

AS TO THE ADMISSIBILITY OF

Application No. 20193/92
by Telesystem Tirol Kabeltelevision
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 6 April 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 5 June 1992 by Telesystem Tirol Kabeltelevision against Austria and registered on 22 June 1992 under file No. 20193/92;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the applicant, may be summarised as follows:

The applicant is a limited company with seat in Innsbruck. Before the Commission it is represented by Ms. E. Berchtold-Ostermann, a lawyer practising in Vienna.

A. Particular circumstances of the case

The applicant company runs a cable TV net in the area of Innsbruck, which receives and transmits domestic and foreign radio and television programmes.

On 11 December 1981 the applicant company requested the Tirol and Vorarlberg Regional Postal Administration (Post- und Telegraphen Direktion für Tirol und Vorarlberg) to grant it permission to transmit by means of cable TV a number of foreign television and radio programmes, including those of 'Radio Tirol', a radio station operating in South Tirol.

On 9 August 1984 the Tirol and Vorarlberg Regional Postal Administration granted the applicant company's request as regards a number of television and radio programmes, but did not decide on its request relating to 'Radio Tirol'.

On 31 May 1987, the General Direction of Post and Telecommunications (Generaldirektion für die Post- und Telegraphenverwaltung), upon the applicant company's motion for a transfer of jurisdiction to the higher authority (Devolutionsantrag), dismissed this request on the ground that it was not sufficiently specified and that the applicant company had failed to submit documents containing the necessary technical data.

Subsequently, on 21 July 1987, the applicant company filed a new request to grant it permission for transmitting the programmes of 'Radio Tirol'. As regards the technical requirements, the applicant company submitted that it would receive the programmes at issue with its antenna established in Innsbruck and transmit them via cable net.

On 12 April 1988 the Tirol and Vorarlberg Regional Postal Administration again dismissed the applicant company's request on the ground that it had failed to submit the necessary technical documents.

On 4 November 1988 the General Direction of Post and Telecommunications, upon the applicant company's appeal, quashed this decision and referred the case back to the Regional Postal Administration. It found that it could not take a decision on the basis of the file and ordered that the Regional Postal Administration hold a hearing. Subsequently, the applicant company lodged a complaint with the Administrative Court (Verwaltungsgerichtshof).

On 20 June 1990 the Administrative Court (Verwaltungsgerichtshof) quashed the decision of the General Direction of Post and Telecommunications on the ground that it should have decided on the merits of the applicant company's request.

On 18 January 1991 the General Direction of Post and Telecommunications dismissed the applicant company's request of 21 July 1987. It referred to the Constitutional Court's judgment of 16 December 1983, No. 9909/1983 (see below, Relevant domestic law and practice), and found that the programmes of 'Radio Tirol', which the applicant company wanted to transmit, were, having regard to their composition and the fact that they were mainly in German, aimed at an Austrian audience and likely to contravene the Austrian broadcasting monopoly.

The applicant company lodged a complaint with the Constitutional Court (Verfassungsgerichtshof). It submitted, inter alia, that the Constitutional Court's judgment No. 9909/1983, on which the General Direction for Post and Telecommunications had relied, only applied to broadcasting, whereby programmes were created (eigene Programmschöpfung) but not to passive cable broadcasting, i.e. the integral transmission of programmes. The intended transmission of broadcasts of 'Radio Tirol' would constitute such passive broadcasting.

On 30 September 1991 the Constitutional Court, referring to its decision of 16 December 1983, No. 9909/1983 (see below, Relevant law and practice), refused to entertain the applicant company's complaint for lack of sufficient prospects of success and referred the case to the Administrative Court.

On 8 July 1992 the Administrative Court quashed the decision of 18 January 1991 by the General Direction of Post and Telecommunications. The Administrative Court found that S. 20 para. 1 of the Radio Broadcasting Ordinance allowed for the immediate, complete and unaltered transmission of radio signals known as passive cable broadcasting. According to the practice of the administrative authorities such passive cable broadcasting did not fall within the scope of the Constitutional Broadcasting Act. There was no legal basis

in the Radio Broadcasting Ordinance to prohibit passive cable broadcasting on the ground that it would contravene the Austrian broadcasting monopoly by transmitting programmes of a foreign broadcaster aimed mainly at an Austrian audience.

On 26 November 1992 the General Direction of Post and Telecommunications, on the applicant company's request, quashed the decision of 12 April 1988 by the Tirol and Vorarlberg Regional Postal Administration and gave it permission to transmit 'Radio Tirol' via its cable TV net.

B. Relevant domestic law and practice

1. Telecommunications Act of 13 July 1949 ("Fernmeldegesetz")

According to Section 2 para. 1 of the Telecommunications Act, "the right to set up and operate telecommunications installations is vested exclusively in the federal authorities" ("Das Recht, Fernmeldeanlagen zu errichten und zu betreiben steht ausschliesslich dem Bunde zu"). Section 3 envisages the authorization for private persons or institutions to operate broadcasting installations. Section 5 lists instances where broadcasting installations may be set up without authorization, e.g. within the boundaries of a private property.

2. Private Telecommunications Installations Ordinance (1961) ("Verordnung des Bundesministeriums für Verkehr und Elektrizitätswirtschaft über Privatfernmeldeanlagen")

The Ordinance on Private Telecommunication Installations of 1961 concerns all broadcasting installations which, on the basis of the Telecommunications Act, are subject to Federal supervision (Section 1). The Ordinance states inter alia the conditions for the setting up and operation of private broadcasting installations. However, according to the decisions of the Austrian courts and administrative authorities, these provisions cannot constitute the basis for granting licences to private applicants.

3. Constitutional Broadcasting Act of 10 July 1974 ("Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks")

Section 1 of the Constitutional Law of 10 July 1974 states:

<Translation>

"(2) Broadcasting shall be governed by more detailed rules to be set out in a federal law. Such a law must inter alia contain provisions guaranteeing the objectivity and impartiality of reporting, the diversity of opinions, balanced programming and the independence of persons and bodies responsible for carrying out the duties defined in paragraph 1.

(3) Broadcasting within the meaning of paragraph 1 shall be 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."

4. Radio Broadcasting Ordinance of 1965 ("Rundfunkverordnung")

Section 20 para. 1 of the Radio Broadcasting Ordinance provides that antennae and their receiving and transmitting devices have to comply with the state of technology at the time of their construction. Further, the radio signals received must be transmitted immediately, completely and unaltered to the recipients.

5. Broadcasting Corporation Act of 1974 ("Bundesgesetz über die Aufgaben und die Einrichtung des Österreichischen Rundfunks")

The Broadcasting Corporation Act sets up the Austrian Broadcasting Corporation as an economic unit with legal personality entrusted with the function of supplying the public with broadcasts. These broadcasts must comply with certain criteria, for instance with regard to the number and quality of programmes. 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.

6. Constitutional Court's decision of 16 December 1983 (No. 9909/1983)

The Constitutional Court's decision of 16 December 1983 concerned programmes introduced into an internal cable television system. The Court found inter alia that the aim of the Austrian Constitutional Broadcasting Act was to introduce a licensing requirement within the meaning of Article 10, para. 1, last sentence of the Convention. 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 latter could operate broadcasting.

According to the Constitutional Court's decision, broadcasting included active cable broadcasting which therefore fell within the scope of the Constitutional Broadcasting Act and its implementing legislation. Under the Telecommunications Act and the Ordinance on Private Telecommunication Installations the telecommunications authorities were competent to grant broadcasting licences. An authorization 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.

COMPLAINTS

1. The applicant company complained under Article 10 of the Convention about the decisions by the Austrian authorities refusing it permission to transmit, by means of cable net, programmes of 'Radio Tirol' a broadcasting company operating in Italy. The applicant company submitted in particular that the transmission of programmes at issue constitute passive cable broadcasting which does not fall within the scope of the Constitutional Broadcasting Act of 1974. At the time the application was introduced the domestic proceedings were still pending.

2. The applicant company further complains under Article 6 about the length of the proceedings concerning its request to be granted the above permission.

THE LAW

1. The applicant company complained under Article 10 (Art. 10) of the Convention about a refusal of a permission to transmit, by means of cable net, programmes of 'Radio Tirol' a broadcasting company operating in Italy.

Article 10 (Art. 10) reads as follows:

"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 (Art. 10) 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."

The Commission recalls that someone, who has obtained adequate redress for an alleged violation of the Convention can no longer claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention (No. 10668/83, Dec. 13.5.87, D.R. 52 p. 177; No 12719/87, Dec. 3.5.88, D.R. 56 p. 237).

In the present case the Administrative Court, on 8 July 1992, upon the applicant company's complaint quashed the decision by the General Direction of Post and Telecommunications of 18 January 1991 which had refused the applicant company permission to transmit programmes of 'Radio Tirol'. The Administrative Court found inter alia that the immediate, complete and unaltered transmission of radio signals was passive cable broadcasting and did not fall within the scope of the Constitutional Broadcasting Act. Subsequently, on 26 November 1992, the General Direction of Post and Telecommunications granted the applicant company permission to transmit programmes of 'Radio Tirol'.

The Commission notes that the applicant company, in the course of appeal proceedings available under Austrian law, received the requested permission. In these circumstances, the applicant company has obtained adequate redress for the violations it alleged before the Commission and can, therefore, no longer claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant company further complains under Article 6 para. 1 (Art. 6-1) of the Convention about the length of the proceedings concerning its request to be granted permission to transmit programmes of 'Radio Tirol' via its cable net.

Article 6 (Art. 6), so far as relevant, reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a .. hearing within a reasonable time .."

The Commission finds that the present case concerned a dispute between the applicant company and the Austrian authorities, on whether the transmission of programmes of 'Radio Tirol' was passive broadcasting, which is permissible under S. 20 para. 1 of the Radio Broadcasting Ordinance notwithstanding the general broadcasting monopoly established by the Constitutional Broadcasting Act. The view that there is a right to perform passive cable broadcasting was confirmed by the Administrative Court's decision of 8 July 1992. Thus, the question arises, whether this right was of a civil nature.

The Commission recalls that Article 6 (Art. 6) is, under certain conditions, applicable to proceedings concerning the right to exercise one's business activities or one's profession, (Eur. Court H.R. Pudas judgment of 27 October 1987, Series A. no. 125-A, p. 15 et seq., paras. 36-38; H. v. Belgium judgement of 30 November 1987, Series A no. 127-B, p. 33 et seq., paras. 47-48).

In the present case the applicant company runs a cable TV net, which receives and transmits domestic and foreign radio and television programmes. The contested proceedings, relating to its request for permission to transmit the programmes of 'Radio Tirol', thus concerned an aspect of its professional activities.

The Commission notes that the applicant company's request of 11 December 1981 for permission to transmit the programmes of 'Radio Tirol' was rejected by the General Direction of Post and Telecommunications on 31 May 1987. The application was introduced on 5 June 1992. Thus, the applicant company failed to comply with the six-months-rule laid down in Article 26 (Art. 26) of the Convention in respect of this first set of proceedings.

On 21 July 1987 the applicant company filed a new request, which was rejected by the Tirol and Vorarlberg Regional Postal Administration for failure to submit the necessary technical data. On 4 November 1988 the General Direction for Post and Telecommunication quashed this decision and referred the case back to the lower authority. However, according to the Administrative Court's decision of 20 June 1990, it should instead have decided on the merits of the applicant company's request. These proceedings were terminated on 26 November 1992, when the General Direction, after further successful appeal proceedings before the Administrative Court, granted the applicant company the requested permission. Thus, the proceedings lasted from 21 July 1987 until 26 November 1992, that is for five years and four months.

The Commission recalls that the reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment (Eur. Court H.R., Cesarini judgment of 12 October 1992, Series A no. 245-B, p. 26, para. 17).

The Commission finds that the contested proceedings were of a rather complex nature: The competent authorities had to establish whether the applicant company met the necessary technical requirements laid down in S. 20 para. 1 of the Radio Broadcasting Ordinance. Further, the legal question was of some complexity as it had to be determined whether the transmission of programmes of 'Radio Tirol' was broadcasting within the meaning of the Constitutional Broadcasting Act, or passive broadcasting which is allowed under S. 20 para. 1 of the above-mentioned Ordinance (see *mutatis mutandis* Eur. Court H.R. Katte Klitsche de la Grange judgment of 27 October 1994, Series A no. 293-B, paras. 52-55 and para. 62). Altogether seven decisions were rendered in the proceedings, which involved four instances, including the Constitutional Court and the Administrative Court. No major delays are

imputable to the Austrian authorities. Therefore, the overall length of the proceedings of five years and four months can still be regarded as reasonable within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber

President of the First Chamber

(M.F. BUQUICCHIO)

(C.L. ROZAKIS)