

JUDGMENT OF THE COURT

26 April 1988 *

In Case 352/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the *Gerechtshof* (Regional Court of Appeal), The Hague, for a preliminary ruling in the case pending before that court between

Bond van Averteerders and Others

and

The Netherlands State

on the interpretation of Article 59 *et seq.* of the EEC Treaty in the light of the prohibitions of advertising and subtitling contained in the *Kabelregeling*, a ministerial decree of 26 July 1984 (*Nederlandse Staatscourant* No 145 of 27 July 1984), adopted in the Netherlands in order to regulate the distribution by cable of radio and television programmes,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: G. F. Mancini

Registrar: D. Louberman, Administrator

after considering the observations submitted on behalf of

Bond van Adverteerders and Others, the appellants in the main proceedings, by B. H. Ter Kuile, of the Bar at The Hague,

* Language of the Case: Dutch.

the Government of the Netherlands, by G. M. Borchardt, acting as Agent,

the Government of the Federal Republic of Germany, by M. Seidel, acting as Agent,

the Government of the French Republic, by G. Guillaume, in the written procedure, acting as Agent,

the Commission of the European Communities, by its legal advisers H. Étienne and R. Barents, acting as Agents,

having regard to the Report for the Hearing as supplemented and further to the hearing on 17 September 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 January 1988,

gives the following

Judgment

1 By decision of 30 October 1985, which was received at the Court on 18 November 1985, the Gerechtshof (Regional Court of Appeal), The Hague, referred to the Court for a preliminary ruling nine questions on the interpretation of the provisions of the EEC Treaty relating to the freedom to supply services and on the scope of certain general principles of Community law in order to assess the compatibility with Community law of national rules designed to prohibit the distribution by cable of radio and television programmes transmitted from other Member States which contain advertising intended especially for the public in the Netherlands or subtitles in Dutch.

2 The questions were raised in proceedings between, on the one hand, the Bond van Averteerders (Dutch advertisers' association), 14 advertising agencies and the

operator of a cable network (hereinafter referred to as 'the advertisers') and, on the other, the Netherlands State, relating to the prohibitions of advertising and subtitling contained in the Kabelregeling, a ministerial decree of 26 July 1984 (Nederlandse Staatscourant No 145 of 27 July 1984), which the advertisers consider to be contrary to Article 59 *et seq.* of the EEC Treaty and to the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights.

- 3 The prohibitions of advertising and subtitling are set out in Article 4 (1) of the Kabelregeling, which provides that 'the use of an antenna system to relay to the public radio and television programmes shall be authorized in the case of . . .
 - (c) programmes supplied from abroad via cable, over the air or by satellite, by or on behalf of an organization or group of organizations distributing the programme in the country in which it is established by means of a transmitter or a cable network, provided that:
 - (i) the programme does not contain advertisements intended especially for the public in the Netherlands;
 - (ii) the programme does not contain subtitles in Dutch, unless authorization has been granted by the Minister'.
- 4 According to the explanatory note to the Kabelregeling, the prohibitions in question do not apply to the relaying (doorgifte) by a cable network operator of programmes broadcast over the air. According to the Netherlands Government, the reason for this is that in principle such programmes do not contain advertising intended especially for the public in the Netherlands and are capable of being received directly by at least some television viewers in the Netherlands. The Netherlands Government also expressed the view, which was not contradicted by the advertisers, that the prohibitions set out in the Kabelregeling apply only where a cable network operator relays (overbrenging) programmes sent to it by a foreign transmitter 'point-to-point' via a telecommunication satellite, as in the case of programmes transmitted by Sky Channel or TV 5.

- 5 According to the explanatory note to the Kabelregeling the prohibitions of advertising and subtitling are intended to prevent 'the indirect establishment in the Netherlands of a cable or subscriber commercial television service which would unfairly compete with national broadcasting and with Netherlands television by subscription which has still to be developed'.
- 6 The Omroepwet 1967 (Broadcasting Law) (Staatsblad 176) aims to introduce on the two national television channels a pluralistic, non-commercial broadcasting system. Under Articles 27 and 29 of that law, air time available for the broadcasting of programmes on the two channels is divided between the Nederlandse Omroepstichting (Netherlands Broadcasting Foundation, hereinafter referred to as 'the NOS'), on the one hand, and a number of broadcasting organizations approved by the competent minister (the Omroeporganisaties) which represent *inter alia* the main schools of thought in Dutch society, on the other. Under Article 36 of the Omroepwet, the NOS has to produce a common service including, among other things, the television news. In addition, Article 35 of the Omroepwet requires each Omroeporganisatie to produce a comprehensive service, including reasonable proportions of cultural, educational, entertainment and informative broadcasts.
- 7 Article 11 of the Omroepwet prohibits Omroeporganisaties from broadcasting advertisements at the request of third parties. Under Article 50 of that law, the right to broadcast advertisements on the two national television channels is confined to the Stichting Etherreclame (Television and Radio Advertising Foundation), hereinafter referred to as the 'STER'. The STER does not make the advertisements itself; it merely arranges for advertising produced by third parties to be broadcast and makes air time available for that purpose. Under Article 6 (2) of its Statute the STER has to pay over its receipts to the State, which uses them to subsidize the Omroeporganisaties and, to a smaller degree, the press. According to information provided by the Netherlands Government, which was not contested by the advertisers, about 70% of the Omroeporganisaties' financial resources come from licence fees (omroepbijdragen) paid by television viewers and about 30% from the receipts of the STER.
- 8 The advertisers consider that the advertising facilities afforded them by the STER are too limited. In particular, advertisements cannot be broadcast sufficiently frequently by the STER. Consequently, the advertisers wish to utilize the more

extensive facilities offered to them by foreign broadcasters of commercial programmes, which they are prevented from using as a result of the Kabelregeling's prohibitions of advertising and subtitling.

- 9 They therefore brought an application before the President of the Arrondissement-rechtbank (District Court), The Hague, for interim relief by way of the provisional suspension of the prohibitions in question. The President of the Arrondissementsrechtbank granted the application with regard to the prohibition of subtitling but dismissed the application relating to the prohibition of advertising. The President considered that the prohibition of subtitling was discriminatory since it did not apply to the Omroeporganisaties and unnecessary because the prohibition of advertising was in itself sufficient to prevent the distribution of foreign programmes with Dutch subtitles which included advertising. Both the advertisers and the Netherlands State appealed against that order to the Gerechtshof, The Hague.

- 10 The Gerechtshof considered it necessary to refer to the Court nine questions on the interpretation of Article 59 *et seq.* of the Treaty. They are worded as follows:
 1. Can there be said to be a provision of a service (or services whose relevant elements are not confined within a single Member State where cable network operators within that Member State receive radio and television programmes (with or without advertisements) supplied from abroad via cable, over the air or by satellite and distribute such programmes through cable networks?

 2. If Question 1 is answered in the affirmative, do national rules which subject such distribution of programmes supplied from abroad on national cable networks to restrictions which do not apply, or do not apply in an identical manner, to similar programmes supplied within the Member State concerned constitute a restriction on the freedom to provide such services which is prohibited by Article 59 of the EEC Treaty?

 3. Is it relevant for the purpose of answering Question 2 whether the programmes supplied from abroad in the manner described above contain advertisements aimed in particular at the public of the Member State concerned, where similar advertisements in programmes supplied within that Member State may only be

broadcast by an organization which has a statutory advertising monopoly and where the revenue derived from advertisements by that organization goes almost entirely to finance the activities of domestic broadcasting organizations and to the national press?

4. If the Treaty provisions on freedom to provide services are applicable, do national rules such as those described above, which prohibit the distribution of programmes supplied from abroad which contain advertisements aimed in particular at the public of the Member State in which the programmes are received, constitute a restriction prohibited by Article 59 of the EEC Treaty, where domestic broadcasting organizations in that Member State are not permitted to broadcast advertisements and the broadcasting of advertising in that Member State is reserved to an organization with a statutory advertising monopoly, while the revenue derived from advertisements goes almost entirely to domestic broadcasting organizations and the national press?

5. If the Treaty provisions on freedom to provide services are applicable, do national rules such as those described above, which provide that programmes with subtitles in the language of the Member State in which the programmes are received may be broadcast only with government approval solely in order to exclude commercial broadcasts aimed at the public of the Member State concerned, constitute a restriction prohibited by Article 59 of the EEC Treaty, if domestic broadcasting organizations are subject to strict conditions of approval and are not permitted to make commercial broadcasts (in any form whatsoever), and, in addition, the circumstances set out above in the second part of Question 4 apply?

6. If the Treaty provisions on freedom to provide services apply to national rules such as those described above, must such rules not only comply with the prohibition of discrimination but also be justified on grounds relating to the public interest and proportional to the objective to be achieved?

7. If Question 6 is answered in the affirmative, can objectives relating to cultural policy, designed to maintain a pluralistic and non-commercial broadcasting

system and a pluralistic and independent press constitute such justification, even if the rules concern almost exclusively the financial requirements of those objectives?

8. Can such justification lie in the fact that national rules such as those described in the previous questions are necessary to prevent commercial programmes supplied from abroad from competing with domestic broadcasts in the Member State concerned and with new media forms which are still being developed in that State?
 9. Can the generally accepted principles of Community law (in particular the principle of proportionality) and the fundamental rights enshrined in Community law (in particular the freedom of expression and freedom to receive information) impose directly applicable obligations on the Member States in the light of which national rules such as those concerned here must be assessed, regardless of whether or not any written provisions of Community law are applicable thereto?
- 11 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- (a) The existence of services within the meaning of Articles 59 and 60 of the EEC Treaty**
- 12 In its first question the national court seeks essentially to ascertain whether the distribution, by operators of cable networks established in a Member State, of television programmes supplied by broadcasters established in other Member States and containing advertisements intended especially for the public in the Member State where the programmes are received, involve the provision of a service or services within the meaning of Articles 59 and 60 of the Treaty.
 - 13 In order to answer that question it is necessary first to identify the services in question, secondly to consider whether the services are transfrontier in nature for the purposes of Article 59 of the Treaty and, lastly, to establish whether the services in question are services normally provided for remuneration within the meaning of Article 60 of the Treaty.

- 14 It must be held that the transmission of programmes at issue involves at least two separate services. The first is provided by the cable network operators established in one Member State to the broadcasters established in other Member States and consists of relaying to network subscribers the television programmes sent to them by the broadcasters. The second is provided by the broadcasters established in certain Member States to advertisers established in particular in the Member State where the programmes are received, by broadcasting advertisements which the advertisers have prepared especially for the public in the Member State where the programmes are received.
 - 15 Each of those services are transfrontier services for the purposes of Article 59 of the Treaty. In each case the suppliers of the service are established in a Member State other than that of certain of the persons for whom it is intended.
 - 16 The two services in question are also provided for remuneration within the meaning of Article 60 of the Treaty. Firstly, the cable network operators are paid, in the form of the fees which they charge their subscribers, for the service which they provide for the broadcasters. It is irrelevant that the broadcasters generally do not themselves pay the cable network operators for relaying their programmes. Article 60 does not require the service to be paid for by those for whom it is performed. Secondly, the broadcasters are paid by the advertisers for the service which they perform for them in scheduling their advertisements.
 - 17 The reply to the first question put by the national court must therefore be that the distribution, by operators of cable networks established in a Member State, of television programmes supplied by broadcasters established in other Member States and containing advertisements intended especially for the public in the Member State where the programmes are received, comprises a number of services within the meaning of Articles 59 and 60 of the Treaty.
- (b) The existence of restrictions on freedom to supply services contrary to Article 59 of the Treaty**
- 18 In its second, third, fourth and fifth questions the national court essentially seeks to ascertain whether prohibitions of advertising and subtitling such as those contained in the Kabelregeling constitute restrictions on freedom to supply services

contrary to Article 59 of the Treaty, regard being had to the fact that the Omroepwet prohibits national broadcasters from broadcasting advertisements and restricts the right to broadcast advertisements to a foundation which is bound by its statute to transfer its receipts to the State, which uses them to subsidize national broadcasters and the press.

- 19 It is appropriate to answer those questions together in the light, firstly, of the prohibition of advertising and, secondly, of the prohibition of subtitling.
- 20 It appears from the specific circumstances mentioned by the national court that the prohibitions of advertising and subtitling contained in the Kabelregeling must be considered in the context of the national legislation relating to the broadcasting system.

The prohibition of advertising

- 21 Under Article 59 of the Treaty restrictions on freedom to provide services within the Community were to be abolished by the expiry of the transitional period 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.
- 22 A ban on advertising such as the one embodied in the Kabelregeling involves a twofold restriction on freedom to supply services. In the first place, it prevents cable network operators established in a Member State from relaying television programmes supplied by broadcasters established in other Member States. Secondly, it prevents those broadcasters from scheduling for advertisers established in particular in the Member State where the programmes are received advertisements intended especially for the public in that State.
- 23 The Netherlands Government maintains that the prohibition of advertising laid down by the Kabelregeling affects broadcasters established in other Member States in the same way as the prohibition of advertising laid down in the Omroepwet

affects the Omroeporganisaties, and, moreover, is less strict than the ban laid down by the Omroepwet in so far as it does not apply to advertising in general but only to advertising intended specially for the public in the Netherlands. The Netherlands Government concludes that if there is a restriction on freedom to supply services it is not discriminatory and hence is not prohibited by Article 59 of the Treaty.

- 24 That argument cannot be accepted. It is not a matter of comparing the situation of the Omroeporganisaties with that of broadcasters established in other Member States, but the situation of the Dutch television stations as a whole with that of the foreign broadcasters.
- 25 In that connection, it must be stressed that the STER's sole role is that of carrying out the technical and financial management of the broadcasting of advertising on Netherlands stations in accordance with the rules laid down by the Omroepwet and that it itself cannot be regarded as a broadcaster of programmes. The STER merely organizes the transmission of advertising prepared by third parties, to whom it sells air time.
- 26 It must therefore be held that there is discrimination owing to the fact that the prohibition of advertising laid down in the Kabelregeling deprives broadcasters established in other Member States of any possibility of broadcasting on their stations advertisements intended especially for the public in the Netherlands whereas the Omroepwet permits the broadcasting of advertisements on national television stations for the benefit of all the Omroeporganisaties.
- 27 Accordingly, a prohibition of advertising such as that contained in the Kabelregeling entails restrictions on the freedom to supply services contrary to Article 59 of the Treaty.

The prohibition of subtitling

- 28 The Netherlands Government argues in essence that, as the explanatory note to the Kabelregeling makes clear, the prohibition of subtitling is designed solely to

prevent the prohibition of advertising from being circumvented. This occurs in particular where the foreign programme with Dutch subtitles contains advertising, which is usually the case with a commercial programme. According to the explanatory note to the Kabelregeling, such advertising should be regarded as being intended especially for the public in the Netherlands by virtue of the fact that the programme in question has subtitles. The Netherlands Government admits that the Omroepwet contains no prohibition of subtitling as far as the Omroeporganisaties are concerned, but points out that in practice, under the rules governing access to the Netherlands broadcasting system, the latter may not broadcast programmes with subtitling except in so far as the programmes contain no advertising.

29 In that regard, it is sufficient to observe that the prohibition of subtitling to which broadcasters in other Member States are subject simply has the aim of complementing the prohibition of advertising, which, as appears from the considerations set out above, entails restrictions on the freedom to provide services contrary to Article 59 of the Treaty.

30 Accordingly, a prohibition of subtitling such as that contained in the Kabelregeling entails restrictions on the freedom to supply services contrary to Article 59 of the Treaty.

(c) The possibility of justifying restrictions such as those at issue on the freedom to supply services

31 On the assumption that national rules of the type at issue are not discriminatory, the national court asks in its sixth question whether they must be justified on grounds relating to the public interest and proportional to the objectives which they set out to achieve. In its seventh and eighth questions it further asks whether those grounds might relate to cultural policy or to policy designed to combat a form of unfair competition.

32 It is appropriate to point out in the first place that 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.

- 33 The only derogation which may be contemplated in a case such as this is that provided for in Article 56 of the Treaty, to which Article 66 refers, under which national provisions providing for special treatment for foreign nationals escape the application of Article 59 of the Treaty if they are justified on grounds of public policy.
- 34 It must be pointed out that economic aims, such as that of securing for a national public foundation all the revenue from advertising intended especially for the public of the Member State in question, cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty.
- 35 However, the Netherlands Government has stated that, in the final analysis, the prohibitions of advertising and subtitling have a non-economic objective, namely that of maintaining the non-commercial and, thereby, pluralistic nature of the Netherlands broadcasting system. The receipts of the STER go to fund the subsidies which the State pays to the Omroeporganisaties, in order that they may preserve their non-commercial character. The Netherlands Government maintains that a pluralistic broadcasting system is conceivable only if the Omroeporganisaties are non-commercial in character.
- 36 It is sufficient to observe in that regard that the measures taken by virtue of that article must not be disproportionate to the intended objective. As an exception to a fundamental principle of the Treaty, Article 56 of the Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard.
- 37 The Netherlands Government itself admits that there are less restrictive, non-discriminatory ways of achieving the intended objectives. For instance, broadcasters of commercial programmes established in other Member States could be given a choice between complying with objective restrictions on the transmission of advertising, such as a prohibition on advertising certain products or on certain days and limiting the duration or the frequency of advertisements — restrictions also imposed on national broadcasters — or, if they did not wish to comply, refraining from transmitting advertising intended especially for the public in the Netherlands.

- 38 It should be pointed out in that connection that, as the Court held in its judgment of 18 May 1980 (Case 52/79 *Debauve* [1980] ECR 833), in the absence of harmonization of the national rules applicable to broadcasting and television, each Member State has the power to regulate, restrict or even totally prohibit television advertising on its territory on grounds of the public interest, provided that it treats all services in that field identically whatever their origin or the nationality or place of establishment of the persons providing them.
- 39 It must therefore be held that prohibitions of advertising and subtitling such as those contained in the *Kabelregeling* cannot be justified on grounds of public policy under Article 56 of the Treaty.

(d) General principles of Community law and fundamental rights recognized by Community law

- 40 In its ninth question the national court essentially asks whether the principle of proportionality and the right of freedom of expression guaranteed by Article 10 of the European Convention on Human Rights in themselves impose obligations on the Member States, independently of the applicability of provisions of Community law.
- 41 It is clear from the answers given to the preceding questions that prohibitions of advertising and subtitling such as those contained in the *Kabelregeling* are incompatible with the provisions of Article 59 *et seq.* of the Treaty. Since the national court can resolve the dispute before it in the light of those answers alone, the ninth question has no purpose.

Costs

- 42 The costs incurred by the German and French Governments and by the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are

concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Gerechtshof, The Hague, by order of 18 November 1985, hereby rules:

- (1) The distribution, by operators of cable networks established in a Member State, of television programmes supplied by broadcasters established in other Member States and containing advertisements intended especially for the public in the Member State where the programmes are received, comprises a number of services within the meaning of Articles 59 and 60 of the Treaty.
- (2) Prohibitions of advertising and subtitling such as those contained in the Kabel-regeling entail restrictions on freedom to supply services contrary to Article 59 of the Treaty.
- (3) Those prohibitions cannot be justified on grounds of public policy under Article 56 of the Treaty.

Mackenzie Stuart	Bosco	Due	Moitinho De Almeida	
Rodríguez Iglesias	Koopmans	Everling	Bahlmann	Galmot
Kakouris	Joliet	O'Higgins	Schockweiler	

Delivered in open court in Luxembourg on 26 April 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President