OPINION OF ADVOCATE GENERAL LENZ
delivered on 16 June 1994 *

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* Original language: German.

Mr President,
Members of the Court,

A — Introduction

1. In these proceedings, the Netherlands Raad van State (Council of State) has referred to the Court for a preliminary ruling questions on the application of the provisions on freedom to provide services to particular activities of a television broadcasting body.

2. The main proceedings are between the broadcasting body TV 10 (hereinafter 'the appellant'), a company limited by shares and incorporated under Luxembourg law, and the Netherlands Commissariat voor de Media (hereinafter 'the respondent'). What prompted the dispute was the respondent's refusal to authorize the programmes broadcast by TV 10 access to the Netherlands cable network. In the decision refusing such authorization, the respondent stated that TV 10 could not be regarded as a foreign broadcasting body within the meaning of Article 66(1) of the Mediawet (Media Law) on the ground that the appellant had established itself in Luxembourg manifestly in order to evade the legislation applicable to domestic broadcasting bodies in the Netherlands.

3. The version of Article 66(1) of the Mediawet applicable to these proceedings reads as follows:

'(1) The operator of a cable broadcasting 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 an ordinary 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. ...'

4. TV 10 appealed to the Administrative Appeal Section of the Raad van State against the decision refusing it authorization. The appellant considers that the contested decision is open to challenge on several heads. It takes the view that the legal assessment of

the facts found is wrong. In addition, it argues that the decision infringes the principle of equal treatment, Articles 10 and 14 of the European Convention on Human Rights and Articles 7, 52 et seq. and 59 et seq. of the EEC Treaty. [1]

5. The national court has held that the appellant is *not* a broadcasting body within the meaning of Articles 14 to 30 of the Mediawet. It finds it proven that the appellant established itself abroad with the manifest purpose of evading the legislation applicable to domestic broadcasting in the Netherlands. It considers nevertheless that the appellant's complaint that the contested decision infringes Community law is relevant for the purposes of deciding the case.

6. In that connection, the national court states, on the basis of the judgment in *Debauve*, [2] that the provisions of the EEC Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single State. Referring to the judgment in *Van Binsbergen*, [3] it states that Member States cannot be denied the right to take measures to prevent the exercise by a person providing services whose activities are entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. Such a situation might be subject, not to the chapter on the provision of services, but to that on the right of establishment. Having regard to the judgment in *Segers*, [4] the national court is uncertain what decision to take in the case of activities carried out by a broadcasting body which has been constituted under the law of another Member State and is technically established there.

7. The Raad van State has therefore referred the following questions to the Court for a preliminary ruling:

'(1) Where a broadcaster not eligible for access to the cable network in Member State A transmits material from Member State B with the manifest purpose, as shown by objective circumstances, of thereby evading the legislation of the Member State to which the material is

1 — Since 1 November 1993 the EC Treaty in accordance with the Treaty on European Union of 7 February 1992 (OJ 1992, C 224).

2 — Judgment in Case 52/79 *Debauve* [1980] ECR 833.

3 — Judgment in Case 33/74 *Van Binsbergen* [1974] ECR 1299.

4 — Judgment in Case 79/85 *Segers* [1986] ECR 2375.

primarily but not exclusively transmitted, is that a case of cross-border provision of services for the purposes of Community law?

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

8. The appellant, the respondent, the Netherlands, German and French Governments and the Commission of the European Communities took part in the proceedings. The respondent referred in full to the observations of the Netherlands Government. I shall be returning to discuss details of the facts and the parties' observations when I carry out the legal assessment.

B — Opinion

Preliminary remark

9. Before I embark on the legal assessment of the case, I would make a preliminary remark. The facts of this case took place before Directive 89/552/EEC [5] had to be transposed into national law and before the Netherlands Mediawet had been amended so as to allow commercial broadcasting to take place. The legal criteria on the basis of which this case is to be considered would be basically different if the facts had occurred at a later time. Consequently, the legal assessment of this case will have only limited significance for later cases.

10. I would also draw attention to a further factor. The national court has not asked about the applicability to the present case of the Community-law prohibition of discrimination, which there might have been grounds to consider in the light of the access given to the Dutch cable network of transmissions of

5 — Council Directive 89/522/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).

RTL 4. The national court seems to have answered that question itself. The Court has been asked to consider the question of the prohibition of discrimination only in connection with Article 14 of the European Convention on Human Rights. In that regard, the Court's power of review is subject to considerably narrower limits than when it considers the prohibition of discrimination under Community law.

I. *The first question*

Provision of services within the meaning of Community law

11. The first question seeks to establish whether a purely *de facto* cross-border broadcasting activity can be classed as a provision of services for the purposes of Community law, even where the broadcasting body was established abroad in order to circumvent the legislation applying to domestic broadcasting bodies in the State in which the broadcasts are received.

12. Both the Netherlands and the German Governments take the view that, on the basis of the Court's 'case-law on avoidance of national rules', [6] a provision of services within the meaning of Community law cannot be taken to exist and consequently only the legislation of the State in which the broadcasts are received concerning purely domestic facts must be applied.

13. For its part, the appellant argues that a provision of services within the meaning of Community law is most certainly involved, especially since the broadcasting body is actually established in Luxembourg and has commenced broadcasting in conformity with Luxembourg legislation. Thus, it has obtained authorization from the competent Luxembourg authorities to broadcast its programmes via the Astra satellite. It is simply a question here of determining the limits of the freedom to provide services, which, moreover, should be determined solely in accordance with objective criteria.

14. Both the French Government and the Commission take the view that a provision of services within the meaning of Community law is involved. This should be distinguished from the question as to what measures a Member State is entitled to take in order to prevent the avoidance of domestic rules by the provider of services.

6 — See the case-law discussed in sections 51 and 52 *infra*.

15. Services within the meaning of Community law are defined in Article 60 of the Treaty as services which are 'normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'. Freedom to provide services is accorded for services 'within the Community', [7] that is to say, the services must be cross-border. The persons entitled to avail themselves of the freedom to provide services are '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'. [8] The expression 'nationals of Member States' within the meaning of this provision covers both natural and legal persons. For the purposes of the chapter of the Treaty on 'Services', legal persons are equated with natural persons in accordance with Article 58 by virtue of Article 66. According to Article 58, this applies to 'companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community'.

16. According to the case-law of the Court, the seat of a company in that sense serves as the connecting factor with the legal system of a particular State. [9]

17. In order to be able to invoke the freedom to provide services under Community law, the appellant must, in the first place, fulfil the criteria characterizing persons to whom the freedom applies. The appellant is a company limited by shares which was incorporated under Luxembourg law on 27 July 1989 under the name FICORT SA and was renamed TV 10 SA on 1 September 1989. The company's objects are described, *inter alia*, as 'in particular the broadcasting of television programmes'. In addition, according to its objects clause, the company may produce radio and television programmes and provide ancillary services in that connection. The appellant has been recognized as a broadcasting body by the Luxembourg authorities. Coupled with this, it has obtained authorization to transmit programmes over the Luxembourg cable network. In addition, the 'Société Européenne des Satellites' [10] has received authorization from the Luxembourg authorities to broadcast the programmes of the appellant, with which it has concluded a contract, via the Astra satellite. The production of the programmes and the technical and substantive implementation and organization of the broadcasting activity were to take place in Luxembourg.

18. Accordingly, it has been found that the appellant was established in accordance with the legal provisions of a Member State and has its seat in the Community, namely in Luxembourg. There is no need to decide whether it has its registered office, its central

7 — See the second paragraph of Article 59.

8 — See the first paragraph of Article 59. For possible exceptions to this rule, see the judgments in Case C-145/89 *Commission* v *France* [1991] ECR I-659, Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, Case C-198/89 *Commission* v *Greece* [1991] ECR I-727 and Case C-375/92 *Commission* v *Spain* [1994] ECR I-923. See also my Opinion in Case C-379/92 *Peralta* [1994] ECR I-3453, I-3456, paragraphs 74 to 77.

9 — Judgments in Case 270/83 *France* v *Commission* [1986] ECR 273, paragraph 18, Case 79/85 *Segers*, cited in footnote 4, paragraph 13, and Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 13.

10 — Written thus in the appellant's observations.

administration or its principal place of business in Luxembourg, since those characteristics are alternative criteria and the fulfilment of one of them satisfies the requirements. To all appearances, all three criteria are concurrently fulfilled in this case.

19. As a rule, [11] a provider of services within the meaning of Community law is established in a Member State other than the one in which the recipient of the services is established. Established means, however, the existence of an actual, permanent connection with the economy of a Member State. In my view, the facts, as described, of the formation and establishment of the company, the procurement of all the necessary authorizations for the broadcasting business and the commencement of business operations are sufficient evidence to hold that establishment has taken place.

20. A broadcasting operation which extends to or is directed at the Netherlands also fulfils the criterion of being a cross-border operation. The Court has in decided cases consistently categorized television transmissions as services, [12] irrespective of the way in which they are broadcast. [13] Even broadcasts for advertising purposes are covered; [14] in that context, the advertising broadcast may even constitute a provision of services to the advertising firm. [15]

The influence of the 'case-law on avoidance of national rules' on the existence of a provision of services

21. The Netherlands and German Governments argue, as I have already pointed out, that the appellant's broadcasting activity cannot be regarded as a provision of services within the meaning of Community law, since the appellant's intention to evade the Netherlands legislation on the media puts this out of the question. They maintain that a principle may be inferred from the Court's case-law in the sphere of fundamental freedoms to the effect that a person may not invoke the freedoms guaranteed by Community law in order to evade legislation applicable to him.

22. There is no doubt that the national court has determined, bindingly for the Court of Justice, that circumvention is involved. It is for the national court alone to make findings

11 — As regards possible exceptions, see the case-law cited in footnote 8.

12 — Expressly in the judgment in Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6; implicitly in the judgments in Case C-260/89 *Elliniki Radiophonia Tileorassi* [1991] ECR I-2925, paragraph 19 et seq., Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069 and Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487.

13 — Judgment in Case 52/79 *Debauve*, cited in footnote 2, paragraph 8.

14 — Judgment in *Debauve*, cited in footnote 2.

15 — Judgment in Case 352/85 *Bond van Adverteerders* v *Netherlands State* [1988] ECR 2085, paragraph 14.

of fact. It is a different question as to the circumstances on the basis of which such a finding may be made — whether they must be made solely on the basis of objective criteria or whether the assessment may be influenced by subjective factors, such as intention and motive. That aspect is especially difficult when evaluating the activity of a legal person. I shall be returning to this later.

23. For the purposes of the further assessment of the question whether a provision of services within the meaning of Community law is involved, the starting point should be the assessment made by the national court to the effect that legislation has been circumvented.

24. The Court held as follows in *Van Binsbergen*: [16]

'Likewise, a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State; *such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.*' [17]

25. The last part of the sentence in particular raises doubts as to what legal consequences are to be linked with the avoidance of applicable rules of professional conduct by a provider of services. Does the wording mean that the provider of services may, in an appropriate case, fall outside the scope of the rules on freedom to provide services and be subject to the right of establishment as if he had established himself in the country where the services are provided, or that he basically remains subject to the chapter on the provision of services, with the result that the constitutive elements such as establishment of the provider of services in a Member State other than that of the recipient of the services or the cross-border nature of the services must be found to exist and the provider of services is additionally subject to the rules of professional conduct of the country in which the services are provided?

26. Both the position of the Netherlands and German Governments and the views of the other parties have to be reconciled in that respect with the wording of the relevant passage of the judgment in *Van Binsbergen*.

16 — The subsequent case-law is similar, for example, the judgments in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, Case C-211/92 *Commission* v *Belgium* [1992] ECR I-6757, paragraph 12, and Case C-148/91 *Veronica Omroep Organisatie*, cited in footnote 12, paragraph 12.

17 — Case 33/74, cited in footnote 3, paragraph 13; my emphasis.

27. The Commission has also recognized the problem and set out cogent arguments with regard to it in its observations. [18] It argues that the view taken in the '*Van Binsbergen* case-law' can be seen from two angles. On the one hand, it can be regarded as a test for distinguishing between the application of Article 52 and Article 59 of the Treaty. The last part of the sentence in paragraph 13 of *Van Binsbergen* [19] and likewise the effects of that case-law militate in favour of such an interpretation. On the other hand, the case-law may be understood as being *an exception to Article 59 of the Treaty*, which assumes that in principle a service within the meaning of Article 59 is provided.

28. The Commission argues that the distinction is important in so far as the first interpretation assumes that *only* the legislation of the State in which the service is provided is applicable, whereas in contrast, according to the second interpretation, the provider of the service is subject in any event to the legislation of the Member State in which it is (officially) established and may, *additionally*, be subject to the legislation of the State in which it provides the service. As a result, the second interpretation results in the concurrent application of two possibly irreconcilable legal situations, which constitutes a not insignificant impediment. Nevertheless, the Commission tends to prefer the latter interpretation on the ground that, if the '*Van Binsbergen* case-law' were to be interpreted as being simply a criterion for distinguishing between freedom of establishment and freedom to provide services, this might constitute a major cause of legal uncertainty.

29. The Commission underpins that conclusion by means of the following argument. The Member State in which the service is provided is *not obliged* to apply the rules of professional conduct in force in its territory: the '*Van Binsbergen* case-law' gives it the right to 'defend itself'. That Member State may — provided that all the requirements are met — require all the rules of professional conduct to be complied with or, if it wishes, just some of them; but this *possibility of intervening* affords no pointer to the position in the Member State in which the provider of services is officially established. Is the latter Member State entitled to apply none of the provisions which apply in its territory (on the ground that, according to the first interpretation, the undertaking in question is deemed to be 'established' in the Member State in which it provides services) or is it entitled to apply its provisions only to the extent to which the other Member State does not intervene? In any event, the first interpretation requires close cooperation between the authorities of the two Member States.

30. What is more, the '*Van Binsbergen* case-law' applies only to 'rules of professional conduct'. The Commission takes the view that — in view of the fact that the '*Van Binsbergen* case-law' (whichever interpretation is followed) is to be placed in the context of the Treaty provisions on the abolition of restrictions on the exercise of an economic activity in the Community — 'rules of pro-

18 — See the Commission's observations, sections 12 and 13, at p. 10 et seq.

19 — Quoted in section 24 *supra*.

fessional conduct' constitute the national provisions which govern access to activities within the meaning of Article 57 of the Treaty and their exercise. Other legal provisions, for instance in the field of revenue law, social security, town and country planning, etc., are not affected. The Member State in which the undertaking is officially established is faced with a situation which it is difficult to assess.

31. I would add the following to the Commission's — valid — arguments. The interpretation of the judgment in *Van Binsbergen* according to which it is a test for determining the demarcation line between the applicability of the provisions on freedom to provide services and the applicability of the provisions on freedom of establishment does not convince me, as that approach would in any event disregard to some extent the real establishment of the provider of services and proceed on the basis of a fictitious establishment of the provider of services in the country in which the services are rendered. Leaving aside abuse or circumventing devices, it is the declared aim of the provisions on freedom to provide services to permit the provision of services to take place free of restriction without maintaining an establishment in the Member State in which the recipient of the services is located. In the judgment in *Van Binsbergen* and subsequent case-law, [20] it was certainly not a question of regulating establishment but of subjecting a particular cross-border activity to the relevant rules of professional conduct.

20 — Judgment in Case 39/75 *Coenen* [1975] ECR 1547, in Case 115/78 *Knoors* [1979] ECR 399, in Case 205/84 *Commission* v *Germany*, cited in footnote 16, in Case 130/88 *Van de Bijl* [1989] ECR 3039 and in Case C-148/91 *Veronica Omroep Organisatie*, cited in footnote 12.

32. In the instant case, there is no disputing that the appellant's establishment is in Luxembourg from the point of view of Community law. It is definitely only a question as to whether and, if so, what provisions of the country in which the services are provided are to apply.

33. In the first place, I therefore consider that, regard being had to the *Van Binsbergen* judgment and subsequent case-law, only the provisions on freedom to provide services apply. It is only within the framework of the freedom to provide services that the law of the country in which the services are provided can be applied under certain circumstances [21] as a limitation of or an exception to the freedom as if the provider of services were established in that country.

34. Admittedly, a factor against the point of view which I have taken is the proliferation of applicable legal systems, which is the opposite of that which was intended by the freedom to provide services. Nevertheless, that argument cannot prevail. In common with all exceptions, this one must be narrowly construed. In so doing, strict attention

21 — According to the *Van Binsbergen* case-law, the application of rules on professional conduct objectively comes into consideration only on the proviso that first the activity of the provider of services is 'entirely or principally directed towards [the] territory' of that country *and*, secondly, he uses the freedom to provide services 'for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State' (see paragraph 13 of the judgment).

must be paid that it covers only the application of rules of professional conduct which the provider of services seeks to circumvent.

35. Consequently, the potential application also of the rules of professional conduct of the State in which the services are provided in the event of abuse or avoidance of national provisions does not exclude in principle the facts of the present case from the scope of the provisions on freedom to provide services. As appears objectively on the face of it, the cross-border television broadcasting activity at issue in the main proceedings is therefore to be classed as a service within the meaning of Community law.

II. *The second question*

36. The national court's second question seeks to establish whether the Member State in which the services are provided is entitled in the circumstances of the instant case to subject the provision of services to restrictions consisting of denying the appellant the status of a foreign broadcasting body within the meaning of national law, which brings with it more favourable treatment in the matter of access to the market as compared with domestic broadcasting bodies, and of applying to it the treatment afforded to a domestic broadcaster instead.

37. The application of national law is a matter for the national court alone. In the final analysis, whether a broadcasting body is classed as foreign or domestic for the purposes of the Netherlands Mediawet constitutes the application of domestic law. However, the national court has doubts about the consistency with Community law of the statutory interpretation which it advocates. It therefore considers that the preliminary questions are relevant for the purposes of its decision and that the request for a preliminary ruling is necessary. As the Court has consistently held, in preliminary-ruling proceedings the Court will provide the national court with the criteria which it needs in order to decide the case before it consistently with Community law. [22]

Prohibition of restrictions as the substance of freedom to provide services

38. The abolition of restrictions within the meaning of Article 59 is the essential substance of freedom to provide services. Several different types of restrictions are conceivable. First, according to the Court's early case-law, they include all requirements 'imposed on the person providing the service by reason in particular of his nationality or of the fact that he does not habitually reside in the State where the service is provided, which do not apply to persons established

22 — Judgment in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 29 et seq.

within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service'. [23]

39. In accordance with this view, the prohibition of restrictions, [24] which has been directly applicable since the end of the transitional period, is primarily a prohibition of discrimination. [25] In this connection, prohibitions do not consist only of overt unequal treatment but also of covert forms of discrimination, which, albeit ostensibly based on neutral criteria, have in fact the same result. [26] National rules which are not applicable to all 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. [27]

40. Restrictions may, however, also occur in the form of national rules which are applicable without discrimination. Such rules, which have an obstructive effect on providers of services established in other Member States are deemed to be 'other restrictions' and are also covered by the directly applicable prohibition of restrictions. The distinction between covert discrimination and other restrictions is not always clear. [28] In any event, it can be inferred from the Court's case-law [29] that any provision which, *de jure* or *de facto*, impedes the freedom to provide services *may* constitute an infringement of Article 59 of the EC Treaty; in each individual case it is necessary to check the compatibility of the impediment with Article 59. [30]

41. In view of the particularities of many services, certain special requirements imposed on the provider as a result of the application of rules governing the relevant type of activity may be regarded as compatible with the Treaty. However, freedom to provide services may be restricted only by provisions which are applicable without discrimination and justified by the public interest, provided that that interest is not safeguarded by the provisions to which the provider of the services is subject in the State of his establishment. [31]

42. Focusing on the satisfaction of certain general interests by taking account of the

23 — Judgment in *Van Binsbergen*, cited in footnote 3, paragraph 10; cf. to the same effect the judgment in Case 39/75 *Coenen* [1975] ECR 1547, paragraph 6.

24 — Judgment in *Van Binsbergen*, paragraph 23.

25 — Judgment in Case C-288/89 *Collectieve Antennevoorziening Gouda*, cited in footnote 12, paragraph 10.

26 — Cf. my Opinion in Case C-154/89 (judgment in *Commission* v *France* [1991] ECR I-659, at I-666, paragraph 27).

27 — See the judgment in Case C-288/89 *Collectieve Antennevoorziening Gouda*, cited in footnote 12, paragraph 11.

28 — Cf. the Opinion of Advocate General Jacobs in Case C-76/90 (judgment in *Säger* [1991] ECR I-4221, at I-4229, paragraphs 20, 21 and 22).

29 — Judgments in Case 278/80 *Webb* [1981] ECR 3305, paragraph 6, and in Case 205/84 *Commission* v *Germany*, cited in footnote 16.

30 — Cf. my Opinion in Case C-154/89 *Commission* v *France*, cited in footnote 26, paragraph 9.

31 — Judgment in Case 205/84 *Commission* v *Germany*, cited in footnote 16, paragraph 27; judgment in Case 279/80 *Webb*, cited in footnote 29, paragraph 7.

legal requirements in force in the country in which the provider of services is established has invariably been assessed as a turning of the case-law in the sphere of the provision of services towards the country-of-origin principle in a similar manner to the *Cassis de Dijon* case-law [32] in the field of the free movement of goods. The imperative grounds of public interest already recognized by the Court in its case-law include, for instance, rules of professional conduct intended to protect the person for whom the services are provided and consumer protection. [33]

43. Lastly, the requirements must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected. [34] As far as these characteristics are concerned, I share the view expressed by Advocate General Jacobs in his Opinion in *Säger* [35] to the effect that they do not constitute additional requirements for permissible restrictions on freedom to provide services. In my opinion, they are aspects of the examination of proportionality [36] which is to be undertaken of restrictions which may possibly be permitted.

Application of the criteria by the Court of Justice to the Netherlands Mediawet

44. The Court has already applied the abstract criteria to parts of the Netherlands Mediawet in the judgments in Case C-288/89 *Collectieve Antennevoorziening Gouda*, [37] Case C-353/89 *Commission* v *Netherlands* [38] and Case C-148/91 *Veronica Omroep Organisatie*. [39] In those cases, the Court held that the Mediawet seeks to maintain a pluralist, non-commercial broadcasting system and thereby forms part of a cultural policy designed to safeguard the freedom of expression of the various social groups in the Netherlands in the sphere of the press, radio and television. [40] Such cultural-policy objectives are requirements relating to the general interest which a Member State may legitimately pursue, for example by determining the structure of its own broadcasting bodies in an appropriate manner. [41]

45. Consequently, the Member State's decision to maintain a non-commercial broadcasting system is not objectionable *per se*. A subsequent amendment of the law cannot call in question the legality of the value-judgment which was previously made. According to the parties' written observa-

32 — Judgment in Case 120/78 *Rewe-Zentral* v *Bundesmonopolverwaltung* [1979] ECR 649.

33 — Cf. the judgment in C-288/89 *Collectieve Antennevoorziening Gouda*, cited in footnote 12, paragraph 4, where other categories are listed together with references to the relevant case-law.

34 — Judgment in Joined Cases 110 and 111/78 *Ministère Public and Another* v *Van Wesemael* [1979] ECR 35, paragraph 30; judgment in Case 205/84 *Commission* v *Germany*, cited in footnote 16, paragraph 27.

35 — Opinion in Case C-76/90 *Säger*, cited in footnote 28, paragraph 29.

36 — For instance, Case 205/84 *Commission* v *Germany*, cited in footnote 16, paragraph 41 et seq. and Case C-288/89 *Collectieve Antennevoorziening*, cited in footnote 12, paragraph 15.

37 — Cited in footnote 12.

38 — Cited in footnote 12.

39 — Cited in footnote 12.

40 — *Veronica Omroep Organisatie*, paragraph 9, where reference is made to *Commission* v *Netherlands*, paragraphs 3, 29 and 30, and *Collectieve Antennevoorziening Gouda*, paragraphs 22 and 23 (all cited in footnote 12).

41 — *Veronica Omroep Organisatie*, paragraph 10, where reference is made to *Commission* v *Netherlands*, paragraphs 41 and 42, and *Collectieve Antennevoorziening Gouda*, paragraphs 23 and 24 (all cited in footnote 12).

tions, as confirmed at the hearing, it was precisely this legislative decision which led the establishment of a commercial broadcasting body in the Netherlands and to the formation of the appellant company.

46. It further follows from the aforementioned case-law that legislative provisions relating to the structure of a broadcasting body may constitute a prohibited restriction of freedom to provide services within the meaning of Article 59 of the EC Treaty with regard to foreign establishments even where they are applied without discrimination to domestic and foreign entities alike. [42] Consequently, from the Netherlands point of view, foreign broadcasting bodies enjoy greater freedom with regard to their corporate structure even if they broadcast transmissions intended for the Netherlands. Admittedly, that freedom is only relative in so far as foreign broadcasting bodies must comply with the legal requirements of the Member State in which they are established. Of course, those requirements may possibly be more liberal.

47. The relevant version of Article 66 of the Mediawet as far as these proceedings are concerned constitutes, in conformity with Community law, an independent legal basis for the access of foreign broadcasting bodies transmissions to the Netherlands cable network. Under the system of Community law, that provision can be ascribed to the country-of-origin principle. A comparable approach is, moreover, bindingly prescribed by Directive 85/552/EEC [43] in Article 2 [44] which, however, was not yet applicable at the material time as far as the present case is concerned. [45]

48. The founders of the appellant company evidently utilized the opportunities afforded by the Luxembourg media law and set up their company in the hope that they would be able to take advantage of the greater freedom of foreign broadcasting bodies by comparison with the provisions applying to Netherlands broadcasting bodies. In terms of the Community-law aim of free choice of one's place of establishment, there are no objections to the appellant's establishment.

49. For the purposes of the further examination of this case, it is to be assumed that the

42 — Case C-353/89 *Commission* v *Netherlands*, cited in footnote 12, paragraph 40 et seq.

43 — Cited in footnote 5.

44 — Cf. *inter alia* the twelfth, fourteenth and fifteenth recitals in the preamble to the directive:
'Whereas it is consequently necessary and sufficient that all broadcasts comply with the law of the Member State from which they emanate;
...
Whereas it is necessary, in the common market, that all broadcasts emanating from and intended for reception within the Community and in particular those intended for reception in another Member State, should respect the law of the originating Member State applicable to broadcasts intended for reception by the public in that Member State and the provisions of this Directive;
Whereas the requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Community law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States ...'.

45 — Article 25 of Directive 89/552.

application without discrimination of the Netherlands legal provisions on the prevention of commercial television — which, as regards domestic broadcasting bodies, are admittedly not objectionable [46] — has the effect of a prohibited restriction within the meaning of Article 59 of the EC Treaty vis-à-vis the operations of foreign broadcasting bodies. It can therefore only be a question as to whether the Member State is justified, exceptionally, in asserting against the appellant's broadcasting activities, by reason of the particular circumstances of the case, the provisions applying to domestic broadcasting in order to prevent the appellant's programmes being fed into the Netherlands cable network.

The Court's 'case-law on the avoidance of national rules'

50. As I have already mentioned, there is case-law of the Court of Justice on fundamental freedoms which is characterized by refusal to allow the person concerned to invoke fundamental freedoms in the event of the avoidance of national provisions or the abuse of the freedoms guaranteed by Community law.

51. In the field of the free movement of goods, the Court held that legislation on fixed prices for books which was applicable without restriction constituted a prohibited measure having effect equivalent to a quantitative restriction on imports. However, this was not applicable 'where it is established that the books in question were exported for the sole purpose of re-importation in order to circumvent legislation of the type at issue'. [47] In the field of the free movement of workers, the Court held in a judgment on student assistance that abuses established on the basis of objective evidence such that a worker entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State were not covered by the relevant Community provisions. [48] The Court has held similarly in cases involving freedom of establishment and freedom to provide services. For instance, in the judgment in *Knoors* [49] the Court held as follows:

'However, it is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the

46 — The possibility for Member States to lay down stricter provisions for television broadcasters subject to their jurisdiction is preserved even following the entry into force of Directive 85/552. See Article 3(1) of Directive 89/552 and the thirteenth recital in the preamble thereto: 'Whereas this Directive lays down the minimum rules needed to guarantee freedom of transmission in broadcasting; whereas, therefore, it does not affect the responsibility of the Member States and their authorities with regard to the organization — including the systems of licensing, administrative authorization or taxation — financing and the content of programmes; whereas the independence of cultural developments in the Member States and the preservation of cultural diversity in the Community therefore remain unaffected'.

47 — Judgment in Case 229/83 *Leclerc* v *Au blé vert* [1985] ECR 1, paragraph 27 and operative part. To the same effect, see also the judgments in Case 299/83 *Leclerc* v *Syndicat de Librairies de Loire-Océan* [1985] ECR 2515 and in Case 95/84 *Boriello* v *Darras and Tostain* [1986] ECR 2253.

48 — Judgment in Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161, paragraph 43.

49 — Judgment in Case 115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399, paragraph 25.

Treaty, from attempting wrongly to evade the application of their national legislation as regards training for a trade.'

52. The judgments concerning the provisions on freedom to provide services in *Van Binsbergen* and cases following on from it point in the same direction. In the relevant passage for present purposes [50] the Court held that a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. [51]

In the judgment in *Van de Bijl*, [52] the Court made substantively the same observation, with a minor change in terminology in that it employed the phrase 'Maßnahmen zu ergriefen' (take measures) instead of the phrase 'Elaß von Vorschriften' (adopt provisions). (The same phrase 'take measures' is invariably used in the English version: translator.) The most up-to-date judgment and the one which is closest in point of content to the present case, *Veronica Omroep Organisatie*, [53] in which the Court applied the principles in a case relating to radio and television, contains substantively similar observations on the measures which might be taken. Instead of using the words 'professional rules of conduct', it refers more generally to 'provisions'. [54]

53. In the final analysis, it can be held that a Member State is entitled to take *measures* in order to prevent a provider of services whose activity is entirely or principally directed towards its territory from exercising the freedom to provide services in order to avoid the provisions regulating the relevant occupational activity. [55]

Consequences for the instant case

54. The provisions, the avoidance of which is at issue in this case, govern television broadcasting. This is without doubt an occupational activity and hence the provisions are to be ascribed to a broadly construed concept of 'rules of professional conduct'.

50 — Quoted verbatim in section 24 *supra*.

51 — See paragraph 13 of the judgment, cited in footnote 3. The Court repeated this verbatim in *Coenen*, cited in footnote 20, paragraphs 8 to 11, and in *Commission* v *Germany*, cited in footnote 16, paragraph 22.

52 — Judgment in *Van de Bijl*, cited in footnote 20, paragraph 26.

53 — Cited in footnote 12, paragraph 12 of the judgment.

54 — In the judgment in Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757, paragraph 12, the application of the principles on circumvention was considered but refused.

55 — The Commission's answer to written question No 1101/89 is worthy of attention in this regard. According to that answer, during the discussions in the Council preceding the adoption of Directive 89/552, the Commission stated, referring to the judgment in *Van Binsbergen*, that, in carrying out its appointed duties and interpreting the law, it would ensure that the case-law of the Court of Justice of the European Communities regarding avoidance of national rules was respected (OJ 1990 C 125, p. 34).

55. The question as to whether the appellant's activities are entirely or principally directed towards the Netherlands is to be answered in the light of objective criteria. The content of the programmes, the language used and the advertisements are all evidence as to where the broadcasting is directed. A further criterion is that the appellant completely suspended broadcasting when it was refused authorization to feed its programmes into the Netherlands cable network.

56. In order for a Member State to be able to take measures, it must be found that the provider of services asserts the freedom to provide services in order to avoid the legislation applying in the country where the services are to be provided.

57. In its written observations, the Commission described this aspect as a subjective criterion, but ceased to do so at the hearing. In this connection, the question arises as to how the 'avoidance' must come about and on the basis of what circumstances it may be determined. It turns in particular on whether subjective criteria are involved — which especially in the case of legal persons are scarcely susceptible of proof — or avoidance determined on the basis of objective circumstances.

58. Both in the parties' written observations and at the hearing it was observed on several occasions that the national court had already made a binding finding of fact to the effect that the Netherlands provisions had been evaded. However, counsel for the appellant argued — to my mind, rightly — that although the national court makes the findings of fact, it is the task of the Court of Justice to assess them in the light of Community law. Determining whether a law has been circumvented or evaded is a legal assessment of facts which cannot be entirely withdrawn from the appreciation of the Court of Justice. In any event, the limits to that legal assessment are subject to the legal supervision of the Court of Justice. [56]

59. In the first place, it should be considered on the basis of what facts a circumvention can be found to have taken place. Circumvention of a law or an abuse of law is regularly characterized by an intention to circumvent or abuse, which is undoubtedly a subjective factor. Consequently, the interpretation of the *Van Binsbergen* case-law put forward by the Commission to the effect that there is an objective and a subjective test suggests itself. In the judgments in *Van Binsbergen*, *Coenen*, *Knoors* and *Van de Bijl*, it was a question of assessing the conduct of natural persons and hence it was possible to take account of intention and motives.

56 — The national court also seems to have proceeded on the basis of this assessment, since it submitted the facts found by it for assessment by the Court of Justice by way of preliminary ruling.

60. In the case of a legally relevant activity of a legal person which acts through its constituent organs, the position is fundamentally different with regard to the materialization of subjective factors. A legal person as such is not in a position to exhibit subjective attitudes. Only natural persons are morally responsible for their acts, which is, for instance, of fundamental importance as regards the liability of a person under criminal law. Within the context of the legal system which enables a legal person to exist in law and confers legal capacity on it, there regularly exist imputing provisions which enable acts of the corporate body's organs which are carried out by natural persons to be deemed to be the acts of the legal person. This imputation may go so far as to recognize the capacity of the legal person to commit torts. As far as the actual organization of the imputing provisions is concerned, considerable differences exist as between the various national legal systems.

61. A uniform manner of imputing acts of natural persons to the sphere of responsibility of a legal person which was valid in Community law for all Member States could be established, in my view, only by means of a comparative study. In the absence of the prior establishment of such a legal basis in Community law, I regard the employment of subjective criteria for assessing the legally relevant conduct of a legal person as problematic. Consequently, I consider that the avoidance of legal provisions by a legal person should be able to be determined using objective criteria.

62. Even assuming that only objective characteristics may influence the assessment, it still has to be clarified to what extent the consideration of objective facts is subject to limits under Community law. In the case at issue, the national court has evidently allowed the nationality of the founders of the company in question, the managers and the appellant's employees to influence its assessment.

63. However, according to the legislative decision which the Member States took in Article 58 of the EC Treaty, the nationality of the shareholders or managers of a company cannot be taken into account in order to determine the seat of the company and hence the subjection of the company to the legal system of a Member State. [57] In the judgment in *Factortame* [58] the Court held that a link with the nationality of the shareholders and managers of a company was contrary to Community law on account of unlawful discrimination on grounds of nationality. [59] Consequently, a link with the nationality of the natural persons behind the company seems to be contrary to Community law — in any event where those persons are Community nationals.

64. On the other hand, it should not be ignored that in a case involving a potential

57 — Judgments in *France* v *Commission*, cited in footnote 9, paragraph 18, and in *Segers*, cited in footnote 4, paragraph 13.

58 — *The Queen* v *The Secretary of State for Transport, Ex parte Factortame Limited and Others* [1991] ECR I-3905, paragraph 33.

59 — *Factortame*, paragraph 32.

avoidance of the law the actual formation of a company may itself be part of the circumvention machinery. I consider nevertheless that a link with the nationality of natural persons should be avoided on account of the associated danger of discrimination against Community nationals on grounds of nationality, the prohibition of which ranks as a fundamental right in Community law.

65. Avoidance of national legislation should be capable of determination on the basis of objective characteristics, such as, for instance, the time of the commencement, the substance and orientation of the company's business operations. Corporate relationships may also play a part in the assessment. In *Brother* v *Council* [60] the Court undertook an overall consideration of the group's conduct in assessing under Community law the conduct of a legal person, and did not allow the formal distribution of various tasks of the group to independent companies to be effective in order for certain modes of conduct to be left out of account.

66. In the result, in my view, objective circumstances not based on the nationality of natural persons who are Community nationals, stand behind the company and act through it should be used to determine the circumvention of national provisions regulating occupational activities.

67. The Court of Justice may not make a conclusive assessment of the matters which resulted in the present proceedings, since that is a matter for the national court. Nevertheless, I am of the opinion that evidence is discernible already from the facts described to the Court to suggest that the law has been circumvented, such as, for instance, the objective impossibility of broadcasting in the manner chosen by the appellant in the Netherlands, the organization and orientation of the programmes and the complete suspension of broadcasting when the appellant was refused authorization to feed its programmes into the Netherlands cable network. The production of programmes in the Netherlands by a company to which certain connections may exist may also be taken into account.

68. If the circumvention of national provisions governing the exercise of a trade or profession is established on the basis of objective facts, the subjection of a legal person to the legal system of another Member State on account of the company's seat cannot preclude the Member State in question from taking measures in order to prevent the circumvention of its provisions. The measures need not consist in the adoption of measures, but may certainly consist, *inter alia*, in the application without discrimination of national provisions. In the final analysis, it is a matter for the Member State whether this is carried out from the point of view of legal technique in such a way that a legal person who comes under the legal system of another Member State is treated as if it were a domestic legal person by being

60 — Judgment in Case 250/85 *Brother* v *Council* [1988] ECR 5683, paragraph 16.

deprived of the status of a foreign broadcasting body. In any event, the Member State is empowered to frustrate an attempt by an undertaking to evade the jurisdiction of that State by treating the company in that respect as if it were subject to its jurisdiction.

Articles 10 and 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms

69. It remains to be considered whether that intermediate outcome can stand up against the background of Articles 10 and 14 of the European Convention on Human Rights. The national court's second question expressly asks about the effects of Articles 10 and 14 on the Community-law assessment of the issue in question.

70. At the hearing, this question was largely avoided. During the written procedure, the parties essentially expressed the following views on it.

71. The *appellant* considers that its arguments based on Community law are reinforced by the fact that freedom of expression as safeguarded by Article 10 of the European Convention is at stake. To require it to fulfil all the requirements for establishment, which at the material time were exclusively those of a public system to which TV 10 precisely did not wish to belong is, it argues, tantamount to an actual, absolute bar on all its corporate activities. Since the freedom in question is a fundamental right, Community-law provisions should not be construed in such a way as to deprive the freedom to provide services of its substance.

72. This applies *a fortiori* because at the material time the Netherlands authorities had authorized the programmes of another Luxembourg broadcasting body. Even if the Netherlands authorities had wished to authorize TV 10 to establish itself in the Netherlands, under Article 10 in conjunction with Article 14 of the European Convention they would have had to have taken account, in fixing the conditions for its establishment, of the fact that in taking that decision they were not entitled to practise any discrimination with regard to TV 10's status.

73. For the sake of completeness, the appellant points out that following the decision of the national court, in so far as it contains a final determination, it lodged a complaint against the Kingdom of the Netherlands at the European Commission of Human Rights in Strasbourg.

74. The *Netherlands Government* starts by expressing doubts about the jurisdiction of the Court of Justice to decide on the reference made by the national court to the European Convention. It goes on to refer to the judgment in *Elliniki Radiophonia Tileorassi*. [61] In the event that the Court should consider itself to have jurisdiction to consider the national court's reference to the European Convention, the Netherlands Government takes the view with regard to Article 10 of the European Convention that the restrictions on freedom to provide services resulting from the application of the Mediawet are justified on the grounds of the prevention of disorder and the protection of rights of others within the meaning of Article 10(2). That conclusion has already been reached by the national court. In the Netherlands Government's view, it should be held with regard to the principle of equal treatment that the appellant, as a non-foreign broadcasting body, should be subject to the same provisions as Netherlands broadcasting bodies. Consequently, TV 10 is not the victim of discrimination within the meaning of Article 14 of the European Convention vis-à-vis comparable Netherlands broadcasting bodies. This, too, has already been held by the national court.

75. The *Government of the Federal Republic of Germany* observes in the first place that the purpose of Article 14 of the European Convention is that 'citizens of Member States are entitled to be freely informed by programmes broadcast not only from their own State but also from other Member States and are entitled freely to receive such programmes, in so far as it is technically possible for them to do so'. The German Government goes on to state as follows:

'In this connection, the supra-national legal provisions take account of the fact that each programme is produced in accordance with the legislation applicable to it, that is to say, the relevant national broadcasting legislation. This means programmes intended for the Member State in question and not — in accordance with the meaning of Article 10 of the European Convention — programmes produced with the intention of evading the provisions of the national broadcasting legislation through the choice of the place of establishment.' [62]

76. The German Government's view that a programme producer cannot rely on Article 59 of the EEC Treaty if his aim thereby is to circumvent the national broadcasting legislation is not called in question on that view by Articles 10 and 14 of the European Convention. According to the German Government, in principle it can be assumed that the 'free flow of information' would be adversely affected if programmes broadcast from another Member State were subject to domestic restrictions. However, the position is different if the aspect of the circumvention

61 — Judgment in Case C-260/89 *Elliniki Radiophonia Tileorassi*, cited in footnote 12, paragraphs 42, 43 and 44.

62 — See p. 11 of the German Government's observations.

of national rules is to be taken into account. The German Government argues that, in such case, the same considerations apply as in the case of the circumvention of provisions of the EEC Treaty. It is not the purpose of Article 10 of the European Convention to enable a broadcaster lawfully to circumvent national legislation. This assessment corresponds, it maintains, to the view taken by the European Court of Human Rights, which has held that it was permissible for the authorities of a Contracting State to regard a broadcaster established abroad as a domestic broadcaster where the station was established abroad in order to evade the domestic broadcasting legislation. [63]

77. As regards the possible violation of the prohibition of discrimination set out in Article 14 of the European Convention, the German Government argues that that which is permissible under Article 10(2) of the European Convention in order to prevent circumvention is objectively necessary and hence not arbitrary. As regards possible discrimination vis-à-vis foreign broadcasters as a result of the appellant's being treated as a domestic broadcaster, the fact of circumvention precludes *per se* reliance on the prohibition of discrimination.

78. The *Commission* takes the view that Articles 10 and 14 of the European Convention have no impact on the questions to be considered in this case. Article 10 embodies the right to freedom of expression. Article 10(2) allows the exercise of that right to be subject to such formalities, conditions and restrictions as are prescribed by law and are necessary in a democratic society. Article 14 prohibits discrimination with regard to the rights and freedoms set forth in the Convention. It is not argued that the rules of professional conduct applied to broadcasters in the Netherlands are incompatible with Article 10 of the Convention. The Commission cannot see how the application of those rules to an undertaking established abroad can be incompatible with Articles 10 and 14 of the European Convention in a specific situation such as that described in the *Van Binsbergen* case-law where an undertaking deliberately circumvents rules which in themselves are compatible with the Convention.

79. In the past, the Court of Justice has been repeatedly asked to apply and interpret provisions of the European Convention on Human Rights. The Court of Justice has held as follows with regard to its jurisdiction to review legislative measures for compatibility with the European Convention:

'Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has

63 — European Court of Human Rights, judgment of 28 March 1990 No 14/1988/158/214 *Groppera Radio AG and Others* v *Switzerland*, Publications of the ECHR, Series A, Vol. 173, at paragraph 72.

no power to examine the compatibility with the European Convention of national legislation which concerns ... an area which falls within the jurisdiction of the national legislator.' [64]

80. However, the fundamental rights safeguarded by the Convention, in particular Article 10 thereof, number among the fundamental rights guaranteed by the Community legal order. [65] In the judgment in *Elliniki Radiophonia Tileorassi* the Court of Justice took the opportunity, on a reference for a preliminary ruling concerning Article 10 of the European Convention, to give its views in principle on the relationship between Community law and the European Convention on Human Rights. Referring to the judgments in *Nold*, [66] *Johnston* [67] and *Wachauf*, [68] the Court stated that it first had to be pointed out that, as it had consistently held, fundamental rights formed an integral part of the general principles of law, the observance of which it ensured. For that purpose, the Court drew inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States had collaborated or of which they were signatories. The European Convention had special significance in that regard. It followed that the Community could not accept measures which were incompatible with observance of the human rights thus recognized and guaranteed. [69]

81. Referring to the judgments in *Cinéthèque* [70] and *Demirel*, [71] the Court further stated that it had no power to examine the compatibility with the European Convention on Human Rights of national rules which did not fall within the scope of Community law. 'On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.' [72]

82. In so far as the application of the 'case-law on avoidance of national rules' may be construed as an exception to the freedom to provide services, the Court's subsequent observations in *Elliniki Radiophonia Tileo-*

64 — Judgment in Joined Cases 60 and 61/84 *Cinéthèque* v *Fédération nationale des cinémas français* [1985] ECR 2605, paragraph 26.

65 — See the judgment in Case C-353/89 *Commission* v *Netherlands*, cited in footnote 12, paragraph 30, where reference is made to the judgment in Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13.

66 — Cited in the preceding footnote, paragraph 13.

67 — Judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18.

68 — Judgment in Case 5/88 *Wachauf* v *Germany* [1989] ECR 2609, paragraph 19.

69 — Judgment in Case C-260/89 *Elliniki Radiophonia Tileorassi*, cited in footnote 12, paragraph 41.

70 — Judgment in Joined Cases 60 and 61/84 *Cinéthèque* v *Fédération nationale des cinémas français*, cited in footnote 64, paragraph 26.

71 — Judgment in Case 12/86 *Demirel* v *Stadt Schwabisch Gmund* [1987] ECR 3719, paragraph 28.

72 — Judgment in *Elliniki Radiophonia Tileorassi*, cited in footnote 12, paragraph 42.

rassi are of particular relevance to the present case. They read as follows:

'In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 36 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.' [73]

83. Basically, those observations are likewise applicable to this case. In the judgment, the Court goes on to draw the following conclusion from the above:

'It follows that in such a case it is for the national court, and, if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.' [74]

84. The Court of Justice has invariably held back from applying in practice the general legal principles defined in the European Convention. In *Hoechst* v *Commission*, [75] in which a violation of Article 8 of the European Convention was alleged, the Court stated in one sentence that that provision was not applicable to the actual facts of the case and went on to observe as follows:

'Furthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject.' [76]

85. There is case-law of the European Court of Human Rights on the application of Articles 10 and 14 of the European Convention to facts similar to those of the instant case. In *Groppera Radio AG and Others* v *Switzerland*, [77] the European Court of Human Rights held as follows in considering the justification of restrictions on the distribution of radio broadcasts by cable networks:

'Lastly and above all, the procedure chosen could well appear necessary in order to pre-

73 — Judgment in *Elliniki Radiophonia Tileorassi*, paragraph 43.

74 — Judgment in *Elliniki Radiophonia Tileorassi*, paragraph 44.

75 — Judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859.

76 — *Hoechst* v *Commission*, paragraph 18.

77 — Cited in footnote 63.

vent evasion of the law; it was not a form of censorship directed against the content or tendencies of the programmes concerned, but a measure taken against a station which the authorities of the respondent State could reasonably hold to be in reality a Swiss station operating from the other side of the border in order to circumvent the statutory telecommunications system in force in Switzerland.

The national authorities accordingly did not in the instant case overstep the margin of appreciation left to them under the Convention.' [78]

86. In that case the majority of the judges assumed that the applicant's broadcasting operation was to be adjudged unlawful under the legislation of the State from which the broadcasts were transmitted. In that respect, the *Groppera Radio* case differs from the one now before this Court. However, it may be inferred from the dissenting judgments of Judges Petitti, Bernhard and De Meyer that it was not established that the transmitting operation was illegal.

87. A decision of the European Commission of Human Rights [79] contains the following passage in connection with Article 10(2) of the European Convention:

'The Commission notes that the recent changes in the Media Act have not affected the position of broadcasting institutions established abroad with the evident intention of evading the Dutch statutory regulations for national broadcasting institutions. They are not regarded as foreign broadcasting institutions, but as national broadcasting institutions subject to the rules on broadcasting applicable to such institutions.

The Commission notes that, while the applicant company is incorporated under British law and has its seat in the United Kingdom, the programme at issue is specifically intended for the Dutch public. In these circumstances and having regard to the fact that both the company and the Cable One programme have other strong links with the Netherlands, the Dutch authorities could reasonably consider that these broadcasts should be subject to those rules which normally apply to Dutch broadcasting institutions. There is no indication that these rules, in so far as they are relevant to the present case, involve restrictions which would be in violation of Article 10 of the Convention.'

78 — Paragraph 73 of the judgment.

79 — Case 1803/91 *Cable Music Europe Ltd* v *Netherlands*.

88. In the same decision, the Commission stated as follows in considering Article 14 of the European Convention:

'The Commission recalls that Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms guaranteed by the Convention. It refers in this connection to the case-law of the Court concerning the criteria for assessing a difference in treatment: There must be established an objective and reasonable justification for the measure in question, as well as a reasonable relationship of proportionality between the means employed and the aim sought to be realized ...'.

89. The interpretation of Articles 10 and 14 by the European Court of Human Rights and the European Commission of Human Rights as set out above affords no indications which might give reason to doubt the proposed solution to this case from the point of view of Community law. In my view, that interpretation is in line with the results reached through the case-law of the Court of Justice on the avoidance of national rules. Consequently, Articles 10 and 14 of the European Convention do not preclude the application of that case-law.

C — Conclusion

90. In the light of the foregoing considerations, I propose that the reply to the national court's questions should be as follows:

(1) Where a broadcasting body transmits from Member State X to Member State Y television broadcasts primarily but not exclusively intended for that Member State, this constitutes a cross-border provision of services for the purposes of Community law even where the broadcasting body is not eligible for access to the cable network in Member State Y and it transmits material from Member State X with the manifest purpose, as shown by objective circumstances, of thereby evading the legislation of Member State Y.

(2) In order to prevent the circumvention of a law, Member State Y in which the broadcasts are received is entitled to take measures which exceptionally impose restrictions on the provision of the services whereby the broadcaster is denied the status of a foreign broadcasting body and is therefore subjected to the provisions applicable to domestic broadcasting bodies. The application

without discrimination of the rules applicable to domestic broadcasting bodies is permissible in that connection provided that

(i) the activity is entirely or principally directed towards that Member State and

(ii) the provider of the services is utilizing the freedom guaranteed by Article 59 of the EC Treaty in order to avoid provisions which would be applicable to it if it were established in that Member State.

Those two requirements must be discernible on the basis of objective criteria which are not based on the nationality of the shareholders, the managers or the employees of the company providing the services.

Articles 10 and 14 of the European Convention on Human Rights do not preclude that interpretation and application of Community law.