COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF GROPPERA RADIO AG AND OTHERS v. SWITZERLAND

(Application no. 10890/84)

JUDGMENT

STRASBOURG

28 March 1990

In the case of Groppera Radio AG and Others[*],

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S. K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 23 and 24 November 1989 and 21 and 22 February 1990,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 16 November 1988 and 31 January

[*] Note by the registry: The case is numbered 14/1988/158/214. The first number is the case's position on the list of the cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

1989 respectively, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 10890/84) against Switzerland lodged with the Commission under Article 25 (art. 25) by a limited company incorporated under Swiss law, Groppera Radio AG, and three Swiss citizens, Mr Jürg Marquard, Mr Hans-Elias Fröhlich and Mr Marcel Caluzzi, on 9 February 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 10 and 13 (art. 10, art. 13).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mrs D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 24 November 1988, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr F. Gölcüklü, Mr F. Matscher, Mr L.-E. Pettiti, Mr J. De Meyer and Mrs E. Palm (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 § 1). In accordance with the President's Order and instructions, the Registrar received the applicants' memorial on 8 May 1989 and the Government's memorial on 30 May. On 21 July the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 15 June that the oral proceedings should open on 21 November 1989 (Rule 38).

6. On 20 June the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

7. On 26 September the Commission's secretariat filed documents at the registry concerning the proceedings before the Commission.

8. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:
- for the Government
Mr O. Jacot-Guillarmod, Assistant Director,
Federal Office of Justice, Head of the International Affairs Division, *Agent*,
Mr B. Münger, Federal Office of Justice,
Deputy Head of the International Affairs Division,
Mr P. Koller, Federal Department of Foreign Affairs,
Deputy Head of the Cultural Affairs Section,
Mr A. Schmid, Head Office of the PTT,
Head of the General Legal Affairs Division,
Mr H. Kieffer, Head Office of the PTT,
Head of the Frequency Management and Broadcasting Rights Section,
Mr P. Nobs, Head Office of the PTT,
Telecommunications Rights and Criminal Law Section,
Mr M. Regnotto, Federal Department of Transport,
Communications and Energy - Radio and Television Department, *Counsel*;
- for the Commission
Mr J. A. Frowein, *Delegate*;
- for the applicants
Mr L. Minelli, Rechtsanwalt, *Counsel*.

The Court heard addresses by Mr Jacot-Guillarmod for the Government, by Mr Frowein for the Commission and by Mr Minelli for the applicants, as well as their replies to questions put by the Court and by three of its members individually.

9. The Agent of the Government and the representative of the applicants produced several documents at the hearing.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. Groppera Radio AG, a limited company incorporated under Swiss law, has its registered office at Zug (Canton of Zug) and produces radio programmes.

Mr Jürg Marquard, Mr Hans-Elias Fröhlich and Mr Marcel Caluzzi are all Swiss nationals. Mr Marquard is a publisher and lives at Zug; he runs Groppera Radio AG and is its statutory representative and sole shareholder.

Mr Fröhlich, who is a journalist and an employee of Groppera Radio AG, lives at Thalwil (Canton of Zürich). Mr Caluzzi is likewise employed by the company as a journalist and lives at Cernobbio in Italy but also has a home in Lucerne.

A. The background to the case

1. The Pizzo Groppera radio station

11. In 1979 an Italian private limited company, Belton s.r.l., built a radio station on the Pizzo Groppera - a 2,948 m peak in Italy, near Campodolcino, six kilometres from the Swiss border - for Groppera Radio's predecessor, Radio 24 AG (see paragraphs 14-15 below). The station used a 50 kW transmitter and a directional aerial with a gain of about 100 kW, such that the apparent power radiated was of the order of 5,000 kW. Using this transmitter, the most powerful in Europe, the station broadcast to Switzerland over a distance of 200 km to the north-west and thus reached nearly a third of the country's population, mainly in the Zürich area.

2. The situation from 13 November 1979 to 30 September 1983

12. From 13 November 1979 to 30 September 1983 the Pizzo Groppera station was managed by Belton s.r.l. but operated by its owner, Radio 24 AG, a company that Mr Roger Schawinski had set up in order to evade the State broadcasting monopoly in Switzerland. The programmes, which were broadcast on VHF and were wholly financed by Swiss advertisers, were intended for listeners between the ages of 15 and 40.

13. On 7 June 1982 the Federal Council adopted an Ordinance on local radio trials, thereby ending the monopoly of the Swiss Radio Broadcasting Company. Nearly three hundred applications were made for trials of this kind, including one by Radio 24 AG, which wanted to serve the Zürich area.

14. On 20 June 1983 the Federal Council issued thirty-six licences. One of these went to Radio 24 AG, but it was issued on condition that the broadcasts from the Pizzo Groppera should cease after 30 September 1983.

Mr Schawinski agreed to this but sold the station on the Pizzo Groppera to Mr Marquard.

3. The situation from 1 October to 31 December 1983

15. From 1 October 1983 Groppera Radio AG used the Pizzo Groppera station to broadcast, under the name of Sound Radio, a slightly altered schedule to the Zürich area, on the frequency that had been used by Radio 24. These programmes could be received not only by the owners of car radios and other personal sets but also by cable-network companies, which retransmitted them. They consisted of light music, information bulletins,

commercials and programmes in which the programme-makers and listeners communicated directly or indirectly with each other by telephone or over the air. Like Radio 24, Sound Radio broadcast only in the Zürich dialect.

16. Swiss local radio stations began broadcasting from 1 November 1983 and attracted a large number of listeners. They came into competition with Sound Radio, mainly because they could finance themselves through advertising, subject to certain conditions. An opinion poll carried out in the Zürich area and published on 1 December 1983 showed that Radio 24 reached 60% of listeners and Sound Radio 12%.

B. The proceedings in Switzerland

17. On 17 August 1983 the Federal Council issued an Ordinance relating to the Act governing correspondence by telegraph and telephone ("the 1983 Ordinance") to replace another of 10 December 1973. It came into force on 1 January 1984 and contained general provisions applicable to the licensing scheme.

It created a third category of licence for receiving installations - community-antenna installations - which was additional to categories 1 (private receiving) and 2 (public receiving). By Article 78 § 1 (a) of the Ordinance,

> "A community-antenna licence shall entitle the holder to:
>
> (a) operate the local distribution network defined in the licence and rebroadcast by this means radio and television programmes from transmitters which comply with the provisions of the International Telecommunication Convention of 25 October 1973 and the international Radio Regulations and with those of the international conventions and agreements concluded within the International Telecommunication Union;
>
> ..."

18. From 1 January 1984 most of the Swiss cable companies ceased to retransmit the programmes put out by Sound Radio.

Some of them, however, including the community-antenna co-operative of Maur and the surrounding district (Genossenschaft Gemeinschaftsantennenanlage Maur und Umgebung - "the co-operative"), continued to broadcast them.

1. The administrative proceedings

19. On 21 March 1984 the Zürich area telecommunications office of the national Post and Telecommunications Authority (PTT) informed the co-operative that Groppera Radio AG's broadcasts, since they did not comply with the international rules in force, were unlawful, so that under Article 78

§§ 1 and 3 of the 1983 Ordinance retransmission was not covered by the community-antenna licence. It added that the co-operative would be committing an offence if it continued to retransmit them, and it required the co-operative to cancel within thirty days all the technical arrangements made for receiving and broadcasting the programmes in question.

20. On 31 July 1984 this order was confirmed by the national head office of the PTT.

2. The judicial proceedings

21. The co-operative and two of its subscribers challenged this decision by bringing an administrative-law appeal in the Federal Court.

22. On 30 August 1984 the Pizzo Groppera transmitter was damaged by lightning. It ceased broadcasting and has never resumed since, although the applicants claimed that the damage was quickly repaired. Later, in an interview published in the Tages-Anzeiger Magazin on 13 December 1986, Mr Marquard acknowledged that he had made an error of business judgment in acquiring the radio station.

23. Groppera Radio AG joined the appeal by filing pleadings on 18 September 1984. It claimed that it too was a victim of the provisions of the 1983 Ordinance concerning community-antenna licences, as the restrictions they imposed considerably reduced the number of its listeners, thereby cutting its revenue and jeopardising its financial survival.

24. On 12 November 1984 the Federal Court informed the parties that it had learned that the Pizzo Groppera transmitter had been destroyed and would apparently not be repaired. As there was no interest in pursuing the proceedings, the court proposed striking out the appeals without taking a decision on the merits ("die Beschwerde ohne Sachentscheid abzuschreiben").

The applicants refused to consent to this.

25. The Federal Court gave judgment on 14 June 1985, after deliberating in public on the same day.

It ruled that the appeals were admissible inasmuch as they were directed not against the ban on retransmission itself but against the sanctions imposed by the PTT for disregarding the ban.

It went on to dismiss the appeals for the following reasons (translated from German):

> "3. The Court can normally only hear an administrative appeal if the appellant has a live (present or future) interest in taking proceedings. If the interest in taking proceedings has ceased to exist, the case becomes purely academic and must not continue unless special circumstances require a decision on the merits, for example where it would otherwise not be possible to give a binding ruling on matters of principle in time ...
>
> (a) the Maur community-antenna co-operative and its subscribers have only a contingent interest in taking proceedings, depending on whether Sound Radio is going

to resume broadcasting; so long as there are no broadcasts, there is nothing to feed into the cable network. If it is highly unlikely that the broadcasts will be resumed, there is no need to examine the merits of the appeal.

Groppera Radio AG claimed to have made all the arrangements necessary for restarting its broadcasts in the event of the present appeal's being held to have a suspensive effect (or of its succeeding). That statement, however, was unsupported by any evidence, although the burden of proof is on the appellant in this regard and Groppera's submission is open to serious doubt. The company claimed to have ceased its broadcasts - independently of the consequences of the station's having been struck by lightning - because of the PTT's ban on retransmission. Other reasons may have weighed more heavily, however. With the arrival of experimental local radio stations and a third frequency for Radio DRS [Direktion Radio und Fernsehen der deutschen und rätoromanischen Schweiz], the transmitter on the Pizzo Groppera had to face serious competition, including that from Radio 24; the transmitter's survival is accordingly no doubt in jeopardy irrespective of the ban on retransmission. That being so, Groppera Radio AG's gratuitous statement that it was ready to resume its activities is not sufficient to prove that the Maur community-antenna co-operative and its subscribers have a live interest in taking proceedings. It follows that there is no need to examine the merits of their appeal.

The Court does not need to determine the question whether there might be a live interest if the transmitter resumed or had already resumed its broadcasts, which are incompatible with international telecommunications law - subject to any contrary decision by the Italian courts and, possibly, by an international court of arbitration.

(b) For the same reasons there is no need to consider the merits of the appeal brought by Groppera Radio AG.

The company cannot plausibly maintain that if its appeal succeeded, it would resume its activities - which have been made impossible, short of new investment, by a storm that occurred after the appeal was brought - and would, furthermore, have the financial means to do so.

Moreover, this case is a wholly exceptional one. Transmitters which broadcast in contravention of national or international law cannot usually survive for long. Matters are different as regards the Pizzo Groppera transmitter only because proceedings are still pending in Italy and because hitherto none of the means of settling disputes provided for in Article 50 of the International Telecommunication Convention ... has been used. It is unlikely that a second case of this kind will arise, if only because of the doubtful profitability of such transmitters. There is therefore insufficient justification for determining, with an eye to the future, the issues raised by the case, some of which are extremely sensitive.

In any case, even if it were to be held that Groppera Radio AG had a possible interest in taking proceedings, its claim to retransmit again, through the co-operative's cable network, its probably unlawful ... broadcasts, after resuming them, would not deserve the law's protection."

Lastly, the court made an order for costs against Groppera Radio AG since its appeal could not succeed as the company had breached the law by

attempting to circumvent a ban on retransmission that had been imposed by the PTT and that, moreover, did not concern it directly.

C. The proceedings in Italy

26. From 13 November 1979 onwards Radio 24 (Sound Radio's predecessor) broadcast to Switzerland from the Pizzo Groppera (see paragraph 12 above). On several occasions it changed its frequency in order to prevent interference with other radio stations.

On 21 December 1979, following complaints from the German and Swiss telecommunications authorities, the Italian Ministry of Post and Telecommunications prohibited Belton s.r.l. (the manager of the station - see paragraph 12 above) from continuing its operations and threatened to put its transmitter out of action. The transmitter closed down on 22 January 1980, was functioning again three days later and then ceased broadcasting on 29 January.

27. Belton s.r.l. brought proceedings in the Lombardy Regional Administrative Court, which on 11 March 1980 refused an application for a provisional broadcasting licence.

28. On 19 March 1980 the Chiavenna magistrate declared that the closing down of the transmitter was unlawful, and broadcasting resumed on 23 March.

29. On 3 October 1980 the PTT again demanded that the broadcasts should cease. On 11 October a second application (no. 2442/82) was made to the Lombardy Regional Administrative Court, but on 18 November that court refused a stay of execution. On 25 November the Pizzo Groppera transmitter closed down for the third time.

On 13 January 1981 the Consiglio di Stato granted an application for a stay of execution pending the proceedings in the Administrative Court, and Radio 24 began broadcasting again on 16 January.

30. In a judgment (no. 1515/81) of 1 October, which was filed at the registry on 4 December 1981, the Administrative Court held that Radio 24 was carrying on its activities in Italy unlawfully. The Pizzo Groppera station could not be considered as a local radio station under Italian law, since it had a broadcasting radius of more than 20 km and broadcast only to listeners living across the border. The court added that under Law no. 103 of 14 April 1975 ("new provisions concerning radio and television broadcasting"), the State had a monopoly of radio broadcasts intended for foreign countries. Lastly, the court upheld the closure order, which was executed on 21 January 1982.

31. On 4 May 1982, following an appeal by Belton s.r.l., the Consiglio di Stato adopted three decisions, the first of which was filed at the registry the next day and the other two on 26 October:

(i) an order (no. 124/82) staying execution of the judgment of 1 October 1981, so that Radio 24 was able to resume broadcasting on 9 May;

(ii) a judgment (no. 508/82) allowing the appeal in part and reserving a decision as to the rest; and

(iii) an order (no. 509/82) referring the case to the Constitutional Court - as sections 1, 2 and 45 of the 1975 Law appeared to raise a constitutional issue - and staying the proceedings.

32. The Constitutional Court gave its decision on 6 May 1987 in a judgment (no. 153/1987) which was filed at the registry on 13 May. It declared section 2(1) of the impugned Law to be unconstitutional as it did not make any provision for the possibility of broadcasting programmes abroad under licences issued to private companies by the State authorities.

II. SWITZERLAND AND INTERNATIONAL TELECOMMUNICATIONS LAW

A. The International Telecommunication Convention

33. The International Telecommunication Convention, which was concluded in the International Telecommunication Union on 25 October 1973 and revised on 6 November 1982, has been ratified by all the Council of Europe's member States. In Switzerland it has been published in full in the Official Collection of Federal Statutes (1976, p. 994, and 1985, p. 1093), and in the Compendium of Federal Law (0.784.16).

Article 33, entitled "Rational Use of the Radio Frequency Spectrum", provides:

> "Members shall endeavour to limit the number of frequencies and the spectrum space used to the minimum essential to provide in a satisfactory manner the necessary services. To that end they shall endeavour to apply the latest technical advances as soon as possible."

Article 35 § 1 reads:

> "All stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Members or of recognised private operating agencies, or of other duly authorised operating agencies which carry on radio service, and which operate in accordance with the provisions of the Radio Regulations."

34. The Convention is supplemented and clarified by three sets of administrative rules: the Radio Regulations, the Telegraph Regulations and the Telephone Regulations. Only the first of these is relevant in the instant case.

B. The Radio Regulations

35. The Radio Regulations date from 21 December 1959 and were likewise amended in 1982 and also on other occasions. They run to over a thousand pages and - except for numbers 422 and 725 - have not been published in the Official Collection of Federal Statutes. The latter contains the following reference to them:

> "The administrative regulations relating to the International Telecommunication Convention of 25 October 1973 are not being published in the Official Collection of Federal Statutes. They may be consulted at the Head Office of the PTT, Library and Documentation, Viktoriastrasse 21, 3030 Berne, or may be obtained from the ITU, International Telecommunication Union, Place des Nations, 1202 Geneva."

Apart from number 584 (see paragraph 36 below), the provisions of the Radio Regulations relevant to the present case are the following:

Number 2020

> "No transmitting station may be established or operated by a private person or by any enterprise without a licence issued in an appropriate form and in conformity with the provisions of these Regulations by the Government of the country to which the station in question is subject ..."

Number 2666

> "In principle, except in the frequency band 3900-4000 kHz, broadcasting stations using frequencies below 5060 kHz or above 41 MHz shall not employ power exceeding that necessary to maintain economically an effective national service of good quality within the frontiers of the country concerned."

C. The Darmstadt plan

36. By number 584 of the Radio Regulations,

> "Broadcasting stations in the band 100-108 MHz in Region 1 shall be established and operated in accordance with an agreement and associated plan for the band 87.5-108 MHz to be drawn up by a regional broadcasting conference (see Resolution 510). Prior to the date of entry into force of this agreement, broadcasting stations may be introduced subject to agreement between administrations concerned, on the understanding that such an operation shall in no case prejudice the establishment of the plan."

37. The work of the conference contemplated in this provision resulted in the adoption in 1971 of a regional convention better known under the name of the Darmstadt plan. This instrument, which was superseded in 1984 by the "Geneva plan", governed the use of the 100-108 MHz frequency band and laid down a procedure for considering new applications for

frequency allocations; it also indicated the position and characteristics of the transmitters concerned.

38. Unlike Switzerland, Italy has not acceded to the plan. Nor have the two countries concluded an individual agreement as required before a transmitter can broadcast from one national territory to another.

D. Switzerland's representations

39. The Swiss Government never jammed the broadcasts from the Pizzo Groppera in order to stop them. They did, however, make approaches to the Italian authorities and to the International Telecommunication Union.

1. The approaches to the Italian authorities

40. Two delegations, one Swiss and one Italian, met in Berne on 29 and 30 November 1979 to study the "problem of external transmitters situated on Italian territory and broadcasting programmes to Switzerland". The minutes of the meeting mentioned the following points:

> "1. The Italian delegation confirmed that on 22 November 1979 the 'Ministero delle Poste e delle Telecomunicazioni' sent a warning to the Belton company (Signor Fedele Tiranti) in Como, and receipt of the document was acknowledged on 23 November. The document stated that the transmitter had to confine the scope of its activities to Italian territory. Those in charge of the station had seven days in which to comply with this order, failing which their transmitter would be put out of action (disattivazione). The Swiss delegation expected immediate action. In accordance with the agreements concluded in Rome on 22 and 23 October 1979, the Italian delegation assured the Swiss delegation that the Italian Post and Telecommunications Authority would pursue the course of action already embarked on with the despatch of the warning (diffida), in order to halt the broadcasts to Switzerland. The Swiss delegation stated nonetheless that if nothing was done by 20 December 1979 and if the broadcasts still continued, the case would have to be submitted to the International Telecommunication Union (ITU).
>
> 2. As regards the external transmitters which were disrupting broadcasting in Switzerland, some measure of agreement was reached. The Italian side had already taken measures to implement the rules in force. One transmitter had even temporarily ceased functioning. Future arrangements would be examined on a case-by-case basis by the representatives of the two authorities, i.e. Mr Blaser for Switzerland and Mr Cito for Italy.
>
> 3. The Swiss delegation insisted on measures being taken, in accordance with the international agreements, against other transmitters sited in Italy which broadcast programmes intended mainly for Switzerland. The Italian delegation, which was willing to settle the problem in accordance with its international commitments, said that it could not for the time being participate in any official co-ordination procedure, mainly because there was currently no legal basis for it.

4. The Swiss delegation confirmed its position vis-à-vis the international agreements and stressed the need for them to be applied unrestrictedly by the co-signatory countries.

5. Given the importance of the issues in question, the two delegations decided to continue their negotiations early in 1980."

2. The approaches to the International Telecommunication Union

(a) The request for assistance from the Head Office of the PTT

41. In a letter of 20 January 1987 the Radio Rights Division (Head Office of the PTT) submitted a request for assistance to the chairman of the International Frequency Registration Board (International Telecommunication Union).

It indicated inter alia:

"In Italy, especially in the Po valley, there are a large number of private radio and television broadcasting stations transmitting on frequencies which have not been co-ordinated with the Swiss Post and Telecommunications Authority. This state of affairs contravenes Articles 2 and 4 of the regional broadcasting agreements (Stockholm 1961, Geneva 1984) and numbers 1214 and 1215 of the Radio Regulations, international agreements to which the Swiss and Italian authorities are parties.

Some of these stations broadcast programmes and advertising designed for listeners in neighbouring Swiss towns and employ power exceeding that necessary to maintain economically an effective national service of good quality within the frontiers of the country concerned, contrary to number 2666 of the Radio Regulations. Furthermore, these private stations interfere with the proper functioning of Swiss radio services. To give a better picture of the situation, we are enclosing copies of the reports of harmful interference that we have sent to the Italian authorities (since 1984), pursuant to Article 22, Appendix 23 of the Radio Regulations. You will also find a summary table of Italian private radio stations which, through their presence on the airwaves, are preventing the implementation of our frequency allocations.

For more than six years now, the various representations made by the Swiss PTT to the Italian authorities with a view to a co-ordination of effort have unfortunately produced no significant result. It is for this reason that before, if need be, taking the steps provided for in Article 50, number 189, of the International Telecommunication Convention (Nairobi, 1982), the Swiss authorities request the Board to take, as soon as possible, all necessary measures to remedy this situation."

(b) The International Telecommunication Union's reply

42. On 8 July 1988 the chairman of the International Frequency Registration Board sent the Head Office of the Swiss PTT a copy of a letter sent the same day to the Italian Ministry of Post and Telecommunications informing it that frequency allocations were being used in breach of the Radio Regulations and regional agreements.

The most recent of the Board's representations to the Italian authorities was made in a telefaxed message on 29 November 1988, which read:

"1. The Board has yet to receive any information about the solution of the cases of harmful interference reported by the Swiss authorities. Similar cases of harmful interference have recently been reported by the authorities of two other States.

2. On behalf of the International Frequency Registration Board I wish to express serious concern at the apparent lack of progress in eliminating the harmful interference caused to radio and television broadcasting stations in Switzerland and at the fact that a chaotic situation seems to have developed in the region which, to say the least, renders the existing international treaties nugatory.

3. In your letter of 8 August 1988 you informed the Board that an agreement had been reached with the Swiss authorities, but no practical measure seems to have been taken. Your Department has not yet replied to the Board's letters of 3 April 1987, 21 August 1987 and 25 October 1988 and has not submitted any comments - as it was required to do under RR [Radio Regulations] 1444 - on the Board's investigation pursuant to RR 1438 and RR 1442 into the harmful interference caused to the Swiss authorities' radio and television broadcasting stations which was reported to you in the Board's letter of 8 July 1988.

...

6. The Board wishes to draw your Department's attention to the extremely serious situation currently prevailing.

In particular:

(I) The Board has concluded that the Italian authorities have failed to comply with the obligations which they freely undertook to fulfil in the International Telecommunication Convention, the Radio Regulations and the regional agreements.

(II) More than a hundred Italian stations are currently causing persistent harmful interference to officially authorised stations in three neighbouring countries.

(III) No means has been found of reducing this major interference, which continues to increase.

(IV) There has been no specific reply to the Board's letters.

7. In view of this situation, which has existed for several years now and has recently become alarmingly serious, the Board is bound to consider taking further measures with a view to overcoming the serious consequences for the authorities of France, Switzerland and Yugoslavia of the Italian authorities' failure to fulfil their obligations.

8. Copies of this telefax are being sent to the authorities of France, Switzerland and Yugoslavia."

The Board never received any reply from the Italian authorities.

PROCEEDINGS BEFORE THE COMMISSION

43. In their application of 9 February 1984 to the Commission (no. 10890/84), Groppera Radio AG and Mr Marquard, Mr Fröhlich and Mr Caluzzi relied on Article 10 (art. 10) of the Convention. They contended that the ban on cable retransmission in Switzerland of their broadcasts from Italy infringed their right to impart information and ideas regardless of frontiers. They also claimed to be the victims of a breach of Article 13 (art. 13), for want of any remedy against a Federal Council Ordinance.

44. The Commission declared the application admissible on 1 March 1988. In its report of 13 October 1988 (made under Article 31) (art. 31), the Commission found that there had been a breach of Article 10 (art. 10) (by seven votes to six) but not of Article 13 (art. 13) (unanimously). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

45. At the hearing the Government confirmed the final submissions in their memorial of 30 May 1989, in which they asked the Court to hold:

> "primarily, that the applicants lack the status of victims and that consequently they cannot claim a violation of the Convention;
>
> in the alternative, that the restrictions on freedom of expression formed part of the licensing system to which broadcasting enterprises may be subject in virtue of the third sentence of Article 10 § 1 (art. 10-1) of the Convention;
>
> in the further alternative, that the State interferences with the applicants' freedom of expression were justified under Article 10 § 2 (art. 10-2) of the Convention."

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

46. The Government submitted - as they had already done unsuccessfully before the Commission - that the applicants were not "victims" within the meaning of Article 25 § 1 (art. 25-1) of the Convention.

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* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 173 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

Only the community-antenna co-operative of Maur and the surrounding district had suffered interference with the exercise of its freedom of expression, namely the ban on cable transmission of programmes received over the air from the Pizzo Groppera. Groppera Radio AG, the Government claimed, had only an indirect legal interest, since at all events Sound Radio could still broadcast over the air and cover the Zürich area, including the village of Maur. Furthermore, challenging the Federal Council's 1983 Ordinance would be tantamount to applying for a review of legislation in the abstract, which was in principle outside the jurisdiction of the Convention institutions. Nor could Mr Marquard, Mr Fröhlich and Mr Caluzzi claim to be victims on the ground that they were listeners living in the area covered by the co-operative, since they were not subscribers to its cable network.

47. By "victim" Article 25 (art. 25) means the person directly affected by the act or omission which is in issue, a violation being conceivable even in the absence of any detriment; the latter is relevant only to the application of Article 50 (art. 50) (see, in particular, the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 21, § 42).

48. Like the Commission in its decision of 1 March 1988 on the admissibility of the application, and for similar reasons, the Court does not consider it necessary to examine whether the applicants can claim to have been victims during the period from 1 January 1984 (entry into force of the Federal Council's Ordinance of 17 August 1983) to 21 March 1984 (date of the order from the Zürich area telecommunications office of the PTT to the co-operative) or during the period following 30 August 1984, when the Pizzo Groppera station was damaged by lightning.

From 21 March to 30 August 1984, on the other hand, the applicants were directly affected by the 1983 Ordinance and by the administrative decisions of 21 March and 31 July 1984. Admittedly, these were not formally directed at the applicants, who continued to broadcast over the air freely, but their effects were fully felt by them. Since the co-operative was prohibited from feeding Sound Radio's programmes into its network, the applicants lost an appreciable proportion of their usual audience - the listeners living in areas where reception was poor or even impossible because of the mountainous nature of the country.

49. Nor, in relation to Article 25 (art. 25), is there any ground for distinguishing between the different applicants, despite obvious dissimilarities of status or rôle and the fact that Groppera Radio AG alone joined the co-operative's appeal to the Federal Court. All had a direct interest in the continued transmission of Sound Radio's programmes by cable: for the company and its sole shareholder and statutory representative, it was essential to keep the station's audience and therefore to maintain its

financing from advertising revenue; for the employees, it was a matter of their job security as journalists.

50. Lastly, the Court cannot attach any importance to the fact that Mr Marquard, Mr Fröhlich and Mr Caluzzi were not subscribers to the co-operative's cable network. Before the Convention institutions they complained of interference with their freedom to impart information and ideas regardless of frontiers and not, other than in their observations of 29 August 1986 to the Commission, of an infringement of their freedom personally to receive such information and ideas.

51. In short, the applicants can claim to be victims of the alleged violation.

II. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

52. Groppera Radio AG, and also Mr Marquard, Mr Fröhlich and Mr Caluzzi, complained of the ban on cable retransmission in Switzerland of the programmes broadcast by Sound Radio from Italy. They relied on Article 10 (art. 10) of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Whether there was an interference

53. In the applicants' submission, the administrative decisions of 21 March and 31 July 1984 taken against the co-operative under the Federal Council's 1983 Ordinance interfered with their right to impart information and ideas regardless of frontiers; the decisions prevented subscribers to the cable networks from receiving the broadcasts from the Pizzo Groppera and thus amounted in effect to a ban on those programmes, which was the more serious as in Switzerland two-thirds of the population can receive broadcasts by cable, and the mountainous terrain often makes reception over the air difficult and sometimes even impossible.

54. Without expressly disputing that Article 10 (art. 10) was applicable, the Government denied that the applicants had any interest in taking

proceedings. Sound Radio, they said firstly, used a transmitter of considerable power allowing it to "blanket" the Zürich area and had never been jammed. Secondly, the station had ceased broadcasting on 1 September 1984 not only because of the damage caused by the lightning but also, and more particularly, for economic reasons. Thirdly, it broadcast programmes whose content - mainly light music and commercials - could raise doubts as to whether they were "information" and "ideas".

55. The Court notes that the first two of the Government's submissions reiterate in substance the preliminary objection that has already been dismissed. As to the third submission, the Court does not consider it necessary to give on this occasion a precise definition of what is meant by "information" and "ideas". "Broadcasting" is mentioned in the Convention precisely in relation to freedom of expression. Like the Commission, the Court considers that both broadcasting of programmes over the air and cable retransmission of such programmes are covered by the right enshrined in the first two sentences of Article 10 § 1 (art. 10-1), without there being any need to make distinctions according to the content of the programmes. The disputed administrative decisions certainly interfered with the cable retransmission of Sound Radio's programmes and prevented the subscribers in the Maur area from receiving them by that means; they therefore amounted to "interference by public authority" with the exercise of the aforesaid freedom.

B. Whether the interference was justified

56. The Government submitted, in the alternative, that the interference was in keeping with paragraph 1 (art. 10-1) in fine, according to which Article 10 "shall not prevent States from requiring the licensing of broadcasting ... enterprises"; in the further alternative, they argued that it was justified under paragraph 2 (art. 10-2).

1. Paragraph 1, third sentence, of Article 10 (art. 10-1)

57. As to the first point, the applicants contended that Switzerland had no jurisdiction to regulate reception on its territory of programmes legally broadcast from abroad and retransmitted by cable. Since the Pizzo Groppera station was in Italy, only the Italian authorities might be entitled to grant Groppera Radio AG a licence within the meaning of the third sentence of Article 10 § 1 (art. 10-1). Furthermore, companies which operated cable networks each had a relatively large number of channels; the licences that were granted to them in Switzerland were for purely technical purposes and could not in any circumstances be used to dictate the choice of programmes.

In the Commission's view likewise, the third sentence of Article 10 § 1 (art. 10-1) could not justify the interference complained of. The condition to which the award and holding of the "community-antenna licence" were made subject by the administrative decisions of 21 March and 31 July 1984 was not designed to ensure compliance with a licence issued to a broadcasting enterprise operating under the Swiss system. The legitimacy of the restriction imposed on licensed cable companies by Article 78 § 1 (a) of the 1983 Ordinance could accordingly be assessed only under Article 10 § 2 (art. 10-2).

58. The Government disputed this contention. They did not deny that Groppera Radio AG was a broadcasting enterprise but they included in that category community-antenna companies which received programmes over the air and retransmitted them by cable. Furthermore, they distinguished between two national licensing systems: the Italian one, applicable to Groppera Radio AG, and the Swiss one, applicable to the co-operative. They considered that they had made legitimate use of the second system in refusing to endorse the application for a licence, as to have done so would have breached Switzerland's international undertakings - especially as Sound Radio used VHF, a frequency intended purely for national broadcasting - and would have been to disregard the conditions attaching to the licences granted to cable companies.

59. The Court agrees with the Government that the third sentence of Article 10 § 1 (art. 10-1) is applicable in the present case. What has to be determined is the scope of its application.

60. The insertion of the sentence in issue, at an advanced stage of the preparatory work on the Convention, was clearly due to technical or practical considerations such as the limited number of available frequencies and the major capital investment required for building transmitters. It also reflected a political concern on the part of several States, namely that broadcasting should be the preserve of the State. Since then, changed views and technical progress, particularly the appearance of cable transmission, have resulted in the abolition of State monopolies in many European countries and the establishment of private radio stations - often local ones - in addition to the public services. Furthermore, national licensing systems are required not only for the orderly regulation of broadcasting enterprises at the national level but also in large part to give effect to international rules, including in particular number 2020 of the Radio Regulations (see paragraph 35 above).

61. The object and purpose of the third sentence of Article 10 § 1 (art. 10-1) and the scope of its application must however be considered in the context of the Article as a whole and in particular in relation to the requirements of paragraph 2 (art. 10-2).

There is no equivalent of the sentence under consideration in the first paragraph of Articles 8, 9 and 11 (art. 8, art. 9, art. 11), although their

structure is in general very similar to that of Article 10 (art. 10). Its wording is not unlike that of the last sentence of Article 11 § 2 (art. 11-2). In this respect, however, the two Articles (art. 10, art. 11) differ in their structure. Article 10 (art. 10) sets out some of the permitted restrictions even in paragraph 1 (art. 10-1). Article 11 (art. 11), on the other hand, provides only in paragraph 2 (art. 11-2) for the possibility of special restrictions on the exercise of the freedom of association by members of the armed forces, the police and the administration of the State, and it could be inferred from this that those restrictions are not covered by the requirements in the first sentence of paragraph 2 (art. 11-2), except for that of lawfulness ("lawful"/"légitimes"). A comparison of the two Articles (art. 10, art. 11) thus indicates that the third sentence of Article 10 § 1 (art. 10-1), in so far as it amounts to an exception to the principle set forth in the first and second sentences, is of limited scope.

The Court observes that Article 19 of the 1966 International Covenant on Civil and Political Rights does not include a provision corresponding to the third sentence of Article 10 § 1 (art. 10-1). The negotiating history of Article 19 shows that the inclusion of such a provision in that Article had been proposed with a view to the licensing not of the information imparted but rather of the technical means of broadcasting in order to prevent chaos in the use of frequencies. However, its inclusion was opposed on the ground that it might be utilised to hamper free expression, and it was decided that such a provision was not necessary because licensing in the sense intended was deemed to be covered by the reference to "public order" in paragraph 3 of the Article (see Document A/5000 of the sixteenth session of the United Nations General Assembly, 5 December 1961, paragraph 23).

This supports the conclusion that the purpose of the third sentence of Article 10 § 1 (art. 10-1) of the Convention is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2 (art. 10-2), for that would lead to a result contrary to the object and purpose of Article 10 (art. 10) taken as a whole.

62. The sentence in question accordingly applies in the instant case inasmuch as it permits the orderly control of broadcasting in Switzerland.

63. The Court notes that the Pizzo Groppera station as such admittedly came under Italian jurisdiction, but that the retransmission of its programmes by the Maur co-operative came under Swiss jurisdiction. The ban on retransmission was fully consistent with the Swiss local radio system established by the Federal Council in its Ordinance of 7 June 1982 (see paragraphs 13-14 above).

64. In sum, the interference was in accordance with the third sentence of paragraph 1 (art. 10-1); it remains to be determined whether it also

satisfied the conditions in paragraph 2 (art. 10-2), that is to say whether it was "prescribed by law", had a legitimate aim or aims and was "necessary in a democratic society" in order to achieve them.

2. Paragraph 2 of Article 10 (art. 10-2)

(a) "Prescribed by law"

65. The applicants did not object to the fact that the Ordinance of 17 August 1983 referred to the rules of international law, but they did not consider these sufficiently accessible or precise for a citizen to be able to adapt his behaviour to them - even after consulting a lawyer, if necessary. The applicants added that international telecommunications law was binding only on the States parties to the instruments in question; as Groppera Radio AG's transmitter came under Italian jurisdiction, any problem with applying that law therefore had to be resolved at inter-State level, if need be by resorting to the machinery provided for in Article 50 of the International Telecommunication Convention. In short, they claimed that the interference complained of was not "prescribed by law".

66. The Commission reached a similar conclusion. It noted that neither Article 78 § 1 (a) of the 1983 Ordinance nor the decision taken by the Zürich area telecommunications office of the PTT on 21 March 1984 (see paragraphs 17 and 19 above) mentioned any particular rule of international telecommunications law. The Commission also referred to the Swiss Federal Court's and the Italian Constitutional Court's judgments of 14 June 1985 and 6 May 1987 (see paragraphs 25 and 32 above) in order to advance the view that the question whether Groppera Radio AG was validly in possession of a "licence" within the meaning of number 2020 of the Radio Regulations (see paragraph 35 above) had not been resolved. To hold that in the instant case the persons concerned could know what the legal basis of the measure affecting Sound Radio was would amount to giving the authorities a quasi-discretionary power to ban any programme alleged to be contrary to public international law.

67. The Government submitted that, on the contrary, the national and international rules in issue satisfied the criteria of precision and accessibility identified in the Convention institutions' case-law.

On the first point the Government argued that the decision taken on 31 July 1984 by the national head office of the PTT referred to Article 78 § 1 (a) of the 1983 Ordinance and to several specific provisions of international telecommunications law (Article 35 of the International Telecommunication Convention and numbers 584 and 2666 of the Radio Regulations). They also emphasised the monistic concept followed in the Swiss legal system; this allowed individuals to rely on rules of international law in order to assert rights and obligations vested in or incumbent on the authorities or other individuals. Lastly, they stated that the applicants were by no means

unaware of the international rules applicable in Switzerland. This was evidenced by two documents: the letter of 29 January 1980 from the PTT's national head office to all licensed community-antenna companies in the area in which Radio 24 (Sound Radio's predecessor) could be received and the Federal Court's judgment of 12 July 1982 in the case of Radio 24 Radiowerbung Zürich AG gegen Generaldirektion PTT (Judgments of the Swiss Federal Court, vol. 108, Part 1b, p. 264). These documents had clearly defined a legal position which the 1983 Ordinance expressed in legislative form.

As regards accessibility, the Government recognised that only the International Telecommunication Convention had been published in full in the Official Collection of Federal Statutes and in the Compendium of Federal Law. While the Radio Regulations had not been published in these - except for numbers 422 and 725 -, information was given in the Official Collection as to how they could be consulted or obtained (see paragraph 35 above). This practice was, the Government said, justified by the length of the text, which ran to more than a thousand pages. Moreover, the practice had been approved by the Federal Court (judgment of 12 July 1982 previously cited) and could be found in at least ten other member States of the Council of Europe. Lastly, it was consonant with the European Court's case-law on individuals' access to legal norms in common-law systems.

68. In the Court's view, the scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.

In the instant case the relevant provisions of international telecommunications law were highly technical and complex; furthermore, they were primarily intended for specialists, who knew, from the information given in the Official Collection, how they could be obtained. It could therefore be expected of a business company wishing to engage in broadcasting across a frontier - like Groppera Radio AG - that it would seek to inform itself fully about the rules applicable in Switzerland, if necessary with the help of advisers. As the 1983 Ordinance and the International Telecommunication Convention had been published in full, such a company had only to acquaint itself with the Radio Regulations, either by consulting them at the PTT's head office in Berne or by obtaining them from the International Telecommunication Union in Geneva.

Nor can it be said that the various instruments considered above were lacking in the necessary clarity and precision. In short, the rules in issue were such as to enable the applicants and their advisers to regulate their conduct in the matter.

(b) Legitimate aim

69. The Government contended that the impugned interference pursued two aims recognised by the Convention.

The first of these was the "prevention of disorder" in telecommunications, the order in question being laid down in the International Telecommunication Convention and the Radio Regulations and being universally binding. Sound Radio had disregarded three basic principles of the international frequency order:

(a) the licensing principle, whereby the establishment or operation of a broadcasting station by a private person or by an enterprise was subject to the issue of a licence (number 2020 of the Radio Regulations), as Sound Radio had never received a licence from the Italian authorities;

(b) the co-ordination principle, which required special agreements to be concluded between States where the frequency used was between 100 and 108 MHz (number 584 of the Radio Regulations), because there was no such agreement between Switzerland and Italy;

(c) the principle of economic use of the frequency spectrum (Article 33 of the International Telecommunication Convention and number 2666 of the Radio Regulations), because the Pizzo Groppera had the most powerful VHF transmitter in Europe.

The Government submitted, secondly, that the interference complained of was for the "protection of the ... rights of others", as it was designed to ensure pluralism, in particular of information, by allowing a fair allocation of frequencies internationally and nationally. This applied both to foreign radio stations, whose programmes had been lawfully retransmitted by cable long before the appearance of Radio 24, and to Swiss local radio stations, trials of which had been authorised in the Ordinance of 7 June 1982 (see paragraph 13 above).

The applicants merely denied that their activities had adversely affected any of the interests listed in paragraph 2 (art. 10-2).

The Commission expressed no view on this matter in its report, but before the Court its Delegate acknowledged the legitimacy of the first aim mentioned by the Government.

70. The Court finds that the interference in issue pursued both the aims relied on, which were fully compatible with the Convention, namely the protection of the international telecommunications order and the protection of the rights of others.

(c) "Necessary in a democratic society"

71. The applicants submitted that the ban affecting them did not answer a pressing social need; in particular, it went beyond the requirements of the aims being pursued. It was tantamount to censorship or jamming.

The Government stated that they had had no other recourse seeing that their representations to the Italian authorities continued to be fruitless,

whether made direct or through the International Telecommunication Union. The refusal to grant the co-operative a redistribution licence related only to Sound Radio's programmes and in no way affected the stations which complied with the criteria of Article 78 of the 1983 Ordinance; furthermore, it was dictated by technical necessity, since a cable's capacity was not unlimited.

The Delegate of the Commission disagreed.

72. According to the Court's settled case-law, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with European supervision covering both the legislation and the decisions applying it; when carrying out that supervision, the Court must ascertain whether the measures taken at national level are justifiable in principle and proportionate (see, as the most recent authority, the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, pp. 19-20, § 33).

73. In order to verify that the interference was not excessive in the instant case, the requirements of protecting the international telecommunications order as well as the rights of others must be weighed against the interest of the applicants and others in the retransmission of Sound Radio's programmes by cable.

The Court reiterates, firstly, that once the 1983 Ordinance had come into force, most Swiss cable companies ceased retransmitting the programmes in question (see paragraph 18 above). Moreover, the Swiss authorities never jammed the broadcasts from the Pizzo Groppera, although they made approaches to Italy and the International Telecommunication Union (see paragraphs 39-42 above). Thirdly, the impugned ban was imposed on a company incorporated under Swiss law - the Maur co-operative - whose subscribers all lived on Swiss territory and continued to receive the programmes of several other stations. Lastly and above all, the procedure chosen could well appear necessary in order to prevent 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.

C. Conclusion

74. In conclusion, no breach of Article 10 (art. 10) is made out, as the disputed measure was in accordance with paragraph 1 (art. 10-1) in fine and satisfied the requirements of paragraph 2 (art. 10-2).

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

75. In their original application Groppera Radio AG and Mr Marquard, Mr Fröhlich and Mr Caluzzi also relied on Article 13 (art. 13) of the Convention, claiming that they had not had an "effective remedy before a national authority" in order to have it determined whether Article 78 § 1 (a) of the 1983 Ordinance was compatible with the Convention, and in particular with Article 10 (art. 10).

They did not maintain this complaint in the subsequent proceedings before the Commission, however, nor did they pursue it before the Court; there is no need for the Court to consider the issue of its own motion.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;

2. Holds by sixteen votes to three that there has been no breach of Article 10 (art. 10);

3. Holds unanimously that there is no need to consider the case under Article 13 (art. 13).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 March 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Matscher; (b) concurring opinion of Judge Pinheiro Farinha; (c) dissenting opinion of Judge Pettiti; (d) dissenting opinion of Judge Bernhardt; (e) dissenting opinion of Judge De Meyer; (f) concurring opinion of Judge Valticos.

R.R.
M.-A.E.

CONCURRING OPINION OF JUDGE MATSCHER, APPROVED BY JUDGE BINDSCHEDLER-ROBERT

(Translation)

While recognising that paragraph 1 of Article 10 (art. 10-1) unquestionably applies in the instant case, I am firmly opposed to the statement - which is apparently unqualified and is in any case unnecessary for the reasoning - that whether this paragraph applies never depends on the content of the programme, however broadcast (see paragraph 55 in fine of the judgment).

One can very readily imagine programmes being broadcast which in no way amount to the communication of "information and ideas" and which therefore, on account of their content, do not come within the right protected by Article 10 § 1 (art. 10-1).

CONCURRING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

1. I concur with the majority in the result.

2. I voted in support of the view that there had not been a breach of Article 10 solely on the basis of the third sentence of paragraph 1 (art. 10-1): "the procedure chosen could well appear necessary in order to prevent evasion of the law", as "a measure taken against a station which the Swiss authorities 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" (see paragraph 73 of the judgment).

3. In my opinion, the lack of any licence in itself justified the interference.

We do not need to invoke paragraph 2 (art. 10-2). "National licensing systems are required not only for the orderly regulation of broadcasting enterprises at the national level but also in large part to give effect to international rules, including in particular number 2020 of the Radio Regulations" (see paragraph 60 of the judgment).

4. To my profound regret, I cannot accept paragraph 61 of the judgment. In my opinion, it is unacceptable to reason on the basis of the drafting history of a later instrument drawn up within a different community (the UN), not within the Council of Europe.

The third sentence is there; it has a meaning and authorises the methodical regulation of broadcasting in Switzerland.

To make licensing measures subject to the requirements of paragraph 2 (art. 10-2) would render the content of the third sentence of paragraph 1 (art. 10-1) nugatory.

The fact that the sentence was not included in the International Covenant on Civil and Political Rights is of no importance when interpreting paragraph 1 of Article 10 (art. 10-1) of the European Convention on Human Rights, in which it does occur.

5. There is no need for me to criticise paragraphs 65-73 of the judgment with a view to accepting or rejecting them, but I have serious difficulty in subscribing to the reasoning in paragraph 68. There was indeed no publication in the Swiss official gazette. I honestly doubt whether what may be acceptable in respect of European Community legislation included in the Community's Official Journal - which is regarded as an official gazette in the member States too - can be acceptable in respect of other international instruments.

6. In conclusion, there was no breach of Article 10 (art. 10) because no licence had been issued by the Swiss authorities (last sentence of paragraph 1) (art. 10-1).

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I do not agree with the majority of the Court as to the interpretation of paragraph 1 (art. 10-1) or paragraph 2 of Article 10 (art. 10-2), or as to the result, and I voted in support of the view that there had been a breach.

To my mind, the error which led the majority to its decision was to have confused to some extent the technical and legal aspects of the issues relating to broadcasting, reception, transfrontier and national frequencies, the international VHF system and the rules governing cable networks.

This distinction, however, was an essential one for assessing the parties' relations and the application of Article 10 (art. 10) to the instant case. Belton s.r.l., which was in charge of the Pizzo Groppera station and in which the rights of management were vested for a given period, was an Italian company with its headquarters at Como (Italy).

Distinguishing between broadcasting and reception is a vital principle in the telecommunications field. The guiding principles may be summed up as follows:

(1) Broadcasting and reception are two separate things, except where the equipment, the place of broadcasting and the area of reception are indivisible.

(2) The distinction must be applied in respect both of jurisdiction where damage is alleged and of the application of national and international rules.

The central question was: in what way was the Maur co-operative's transmission by cable of programmes from the Pizzo Groppera transmitter unlawful or contrary to Swiss public order?

How could the Maur co-operative comply with the authorities' order to it?

The answers to these questions would no doubt establish that what was in issue was the content of the broadcasts.

But even in that case, how could the content have been altered to make it acceptable: by means of a quota of local news, cantonal music or advertising?

It is clear that such an order cannot fairly be made unless the recipient can comply with the legislation and regulations.

In recent European cases dealing with jurisdiction, copyright and tortious damage the applicable rules and systems have been looked at and analysed and the distinctions to be made according to various eventualities have been highlighted:

(a) the broadcasting itself is contrary to national law, or else reception is;

(b) the transmission across a frontier of a broadcast that is unlawful at national level or lawful and causing damage (cf. SNEP c. CLT judgment of

the Paris Court of Appeal referring to the Mines de Potasse judgment of the Court of Justice of the European Communities);

(c) the transmission across a frontier of a lawful broadcast whose reception is unlawful under the local law of the place of destination;

(d) the same situation, but with reception being lawful.

In the case of Groppera Radio AG the whole broadcast was made and recorded in Italy. The Swiss Government did not rely on the concept of damage in order to claim justification for their interference with the broadcasting. We come back to the question: how should the Groppera broadcasts have been made up in order to escape the Swiss ban?

Because of incomplete and uncertain data available to the Commission, the majority of the Court has wrongly taken the view that Belton s.r.l. was a Swiss company; but Belton is definitely a company incorporated under Italian law, in accordance with domestic law and with private international law. It follows that the broadcasts for which the Belton company was responsible during its period of management were a matter for Italian law and that it was from that legal angle that the issues of international telecommunications law had to be considered.

The proceedings which were brought in Italy by Belton s.r.l. to challenge the order of 3 October 1980 and were directed in particular against the Constitutional Court's decision of 28 July 1976 (no. 202) concerning Article 195 of the presidential decree of 29 May 1973 led to the decisions of 4 December 1981 by the Lombardy Administrative Court and of 4 May 1982 by the Consiglio di Stato, which referred the case to the Constitutional Court. In its decision of 6 May 1987 (no. 153) the Constitutional Court held that section 2 of the Law of 14 April 1979 on the broadcasting of programmes abroad was unconstitutional in that the Law made no provision for the possibility of such programmes being broadcast under a licensing system such as the one in Article 1 of the presidential decree of 29 March 1973.

Thus, as matters stood, there had been no final Italian decisions to the effect that the broadcasts from the Pizzo Groppera were unlawful when the Swiss authorities made their order concerning reception and broadcasting by cable.

In its decision of 4 May 1982 the Consiglio di Stato noted in one of its reasons that the measures challenged in the proceedings could not be interpreted as a general ban on broadcasts abroad where these were not pirate broadcasts (document Cour (89) 244-II, pp. 237-238).

It was pointed out in the Italian proceedings that the Pizzo Groppera station had adopted the frequencies 104 and 107.3 instead of the earlier one 456.825 in order to avoid objectionable interference.

The whole thrust of the Swiss Government's argument was that the ban was lawful because the broadcasting was unlawful under the rules of the International Telecommunication Union. They therefore based their stance

on the international rules and not on interference justified on grounds of morality or public interest.

Groppera Radio AG's broadcasts, however, had not been held to be contrary to those rules. The Swiss Government never initiated proceedings with the International Union or lodged a complaint against the Italian Government. On the contrary, they awaited the decision of the Italian Constitutional Court and took no action in the wake of it.

The Federal Court itself, in its decision of 14 June 1985, pointed to this failure: "hitherto none of the means of settling disputes provided for in Article 50 of the International Telecommunication Convention ... has been used." This was, moreover, consistent with the fact that the first notification to the Maur co-operative contained no reference to the international rules and that the second notification referred to irrelevant enactments and eventualities: jamming, piracy.

No final decision had been taken against the Maur co-operative, since it had appealed, together with Groppera Radio AG, to the Federal Court and the latter had not considered the merits of the case, holding that, owing to the accident that had damaged the Pizzo Groppera transmitter, the broadcasts had then ceased.

In Swiss law, therefore, there was no judgment on the merits against either the Maur co-operative or Groppera Radio AG.

Under international telecommunications law and the International Telecommunication Convention the use of the frequency spectrum is laid down in Articles 33 and 35 of the International Telecommunication Convention. The Radio Regulations refer to this in numbers 584, 2020 and 2666.

None of these provisions could be relied on, as the broadcasts came under Italian law and the Italian system and were a matter solely for the Belton company during its period of management; there was no effect which prevented the national service from being provided within Switzerland's frontiers. The lack of any special agreement between Switzerland and Italy did not alter the situation, as the approaches made by the Swiss authorities from 1979 onwards did not result in any joint findings that there had been any transfrontier or national infringements, pending the decision of the Constitutional Court.

The International Frequency Registration Board referred to the case of Italian stations causing harmful and persistent interference, but in the instant case the Swiss Government did not complain of harmful interference by Groppera Radio AG on Radio 24's former frequency under the name of Sound Radio. The Maur co-operative had been awarded a cable-network licence without any difficulty, as there was no shortage of such networks.

The applicants were therefore fully entitled to challenge before the Commission and the Court Switzerland's jurisdiction to control the cable retransmission of programmes lawfully broadcast from abroad, since the Pizzo Groppera station was in Italy and under Italian jurisdiction.

The situation was not like that of a satellite used in order to avoid conventional over-the-air broadcasting, with reception being by cable or individual aerial (as in the case of the TDF1 - Chaîne Sept - Canal Plus dispute). There was therefore no danger that a coded or uncoded channel might use new radio frequencies.

The third sentence of Article 10 § 1 (art. 10-1) could not therefore justify the interference complained of since the issue was not one of making Belton s.r.l. and Groppera Radio AG subject to a Swiss licensing system.

Only paragraph 2 (art. 10-2) could have been open to discussion in respect of the content of the communication transmitted by cable, but the Swiss Government themselves were unable to rely on any justification for interference with the content.

In the instant case, frequencies were neither overloaded nor saturated such as to prevent the operation of other local radio stations; nor was there any lack of cable networks. The community-antenna licence awarded to the Maur co-operative in accordance with the 1983 Ordinance had not been withdrawn; but the order of 21 March 1984 instructing the co-operative to cease broadcasting Groppera Radio AG's programmes on its cable network on pain of a criminal penalty amounted to a ban. The Government were therefore wrong to maintain that, in the absence of any jamming, it was not possible to talk of censorship; surely to prevent a broadcast is to censor it? In fact, the intention was to protect local radio stations whose programmes were less popular with the public. The local authorities' policy was partly prompted by the problems of competition.

The majority of the Court refers in fine to evasion of the law; but how can the offence which such evasion would constitute be relied on when no such charge had been brought and no proceedings of this kind had been brought in either Italy or Switzerland!

Admittedly the scope of the judgment is circumscribed by the facts of the case and by the narrow grounds on which the case has been decided, but inasmuch as Article 10 (art. 10) was at the heart of a problem of retransmission across frontiers, I consider that it was necessary to state that the third sentence of paragraph 1 (art. 10-1) was not applicable and that the interference was not justified under Article 10 § 2 (art. 10-2).

Freedom of expression, which is a fundamental right including the right to receive a communication, is even more necessary in the field of telecommunications. The countries of Eastern Europe have been encouraged on the path to democracy thanks to broadcasts across frontiers and they wish to comply with the European Convention on Transfrontier Television. American and European case-law and legal literature on the

subject agree in maintaining that this freedom extends to the sphere of telecommunications.

The European Court must uphold the protection and promotion of freedom of expression in the same spirit as the First Amendment to the Constitution of the United States and the proceedings of the United Nations (16th session). It must keep in mind Helvetius's statement that it is useful to think and to be able to say everything and the Virginia Declaration of Rights (1776): "the freedom of the Press is one of the greatest bulwarks of liberty".

Bibliography: C. Gavalda and L. Pettiti, Liberté d'expression, Paris, Ed. Lamy Audiovisuel; J.-P. Jacqué and L. Pettiti, Liberté d'expression, Montreal, Presse Universitaire de McGill.

Case-law: SNEP c. CLT, Paris Court of Appeal (distinction); Meredith, United States (extension of the case-law on the First Amendment and the press to the audio-visual media; mutatis mutandis, Virginia State Board of Pharmacy).

Professional opinion: Colloquy on "Freedom of Information and the Audio-Visual Revolution", European University Institute, Florence, 1989.

DISSENTING OPINION OF JUDGE BERNHARDT

Unlike the majority of the Court, I think that the legal basis for the interference by the Swiss authorities with freedom of expression in the present case is not sufficient under the Convention.

Admittedly, the case raises most difficult questions concerning the correct interpretation of Article 10 (art. 10) of the Convention. In the actual context, three points are of primary importance. (1) The second sentence of the Article expressly mentions freedom to receive and impart information "regardless of frontiers". This freedom of cross-boundary communication is an essential element of present-day democracy and must be taken into account when interpreting the other provisions in Article 10 (art. 10). (2) The third sentence of the first paragraph of this Article (art. 10-1) expressly permits the licensing of broadcasting enterprises. Even if modern technical developments permit a far greater number of radio and television enterprises and channels than was the case when the Convention was drafted, States still have the right and the duty to ensure the orderly regulation of communications, and this can only be achieved by a licensing system. Whether a licensing system can be used for preserving a State monopoly in this field in spite of the modern developments can be left open in the present context, since such a monopoly no longer exists in Switzerland. It seems also to be undisputed that a licensing system cannot be used for imposing censorship and cannot justify the suppression of legally permitted information and ideas. I further agree with the majority of the Court that the retransmission of radio programmes by cable can be made conditional on a licence, although under the terms of the third sentence of Article 10 § 1 (art. 10-1) this is by no means beyond doubt. It can hardly be doubted that the prohibition of such retransmission cannot be left to the unfettered discretion of the executive. This implies that the second paragraph of Article 10 (art. 10-2) comes into play and must be respected when a State operates a licensing system. (3) The question, therefore, is whether the interference by the Swiss authorities in the present case satisfies the requirements of Article 10 § 2 (art. 10-2), as developed in the case-law of the Convention organs. Among these requirements, a first condition is that a restriction must be "prescribed by law".

Here a first problem arises which has been discussed neither by the parties nor in the present judgment, but which needs further consideration. As far as can be seen, the Swiss legislature has until now never enacted any substantive provisions on broadcasting licences; instead it has given the Government, by means of Federal Act of 1922 governing correspondence by telegraph and telephone as interpreted in practice, complete freedom to regulate this field. (The Act primarily concerns telegraph and telephone communications, since in 1922 radio did not yet exist). Is the requirement in Article 10 § 2 (art. 10-2) that restrictions must be "prescribed by law"

really satisfied when a parliament confers unlimited or extremely broad powers on the executive, which becomes the law-making as well as the law-executing authority? I have doubts in this respect, but it is not necessary to discuss this question in extenso since I am convinced that the legal basis for the interference in question is not sufficient even if Article 78 of the Government's Ordinance of 17 August 1983 is taken as the starting-point. This Article merely refers to "the provisions of the International Telecommunication Convention and the international Radio Regulations", without giving any further details. I accept that under the Swiss system treaty law is part of domestic law. I also think that technical provisions contained in international texts do not all have to be published in the official gazette; it suffices that they are accessible, which is the case here. But what do these international norms mean and prescribe in the present context? It has never been clarified whether Italy violated its international obligations by permitting or tolerating the radio broadcasts in question. It has never been clarified whether Groppera Radio violated Italian law, including any international norm which is self-executing in Italy. It seems to me to be beyond doubt that Switzerland would not be in breach of any international obligation if it were to permit the retransmission by cable of the programme in question. Under international law it may have the right, but it clearly has no duty, to intervene and to prohibit such retransmission. Taking the foregoing into account and having regard to the only Swiss decision which explains in some detail the situation under Swiss law - that is the decision of 31 July 1984 of the head office of the Swiss Post and Telecommunications Authority -, I see no adequate and sufficiently clear legal provision which can be regarded as a basis for the interference in question.

In view of this conclusion, it is not necessary for me to inquire whether the other requirements of Article 10 § 2 (art. 10-2) are satisfied (purpose and necessity of the interference). I would not exclude that the interference in question could in the final event be found to be justified if it had had a solid legal basis. But this is not the case.

DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

I. The licensing power of States in respect of radio and television broadcasting cannot be arbitrary or even discretionary. It can only be justified inasmuch as the exercise of it is necessary in order that over-the-air communications may function in an efficient and orderly manner and, above all, in order that freedom of expression should be secured as fully as possible[1].

It is only a policing power, under which States may at most take the measures necessary, having regard to the technical characteristics of the type of communication concerned, for satisfying as far as possible the needs and wishes of all interested parties and to enable them as far as possible to broadcast and receive what they wish to broadcast and receive, just as, in the same spirit, States may take measures to regulate the practical arrangements[2] for this kind of communication. The power can only affect radio and television broadcasting as means of communication and not the communication by these means itself - it cannot include a right to interfere with what is communicated, the content of the communication.

States' licensing power does not, as such, imply a power to deny certain individuals or categories of individual the right to avail themselves of freedom of expression by means of the media in question or to prohibit certain things or certain categories of things from being broadcast, transmitted or, above all, received in that way.

Complete or partial exclusions of this kind are not legitimate if they are not justified other than by the licensing power itself.

They are not legitimate unless they are restrictions which answer a pressing social need, which are proportionate to the legitimate aim pursued and which are justified on grounds that are not merely reasonable but

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[1] These principles have been clearly laid down by the United States Supreme Court: see Red Lion Broadcasting Co v. the Federal Communications Commission and US v. Radio Television News Directors Association (1969), 395 US 367, 23 LEd 2d 371, 89 SCt 1794; Columbia Broadcasting System v. Democratic National Committee (1973), 412 US 94, 36 LEd 2d 772, 93 SCt 2080; Federal Communications Commission v. National Citizens Committee for Broadcasting (1978), 436 US 775, 56 LEd 2d 697, 98 SCt 2896; Columbia Broadcasting System, American Broadcasting Companies & National Broadcasting Company v. Federal Communications Commission & al. (1981), 453 US 367, 69 LEd 2d 706, 101 SCt 2813; Federal Communications Commission v. League of Women Voters of California & al. (1984), 468 US 364, 82 LEd 2d 278, 104 SCt 3106; and City of Los Angeles & Department of Water and Power v. Preferred Communications (1986), 476 US 488, 90 LEd 2d 480, 106 SCt 2034.

[2] See on this point the case-law of the United States Supreme Court on "time, place and manner regulation" and, in particular, mutatis mutandis, Virginia State Board of Pharmacy & al. v. Virginia Citizens Consumers Council & al. (1976), 425 US 748, 48 LEd 2d 346, 96 SCt 1817, and Cox v. New Hampshire (1941), 312 US 569, 85 LEd 2d 1049, 61 SCt 762.

relevant and sufficient[1]; or else are non-discriminatory distinctions, that is to say distinctions which are objectively and reasonably justified and likewise proportionate to the legitimate aim pursued[2].

II. The right to freedom of expression exists "regardless of frontiers".

In the field of radio and television broadcasting, it follows from this that the broadcasting of programmes that can be received on the territory of other States and the reception of programmes broadcast from the territory of other States can, as such, be made subject to exclusions or restrictions.

This is so, however, only if the exclusions or restrictions were quite as justified and necessary in respect of programmes broadcast or received only within the frontiers of the State taking the measures and if the measures were also applied to such programmes.

III. In the instant case there is no doubt that by prohibiting the retransmission of the broadcasts in issue, which they considered to be unlawful, the authorities of the respondent State were, in all good faith, pursuing legitimate aims, and more particularly "the prevention of disorder" and the "protection of the rights of others"[3].

But it was not certain that these broadcasts were unlawful. They were still the subject of proceedings in Italy and, moreover, none of the methods of settlement provided for in Article 50 of the International Telecommunication Convention had been used[4]. "Due regard being had to the importance of freedom of expression in a democratic society"[5], such unlawfulness could not, so long as it had not been established with certainty,

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[1] See the following judgments: Handyside, 7 December 1976, Series A no. 24, pp. 22-24, §§ 48-50; The Sunday Times, 26 April 1979, Series A no. 30, pp. 36 and 38, §§ 59 and 62; Barthold, 25 March 1985, Series A no. 90, p. 25, § 55; Lingens, 8 July 1986, Series A no. 103, pp. 25-26, §§ 39-40; and Müller and Others, 24 May 1988, Series A no. 133, p. 21, § 32.

[2] See the following judgments: Case "relating to certain aspects of the laws on the use of languages in education in Belgium", 23 July 1968, Series A no. 6, p. 24, § 10; Marckx, 13 June 1979, Series A no. 31, p. 16, § 33; Rasmussen, 28 November 1984, Series A no. 87, p. 14, § 38; Abdulaziz, Cabales and Balkandali, 28 May 1985, Series A no. 94, pp. 35-36, § 72; James and Others, 21 February 1986, Series A no. 98, p. 44, § 75; Lithgow and Others, 8 July 1986, Series A no. 102, p. 66, § 177; Gillow, 24 November 1986, Series A no. 109, pp. 25-26, § 64; and Inze, 28 October 1987, Series A no. 126, p. 18, § 41.

[3] See paragraphs 69 and 70 of the judgment.

[4] See paragraphs 26-32 of the judgment and the extract of the Swiss Federal Court's decision of 14 June 1985, reproduced in paragraph 25.

[5] Barfod judgment of 22 February 1989, Series A no. 149, p. 12, § 28. (See also the Barthold judgment previously cited, p. 26, § 58, and the previously cited judgments in the cases of Handyside, p. 23, § 49, The Sunday Times, p. 40, § 65, Lingens, p. 26, § 41, and Müller and Others, p. 21, § 32.

be relied on to justify the ban on retransmitting the programmes[6] or, a fortiori, the need for such a ban in a democratic society.

Since the respondent State did not put forward any other justification, there was, in my opinion, a breach of the applicants' right to freedom of expression.

Ultimately, even if the unlawfulness of the broadcasts in issue had been duly established, it could not have sufficed on its own to justify the ban on retransmitting the programmes. It would still have been necessary to show why, in March and July 1984[1], it was essential to put an end to the reception, via a local cable network[2], of programmes broadcast from the territory of another State and which had in fact, since November 1979, been able to be received over a wide area of the respondent State's territory, containing nearly a third of the State's population[3], when, in particular, the financial viability of the broadcasts in issue had already been seriously jeopardised by the operation since November 1983 of local radio stations, which had been made legal in June 1982[4].

[6] See paragraphs 149-157 of the Commission's report.
[1] See paragraphs 19 and 20 of the judgment.
[2] According to Mr Jacot-Guillarmod's reply to Mr Walsh, at the end of the hearing on 21 November 1989, there were not very many subscribers to this network.
[3] See paragraph 11 of the judgment.
[4] See paragraphs 13-16 of the judgment. See also the Federal Court's decision cited in paragraph 25.

CONCURRING OPINION OF JUDGE VALTICOS

(Translation)

Like the majority of the Court I consider that there has been no breach of Article 10 (art. 10) of the Convention, but for different, simpler reasons.

It seems to me that the issue raised is one that in all events does not come within the ambit of Article 10 (art. 10). That provision refers to "freedom of expression", defined as including "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

Can the view really be taken that this case raises an issue of freedom of expression, and in particular of the imparting of information and ideas? What was actually broadcast by the radio station in question? According to its own representative, Mr Minelli, at the public hearing on 21 November 1989, it broadcast light music, variety programmes, news and programmes in which listeners could take part. Apart from the news programmes, which were clearly bulletins of the type usual in broadcasts of this kind, these programmes were therefore essentially light entertainment and contained none of the kind of discussion or mere airing of views and expression of ideas or cultural or artistic events with which Article 10 (art. 10) is concerned. Mr Minelli moreover specified that the programming left political problems untouched and aimed to provide entertainment but also an opportunity for the expression of personal opinions on personal matters. This is far from the discussion of ideas and artistic expression. Besides, the radio station's essentially commercial objective accounts for the emphasis on mere entertainment in its programmes. Article 10 (art. 10) is certainly not designed to protect either commercial operations or mere entertainment. I therefore conclude that no issue arises under it and that consequently there can be no question of a breach in this case.