JUDGMENT OF THE COURT (Fifth Chamber)
5 October 1994 *

In Case C-23/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Afdeling Rechtspraak of the Netherlands Raad van State for a preliminary ruling in the proceedings pending before that court between

TV10 SA

and

Commissariaat voor de Media,

on the interpretation of the provisions of the EEC Treaty on the provision of services,

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, R. Joliet (Rapporteur), G. C. Rodríguez Iglesias, F. Grévisse and M. Zuleeg, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— TV10 SA, by M. van Empel and A. J. H. W. M. Versteeg, of the Amsterdam Bar,

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

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

— the French Government, by P. Pouzoulet, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and J.-L. Falconi, Foreign Affairs Secretary in the Legal Affairs Directorate of that Ministry, acting as Agents,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by H. Etienne, Principal Legal Adviser, and P. Van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of TV10 SA, the Commissariaat voor de Media, the French Government, the Netherlands Government, represented by J. W. De

Zwaan, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission at the hearing on 14 April 1994,

after hearing the Opinion of the Advocate General at the sitting on 16 June 1994,

gives the following

Judgment

1 By order of 11 May 1992, received at the Court on 26 January 1993, the Afdeling Rechtspraak (Administrative Appeals Section) of the Netherlands Raad van State (Council of State) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of the Treaty provisions on the freedom to provide services, in order to assess the compatibility with Community law of rules of a Member State restricting the activities of broadcasters established in other Member States.

2 Those questions were raised in proceedings between TV10, a public limited company governed by Luxembourg law which is a commercial broadcasting undertaking established in Luxembourg, and the Commissariaat voor de Media, the supervisory body for broadcasting in the Netherlands, on the application of provisions of the Netherlands Law of 21 April 1987 governing the supply of radio and television programmes, radio and television licence fees and press subsidies (*Staatsblad* No 249 of 4 June 1987, hereinafter 'the Mediawet').

3 The Mediawet lays down two different sets of rules for broadcasting of Netherlands origin and for transmission of programmes broadcast from abroad.

4 With respect to Netherlands broadcasting, Article 31 of the Mediawet prescribes that air time for radio and television programmes on the national network is to be allocated to broadcasting associations by the Commissariaat voor de Media. Under Article 14 of the Mediawet, broadcasting associations are associations of listeners or viewers having legal personality, established to represent a particular social, cultural, religious or philosophical persuasion set out in their statutes. They must provide a varied programme. Articles 99 to 102 of the Mediawet further provide for a method of financing intended to maintain the pluralist and non-commercial character of domestic broadcasting associations.

5 With reference to the transmission of foreign audiovisual programmes via the cable network, Article 66 of the Mediawet, in the version in force at the time, stated:

'1. The operator of a cable network may:

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

(b) transmit programmes other than those mentioned in (a) which are broadcast by a foreign broadcaster or a group of broadcasters as broadcast programmes, in accordance with the legislation in force in the broadcasting country ...'.

6 According to the case file, TV10 was in fact established in Luxembourg and took steps to broadcast in accordance with Luxembourg law. It therefore obtained authorization from the Luxembourg authorities to transmit its programmes via the Astra satellite, which directs them to Netherlands territory. The Commissariaat

voor de Media has noted, however, that day-to-day management of TV10 is largely in the hands of Netherlands nationals and that its programmes are intended to be transmitted by cable networks primarily in Luxembourg and the Netherlands. It has further noted that TV10 has concluded contracts with cable network operators in Luxembourg and the Netherlands only and not in other States of the European Community. The Commissariaat voor de Media has also stated that although the broadcasting of programmes, purchase and sub-titling of foreign programmes, directing and final editing are carried out in Luxembourg, the target audience is the Dutch public, most of those employed for TV10's various programmes are from the Netherlands and the advertisements are made in the Netherlands.

7 On that basis the Commissariaat voor de Media, in a decision of 28 September 1989, held that TV10 had established itself in Luxembourg in order to escape the Netherlands legislation applying to domestic associations. It concluded that it could not be regarded as a foreign broadcaster within the meaning of Article 66(1) of the Mediawet, and that its programmes could therefore not be transmitted by cable in the Netherlands.

8 Following that decision TV10 decided not to broadcast any programmes. However, it appealed against the decision, under the Wet Administratieve Rechtspraak Overheidsbeschikkingen (Law on administrative jurisdiction over decisions of authorities), to the Administrative Appeals Section of the Raad van State.

9 In its judgment of 11 May 1992 the Raad van State first confirmed the analysis by the Commissariaat voor de Media and shared its view that TV10 had established itself in Luxembourg with the evident intention of avoiding the Mediawet and could not be regarded as a foreign broadcaster within the meaning of Article 66 of

that Law. It further held that the Commissariaat's decision infringed neither the principle of equality, nor Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention on Human Rights'), which guarantees the right to freedom of expression, nor Article 14 of that Convention, which prohibits discrimination with reference to the rights and freedoms it guarantees.

10 The Raad van State referred to the judgments in Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging voor de Metallnijverheid* [1974] ECR 1299 and Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833 and stated *inter alia* that a Member State has the right to take measures to prevent the exercise by a person providing services whose activities are entirely or principally directed toward its territory of the Treaty provisions on 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 Member State. However, in view of the judgment in Case 79/85 *Segers* v *Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR 2375, the Raad van State was uncertain how to assess 'activities directed from another Member State by a broadcaster whose undertaking has been constituted under the laws of that other Member State and is formally established there'.

11 It therefore considered it necessary to request a preliminary ruling on the following two questions:

'1. Where a broadcaster not eligible for access to the cable network in Member State A transmits programmes from Member State B with the manifest purpose, as shown by objective circumstances, of thereby avoiding the legislation of the Member State to which the programmes are primarily but not exclusively transmitted, is that a case of provision of services with a relevant cross-border element 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 access conditions 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?'

Applicability of the rules on freedom to provide services

12 By Question 1 the national court essentially asks whether the concept of 'provision of services' referred to in Articles 59 and 60 of the Treaty covers the transmission, via cable network operators established in one Member State, of television programmes supplied by a broadcasting body established in another Member State, even if that body established itself there in order to avoid the legislation applicable in the receiving State to domestic broadcasters.

13 Before considering that question, the Court notes that it has already held in Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6, that the transmission of television signals comes, as such, within the rules of the Treaty relating to the provision of services. In *Debauve*, cited above, paragraph 8, the Court stated that there was no reason to treat the transmission of such signals by cable television any differently.

14 Also in *Debauve* the Court observed, however, that the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State. Whether that is so in a particular case

depends on findings of fact which are for the national court to establish. In the present case, the Raad van State has established that TV10 was constituted in accordance with Luxembourg law, that the seat of the company is in the Grand Duchy of Luxembourg and that its intention was to broadcast to the Netherlands.

15 The circumstance that, according to the Raad van State, TV10 established itself in the Grand Duchy of Luxembourg in order to escape the Netherlands legislation does not preclude its broadcasts being regarded as services within the meaning of the Treaty. That is distinct from the question of what measures a Member State may take to prevent a provider of services established in another Member State from evading its domestic legislation. The latter point is the subject of the Raad van State's second question.

16 The answer to Question 1 must therefore be that the concept of 'provision of services' referred to in Articles 59 and 60 of the Treaty covers the transmission, via cable network operators established in one Member State, of television programmes supplied by a broadcasting body established in another Member State, even if that body established itself there in order to avoid the legislation applicable in the receiving State to domestic broadcasters.

The lawfulness of certain restrictions on freedom to provide services

17 By Question 2 the national court essentially asks whether the provisions of the Treaty on freedom to provide services are to be interpreted as precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted

under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State.

18 The Court has held in Case C-288/89 *Collectieve Antennevoorziening Gouda* v *Commissariaat voor de Media* [1991] ECR I-4007, paragraphs 22 and 23, Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraphs 3, 29 and 30, and Case C-148/91 *Veronica Omroep Organisatie* v *Commissariaat voor de Media* [1993] ECR I-487, paragraph 9, that the Mediawet is intended to establish a pluralist and non-commercial radio and television broadcasting system and thus forms part of a cultural policy whose aim is to safeguard the freedom of expression in the audiovisual sector of the various components, in particular social, cultural, religious and philosophical ones, of the Netherlands.

19 It also follows from those three judgments that such cultural policy objectives are objectives of general interest which a Member State may lawfully pursue by formulating the statutes of its own broadcasting bodies in an appropriate manner.

20 Moreover, the Court has already held in connection with Article 59 of the Treaty on the freedom to provide services 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 freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State (see *van Binsbergen*, cited above).

21 It follows that a Member State may regard as a domestic broadcaster a radio and television organization which establishes itself in another Member State in order to provide services there which are intended for the first State's territory, since the aim of that measure is to prevent organizations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law, in this case those designed to ensure the pluralist and non-commercial content of programmes.

22 In those circumstances it cannot be regarded as incompatible with the provisions of Articles 59 and 60 of the Treaty to treat such organizations as domestic organizations.

23 The national court, however, considered the question whether that treatment jeopardized the right to freedom of expression guaranteed by Article 10 and Article 14 of the European Convention on Human Rights.

24 It is settled law that fundamental rights, including those guaranteed by the European Convention on Human Rights, form an integral part of the general principles of law, the observance of which the Court ensures (see in particular Case C-260/89 *Elliniki Radiophonia Tileorasi* [1991] ECR I-2925, paragraph 41, and *Commission* v *Netherlands*, cited above).

25 In *Commission* v *Netherlands*, cited above, paragraph 30, the Court held that the maintenance of the pluralism which the Netherlands broadcasting policy seeks to safeguard is intended to preserve the diversity of opinions, and hence freedom of expression, which is precisely what the European Convention on Human Rights is designed to protect.

26 In those circumstances, the answer to Question 2 must be that the Treaty provisions on freedom to provide services are to be interpreted as not precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State.

Costs

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

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Netherlands Raad van State, by order of 11 May 1992, hereby rules:

1. **The concept of 'provision of services' referred to in Articles 59 and 60 of the EEC Treaty covers the transmission, via cable network operators established in one Member State, of television programmes supplied by a broadcasting body established in another Member State, even if that body established**

itself there in order to avoid the legislation applicable in the receiving State to domestic broadcasters.

2. The provisions of the EEC Treaty on freedom to provide services are to be interpreted as not precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State.

Moitinho de Almeida Joliet Rodríguez Iglesias

Grévisse Zuleeg

Delivered in open court in Luxembourg on 5 October 1994.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber