

EUROPEAN COMMISSION OF HUMAN RIGHTS

APPLICATIONS Nos. 13914/88, 15041/89,
15717/89, 15779/89 and 17207/90

Informationsverein Lentia,
Jörg Haider,
Aktionsgemeinschaft Offenes Radio (AGORA),
Wilhelm Weber and
Radio Melody Ges. m. b. H.

against

Austria

REPORT OF THE COMMISSION

(adopted on 9 September 1992)

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I. INTRODUCTION

1. The following is an outline of the case, as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The applications

2. The first applicant, Informationsverein Lentia, is a private association established at Linz in Upper Austria. Before the Commission it is represented by Mr. B. Binder, a lawyer practising in Linz.

3. The second applicant, Mr. J. Haider, is an Austrian citizen residing at Klagenfurt in Carinthia. He is the Chairman of the Austrian Liberal Party (FPÖ) and Deputy Governor of Carinthia. He is represented by Messrs. D. Böhdorfer and W. Themmer, lawyers practising in Vienna.

4. The third applicant, Arbeitsgemeinschaft Offenes Radio (AGORA), is a private association established at Eisenkappel in Carinthia. It is represented by Mr. Th. Höhne, a lawyer practising in Vienna.

5. The fourth applicant, Mr. W. Weber, is an Austrian citizen born in 1941 who resides at St. Andrä in Lavanttal in Carinthia. He is also represented by Messrs. D. Böhdorfer and W. Themmer.

6. The fifth applicant, Radio Melody Ges.m.b.H., is a limited liability company established and registered in Salzburg. It is represented by Mr. Wilfried Haslauer, a lawyer practising in Salzburg.

7. The case concerns the applicants' complaints under Article 10 of the Convention that the Austrian broadcasting system does not envisage any licensing procedure for private radio or television stations. Under Article 14 of the Convention taken together with Article 10 the first applicant further complains that it is being treated differently from other institutions employing internal cable television systems. Also under Article 14 taken together with Article 10 the third applicant complains that the restrictions in the broadcasting system constitute a discrimination against the Slovene minority in Carinthia.

B. The proceedings

8. Application No. 13914/88 was introduced on 16 April 1987 and registered on 3 June 1988.

9. Application No. 15041/89 was introduced on 15 May 1989 and registered on 23 May 1989.

10. Application No. 15717/89 was introduced on 27 September 1989 and registered on 30 October 1989.

11. Application No. 15779/89 was introduced on 18 September 1989 and registered on 20 November 1989.

12. On 13 July 1990 the Commission joined the proceedings in Applications Nos. 15041/89, 15717/89 and 15779/89 and gave notice of these three applications and of Application No. 13914/88 to the respondent Government who were invited to submit observations in writing on their admissibility and merits before 31 October 1990.

13. After having been granted an extension of the time-limit, the Government's observations on Application No. 13914/88 were submitted on 14 November, those on the other three applications on 15 November 1990.

14. The applicants were invited to submit observations in reply before 31 January 1991. The third applicant submitted observations on 29 January 1991. The second and fourth applicants submitted their observations, after having been granted an extension of the time-limit, on 27 February 1991. The first applicant, after having been reminded by the Commission's Secretariat that no observations had been received within the time-limit, eventually submitted observations on

LENTIA, JÖRG HAIDER, AKTIONSGEMEINSCHAFT OFFENES RADIO (AGORA), WILHELM WEBER AND RADIO MELODY Ges.
15 May 1991.

15. In the meantime Application No. 17207/90 was introduced on 20 August 1990 and registered on 26 September 1990.

16. On 12 July 1991 the Commission also gave notice of this application to the respondent Government and invited them to submit observations in writing on its admissibility and merits before 1 October 1991.

17. The Government submitted their observations on this application on 2 October 1991 and the applicant replied on 8 November 1991.

18. In the meantime the Commission decided on 3 September 1991 to invite the parties in Applications Nos. 13914/88, 15041/89, 15717/89 and 15779/89 to an oral hearing on the admissibility and merits. On 6 December 1991 the Commission included Application No. 17207/90 in the hearing.

19. On 14 January 1992 the Commission decided to join all five cases.

20. The hearing took place on 15 January 1992. At the hearing, the Government were represented by their Agent, Mr. H. Türk, who was assisted by Mrs. S. Bernegger, of the Federal Chancellery, and Mr. R. Fischer-See, of the Austrian Broadcasting Corporation as advisers. The applicants were represented as follows: the first applicant by Mr. G. Lehner, a lawyer practising in Linz; the second applicant, who was present himself, by Mr. D. Böhmendorfer, assisted by Mrs. S. Riess, Mr. W. Meischberger and Mr. P. Westenthaler as advisers; the third applicant, whose President, Mrs. B. Busch, and a member of the Governing Board, Mr. V. Wakounig, were present, by Mr. Th. Höhne; the fourth applicant by Mr. D. Böhmendorfer assisted by Mr. W. Dillenz, Adviser; the fifth applicant by Mr. W. Haslauer. Mr. H. Tretter of the University of Vienna acted as adviser for the second, third, fourth and fifth applicants.

21. On 15 January 1992 the Commission declared the applications admissible with regard to the applicants' complaints under Article 10 of the Convention, and under Article 14 of the Convention taken together with Article 10.

22. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. Consultations with the parties took place between 19 February and 20 May 1992. The Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

23. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President
J. A. FROWEIN
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A. S. GÖZÜBÜYÜK
J. C. SOYER
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
Mr. C. L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J. -C. GEUS

24. The text of this Report was adopted on 9 September 1992 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

25. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- i) to establish the facts, and
- ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

26. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the applications as Appendix II.

27. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

a. Informationsverein Lentia (Application No. 13914/88)

28. The applicant association was founded by the joint owners and inhabitants in Linz of a residential development comprising some 450 apartments and 30 shops. In order to improve communication between the members, the applicant sought to establish an internal cable television system, the programme of which was to be limited to questions of common concern relating to the members' property rights.

29. On 9 June 1978 the applicant applied to the Linz Regional Direction of Post and Telecommunications (Post- und Telegraphendirektion) for a licence under the Telecommunications Act (Fernmeldegesetz). As no decision was taken within the time-limit of six months stipulated in Section 73 of the Code of Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetz), the applicant requested a transfer of jurisdiction (Devolution) to the General Direction of Post and Telecommunications of the Federal Ministry of Transport (Generaldirektion für die Post- und Telegraphenverwaltung des Bundesministeriums für Verkehr).

30. On 23 November 1979 the Ministry rejected the request. The decision stated that the Federal Constitutional Act for Securing the Independence of Broadcasting (Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks, hereafter referred to as Constitutional Broadcasting Act) had reserved to the federal legislation the regulation of broadcasting and its organisation. Broadcasting could therefore only take place on the basis of a special federal law. Such a federal law only existed for the public Austrian Broadcasting Corporation (Österreichischer Rundfunk, ORF) according to the Federal Law on the Functions and the Organisation of the Austrian Broadcasting Corporation (Bundesgesetz über die Aufgaben und die Einrichtung des Österreichischen Rundfunks). It followed that there was no legal basis for the applicant's request to establish a private broadcasting station for television.

31. With regard to Article 10 of the Convention, the Ministry considered that the Austrian legislature had made use of the authorisation under the third sentence of para. 1 of this provision to require the licensing of broadcasting enterprises by envisaging the enactment of special legislation for the operation of any broadcasting station.

32. The applicant's constitutional complaint against this decision was rejected by the Constitutional Court (Verfassungsgerichtshof) on 16 December 1983. The Court considered with reference to Article 10 of the Convention that an administrative decision violated the right to operate a broadcasting station if it was taken without a legal basis, if the applicable law was unconstitutional, or if it was applied in an arbitrary manner. The contested decision had not interpreted the Constitutional Broadcasting Act arbitrarily. The aim of the Constitutional Broadcasting Act was to introduce a licensing requirement within the meaning of Article 10, para. 1, last sentence. This aim could not be achieved if, in the absence of legislation, everybody was entitled freely to broadcast. So far, a law had only been enacted for the Austrian Broadcasting Corporation. It followed "that only the Austrian Broadcasting Corporation <otherwise nobody> could operate broadcasting within the meaning of Section 1 para. 1 of the Constitutional Broadcasting Act" ("dass Rundfunk iS des Art. 1 Abs. 1 BVG-Rundfunk derzeit nur vom ORF <sonst von niemandem> betrieben werden darf").

33. In the Court's opinion, the applicant's view was misconceived that its cable television system was not to be qualified as broadcasting because it was addressed to a limited audience. Broadcasting included active cable broadcasting which therefore fell within the scope of the Constitutional Law and its implementing legislation. The persons who received the programme were not predetermined and individualised, they were potentially all people present in many apartments and shops and therefore constituted a general public.

34. The Court noted that under the Telecommunications Act and the Ordinance on Private Telecommunication Installations (Privatfernseh-Anlagenverordnung) the telecommunications authorities were competent to grant broadcasting licences. On the other hand, the Constitutional Broadcasting Act did not contain express provisions on the application of the broadcasting legislation by those authorities. In the Court's view, the Constitutional Broadcasting Act was to be applied by all authorities which could influence the operation of broadcasts. Thus, the Telecommunications Act and the Ordinance on Private Telecommunication Installations were to be read subject to the proviso that an authorisation for the setting-up and operation of broadcasting installations could not be granted by the authorities before a federal law on the subject had been enacted in accordance with Article 1 para. 2 of the Constitutional Broadcasting Act.

35. The Constitutional Court concluded that there had been no violation of Article 10 of the Convention nor of any other constitutional provision. It referred the case to the Administrative Court (Verwaltungsgerichtshof) as requested by the applicant association.

36. The Administrative Court rejected the applicant's complaint on 10 September 1986. The decision confirmed the views expressed by the Constitutional Court. It considered that the Telecommunications Act could not be seen as a special law referred to by the Constitutional Broadcasting Act. The authorities were required to comply with Article 18 para. 1 of the Federal Constitution (Bundesverfassungsgesetz) according to which all administrative acts could be taken only on the basis of the law, and to examine in this context whether the provisions of the Constitutional Broadcasting Act created an obstacle for granting the authorisation requested. Neither the Telecommunications Act nor any other legal provision granted the applicant a right to this authorisation. Its refusal was not unlawful, and the reasons given were neither self-contradictory nor insufficient.

b. Mr. J. Haider (Application No. 15041/89)

37. Between 1987 and 1989 the applicant had plans to establish

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c. AGORA (Application No. 15717/89)

38. The applicant, a member of the Fédération européenne des radios libres (FERL), wishes to establish a radio station in Carinthia which would transmit a multilingual non-commercial programme financed by listeners. A target group would be the bilingual area of Southern Carinthia, and the programmes would be broadcast in German and Slovene. The proponents of this radio station already operate a mobile station on Italian territory on the basis of an Italian radio licence.

39. In 1988 the applicant applied for a licence for a private radio station. On 19 December 1989 the Klagenfurt Regional Direction of Post and Telecommunications rejected the application. This decision was confirmed on 30 September 1991 by the General Direction of Post and Telecommunications of the Federal Ministry for Public Economy and Transport (Generaldirektion für die Post- und Telegraphenverwaltung des Bundesministeriums für öffentliche Wirtschaft und Verkehr), and on 30 September 1991 by the Constitutional Court which thereby relied on its earlier case-law (see above, paras. 32 et seq.).

d. Mr. W. Weber (Application No. 15779/89)

40. The applicant is the shareholder of an Italian company which operates a private radio station in Italy transmitting broadcasts to Austria on a commercial basis. He wishes to operate such a radio station himself on Austrian territory. In view of the Austrian legislation and its interpretation by the Constitutional Court the applicant did not institute proceedings in order to apply for a radio licence.

e. Radio Melody Ges. m. b. H. (Application No. 17207/90)

41. The applicant applied on 8 November 1988 for a licence and the attribution of a frequency band in order to operate a private local radio station in Salzburg. On 28 April 1989 the Linz Regional Direction of Post and Telecommunications rejected the application. Its decision was confirmed on 12 July 1989 by the General Direction of Post and Telecommunications of the Federal Ministry for Public Economy and Transport, and on 18 June 1990 by the Constitutional Court which thereby relied on its earlier case-law (see above, paras. 32 et seq.).

B. Relevant domestic law

a. Telecommunications Act (1949)

42. According to Section 2 para. 1 of the Telecommunications Act of 1949 (Fernmeldegesetz), "the right to set up and operate telecommunications installations falls exclusively to the Federation" ("Das Recht, Fernmeldeanlagen zu errichten und zu betreiben steht ausschliesslich dem Bunde zu"). Section 3 envisages the authorisation for private persons or institutions (physische oder juristische Personen) to set up and operate broadcasting installations. Section 5 lists instances where broadcasting installations may be set up without authorisation, for instance within the boundaries of a private property.

b. Private Telecommunication Installations Ordinance (1961)

43. The Ordinance on Private Telecommunication Installations of 1961 (Verordnung über Privatfernmeldeanlagen) concerns all broadcasting installations which, on the basis of the Telecommunications Act, are

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c. Constitutional Broadcasting Act (1974)

44. Section 1 para. 1 of the Constitutional Broadcasting Act of 1974 (Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks) gives a definition of broadcasting which includes the transmission of word, sound and images (Wort, Ton und Bild). Paras. 2 and 3 provide:

<Translation>

"(2) More detailed provisions for broadcasting, and its organisation, are to be determined by Federal Act. Such a Federal Act must in particular contain special provisions ensuring the objectivity and impartiality of reporting, the diversity of opinions, balanced programmes and the independence of persons and organs charged with the duties stated in para. 1.

(3) Broadcasting according to para. 1 is a public service."

<Original >

"(2) Die näheren Bestimmungen für den Rundfunk und seine Organisation sind bundesgesetzlich festzulegen. Ein solches Bundesgesetz hat insbesondere Bestimmungen zu enthalten, die die Objektivität und Unparteilichkeit der Berichterstattung, die Berücksichtigung der Meinungsvielfalt, die Ausgewogenheit der Programme sowie die Unabhängigkeit der Personen und Organe, die mit der Besorgung der im Abs. 1 genannten Aufgaben betraut sind, gewährleisten.

(3) Rundfunk gemäss Abs. 1 ist eine öffentliche Aufgabe."

d. Broadcasting Corporation Act (1974)

45. The Federal Law on the Functions and the Organisation of the Austrian Broadcasting Corporation of 1974 (Bundesgesetz über die Aufgaben und die Einrichtung des Österreichischen Rundfunks) sets up the Austrian Broadcasting Corporation as an economic unit with legal personality entrusted with the function of supplying the public with broadcasts.

46. The broadcasts must comply with certain criteria. Apart from those mentioned in the Constitutional Broadcasting Act (see above, para. 44), they include, for instance, with regard to the number and quality of programmes, an even and steady supply to the whole population in Austria, according to current technical standards of reception in so far as economically feasible, with at least two television and three radio programmes (Section 3 para. 1), one of the latter being a regional programme which takes into consideration the particular interests of the Provinces (Section 3 para. 2). The programmes must inform the public comprehensively of all important political, economic, cultural and sports events by objective selection and dissemination of news and reports and must transmit and convey comments, opinions and critical statements of importance for the public having due regard to the plurality of views represented in public discussions (Section 2 para. 1, sub-para. 1). Broadcasting time must be provided to political parties represented in Parliament as well as to interest groups (Section 5 para. 1).

47. The Broadcasting Corporation Act furthermore institutes a "Commission for Safeguarding Observance of the Broadcasting Corporation Act" ("Kommission zur Wahrung des Rundfunkgesetzes"). It exercises a

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III. OPINION OF THE COMMISSION

A. Complaints declared admissible

48. The following complaints were declared admissible:

- under Article 10 (Art. 10) of the Convention the applicants' complaints that the Austrian broadcasting system does not envisage any licensing procedure for private broadcasting stations;
- under Article 14 (Art. 14) of the Convention taken together with Article 10 (Art. 10) the first applicant's complaint that it is being treated differently from other institutions employing internal cable television systems;
- under Article 14 (Art. 14) of the Convention taken together with Article 10 (Art. 10) the third applicant's complaint that the restrictions in the broadcasting system constitute a discrimination against the Slovene minority in Carinthia.

B. Points at issue

49. Accordingly, the issues to be determined are:

- whether, with regard to all applicants, there has been a violation of Article 10 (Art. 10) of the Convention;
- whether, with regard to the first and third applicants, there has been a violation of Article 14 (Art. 14) of the Convention taken together with Article 10 (Art. 10).

C. Article 10 (Art. 10) of the Convention

50. The applicants complain that contrary to Article 10 (Art. 10) of the Convention they are unable to obtain licences in Austria for private radio stations or, in the case of the first applicant, for a private cable television system. They observe that under Austrian constitutional law the operation of broadcasting stations is not as such inadmissible, but since implementing legislation has been enacted only in respect of the Austrian Broadcasting Corporation there exists in fact a monopoly of this Corporation. In the applicants' view the legislature's failure to enact provisions which would allow others than the Austrian Broadcasting Corporation access to the audiovisual media is incompatible with Article 10 (Art. 10) which guarantees freedom of expression to "everyone".

51. Article 10 (Art. 10) of the Convention states:

"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

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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. Interference with the applicants' rights under Article 10
para. 1 (Art. 10-1)

52. The first question is whether there has been an interference with
the applicants' rights under Article 10 para. 1 (Art. 10-1) of the
Convention.

53. The present case concerns the refusal by the Austrian authorities
to grant broadcasting licences to the applicants. It relates in
principle to the freedom enshrined in Article 10 para. 1 (Art. 10-1)
"to ... impart information and ideas without interference by public
authority".

54. However, according to the third sentence of Article 10 para. 1
(Art. 10-1) of the Convention, Article 10 does "not prevent States from
requiring the licensing of broadcasting ... enterprises". The third
sentence refers to "broadcasting" rather than the reception of
broadcasting (see *Autronic v. Switzerland*, Comm. Report 9.3.89,
Series A no. 178, p. 38, para. 61). By envisaging a licensing system,
the third sentence appears to limit the protection afforded by the
rights in the first and second sentence of Article 10 para. 1
(Art. 10-1).

55. According to the decisions of the Austrian courts and
administrative authorities, the licensing system in Austria excludes
any broadcasting other than by the Austrian Broadcasting Corporation.
On the basis thereof the applicants' requests for licences were
refused. An issue arises therefore whether in the light of the third
sentence of Article 10 para. 1 (Art. 10-1) there was an interference
with the applicants' rights under the first and second sentence of
Article 10 para. 1 (Art. 10-1) of the Convention.

56. The applicants submit that according to the case-law of the
Convention organs the last sentence of Article 10 para. 1 (Art. 10-1)
does not cover a broadcasting monopoly (see *Eur. Court H.R., Groppera*
judgment of 28 March 1990, Series A no. 173, p. 23 et seq., paras. 57
et seq.; *Autronic* judgment of 22 May 1990, Series A no. 178, p. 24,
paras. 50 et seq.) Rather, the interference with their rights must be
justified under Article 10 para. 2 (Art. 10-2) of the Convention. Due
to the technical progress in the area of radio and television the
reasons which may earlier have justified broadcasting monopolies, in
particular the constraints caused by the scarcity of available
frequencies, have disappeared. In any event, in the applicants' view
the application of Article 10 para. 1 (Art. 10-1), third sentence
presupposes the existence of a licensing procedure which is lacking in
Austria.

57. The Government submit that a broadcasting monopoly is not as such
incompatible with Article 10 para. 1 (Art. 10-1), third sentence of the
Convention. This last sentence would be deprived of any meaning if
Article 10 para. 2 (Art. 10-2) were also to be applied to the licensing
of broadcasting and television. Broadcasting and television should be
treated differently from the print media: They serve the community as
a whole and require regulation by the State in a manner which ensures
that the public is being informed objectively and impartially. State
legislation enjoys a wide margin of appreciation in this respect.

58. The Government submit that the conformity of a broadcasting
monopoly with this provision depends on the manner in which it is
organised. When the Convention was drafted, broadcasting monopolies
existed in most States. Since then, monopolies in many States have
been liberalised. However, there is no consolidated European standard.
Caution is called for when relying on such developments for purposes

LENTIA, JÖRG HAIDER, AKTIONSGEMEINSCHAFT OFFENES RADIO (AGORA), WILHELM WEBER AND RADIO MELODY Ges. of interpreting Article 10 (Art. 10), since the specific conditions in each country must also be examined. In Austria the legislation concerned is based on the principles of objective reporting, plurality of opinions and independence of journalists. The organisation of the broadcasting monopoly thus meets the requirements of Article 10 para. 1 (Art. 10-1), third sentence.

59. In its earlier case-law on Article 10 para. 1 (art. 10-1), third sentence, the Commission found that there existed in many Convention States a system of monopoly enterprises for radio and television, and that Article 10 para. 1 (Art. 10-1), third sentence could not be understood as excluding a broadcasting monopoly as such (see No. 3071/67, X. v. Sweden, Collection 26 p. 71; No. 6452/74, Sacchi v. Italy, D.R. 5 p. 50). Subsequently, the Commission found that if Article 10 para. 1 (Art. 10-1), third sentence permitted a State to enact legislation requiring the licensing of broadcasting enterprises, the State could also enact legislation ensuring compliance with the licence in question (see No. 10799/84, Radio X. and others v. Switzerland, D.R. 37 p. 236). On the other hand, the Commission found that, while broadcasting enterprises have no guarantee of any right to a licence under the Convention, the rejection by a State of a licence application must not be manifestly arbitrary or discriminatory (see No. 10746/84, Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland, D.R. 49 p. 139 et seq.).

60. The Court was confronted with Article 10 para. 1 (Art. 10-1), third sentence in the Groppera case, where it held:

"the third sentence of Article 10 para. 1 ((Art. 10-1), insofar as it amounts to an exception to the principle set forth in the first and second sentences, is of limited scope ... (T)he purpose of the third sentence of Article 10 para. 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, for that would lead to a result contrary to the object and purpose of Article 10 (Art. 10) taken as a whole" (see Eur. Court H.R., Groppera Radio AG and Others judgment of 28 March 1990, Series A no. 173, p. 24, para. 61; see also Autronic AG judgment of 22 May 1990, Series A no. 178, p. 24, para. 52).

61. Thus, the third sentence of Article 10 para. 1 (Art. 10-1) is made subject to the requirements under Article 10 para. 2 (Art. 10-2) for the justification of any interference with the right to freedom of expression. Therefore, the Commission does not consider that the licensing requirement limits in principle the rights guaranteed by the first and second sentence of Article 10 para. 1 (Art. 10-1). The freedom to impart information also through duly licensed broadcasting is, for these reasons, in principle guaranteed by Article 10 (Art. 10) of the Convention.

62. In the present case, Austria has failed to provide for a procedure through which the applicants could apply for a broadcasting licence. It follows that there has been an interference with the applicants' rights under Article 10 para. 1 (Art. 10-1) of the Convention.

63. The question arises in respect of the first applicant's request for a broadcasting licence whether the establishment of an internal cable television system, aiming at improving communications between proprietors of a residential development, amounts to a broadcasting enterprise within the meaning of the third sentence of Article 10 para. 1 (Art. 10-1). However, the Commission need not resolve this issue. Thus, even if a cable television system did constitute a broadcasting enterprise, the Commission has just found that there would nevertheless have been an interference with the first applicant's right

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b. Relevance of Article 10, para. 1, third sentence (Art. 10-1)

64. Article 10 para. 1 (Art. 10-1), third sentence remains relevant in 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, for instance in the determination and allocation of frequencies, without interfering with the rights under Article 10 para. 1 (Art. 10-1) of the Convention (see the Groppera judgment, loc. cit., p. 24, para. 61).

65. In the present case, it was not on technical grounds that the applicants were prevented from obtaining broadcasting licences. It follows that the third sentence of Article 10 para. 1 (Art. 10-1), in the interpretation given to it by the Court, fails to remove the interference with the applicants' right under Article 10 para. 1 (Art. 10-1) to freedom of expression, in particular the freedom to impart information.

66. The Commission must therefore examine whether the interference satisfied the conditions of Article 10 para. 2 (Art. 10-2) of the Convention.

c. Justification of this interference under Article 10 para. 2 (Art. 10-2)

aa) Was the interference "prescribed by law" (Article 10 para. 2) (Art. 10-2)?

67. The first question is whether the interference was "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

68. Both parties refer in this respect to the Constitutional Broadcasting Act of 1974 and to the fact that for the time being implementing regulations only exist with regard to the Austrian Broadcasting Corporation.

69. The Commission recalls that in order to be "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention, the interference must have some basis in domestic law. The law must be adequately accessible and formulated with sufficient precision to enable the individual to regulate his conduct. It is primarily for the national authorities to interpret the domestic law, as they are particularly qualified to settle the issues concerned (see Eur. Court H.R., Barthold judgment of 25 March 1985, Series A no. 90, p. 21 et seq., paras. 45 et seq.).

70. In the present case, the Commission notes that both the Telecommunications Act of 1949 and the Private Telecommunication Installations Ordinance of 1961 envisage the possibility of private broadcasting installations (see above, paras. 42 et seq.). On the other hand, Section 1 para. 2 of the Constitutional Broadcasting Act of 1974 provides that more detailed provisions for broadcasting, and its organisation, are to be determined by an implementing Federal Act (see above, para. 44). The Broadcasting Corporation Act of 1974 constitutes the only implementing legislation within the meaning of the Constitutional Broadcasting Act (see above, paras. 45 et seq.). In its decision of 16 December 1983 the Austrian Constitutional Court found that this legislation excluded any broadcasting other than by the Austrian Broadcasting Corporation (see above, para. 32).

71. In the Commission's opinion, the legislation referred to, as interpreted by the Austrian Constitutional Court, is sufficiently clear and precise. The interference was therefore "prescribed by law" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

bb) Aim of the interference

72. The next question to be examined under Article 10 para. 2 (Art. 10-2) of the Convention is whether the interference had an aim which is legitimate.

73. In the Government's submissions, which the applicants contest, the legislation concerned aimed at preventing manipulation of the population and the concomitant serious disturbances of the public order. In the Government's view, the interference thus served "the prevention of disorder" and the "protection ... of the rights of others" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

74. The Commission's notes that broadcasting must be organised in such a manner as to prevent disturbances between the various broadcasting stations, and between radio and television broadcasting and other transmissions. This is confirmed by the licensing system in the third sentence of Article 10 para. 1 (Art. 10-1) of the Convention which concerns technical aspects of broadcasting (see above para. 64). The Commission accepts therefore that the establishment of the legal provisions concerned served in particular "the prevention of disorder" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

cc) Necessity of the interference

75. Finally, the Commission must examine whether the interference was "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

76. The applicants contend that there is no urgent social need to maintain the Austrian broadcasting monopoly which cannot therefore be regarded as being necessary in a democratic society. In their view, restrictions of access to the audiovisual media should in principle be limited to a regulation of the technical aspects but should not concern the contents of the programmes. It is unnecessary to maintain a monopoly in order to ensure balanced programmes as the necessary pluralism can be ensured by competition between several broadcasting enterprises. In fact, the monopoly does not really enable a free flow of information and opinions. It does not ensure that the freedom of expression, in particular that of minorities, can be exercised to the degree now technically possible and required in a modern democracy.

77. The Government submit that the interference is necessary in a democratic society within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. Reference is made to the comparatively small Austrian market in which it would not be possible to operate many radio stations on a viable economic basis. The funds available for commercials would have to be divided up between the Austrian Broadcasting Corporation, the print media and any new broadcasting stations. Since there would only be a limited number of such stations, it would appear unavoidable to subject them to regulations ensuring their independence and objectivity. Otherwise there would be a danger of one-sided programmes, undesirable concentration, new local monopolies, and the abuse of media power. In this situation it was justified to maintain the public broadcasting monopoly which by its organisation guaranteed well-balanced, objective and pluralistic programmes.

78. The Commission recalls that the term "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention implies that the interference must correspond to a "pressing social need" and be proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" the Convention organs must also take into account that a margin of appreciation is left to the Contracting States (see Eur. Court H.R., *Autronic* judgment, *ibid.*, p. 28, para. 72; *Markt Intern*

LENTIA, JÖRG HAIDER, AKTIONSGEMEINSCHAFT OFFENES RADIO (AGORA), WILHELM WEBER AND RADIO MELODY Ges. Verlag GmbH and Klaus Beermann judgment, Series A no. 165, p. 19 et seq., para. 33).

79. In the Commission's opinion, this margin of appreciation is of particular relevance in an area as complex and fluctuating as that of radio and television broadcasting. Article 10 (Art. 10) of the Convention itself confirms the need for a broad margin of appreciation in that it envisages in the third sentence of para. 1 a licensing system for broadcasting enterprises.

80. Turning to the circumstances of the present case the Commission recalls that it concerns the applicants' complaints that they cannot obtain broadcasting licences. The Commission is not called upon to examine the conformity with the Convention of a broadcasting monopoly as such. Indeed, it cannot be excluded that, where a State has installed a broadcasting monopoly, it leaves sufficient room for private initiative, for instance with regard to private programmes, and thus adequately ensures the enjoyment of the freedom to impart information within the meaning of Article 10 para. 1 (Art. 10-1) of the Convention.

81. The Commission must therefore examine the reasons for the necessity of the interference with the applicants' rights. It notes that the Austrian courts, in the proceedings concerning the first, third and fifth applicants, refused their requests for a broadcasting licence without assessing the necessity of the measure within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention (see above, paras. 32 et seq., 39 and 41).

82. Before the Commission, the Government have submitted that private broadcasting brings about the danger of one-sided programmes and manipulation. The Commission notes that Article 10 (Art. 10) is based on the idea that a pluralism of opinions must be safeguarded. Therefore, in principle, one-sided programmes must be possible whenever a sufficient number of frequencies is available.

83. The Government have also referred to possible economic difficulties and the emergence of new monopolies. In this respect the Commission is aware of the different solutions adopted in Convention States with regard to broadcasting in general. These solutions include systems whereby private broadcasting licences are granted within a system of public broadcasting, for instance by limiting them to special times or features. The possibility to obtain licences may also vary as to local, regional or nationwide broadcasting. The Commission cannot therefore assume that private broadcasting would necessarily bring about the difficulties, indicated by the Government.

84. It is true that both the Constitutional Court and the Government have emphasised the structure of the Austrian Broadcasting Corporation which provides guarantees ensuring the plurality and objectivity of opinions. However, the Commission finds that no allowance is made at all within the Broadcasting Corporation for private initiative, for instance on a local or regional level, which would enable the applicants adequately to enjoy their freedom to impart information within the meaning of Article 10 (Art. 10) of the Convention.

85. The Commission observes that in Austria it is impossible to obtain licences for private broadcasting; that the grounds explaining the necessity are insufficient; and that within the Broadcasting Corporation there is no room for private initiative. In such circumstances the Commission finds that the national authorities transgressed the margin of appreciation left to them under the Convention.

86. In the Commission's opinion, the interference at issue can no longer be considered "necessary in a democratic society ... for the prevention of disorder" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

87. In view of this conclusion, the Commission finds it unnecessary further to distinguish between the circumstances of the various applicants.

Conclusion

88. The Commission concludes, by a unanimous vote, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of Application No. 13914/88 brought by the first applicant.

89. The Commission concludes, by 14 votes to 1, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of Applications Nos. 15041/89, 15717/89, 15779/89 and 17207/90, brought by the second, third, fourth and fifth applicant, respectively.

D. Article 14 of the Convention taken together with Article 10 (Art. 14+10)

90. The first applicant complains of discrimination in that it is being treated differently from hotels or institutions for elderly people whose internal cable television systems are not regarded as constituting broadcasting within the meaning of the Telecommunications Act of 1949.

91. The third applicant complains of an alleged discrimination against the Slovene minority in Carinthia as regards its right of access to broadcasting. In the third applicant's view, the Broadcasting Act does not provide for the representation of ethnic minorities in the various organs of the Austrian Broadcasting Corporation, and the programmes intended for these minorities are insufficient.

92. Both applicants rely on Article 14 of the Convention taken together with Article 10 (Art. 14+10). Article 14 (Art. 14) of the Convention states:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

93. The Commission has already found that the impossibility for the applicants to obtain broadcasting licences infringed their right under Article 10 (Art. 10) of the Convention. This being so, no useful purpose would be served in determining, in addition, whether there has been discrimination with regard to other institutions, as alleged by the first applicant. As regards the third applicant, the Commission considers that the Austrian system is of a general nature and does not discriminate against any particular minority.

Conclusion

94. The Commission concludes, by a unanimous vote, that in respect of Application No. 13914/88, brought by the first applicant, it is not necessary to examine the case additionally under Article 14 (Art. 14) of the Convention.

95. The Commission concludes, by 14 votes to 1, that in respect of Application No. 15717/89, brought by the third applicant, it is not necessary to examine the case additionally under Article 14 (Art. 14) of the Convention.

E. Recapitulation

96. The Commission concludes, by a unanimous vote, that there has

LENTIA, JÖRG HAIDER, AKTIONSGEMEINSCHAFT OFFENES RADIO (AGORA), WILHELM WEBER AND RADIO MELODY Ges. been a violation of Article 10 (Art. 10) of the Convention in respect of Application No. 13914/88 brought by the first applicant (para. 88).

97. The Commission concludes, by 14 votes to 1, that there has been a violation of Article 10 (Art. 10) of the Convention in respect of Applications Nos. 15041/89, 15717/89, 15779/89 and 17207/90, brought by the second, third, fourth and fifth applicants, respectively (para. 89).

98. The Commission concludes, by a unanimous vote, that in respect of Application No. 13914/88, brought by the first applicant, it is not necessary to examine the case additionally under Article 14 (Art. 14) of the Convention (para. 94).

99. The Commission concludes, by 14 votes to 1, that in respect of Application No. 15717/89, brought by the third applicant, it is not necessary to examine the case additionally under Article 14 (Art. 14) of the Convention (para. 95).

Secretary to the Commission

President of the Commission

(H. C. KRÜGER)

(C. A. NØRGAARD)

PARTLY DISSENTING OPINION OF Sir Basil HALL

I agree that there has been a violation of Article 10 in the case of INFORMATIONSVEREIN LENTIA; but not quite for the reason given by the majority of the Commission. My understanding is that the proposal of the applicant association was that information of concern to residents and shopkeepers in a residential development in Linz should be recorded on video cassettes and transmitted to them through an internal cable system. No use of air waves was to be involved. To my mind neither the association nor its proposed activity can be regarded as a "broadcasting enterprise" for the purposes of Article 10, and I cannot see that the refusal of the Austrian authorities to allow the establishment of the proposed system was necessary in a democratic society, for any of the purposes stated in Article 10.

Having reached the conclusion that there has been a violation of Article 10 in this particular case I do not need to examine whether there is in addition a violation of Article 14 in conjunction with Article 10.

With regret - and indeed with reluctance - I find myself unable to agree with the majority of the Commission that there has been a violation of the rights of the remaining applicants under Article 10 to freedom of expression.

Though considerable technical advances have been made the question remains that the number of frequencies available for use for the broadcasting which the applicants were contemplating remains limited. Any licensing system which is set up has to provide for competitive applications for licences from broadcasting enterprises. Conditions will be prescribed to determine who is eligible for a licence.

The applicants' complaints under Article 10 are not that they do not have a right to broadcast, but that the system in force in Austria is not in line with the requirements of that provision, in particular because it does not provide for any licensing procedure for private stations.

It is a matter of speculation whether the applicants would be eligible to be considered for a licence in any licensing system that might be introduced, and whether, if eligible, they would successfully compete for licences. It is questionable therefore whether the effect on them of the absence of a licensing system is sufficiently direct for that absence to constitute a violation of their rights to freedom of

The majority of the Commission have concluded that there is now an obligation on member States to set up licensing systems or the equivalent, and that the Commission's earlier view, that Article 10 para. 1 third sentence could not be understood as excluding a system of monopoly enterprises for radio and television, no longer has validity.

That view was based in part on the fact that systems of monopolies then existed in most member States. It is true that there has since then been a great increase in the access of individuals and organisation, in particular of commercial enterprises, to broadcasting facilities. This has been achieved in various ways. A licensing of private broadcasters is one. Another is the making of contractual arrangements for the sake of air time to programme makers, who recoup the cost by in turn selling space to advertisers. Yet another is by conferring a right of reply. Though this is so, the situation remains that in some states and in some regions, monopolies still exist.

The Convention must be applied against the background of existing conditions, but it does not seem to me that the time has yet arrived when it can be held that the right to freedom of expression given by Article 10 requires member States to provide a system under which individuals and organisations can apply for permission to establish broadcasting stations, or that an individual or body can claim that there has been a violation of Article 10 because such a system has not been introduced.

The third applicant, AGORA, also complains of discrimination against the Slovenian minority in Carinthia. Provision is however made in programmes for that minority, and even if it were to be accepted that the third applicant has the status to make this complaint, I do not consider that the time allotted to the Slovenian minority is so short as to amount to discriminatory treatment.

CONCURRING OPINION OF MR. L. LOUCIDES

Although I agree with all the conclusions of the Commission, my approach as regards the violations of Article 10 of the Convention in these cases is as follows:

The right to freedom of expression and in particular freedom to impart information and ideas cannot be meaningful in a modern democratic society if the use of mass media of communication, such as broadcasting, is blocked through a system of monopoly of such media. Therefore I believe that the state broadcasting monopoly in Austria, which led to the refusal of broadcasting licences to the applicants is per se incompatible with Article 10 of the Convention. The more so as such monopoly, being in the hands of the State, implies of necessity an interference by "public authority" in respect of the rights in question contrary to the express provisions of Article 10.

The object and effect of the third sentence of para. 1 of Article 10 is not to allow monopolies but simply to permit States to regulate through a licensing system the use of broadcasting, television and cinema enterprises in line with the provisions of para. 2 of the same Article, in view of the importance of these media of communication and the inherent technical difficulties that would arise from an unlimited use of such media. The licensing system in question by itself implies the exclusion of monopolies. Licensing means regulation and regulation cannot amount to suppression.

In the present case the only reason for refusing broadcasting licences to the applicants was the existence of the State broadcasting monopoly. Therefore such refusal was in my opinion an unjustified interference with the applicants' rights under Article 10 of the Convention.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
16 April 1987	Introduction of Application No. 13914/88
15 May 1989	Introduction of Application No. 15041/89
27 September 1989	Introduction of Application No. 15717/89
18 September 1989	Introduction of Application No. 15779/89
20 August 1990	Introduction of Application No. 17207/90
3 June 1988	Registration of Application No. 13914/88
23 May 1989	Registration of Application No. 15041/89
30 October 1989	Registration of Application No. 15717/89
20 November 1989	Registration of Application No. 15779/89
26 September 1990	Registration of Application No. 17207/90
Examination of Admissibility	
13 July 1990	Commission's decision to join Applications Nos. 15041/89, 15717/89 and 15779/89 and to invite the Government to submit observations on the admissibility and merits of these applications and of Application No. 13914/88
12 July 1991	Commission's decision to invite the Government to submit observations on the admissibility and merits of Application No. 17207/90
14 November 1990	Government's observations on Application No. 13914/88
15 November 1990	Government's observations on Applications Nos. 15041/89, 15717/89 and 15779/89
2 October 1991	Government's observations on Application No. 17207/90
29 January 1991	Applicant's observations in reply of No. 15717/89
27 February 1991	Applicants' observations in reply of Nos. 15041/89 and 15779/89
15 May 1991	Applicant's observations in reply of No. 13914/88
8 November 1991	Applicant's observations in reply of No. 17207/90

Date	Item
3 September 1991	Commission's decision to hold an oral hearing
6 December 1991	Commission's decision to include Application No. 17207/90 in hearing
14 January 1992	Commission's decision to join all five cases
15 January 1992	Oral hearing on admissibility and merits, Commission's decision to declare: <ul style="list-style-type: none"> - inadmissible the fifth applicant's complaint under Article 6 para. 1 of the Convention - admissible Application No. 15041/89 and the

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remainders of Applications Nos. 13914/88,
15717/89, 15779/89 and 17207/90

Examination of the merits

16 May 1992	Commission's consideration of the state of proceedings
1 September 1992	Commission's deliberations on the merits and final vote
9 September 1992	Commission's deliberations and adoption of the Report