from penetrating the Dutch advertising market they prevent the STER from being deprived of some of its advertising revenue. Inasmuch as it is sought to argue that such revenue represents a source of funds for the domestic broadcasting bodies and therefore helps from that point of view to safeguard the pluralism of the Dutch system, I would merely observe that it is an objective that is eminently economic and, in any event, excessive in relation to the aim pursued, particularly when it is borne in mind that the funding derived from the revenue of the STER constitutes merely a fraction of total public funding.

As regards the condition that the advertisements must be produced by a legal person separate from the broadcasting body, the Dutch Government maintains that the aim of that condition is to prevent the

18 — Joined Cases 62 and 63/81 *Seco* v *Evi* [1982] ECR 223, paragraph 8.

advertising from influencing programme content; it is therefore intended to secure consumer protection from the point of view of the quality of the programmes themselves. However, the Dutch Government states that it does not require such a separation to be laid down in the legislation in force in the Member State where the broadcast is made. It is enough that, within the broadcasting undertaking in question, the programme production department and the department selling advertising time are legally separate. In other words, a mere 'fiction' would satisfy the requirement laid down by the Dutch Government. It goes without saying that such an arrangement cannot be regarded as suitable to guarantee that the advertising does not influence the programmes.

18. In the final analysis, the conditions imposed on foreign broadcasters by the Mediawet cannot quality for any derogation from the freedom to provide services. They are therefore incompatible with Article 59 of the Treaty.

— *Conditions relating to advertisements*

19. With regard to the conditions laid down in the Mediawet relating to advertising, it should be observed first that they are applicable without distinction, both on the formal and (in principle) substantive levels. They are therefore *non-discriminatory restrictions.*

The Court has had occasion to consider restrictions relating to television advertising in the *Debauve* case [19] and in the *Bond van Adverteerders* case, [20] where it held essentially that until the national provisions governing this field are harmonized, non-discriminatory restrictions must be regarded as being compatible with the Treaty.

In the *Debauve* judgment the Court stated that 'in view of the particular nature of certain services such as the broadcasting and transmission of television signals, specific requirements imposed upon providers of services which are founded upon the application of rules regulating certain types of activity and which are justified by the general interest and apply to all persons and undertakings established within the territory of the said Member State cannot be said to be incompatible with the Treaty to the extent to which a provider of services established in another Member State is not subject to similar regulations there' (paragraph 12).

Indeed, the Court started out from the finding that most Member States impose limitations of varying scope on broadcasts of advertisements, ranging from an absolute prohibition to restrictions relating to the content, the time of day, the duration and the manner of the broadcasting. Those limitations are determined by the fact that the Member States pursue general objectives in the sector in question. The Court concluded that 'taking into account the considerations of general interest underlying the restrictive rules in this area', the application of legis-

19 — Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833.

20 — In that case the Court ruled on the interpretation of the compatibility of Article 59 of the Treaty with Article 4 of the Kabelregeling, which was replaced by Article 66 of the Mediawet with regard to the aspects in issue here.

lation containing such rules 'cannot be regarded as a restriction upon freedom to provide services', provided that that legislation treats 'all such services identically whatever their origin or the nationality or place of establishment of the persons providing them' (paragraph 13).

That conclusion is substantially confirmed by the judgment in *Bond van Adverteerders*, in which the Court held that Article 4 of the Kabelregeling was incompatible with Article 59 of the Treaty with regard to the prohibition imposed on foreign broadcasters against transmitting advertising intended especially for the Dutch public and against the subtitling in Dutch of programmes retransmitted in the Netherlands, but the Court also confirmed that prohibitions imposed by a Member State on grounds of the public interest (requirements of cultural policy in the case in question) were not *per se* incompatible with the Treaty, provided that they were not discriminatory and their scope was not disproportionate to the intended objective.

20. In the final analysis, it appears from the relevant case-law of the Court that as long as national legislation on broadcasting has not been harmonized,[21] the freedom to provide services, which is directly guaranteed by the Treaty, consists solely of the prohibition on restricting television advertising to a greater extent than domestic television advertising.

21 — Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) comes into force on 3 October 1991.

Moreover, in the *Bond van Adverteerders* judgment the Court described 'a prohibition on advertising certain products or on certain days' and a limitation of 'the duration or the frequency of advertisements' as 'objective restrictions'.[22]

Consequently, the Court essentially regarded the restrictions resulting from the application of certain conditions concerning advertisements as justified by the general interest; it is precisely the conformity of those conditions with Article 59 of the Treaty that is now being challenged by the Commission.

21. The Commission maintains that the fact that those conditions do not have to — or, in any event, may not — be complied with in the case of advertising not specifically intended for the Dutch public means that they were not adopted in the general interest, for instance to protect viewers or listeners from excessive advertising.

The Dutch Government rejects this argument and contends that in any event only a small percentage of listeners and viewers listen to or watch foreign programmes and that it is therefore sufficient to ensure that programmes in Dutch or with Dutch subtitles fulfil the conditions imposed.

The Commission maintains on the contrary that the sole objective of the Dutch Government is to protect the Dutch adver-

22 — Paragraph 37.

tising market from foreign competition in order to benefit the domestic broadcasting system.

22. In this respect I would observe that legislation such as that at issue may, in any event, make it more expensive and more difficult for foreign broadcasters to transmit programmes containing advertising specifically intended for the Dutch public, if only because they will have to adapt their programmes in order to fulfil the conditions in question. In other words, conditions such as the 5% limit and the prohibition on advertising on Sundays amount to special rules applicable to broadcasters in the other Member States, since they alone have to cut out parts of their programmes.

Consequently, the conditions in question are such that they mainly impede the operations of foreign broadcasters and constitute a restriction on the free movement of services in the sector at issue. I have some doubts therefore as to whether those conditions can automatically be classified as 'objective', since the difference between them and the three conditions previously examined is more apparent than real.

23. However, it cannot be denied that such a restriction is justifiable on the grounds of requirements connected with the general interest, such as consumer protection, which the Court has accepted on several occasions as a requirement worthy of protection in the services sector. [23]

In the present case, it is evident that the provisions in question apply in a non-discriminatory manner to both Dutch and foreign broadcasting bodies and are not disproportionate to the objective pursued (in fact, it has not been proved that the result sought by the Dutch Government could be achieved by means of less restrictive rules).

Of course, this means that it is the law of the State in which the broadcast is received which prevails rather than that of the State in which the broadcast is made, as should normally happen in a liberalized system of the kind envisaged by the Treaty and, in general terms, by the Court.

Nevertheless, this is merely indicative of the fact that, although the freedom to provide services — like the free movement of goods — is a fundamental freedom guaranteed by the Treaty, it has to be reconciled (in the absence of harmonization at Community level) with requirements which are equally 'fundamental' — in this case, consumer protection.

24. In the final analysis, although the conditions laid down in Article 66 of the Mediawet relating to advertisements constitute a *de facto* restriction on the free movement of services, they are compatible with Article 59 in so far as they are justified by the pursuit of a general interest worthy of protection, namely consumer protection.

23 — See, most recently, the judgments in Case 205/84 *Commission* v *Germany*, cited above, paragraph 33, and Case 180/89 *Commission* v *Italy*, cited above, paragraph 20.

25. In the light of the foregoing I would therefore propose that the Court:

— Declare that, by reserving, wholly or partly, the production of programmes for Dutch broadcasting bodies to a Dutch undertaking and by requiring foreign broadcasting bodies, for the purposes of the retransmission of programmes containing advertising specifically intended for the Dutch public, not to have a profit-making object, not to enable a third party to make a profit and to entrust the management of the advertising activity to a separate legal person, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 59 of the Treaty;

— Dismiss the remainder of the application; and

— Order the defendant to bear the costs.

26. With regard to Case C-288/89, I propose that the Court give the following answers to the questions submitted by the Raad van State, The Hague:

'(1) Restrictions on the freedom to provide services imposed by national provisions applicable without distinction are compatible with Article 59 solely if they are justified by overriding requirements relating to the general interest and those requirements cannot be satisfied by less restrictive conditions.

(2) The pursuit of an objective of cultural policy, such as the preservation of a pluralistic broadcasting system, may, in principle, constitute an overriding requirement justifying a restriction on the freedom to provide services.

(3) Article 59 of the Treaty must be interpreted as meaning that it precludes the application of a national provision (even if it is applicable without distinction) such as Article 66 of the Mediawet, which makes the cable distribution of programmes originating in other Member States and containing advertising specifically intended for the Dutch public subject to the conditions that the broadcaster must not have a profit-making object and must not enable a third party to make a profit and that the advertising activity must be managed by a legal person separate from the broadcaster; whereas, in the absence of harmonization, the conditions that advertisements may be transmitted solely if they are recognizable as such, that they must not exceed 5% of air time and that they must not be broadcast on Sundays, are justified by overriding requirements relating to the general interest.'