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

SECOND SECTION

CASE OF DEMUTH v. SWITZERLAND

(Application no. 38743/97)

JUDGMENT

STRASBOURG

5 November 2002

FINAL

05/02/2003

In the case of Demuth v. Switzerland,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr L. WILDHABER,
Mr GAUKUR JÖRUNDSSON,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 27 September 2001 and 8 October 2002,

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

PROCEDURE

1. The case originated in an application (no. 38743/97) against the Swiss Confederation lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr Walter Michael Demuth ("the applicant"), on 24 October 1997.

2. The Swiss Government ("the Government") were represented by their Agent, Mr P. Boillat, Head of the International Affairs Division of the Federal Office of Justice.

3. The applicant complained under Article 10 of the Convention of the authorities' refusal to authorise him to broadcast a programme on automobiles via cable television.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 27 September 2001 the Court declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section.

8. After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1949 and lives in Zürich, Switzerland.

10. The applicant intended to set up a "specialised television programme", Car TV AG, limited to a particular subject (*Spartenfernsehprogramm*), namely all aspects of car mobility and private road traffic, including news on cars, car accessories, traffic and energy policies, traffic security, tourism, automobile sport, relations between railways and road traffic and environmental issues. The television programme was to be broadcast via cable television in German in the German-speaking areas of Switzerland, and in French in the French-speaking areas. Initially, the programme was to last two hours, to be repeated continuously over the next twenty-four hours and a new one shown once a week; later it was to be extended in duration. The applicant was to be the company's managing director. The programme was to be prepared in close cooperation with industry, automobile associations and the specialist media.

11. On 10 August 1995 the applicant filed with the government in the name of Car TV AG a request for a licence (*Konzessionsgesuch*) to broadcast the intended programme. The Federal Office for Communication replied on 16 August 1995, pointing out the lack of prospects of success of such a request. By a letter of 7 September 1995 the applicant informed the Federal Office that he wished to pursue his request and submitted further documents. From the latter it transpired that Car TV AG would now include in its programme matters concerning the transport needs of non-motorists and set up an independent programme commission.

12. On 16 June 1996 the Swiss Federal Council (*Bundesrat*) dismissed the request. The Federal Council noted that there was no right, either under Swiss law or Article 10 of the Convention, to obtain a broadcasting licence. With reference to the instructions for radio and television listed in section 3(1) of the Federal Radio and Television Act (*Bundesgesetz über Radio und Fernsehen* – "the RTA"; see "Relevant domestic law" below) the decision continued:

> "... The electronic media have the task of conveying content that serves the development of informed democratic opinion. They should furthermore actively

contribute to a culture of communication serving as the basis for cultural development and for an integral democratic discourse.

4. Under section 11(1)(a) of the RTA, a licence shall only be granted if radio and television can achieve the aims mentioned in section 3(1) of the RTA as a whole. It is unnecessary that each venture comply with all aspects of the instructions mentioned. Rather, a positive contribution is required which will further the culture of communication in our country and which will under no circumstances run counter to the aims of the RTA.

5. A comprehensive and broad-based democratic discourse is guaranteed first of all by means of programmes which are committed to a *public service* and can be considered to be comprehensive. These are directed at the entire public and have as their subject matter all aspects of political and social life. Specialised programmes concentrate on particular themes and are directed at particularly interested sectors of the public. The result may be the formation of public opinion influenced by the media by way of specific content, and no longer primarily by way of broad-based, comprehensive programmes. Such a development indubitably has consequences for the culture of communication. Communicative integration via the electronic media is impaired, and leads to a society increasingly shaped by segmentation and atomisation.

6. Against this background, the broadcasting of specialised programmes runs counter to the democratic considerations of the general instructions for radio and television (Section 3(1) of the RTA). These instructions are oriented towards the integration and promotion of an integral culture of communication. As a result, stricter conditions must apply to specialised programmes than would be required for a programme with a varied content. Therefore, when examining the conditions for a licence under section 11(1)(a) of the RTA, qualified criteria shall be adduced, since the active contribution of specialised programmes towards the culture of communication must generally be called into question.

7. Nevertheless, granting a licence to specialised programmes continues to remain possible under qualified conditions. A licence shall be considered if the negative effects of the programme are at least compensated by its valuable contents within the meaning of section 3(1) of the RTA. This could be the case with programmes in the areas of culture (music, films, etc.) or the formation of political opinions (parliamentary broadcasts, etc.).

8. The request for a licence by Car TV AG aims at a specialised programme which has car mobility as its content and places the car at its centre. According to the criteria set out in subsections (4)-(6), it must be considered with the greatest restraint. As a result, granting a licence will only be considered if the disadvantages resulting from a specialised programme are compensated by its valuable contents, offering a particular contribution to the general instructions mentioned in section 3(1).

9. However, the orientation of the programme of Car TV AG is not able to offer the required valuable contribution to comply with the general instructions for radio and television. The programme focuses mainly on entertainment or on reports about the automobile. Car TV AG does not therefore meet the requirements for a licence under section 11(1)(a) of the RTA."

II. RELEVANT DOMESTIC LAW

1. The Swiss Federal Constitution

13. Article 55 *bis* §§ 2 and 3 of the Swiss Federal Constitution (*Bundesverfassung*), in the version in force at the relevant time, provided as follows:

> "2. Radio and television shall contribute to the cultural development, free expression of opinion and entertainment of the public. They shall have regard to the characteristics of the country and the requirements of the cantons. They shall depict events objectively, and express the variety of opinions adequately.
>
> 3. The independence of radio and television and their autonomy in respect of programmes are guaranteed subject to paragraph 2."

14. These provisions are now set out in Article 93 §§ 2 and 3 of the Federal Constitution.

2. The Federal Radio and Television Act ("the RTA")

15. Based on the provisions of the Federal Constitution, section 3(1) of the Swiss Radio and Television Act (*Bundesgesetz über Radio und Fernsehen*) provides:

> "*Instructions*
>
> Radio and television shall as a whole:
>
> contribute to the free expression of opinion, to the provision of general, varied and objective information to the public and to their education and entertainment, and convey civic awareness;
>
> have regard to, and bring closer to the public, the diversity of the country and its population and advance the understanding of other peoples;
>
> promote Swiss cultural enterprise and stimulate the public to participate in cultural life;
>
> facilitate contact with Swiss expatriates and promote the presence of Switzerland abroad and understanding of its concerns;
>
> have particular regard to Swiss audiovisual production, namely films;
>
> have particular regard to European productions."

16. Section 5(1) and (2) of the RTA provide:

> "*Independence and autonomy*
>
> (1) The operators are free in the manner in which they manage their programmes; they bear the responsibility thereof.

(2) Unless federal law provides otherwise, the operators are not bound by the instructions of the federal, cantonal or municipal authorities."

17. Under section 10(2), nobody is entitled to receive, or to have renewed, a broadcasting licence. Section 10(3) establishes the government, that is the Swiss Federal Council (*Bundesrat*), as the authority that grants broadcasting licences for radio and television.

18. Section 11(1)(a) of the RTA mentions various conditions for the granting of a licence, among which are the conditions stated in section 3(1); namely, that the applicant must be a citizen and resident of Switzerland or a company with its registered office in Switzerland; and that the applicant must disclose his financial situation.

19. Under section 43(1), cable companies are in principle free to transmit all radio and television programmes, although subsection (2) lists certain broadcasts which the cable company is obliged to transmit. Section 48 limits the freedom of cable companies to transmit programmes in so far as they contravene international regulations. In accordance with section 56 of the RTA, the relevant authority shall monitor compliance by all licence holders with international and domestic regulations, although the supervision of programmes is not permitted.

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

20. The applicant complained that the decision of the Federal Council, refusing to grant Car TV AG a broadcasting licence, ran counter to Article 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. Submissions of the parties

1. The applicant

21. The applicant accepted that there was no right in principle to broadcast. However, he considered that the authorities' refusal to grant him a licence was arbitrary and discriminatory. In this respect, he noted that the Government no longer relied before the Court on certain arguments, for instance that Car TV AG would bring about the "segmentation and atomisation" of society. Indeed, the Government's conclusion that a democratic debate was primarily made possible by providing a comprehensive programme was neither proved by the facts nor by research, nor even by anyone's experience. In any event, cable networks were already broadcasting a large number of specialised programmes. Such programmes were very common in Germany and in the United States, yet no research had proved that democratic debate had been disrupted in these countries. In Switzerland in 1997 there were an average of forty-five television and fifty FM radio programmes of various types, thus bringing about integration and a communication culture resulting from the existing media taken as a whole. Nor could it be said that Car TV AG aimed primarily at entertaining the viewer. The application for a licence made it clear that the programme would have been based on a strictly journalistic and pluralistic approach, and would also have provided information on such matters as environmental issues.

22. The applicant further pointed out that the Car TV AG project complied with the various rules and regulations, and that the refusal of the licence was based on arbitrary assumptions. This explained why the reasons given by the government did not correspond to any of the aims justifying an interference set out in Article 10 § 2 of the Convention. The present television programme, like all others, would have made its own contribution towards shaping public opinion. Furthermore, the programme would have duly taken account of the specific linguistic and political situation in Switzerland: for instance, in addition to other measures to ensure pluralism, it was planned to set up a French-language programme. The government had discriminated against the applicant when approving a licence for Top TV, a channel exclusively devoted to weather reporting, and when stating that other channels were already dealing with automobile issues. If the latter point were true, it would be clear that the public was interested in the topic, which could and should be covered by an additional programme.

23. The applicant concluded by pointing out that in 1997 there were still frequencies available on the cable networks. Indeed, Car TV AG had been assured a channel by the largest cable operator, which was also going to be one of its shareholders. It could not be up to the licensing authority to make

its opinion dependent on the availability of channels in the cable networks. Here, section 42 of the RTA contained a "must carry" clause which conclusively regulated this question.

2. The Government

24. The Government contended that there had been no violation of Article 10 of the Convention. The third sentence of Article 10 § 1 of the Convention specifically envisaged the power of States to require broadcasting licences. This requirement applied not only to technical aspects but also, as the Court had pointed out in *Informationsverein Lentia and Others v. Austria*, to other conditions, such as "the nature and objectives of a proposed station, its potential audience at national, regional or local level, [and] the rights and needs of a specific audience" (see judgment of 24 November 1993, Series A no. 276, p. 14, § 32). In Switzerland, there was no audiovisual monopoly. Rather, the mixed system set up by the RTA provided for a plurality of media. Access thereto was nevertheless subject to a licence which was granted if certain conditions were met; the fact that no right was conferred did not contradict the Convention.

25. The Government pointed out that the conditions for a licence applied to all audiovisual media which were called upon to contribute, under Article 55 *bis* § 2 of the Federal Constitution, to the cultural development of the public, to enable them freely to form their opinions and to entertain them. These aims fully corresponded to the requirements of the third sentence of Article 10 § 1 of the Convention. It could not therefore be said that the licensing system in Switzerland contradicted this Convention provision.

26. The Government submitted that the interference with the applicant's rights under Article 10 § 1 of the Convention was "prescribed by law" within the meaning of paragraph 2 of this provision. Reference was made in particular to Article 55 *bis* § 2 of the Federal Constitution and sections 3(1) and 11(1) of the RTA. These provisions were sufficiently accessible. Nor could it be said that the Federal Council's decision of 16 June 1996 was not foreseeable, since general television programmes were better placed to meet the respective conditions than specialised television programmes. However, the latter could also meet the conditions if, for instance, cultural elements were included in the programme.

27. As regards the legitimate aim pursued, the Government considered that the impugned interference, aimed at maintaining a pluralism of information and culture, and contributing to the formation of public opinion, served "the protection of the ... rights of others", within the meaning of paragraph 2 of Article 10 of the Convention. In any event, the interference satisfied the third sentence of Article 10 § 1 of the Convention in that it served the purpose of maintaining the "quality and balance of programmes",

as confirmed by the Court in *Informationsverein Lentia and Others* (cited above, p. 15, §§ 33-34).

28. Furthermore, the Government argued that the measure was proportionate as being "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. As the Commission had pointed out, the particular political circumstances in Switzerland had to be taken into consideration (see *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland*, no. 10746/84, Commission decision of 16 October 1986, Decisions and Reports (DR) 49, p. 140). These circumstances were directly reflected in Article 55*bis* § 2 of the Swiss Federal Constitution. In the present case, the request of Car TV AG did not comply with the requirements set out in section 3(1) of the RTA, which specifically aimed at offering a common basis for information not limited to a particular group of viewers. This aspect was of primordial importance in a country marked by cultural and linguistic pluralism.

29. The Government submitted that the Federal Council would have granted the licence if Car TV AG had included cultural elements in its programme. For instance, another television programme, Star TV, had received such a licence as its aim was the promotion of Swiss and European films. Car TV AG, however, did not include such cultural elements. Moreover, it contained information on motorised mobility which was already part of the licence granted by the Federal Council to the Swiss Radio and Television Company. Clearly, the Federal Council did not say that automobile questions were not worthy of television coverage. The Government referred to the Commission's decision in *Hins and Hugenholtz v. the Netherlands*, which referred to "the aim of pluralism pursued in the Dutch broadcast system and policy" (no. 25987/94, Commission decision of 8 March 1996, DR 84-A, p. 146). Although the Federal Council did not refer to the limited number of broadcasting frequencies, it was a fact that, even on cable television, such frequencies were limited. It was conceivable that the Federal Council would have decided to reserve such a licence for a future broadcasting programme, such as Star TV, which better complied with the cultural requirements for such a programme.

B. The Court's assessment

1. Interference with the applicant's rights under Article 10 § 1 of the Convention

30. In the Court's view, the refusal to grant the applicant a broadcasting licence interfered with the exercise of his freedom of expression, namely his right to impart information and ideas under Article 10 § 1 of the

Convention. The question arises, therefore, whether that interference was justified.

2. Relevance of the third sentence of Article 10 § 1

31. In the Government's opinion, the broadcast licensing system in Switzerland was in conformity with the third sentence of Article 10 § 1 of the Convention, which envisages State licensing powers.

32. The applicant accepted that there was no right to obtain a broadcasting licence, although he was of the opinion that in his case the refusal to grant him a licence was arbitrary and discriminatory.

33. The Court reiterates that the object and purpose of the third sentence of Article 10 § 1 is to make it clear that States are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. The latter are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. This may lead to interferences whose aims will be legitimate under the third sentence of paragraph 1, even though they may not correspond to any of the aims set out in paragraph 2. The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2 (see *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, no. 32240/96, § 25, 21 September 2000; *Radio ABC v. Austria*, judgment of 20 October 1997, *Reports of Judgments and Decisions* 1997-VI, pp. 2197-98, § 28; *Informationsverein Lentia and Others*, cited above , p. 14, § 32; and *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, p. 24, § 61).

34. In Switzerland, television broadcasting requires a licence to be issued by the Federal Council in accordance with section 10 of the RTA. Section 3(1) of the RTA sets out various instructions as to the purposes, functions and content of television programmes (see paragraph 15 above). Thus, the licensing system operated in Switzerland is capable of contributing to the quality and balance of programmes through the powers conferred on the government. It is therefore consistent with the third sentence of paragraph 1 (see, *mutatis mutandis*, *Informationsverein Lentia and Others*, cited above, p. 15, § 33).

35. It remains, however, to be determined whether the manner in which the licensing system was applied in the applicant's case satisfies the other relevant conditions of paragraph 2 of Article 10.

3. "Prescribed by law"

36. It was not in dispute between the parties that the legal basis for the issue of a broadcasting licence lay in Article 55 *bis* § 2 of the Federal Constitution in force at the time and sections 3(1), 10(3) and 11(1) of the RTA (see paragraphs 15-18 above). The interference complained of was, therefore, "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

4. Legitimate aim

37. The Court has already found that the aim of the interference in the present case was legitimate under the third sentence of Article 10 § 1, in that the licensing system operated in Switzerland is capable of contributing to the quality and balance of programmes (see paragraph 34 above). This is sufficient, albeit not directly corresponding to any of the aims set out in Article 10 § 2 (see above, paragraph 33).

5. "Necessary in a democratic society"

38. The applicant considered the measure unnecessary, pointing out that specialised programmes were common in Germany and the United States, without democratic debate having been disrupted in these countries. Even in Switzerland the government had approved a licence for a television channel reporting exclusively on the weather. The applicant's programme went beyond mere entertainment and would have provided information on such matters as environmental issues.

39. The Government argued that the particular political circumstances in Switzerland had to be taken into account, necessitating cultural and linguistic pluralism as well as a balance between the various regions. Not all these requirements were met in the present case. The licence would have been granted if Car TV AG had included cultural elements in its programme.

40. The Court reiterates that the adjective "necessary" within the meaning of Article 10 § 2 of the Convention implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing the need for an interference, although that margin goes hand in hand with European supervision, whose extent will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict because of the importance – frequently stressed by the Court – of an open and free debate in a democratic society and the free flow of information. The necessity for any interference with political speech must be convincingly established (see, among other authorities, *Tele 1*

Privatfernsehgesellschaft mbH, cited above, § 34, and *Radio ABC*, cited above, p. 2198, § 30).

41. In order to assess the extent of the margin of appreciation afforded to the domestic authorities, the Court must examine the objectives of Car TV AG. It is a private enterprise which intended to broadcast on all aspects of automobiles, in particular news on cars and car accessories, and information on private-vehicle transport. Furthermore, it intended to deal with such matters as energy policies, traffic security, tourism and environmental issues. However, while it could not be excluded that such aspects would have contributed to the ongoing, general debate on the various aspects of a motorised society, in the Court's opinion the purpose of Car TV AG was primarily commercial in that it intended to promote cars and, hence, further car sales.

42. However, the authorities' margin of appreciation is essential in an area as fluctuating as that of commercial broadcasting (see, *mutatis mutandis*, *markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, pp. 19-20, § 33, and *Jacubowski v. Germany*, judgment of 23 June 1994, Series A no. 291-A, p. 14, § 26). It follows that, where commercial speech is concerned, the standards of scrutiny may be less severe.

43. From this perspective, the Court will carefully examine whether the measure in issue was proportionate to the aim pursued. It will weigh in particular the legitimate need for the quality and balance of programmes in general, on the one hand, with the applicant's freedom of expression, namely his right to impart information and ideas, on the other. In the context of the present case, the Court will also take into account that audiovisual media are often broadcast very widely (see *Informationsverein Lentia and Others*, cited above, p. 13, § 38). In view of their strong impact on the public, domestic authorities may aim at preventing a one-sided range of commercial television programmes on offer. In exercising its power of review, the Court must confine itself to the question whether the measures taken on the national level were justifiable in principle and proportionate in respect of the case as a whole (see *markt intern Verlag GmbH and Klaus Beermann*, cited above, pp. 19-20, §§ 33-34).

44. In the present case, the Government referred before the Court to the particular political and cultural structure of Switzerland, a federal State, as a justification for the refusal to grant the required broadcasting licence. In this respect the Court has regard to the Commission's decision in *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel* (cited above), according to which “the particular political circumstances in Switzerland ... necessitate the application of sensitive political criteria such as cultural and linguistic pluralism, balance between lowland and mountain regions and a balanced federal policy”. The Court sees no reason to doubt the validity of these considerations which are of considerable importance

for a federal State. Such factors, encouraging in particular pluralism in broadcasting, may legitimately be taken into account when authorising radio and television broadcasts.

45. These considerations are reflected in the instructions set out in section 3(1) of the RTA which require, for instance, that programmes shall contribute "to general, varied and objective information to the public"; that they "shall bring closer to the public the diversity of the country"; and that they shall "promote Swiss cultural enterprise" (see paragraph 15 above).

46. These provisions also provided the basis for the Federal Council's decision of 16 June 1996 not to grant a broadcasting licence to the applicant. In the Court's opinion, it does not appear unreasonable that the Federal Council found that the conditions in section 3(1) of the RTA were not met in the present case since the programmes of Car TV AG "[focused] mainly on entertainment or on reports about the automobile".

47. Furthermore, the Court notes that the Federal Council's decision of 16 June 1996 was not categorical and did not exclude a broadcasting licence once and for all. On the contrary, the Federal Council showed flexibility by stating that a specialised programme such as Car TV AG could obtain a licence if the content of its programme further contributed to the "instructions" listed in section 3(1) of the RTA. In this context, the Court takes note of the Government's assurance before the Court that a licence would indeed be granted to Car TV AG if it included cultural elements in its programme.

48. As a result, it cannot be said that the Federal Council's decision – guided by the policy that television programmes shall to a certain extent also serve the public interest – went beyond the margin of appreciation left to the national authorities in such matters. It is obvious that opinions may differ as to whether the Federal Council's decision was appropriate and whether the broadcasts should have been authorised in the form in which the request was presented. However, the Court should not substitute its own evaluation for that of the national authorities in the instant case, where those authorities, on reasonable grounds, considered the restriction on the applicant's freedom of expression to be necessary (see *markt intern Verlag GmbH and Klaus Beermann*, cited above, p. 21, § 37).

49. In view of the foregoing, it is unnecessary to examine the Government's further ground of justification, contested by the applicant, for refusing the licence, namely that there were only a limited number of frequencies available on cable television.

50. Having regard to the foregoing, the Court reaches the conclusion that no breach of Article 10 of the Convention has been established in the circumstances of the present case.

FOR THESE REASONS, THE COURT

Holds by six votes to one that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 5 November 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Gaukur Jörundsson is annexed to this judgment.

J.-P.C.
S.D.

DISSENTING OPINION OF JUDGE GAUKUR JÖRUNDSSON

To my regret, I cannot share the Court's conclusion that there has not been a violation of Article 10 of the Convention.

I agree with the judgment as to the interference with the applicant's rights under Article 10 § 1 of the Convention and as to the relevance of the third sentence of Article 10 § 1. I also agree that the interference was "prescribed by law" and had a legitimate aim as required by Article 10 § 2 of the Convention.

I disagree, however, with the assessment as to whether the interference was "necessary in a democratic society" within the meaning of this provision.

The adjective "necessary" within the meaning of Article 10 § 2 of the Convention implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing the need for an interference, although that margin goes hand in hand with European supervision, whose extent will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict because of the importance – frequently stressed by the Court – of the rights in question. The necessity for any interference must be convincingly established (see among other authorities, *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, no. 32240/96, § 34, 21 September 2000, and *Radio ABC v. Austria*, judgment of 20 October 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2198, § 30).

Such a margin of appreciation is particularly important in commercial matters (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, pp. 19-20, § 33, and *Jacubowski v. Germany*, judgment of 23 June 1994, Series A no. 291-A, p. 14, § 26).

In order to assess the extent of the margin of appreciation afforded to the domestic authorities in the present case, the objectives of Car TV AG must be examined. In my view, a private broadcasting enterprise which aimed at promoting cars was a commercial venture. Nevertheless, the planned television programme went well beyond the commercial framework, being extended to such subjects as traffic policies, road safety and environmental issues. These matters were indubitably of general and public interest and would have contributed to the ongoing, general debate on the various aspects of a motorised society.

It is therefore necessary to reduce the extent of the margin of appreciation pertaining to the authorities, since what was at stake was not merely a given individual's purely “commercial” interests, but his

participation in an ongoing debate affecting the general interest (see, *mutatis mutandis*, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2330, § 47).

From this perspective, it is necessary to examine carefully whether the measure at issue was proportionate to the aim pursued. In particular, the various reasons adduced for refusing to grant the broadcasting licence should be considered. In that connection the legitimate need for the quality and balance of programmes, on the one hand, should be set against the applicant's freedom of expression, namely his right to impart information and ideas, on the other.

To begin with, I would note that the Federal Council in its decision of 16 June 1996 concluded that it would refuse a television broadcasting licence for Car TV AG on the ground that "the programme [focused] mainly on entertainment or on reports about the automobile". In my view, however, it has not been made sufficiently clear in what respect entertainment in itself calls in question, or indeed falls to be distinguished from, freedom of information. In any event, topics such as news on energy policies, the relations between railways and road traffic, or environmental issues, all of which Car TV AG intended to broadcast, may well be considered as going beyond mere entertainment, being also of an educational nature.

In my opinion, moreover, it has not been sufficiently demonstrated to what extent, in a highly motorised society such as Switzerland, the television broadcasts of Car TV AG "would lead to a society increasingly shaped by segmentation and atomisation", as the Federal Council stated in its decision of 16 June 1996.

The Government have furthermore referred to the political and cultural structure of Switzerland, a federal State. Attention was drawn to the Commission's decision in *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland*, according to which "the particular political circumstances in Switzerland ... necessitate the application of sensitive political criteria such as cultural and linguistic pluralism, balance between lowland and mountain regions and a balanced federal policy" (no. 10746/84, Commission decision of 16 October 1986, Decisions and Reports 49, p. 140). In my opinion, such considerations are of considerable relevance to a federal State. Nevertheless, in the present case it has not been sufficiently shown in what respect a television programme on automobiles constituted a politically or culturally divisive factor, particularly as the applicant's programme was to be broadcast in the two main Swiss languages: German and French.

In addition, the Government also referred before the Court to the limited number of frequencies as a reason for refusing the licence. However, the applicant claimed that he had the assurance of the largest Swiss cable company that it would transmit Car TV AG's programme. Here, it may be noted that the decision of the Federal Council of 16 June 1996 did not itself

refer to any limitation of frequencies as a ground for refusing the licence and, indeed, the Government have not provided further details of this ground of justification. In my opinion, it suffices to note that the Car TV AG programme was to be transmitted via cable companies and that, under section 43(1) of the RTA, the latter in principle, have a free choice in the matter (see paragraph 19 above).

Finally, it is true that the decision of the Federal Council of 16 June 1996 did not exclude granting a licence if the programme was "compensated by valuable contents", in particular "with programmes in the areas of culture ... or of the formation of political opinions ...". In my opinion, however, this could not amount to a valid alternative for the applicant since the purpose of his programme, as the name Car TV AG suggested, was to deal exclusively with matters pertaining to automobiles.

In the circumstances of the case, I conclude that the impugned measure could not be considered as "necessary in a democratic society", in that the interests adduced by the Government did not outweigh the interest of the applicant in imparting information under Article 10 of the Convention. The interference with the applicant's freedom of expression was not therefore justified.

Consequently, there has in my opinion been a violation of Article 10 of the Convention.