

1-1-1993

Broadcasting in Europe: Economics Become a Decisive Factor

Willem F. Korthals Altes

Recommended Citation

Willem F. Korthals Altes, *Broadcasting in Europe: Economics Become a Decisive Factor*, 13 Loy. L.A. Ent. L. Rev. 241 (1993).
Available at: <http://digitalcommons.lmu.edu/elr/vol13/iss2/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

BROADCASTING IN EUROPE: ECONOMICS BECOME A DECISIVE FACTOR

*Willem F. Korthals Altes**

I. INTRODUCTION

In the 1950's, six European countries¹ concluded a series of treaties establishing the European Community ("EC").² Europe was still recovering from the Second World War and trying to create a safe and prosperous society for its citizens. At the time, the drafters of the treaties focused on agriculture, coal and steel, and other down-to-earth matters. None of the treaties mentioned radio or television. It is likely that nobody involved in making these documents even considered the possibility that broadcasting issues might be solved by their efforts. In the 1950's, broadcasting was generally considered a public service, organized and regulated at the national level and often with heavy government involvement.³ It was not seen as a matter to be dealt with in terms of free trade or on the basis of economic considerations.

At best, scholars and lawmakers were willing to treat radio and television as elements of the freedom of expression.⁴ But the scarcity of

* Associate Professor, Institute for Information Law, University of Amsterdam; Visiting Scholar, New York University School of Law, 1992; Adjunct Professor and Affiliated Scholar, Communications Media Center, New York Law School; Doctor of Law, University of Amsterdam, 1989; M.C.J., New York University School of Law, 1982; Admitted to the New York State Bar, 1983.

1. These six countries were Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands.

2. See TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSE TREATY]; TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY]; EUROPEAN TREATY ESTABLISHING THE ATOMIC ENERGY COMMUNITY [EURATOM TREATY]. This article will focus on the EEC Treaty. See generally D. LASOK & J.W. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (4th ed. 1987); A. PARRY & S. HARDY, EEC LAW (1973); A.G. TOTH, THE OXFORD ENCYCLOPAEDIA OF EUROPEAN COMMUNITY LAW (1990); DERICK WYATT & ALAN DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC (1980).

3. See Case 155/73, *Sacchi v. Italy*, 1974 E.C.R. 410, 443 (the opinion of Advocate General G. Reisch); *Television Without Frontiers*: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable (Communication From the Commission to the Council) COM (84)300 final at 63 [hereinafter *Green Paper*].

4. JAN M. DE MEIJ, *UITINGSVRIJHEID: DE VRIJE INFORMATIESTROOM IN GRONDWETTELIJK PERSPECTIEF* 154 (1989) (Neth.).

frequencies and the alleged pervasiveness of the broadcasting media were generally accepted as reasons for imposing more severe restrictions on them than on other forms of expression, such as publishing in writing.⁵ It was not until 1990 that the European Court of Human Rights ruled that under the European Human Rights Convention the broadcasting media should essentially be dealt with on the same footing as the press.⁶ By that time, the Court of Justice of the EC had already developed a body of case law, which may have caused broadcasting in Europe to be perceived and regulated differently.⁷

The decisions of both European courts and simultaneous regulatory activities in the Council of Europe and the EC raise two issues. The first is whether considerations of an economic nature have replaced culture and freedom of expression as the foundations on which broadcasting in Europe should be built. A related and even more far-reaching issue is whether European law still permits the maintenance of public broadcasting systems as they have traditionally existed in the Member States of the EC and the Council of Europe. Such systems are arguably mandated by European law. But, the most recent decisions of the Court of Justice of the European Community and the European Court of Human Rights could also be read as holding that government regulation of broadcasting should be as limited as possible.

II. DEVELOPMENTS IN THE EUROPEAN COMMUNITY

A. *Sacchi v. Italy*

1. The Facts

In September 1972, Giuseppe Sacchi of Biella, Italy, started a business under the name *Telebiella* with the purpose of installing television sets in public places where people could watch programs received by cable.⁸ *Telebiella's* services were financed in part by broadcast advertisements.⁹

5. *Id.*

6. *See infra* part III.B.

7. *See infra* part II.

8. *Sacchi*, 1974 E.C.R. at 409 (1974).

9. For a detailed description of the facts, see the Opinion of the Advocate General, Mr. G. Reischl. *Id.* at 425. Mr. Sacchi also filed a complaint with the European Commission of Human Rights of the Council of Europe. *See Giuseppe Sacchi v. Italy*, App. No. 6452/74, 5 Eur. Comm'n H.R. Dec. & Rep. 43, 49 (1976). The complaint challenged the compatibility of the

In the early 1970's, the transmission of radio and television programs in Italy was still the exclusive monopoly of the national radio and television authority, RAI.¹⁰ Owners of radio and television sets had to pay a license fee for the reception of broadcast programs.¹¹

In January 1973, Mr. Sacchi was prosecuted for operating his business without paying the license fee.¹² He was acquitted, however, because the *Pretore* (Magistrate) of Biella found that the law applied to broadcasting only and not to cablecasting.¹³ After a Presidential Decree assimilated cable television equipment to broadcasting equipment on March 29, 1973, the Ministry of Posts and Telecommunications ordered *Telebiella* to dismantle its operation.¹⁴ On the basis of the same decree, Mr. Sacchi was also criminally prosecuted before the *Tribunale* of Biella.¹⁵

Mr. Sacchi argued that the license fee only served to finance RAI.¹⁶ All RAI had, however, was an exclusive right to transmit radio and television programs over the air. Therefore, in his opinion the fee could not be imposed if equipment was installed solely for the purpose of receiving programs by cable. If the RAI monopoly extended to cable transmission, there would be an infringement of the provisions of the European Economic Treaty ("EEC Treaty") on the free movement of goods and on free competition. Because of these potential implications of EC law, the Biella court stayed the proceedings and referred the case to the Court of Justice of the EC for a preliminary ruling under Article 177 of the EEC Treaty.¹⁷

relevant provisions of Italian law with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and five protocols. *Id.* The Commission did not reach the substance of Mr. Sacchi's complaint because he "had not exhausted the remedies which were available to him under Italian law" as required by Article 27(3) of the Convention. *Id.* at 52.

10. *Sacchi*, 1974 E.C.R. at 410.

11. *See id.* at 432 (citing Decree Law No. 246 of Feb. 21, 1938, as amended).

12. *Id.*

13. *Sacchi v. Italy*, App. No. 6452/74, 5 Eur. Comm'n H.R. Dec. & Rep. 48 (1976).

14. *Id.*

15. *Id.*

16. *Sacchi*, 1974 E.C.R. at 419.

17. *Id.* at 445. The text of Article 177 of the EEC Treaty states as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaty; (b) the validity and interpretation of acts of the institutions of the Community; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling

The *Tribunale* posed eleven questions. The most important of these pertained to the applicability of some fundamental principles of EC law. The first principal issue was whether the provisions on the free movement of goods applied to television signals, in particular their commercial aspects, and whether the exclusive right granted by Italian law to RAI to license all types of television transmissions, including commercial advertising, constituted a breach of this principle.¹⁸ Another predominant issue was whether the way that Italian law permitted RAI to operate amounted to an abuse of a dominant position in violation of Article 86.¹⁹

The *Sacchi* case was novel in that the court had never given an opinion on the applicability of EC law to broadcasting.²⁰ Radio and television were not mentioned in the Treaty, and, at the time it was completed, very few people, if any, thought of broadcasting as an issue to be dealt with under the Treaty. The arguments brought forward by several interested parties reflected this situation. The German and Italian governments, for instance, emphasized the nature of radio and television as a public service which belonged to the exclusive domain of the national authorities.²¹

thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

EEC TREATY art. 177.

18. *Sacchi*, 1974 E.C.R. at 432.

19. *Id.* at 427. The text of Article 86 of the EEC Treaty states as follows:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

EEC TREATY art. 86.

20. See IVO E. SCHWARTZ, *EUROPE AND THE MEDIA: EEC REPORT 8 (1984)* (Report for the 11th FIDE Congress, The Hague).

21. *Sacchi*, 1974 E.C.R. at 417-18.

2. *The Position of the Court of Justice of the EC*

In addressing the issues posed by *Sacchi v. Italy*, the court of Justice started by taking a rather surprising step. While most parties argued their positions in terms of the free movement of goods under Article 30 EEC Treaty,²² the court held:

In the absence of [an] express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services. Although it is not ruled out that services normally provided for remuneration may come under the provisions relating to free movement of goods, such is however the case, as appears from Article 60, only insofar as they are governed by such provisions. It follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services.²³

In other words, the court did not consider broadcasting as an aspect of the free movement of *goods*, but as an element of the freedom to provide *services* under Articles 59 to 66 of the EEC Treaty. The free movement of goods was relevant, however, because the Court made a distinction between broadcasting and related activities, stating:

[T]rade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods. As a result, although the existence of a monopoly with regard to television advertising is not in itself contrary to the principle of free movement of goods, such a monopoly would contravene this principle if it discriminated in favour of national material and

22. Defendant Sacchi, for instance, contended the following:

[A]dvertising should be regarded as an intangible asset in its own right, or at least as having, to the products to which it relates, the relationship of accessory to principal, and on this double basis it is subject to the customs union and the principle of the free movement of goods. It appears from the case law of this Court that intangible assets—such as electricity—come under the application of these rules and all products on which a monetary value can be placed, and which are as such capable of being the object of commercial transactions, must be regarded as goods. This assimilation of the advertisement with the product is indispensable for progressive unification of the market, effective equality of opportunity for penetration and distribution which is not beyond the means of all save the large multinational undertakings.

Id. at 426 (citations omitted).

23. *Id.*

products . . . [and if it] were used to favour, within the Community, particular trade channels or particular commercial operators in relation to others.²⁴

As to the competition issue of Article 86, the Court of Justice held that "[n]othing in the Treaty prevents Member States, for considerations of public interest of a non-economic nature, from removing radio and television transmissions, including cable transmissions from the field of competition by conferring on one or more establishments an exclusive right to conduct them."²⁵

This did not mean that there were no limitations on the powers such an establishment could be given. The prohibitions against discrimination on the basis of nationality and residence remained in effect. Moreover, if the performance of its tasks would include activities of an economic nature, the establishment would not be permitted to have a dominant position. But, as a whole, "the fact that an undertaking to which a Member State grants exclusive rights has a monopoly is not as such incompatible with Article 86."²⁶

Due to the nature of the proceedings, the Court of Justice did not decide whether Mr. Sacchi had to pay the license fee.²⁷ That was for the national courts of Italy to determine. The significance of the court's opinion lies in the fact that it brought broadcasting within the realm of the EEC Treaty as an activity of an economic nature subject to the harmonization principles of this document.²⁸

The *Sacchi* decision did not make clear to what extent national legislatures would still be permitted to maintain monopolistic and protective

24. *Id.*

25. *Id.* at 428.

26. *Sacchi*, 1974 E.C.R. at 429. This did not mean, of course, that national governments could prohibit the reception of programs from abroad. In the case of broadcasting by air, such a prohibition would infringe upon the freedom to receive information under Article 10 of the European Human Rights Convention. See generally note 5 and accompanying text. The Court did not say in so many words that the retransmission by cable of foreign broadcasts could not be subject to limitations. *Id.*

27. See D. LASOK & J. W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 316 (1987). See generally ARTICLE 177 EEC: EXPERIENCES AND PROBLEMS (Henry G. Schermers et al., eds. 1987).

28. Schwartz contends that the EEC Treaty encompasses broadcasting in many ways. In addition to the elements mentioned by the court in *Sacchi*, he lists, *inter alia*, broadcasters in their capacity of persons engaging in self-employed activity, employees of broadcasting organizations, and broadcasting organizations as undertakings engaged in competition. See SCHWARTZ, *supra* note 20, at 2-3. Schwartz is right, but the categories he mentions are not typical for broadcasting activities.

structures. Neither the freedom to provide services nor the provisions against the abuse of dominant positions mandated the complete abolition of rules containing exclusivity for national broadcasters. But it was obvious that measures of an economic nature would be considered suspect.

B. *Procureur du Roi v. Marc J.V.C. Debauve*

1. The Background

The next case, *Procureur du Roi v. Marc J.V.C. Debauve*,²⁹ provided some clarity, although here too the position of the government was upheld. *Debauve* was also referred to the Court of Justice on the basis of Article 177 of the EEC Treaty.³⁰ Marc Debauve and several other individuals and organizations were prosecuted before the *Tribunal Correctionnel* (Criminal Court) of Liège, Belgium. They were accused of violating a provision of Belgian law prohibiting the transmission by cable of any broadcast in the nature of a commercial advertisement.³¹

While other European countries were gradually introducing commercial advertisements on radio and television, the Belgian legislature decided that viewers and listeners in their country should not be exposed to such forms of expression.³² It was relatively easy to enforce the ban on advertisements for the national broadcasting organizations. But with the advent of cable, it became increasingly difficult as cable operators wanted to distribute foreign programs to their subscribers. At first, the cable companies made a serious effort to comply with the law by either limiting their options to programs without commercials or by leaving out the advertisements altogether.³³

However, the increase of foreign programs with commercials and the technical and organizational difficulties of leaving out advertisements made the cable companies become less strict in their compliance with the law.³⁴ The government, in turn, made little effort to enforce the prohibition on advertisements.³⁵ In *Debauve*, the underlying action was initiated by organizations of consumers, guardians of cultural interests, and women who

29. Case 52/79, *Procureur du Roi v. Marc J.V.C. Debauve*, 1980 E.C.R. 833 (1988).

30. See *supra* text accompanying note 17.

31. See *Debauve*, 1980 E.C.R. at 836.

32. *Id.*

33. *Id.* at 839.

34. *Id.*

35. *Id.* at 853.

wanted to protect consumers and children against the detrimental effect of commercial messages.³⁶

In their case before the *Tribunal Correctionnel*, the defending cable operators argued, *inter alia*, that the provisions on the prohibition of advertisements were incompatible with Articles 59 to 66 of the EEC Treaty dealing with the freedom to provide services.³⁷ The court stayed the proceedings and referred the case to the Court of Justice for a preliminary ruling.

2. *Relevant Elements within a Single Member State*

The European Court reiterated its holding of the *Sacchi* case that the "broadcasting of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services."³⁸ Although the court added that "[t]here is no reason to treat the transmission of such signals by cable television any differently,"³⁹ it made some additional distinctions.

First, the court pointed out that "the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State."⁴⁰ Second, it held that laws such as the one in question "cannot be regarded as a restriction upon [the] freedom to provide services so long as those laws treat all such services identically whatever their origin or the nationality or place of establishment of the persons providing them."⁴¹ The court acknowledged the desire of the Belgian legislature to ban broadcast advertisements and pointed out that, in the absence of harmonized rules in this regard, the underlying prohibition fell within the residual power of each Member State to regulate advertising on grounds of general interest.⁴²

Finally, the European Court held that the Belgian provisions did not discriminate against foreign broadcasting stations because their signals could be broadcast only within the natural reception zone. The European

36. The *Fédération Nationale du Mouvement Coopératif Féminin*, *Organisation de Consommateurs*, the *Fédération Belge des Coopératives*, and *Vie Féminine* initiated the action. *Debauve*, 1980 E.C.R. at 864-65.

37. *Id.* at 836.

38. *Id.* at 855.

39. *Id.*

40. *Id.*

41. *Debauve*, 1980 E.C.R. at 856.

42. *Id.* at 857.

court referred to the differences between viewers living near the border, who were able to receive foreign programs by air, and those living further inland or near the North Sea, who depended on cable. The European Court said that "such differences, which are due to national phenomena, cannot be described as 'discrimination' within the meaning of the Treaty; the latter regards only differences in treatment arising from human activity, and especially from measures taken by public authorities, as discrimination."⁴³

C. *Bond van Adverteerders v. Netherlands*

1. The Cable Regulations

Although *Sacchi* and *Debauve* established the EC's authority over broadcasting, the scope of the authority was still fairly limited. National monopolies continued to be permitted, advertising (an activity of an economic nature) could be prohibited, and the provisions on the freedom to provide services had little impact if the measures taken by national governments (a) affected their territory only, (b) pursued a non-economic purpose of general interest, and (c) gave nationals and foreigners equal treatment.

These three elements were of major importance in the next case which came before the Court of Justice, *Bond van Adverteerders v. Netherlands*.⁴⁴ Under the so-called Cable Regulations,⁴⁵ cable networks in the Netherlands were prohibited from distributing programs from abroad (except upon permission from the Minister of Cultural Affairs) if they contained commercial advertisements specifically intended for the Dutch public, or if they contained subtitles in Dutch.⁴⁶

43. *Id.* at 858.

44. Case 352/85, *Bond van Adverteerders v. Netherlands*, 1988 E.C.R. 2085 (1988). This case is also known as the *Kabelregeling* (Cable Regulations) case.

45. Ministerial Regulations of July 27, 1984 (*Staatscourant* 1984) (concerning the use of antenna installations for the transmission of radio and television programs). These regulations were based on the *Omroepwet* [Broadcasting Act] of 1967 (*Staatsblad* 1967), which in 1987 was replaced by the Act of April 21, 1987 (*Staatsblad* 1987), containing rules concerning radio and television programs, the broadcasting fee, and subsidies to press institutions better known under its short title of *Mediawet* [Media Act]. *MEDIAWET* art.1 (Neth.) (*Staatsblad* 1987).

46. *KABELREGELING* art.4 (Neth.) (*Staatscourant* 1984).

The Dutch advertisers challenged the rules because they felt restricted in their ability to convey commercial messages to the Dutch public.⁴⁷ In their civil suit against the Dutch government, the advertisers contended that the Cable Regulations violated the provisions on the freedom to provide services in the EEC Treaty. The Dutch court asked the Court of Justice for a preliminary ruling on the basis of Article 177 of the EEC Treaty.⁴⁸

Since the *Debauve* case, the media landscape of Europe had changed substantially. Several countries were in the process of permitting commercially operated organizations to broadcast television programs next to, or even in the place of, the traditional public broadcasting institutions.⁴⁹ Broadcasting satellites and cable networks were developing rapidly. The EC was discussing a draft for a Council Directive on Broadcasting by Television, based on a Green Paper entitled "Television Without Frontiers" issued by the EC Commission in 1984.⁵⁰

Under these circumstances, it was understandable that the Dutch government would have a harder time defending its position than the Italian and Belgian governments in 1974 and 1980, respectively. Moreover, its case was obviously weaker. The Dutch government first contended that EC law, and the freedom to provide services across borders in particular, was not at stake. The government argued that the only relevant service was that provided by Dutch cable networks to Dutch subscribers. In other words, in the view of the Dutch government, it was a purely domestic service.⁵¹

Second, even if the provisions on the freedom to provide services were applicable, the regulations restricting the broadcast of foreign programs by cable were justified in the general interest of media pluralism and non-commerciality, the cornerstones of the Dutch broadcasting system.⁵² Finally, the Dutch government believed that the Cable Regulations did not discriminate against foreign nationals because the Dutch broadcasting associations were subject to the same limitations.⁵³ The administration of

47. They were also unhappy with the limited amount of advertising time available on Dutch public television. It is quite likely that challenging the Cable Regulations they were trying to pressure the Dutch government to lift some of these limitations. See *Bond van Adverteerders*, 1988 E.C.R. at 2127.

48. The *Rechtbank* (District Court) of The Hague found that the ban on advertising was consistent with EC principles but suspended the operation of the prohibition on subtitled. On appeal, the *Gerechtshof* (Appellate Court) of The Hague maintained the *Rechtbank's* ruling but suspended its final opinion pending the case before the European Court. *Id.* at 2128.

49. Green Paper, *supra* note 3, at 213.

50. *Id.* at 328.

51. *Bond van Adverteerders*, 1988 E.C.R. at 2109.

52. *Id.* at 2135.

53. *Id.* at 2133.

advertising on Dutch radio and television was exclusively carried out by an independent foundation, the *Stichting Ether Reclame* ("STER"), which deposited the proceeds in a broadcasting fund used to finance the programs produced by the broadcasting associations.⁵⁴

2. Two Transfrontier Services

The Court of Justice disagreed on all counts. First, the court held: [T]he transmission of programmes at issue involves at least two separate services. The first is provided by the cable network operators established in one [M]ember State to the broadcasters established in other Member States and consists of relaying to network subscribers the television programmes sent to them by the broadcasters. The second is provided by the broadcasters established in particular in the [M]ember State where the programmes are received, by broadcasting advertisements which the advertisers have prepared especially for the public in the [M]ember State where the programmes are received. Each of those services are transfrontier services for the purposes of Article 59 of the Treaty. In each case the suppliers of the service are established in a Member State other than that of certain of the persons for whom it is intended.⁵⁵

The European court also differed with the Dutch government on the discrimination issue. While the broadcasting associations were not permitted to advertise, the STER had the exclusive authority to do so in their interest. According to the Court, "the situation of the Dutch television stations as a whole should be compared with that of the foreign broadcasters."⁵⁶

The Court of Justice pointed out that, although national rules may discriminate against foreign nationals and residents, if the rules are justified on grounds of public policy, economic aims cannot constitute such grounds.⁵⁷ One such legitimate aim is to secure, for a national public foundation, all of the revenue from advertising intended especially for the public of the Member State in question.

54. *Id.* See also *MEDIAWET* art.1 (Neth.) (Staatblad 1987).

55. *Id.* at 2133.

56. *Bond van Adverteerders*, 1988 E.C.R. at 2135.

57. *Id.*

The Court did not enter into the debate over the validity of the government's arguments on pluralism and non-commerciality. It simply stated that "[t]he Dutch government itself admits that there are less restrictive, non-discriminatory ways of achieving the intended objectives."⁵⁸ So-called objective restrictions were acceptable,⁵⁹ restrictions of an economic nature were not. In other words, unlike the Belgian provisions in *Debauve*, the Dutch Cable Regulations did not meet the non-discrimination test.

The *Kabelregeling* case was thus the first in which the European court ruled against a government defending its public broadcasting system. Although the Court provided some clarity on the acceptability of discriminatory national rules, it did not give an express opinion on arguments of culture, pluralism, and non-commerciality as grounds for discrimination on the basis of nationality or residence. The *Groppera* case would be more explicit in this respect.

III. "THE OTHER EUROPE:" THE COUNCIL OF EUROPE

A. *The Human Rights Convention*

During the time period of the preceding cases, many developments in "the other Europe," the *Council of Europe*, were occurring. The Council of Europe was founded in 1949 as a political organization set up to foster greater unity and cooperation between the people and nations of Europe.⁶⁰ Until recently, the Council had 21 members, all non-communist European countries. The democratization process in Eastern Europe caused an influx of new members.⁶¹

The most important document of the Council is the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("ECPHRFF").⁶² Individuals who feel deprived of a right under this

58. *Id.*

59. Examples given by the Court were prohibitions on advertising certain products, advertising on certain days, and limiting the duration or the frequency of advertisements. *Bond van Adverteerders*, 1988 E.C.R. at 2135.

60. See THE COUNCIL OF EUROPE: A CONCISE GUIDE 11 (1982). The Council of Europe was established on September 2, 1949, by the General Agreement on Privileges and Immunities of the Council of Europe. The original twelve members were Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey and the United Kingdom. *Id.*

61. See New York Times articles available in LEXIS, Nexis Library, NYT File.

62. Nov. 4, 1950, 213 U.N.T.S. 222 (hereinafter "ECPHRFF").

Convention can complain to the *European Commission of Human Rights*.⁶³ The Commission attempts to arrange a settlement between the individual and the Member State against which the complaint is filed.⁶⁴ If a settlement cannot be reached, the Commission will report to the Committee of Ministers. Within three months, either the State or the Commission can take the case to the *European Court of Human Rights*. Although the Court has no enforcement powers of its own, governments are bound to comply with its judgments.⁶⁵ Enforcement is supervised through the Committee of Ministers, which consists of the Ministers of Foreign Affairs of the Member States.⁶⁶

Article 10 of the Human Rights Convention deals with the freedom of expression.⁶⁷ The first paragraph sets forth the general scope of freedom of expression in all its aspects. The second paragraph states that national law may subject the freedoms to certain limitations, provided they are necessary in a democratic society in one or more of the listed interests.

The phrase "necessary in a democratic society" is particularly important because it gives the court the opportunity to create common standards applicable to all Member States. In several cases, national regulations were found to be in violation of Article 10 only, or for the most part, because they failed to meet the "necessary in a democratic society" test.⁶⁸

63. *Id.* at 236-38 (art. 25).

64. *Id.* at 238-40 (art. 28).

65. *Id.* at 248 (art. 53).

66. *Id.* at 248 (art. 54).

67. The text of Article 10 of the ECPHRFF 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 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.

ECPHRFF, *supra* note 62, at 230 (art. 10).

68. Examples of cases of the European Court of Human Rights in the area of freedom of expression include the following: *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976); *The Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979); *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) (1986); *The Observer and the Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) (1991); *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) (1992).

B. Applicability to Broadcasting

Until recently, it was uncertain to what extent Article 10 applied to broadcasting. The uncertainty was caused by the third sentence of the first paragraph of this provision: "This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." Some scholars and courts believed that the language and the placing of this sentence in the first paragraph meant that the second paragraph did not apply to broadcasting.⁶⁹ In other words, broadcasting could be subject to more limitations than other forms of expression.

The European Court of Human Rights put an end to this debate in the case of *Groppera*, the first case in which it had the opportunity to deal with the issue.⁷⁰ In 1979, Belton Srl, a company under Italian law, built a radio transmitter on the Pizzo Groppera, a mountain peak in Italy close to the Swiss border. Under the name of Radio 24 AG, programs intended for the Swiss audience between 15 and 40 years of age were broadcast from the Groppera. The programs were financed by advertisements.⁷¹

Until 1982, broadcasting in Switzerland was the exclusive monopoly of the Swiss Radio Broadcasting Company. In 1982, an ordinance ended this monopoly and made it possible for private organizations to run local radio stations.⁷² Radio 24 AG was one of the 36 applicants who received a license.⁷³ Radio 24 AG's license was obtained for the Zürich area and subject to the condition that the broadcasts from the Groppera would cease. The owner agreed but sold the station to Groppera Radio AG, a company under Swiss law which started broadcasting under the name of Sound Radio.⁷⁴ Sound Radio's programs were also intended for the Zürich listening area.

In addition to the broadcasts by air, Sound Radio's programs were retransmitted by several cable operators. On January 1, 1984, most cable networks ceased carrying Sound Radio because a 1983 Ordinance prohibited the distribution of programs other than those which complied with national and international telecommunications regulations.⁷⁵ Only some cable companies, *inter alia* the Community-Antenna Cooperative of

69. See SCHWARTZ, *supra* note 20, at 28.

70. *Groppera Radio AG v. Switzerland*, 173 Eur. Ct. H.R. (ser. A) (1990).

71. *Id.* at 10 (para. 12).

72. See *id.* (para. 13).

73. *Id.* (para. 14).

74. *Id.* at 10-11 (para. 15).

75. *Groppera*, 173 Eur. Ct. H.R. (ser. A) at 11 (para. 17).

Maur, continued to retransmit Sound Radio.⁷⁶ The Swiss authorities instituted an administrative action against the cooperative of Maur and tried to take action via the Italian government and the authorities of the International Telecommunications Union ("ITU").⁷⁷ On August 30, 1984, the transmitter on the Pizzo Groppera was struck by lightning and the broadcasts came to an end.⁷⁸

Although this act of God made the cases essentially moot, the defending cooperative and the owners of the radio transmitter, who had joined in the action, did not want the broadcasts to be terminated.⁷⁹ They sought a decision on issues concerning legal principals. In addition, Groppera Radio AG claimed that it would resume the broadcasts. The defendants contended in particular that the measures taken by the Swiss government violated Article 10 of the ECPHRFF.⁸⁰ After the Swiss courts had rejected their pleas, the defendants filed a complaint with the European Commission of Human Rights.⁸¹ Finally, the case came before the European Court of Human Rights.

C. *The Court of Human Rights on Groppera*

The Court of Human Rights first decided that Groppera Radio AG was a victim under Article 25 of the Convention because it was "directly affected by the act or omission which is in issue."⁸² The court noted that the owners of Sound Radio were particularly struck by the ordinance prohibiting the cable networks from retransmitting their programs.

76. *Id.* at 11 (para. 18).

77. *Id.* at 14 (para. 26).

78. *Id.* at 12 (para. 22).

79. *Id.* (para. 24).

80. *Groppera*, 173 Eur. Ct. H.R. (ser. A) at 21 (para. 52). For the text of Article 10 of the ECPHRFF, see *supra* text accompanying note 67.

81. The Commission concluded that there had been a violation of Article 10. *Id.* at 19 (para. 44).

82. *Id.* at 20 (para. 47). The text of Article 25, § 1 reads as follows:

The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

ECPHRFF, *supra* note 62, at 236-38.

The court of Human Rights then rejected the Swiss government's argument that Article 10 did not apply because there was doubt whether the radio station broadcast "information" and "ideas":

[T]he Court does not consider it necessary to give on this occasion a precise definition of what is meant by "information" and "ideas" . . . [B]oth broadcasting of programmes over the air and cable retransmission of such programmes are covered by the right enshrined in the first two sentences of Article 10 § 1, without there being any need to make distinctions according to the content of the programmes.⁸³

Next, the court turned to the central issue of the case: Whether the interference by the Swiss government with the rights of the owners of the radio station was justified. The Swiss government, referring to the third sentence of Article 10 § 1 of the Convention and its obligations under the International Telecommunications Convention, claimed that it was justified in imposing a license system on the broadcasting of radio programs.⁸⁴ The Court of Human Rights agreed that the third sentence of Article 10 § 1 was applicable. However, it disagreed on the scope of its application stating that § 1 must be considered within the entire context of Article 10, especially in relation to the paragraph 2 requirements:⁸⁵

[T]he purpose of the third sentence of Article 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 [sic] 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 taken as a whole.⁸⁶

In other words, the licensing of broadcasting activities was not exempt from the restrictions of the second paragraph of Article 10. The Court of Human Rights now had to determine whether the measures taken by the Swiss government complied with the limitations of this paragraph. Two hurdles had to be overcome in this respect. One difficulty was the question of whether the measures were prescribed by law. The applicants contended that the regulations were not sufficiently accessible or precise for a citizen to adapt his behavior to them, "even after consulting a lawyer, if neces-

83. *Groppera*, 173 Eur. Ct. H.R. (ser. A) at 22 (para. 55).

84. *Id.* (para. 56).

85. *Id.* at 24 (para. 61).

86. *Id.* (emphasis added).

sary.”⁸⁷ The court, applying a three-fold test,⁸⁸ concluded that the applicants, wishing to engage in broadcasting across a frontier, could become fully aware of the applicable rules.⁸⁹

The second hurdle was whether the measures were necessary in a democratic society in the interests of (1) the prevention of disorder in telecommunications and (2) the protection of the rights of others, namely the interest of pluralism in Swiss broadcasting.⁹⁰ While the owners of the Groppera station argued that the measures did not answer a pressing social need,⁹¹ the court balanced the interests involved and considered the *margin of appreciation* afforded to Member States in taking measures they deemed appropriate.

The court listed four reasons for striking the balance in favor of the Swiss government. First, most Swiss cable operators ceased transmitting the Sound Radio programs after the 1983 Ordinance became effective.⁹² Second, the Swiss authorities never jammed the broadcasts. Third, the measures were essentially taken against a Swiss cable company with subscribers who all lived in Switzerland and could still receive the programs of other stations. Finally, the action taken was not censorship against the content or the tendencies of the programs, but a measure taken against a station which could reasonably be held to operate from across the Swiss border with the intent to circumvent Swiss telecommunications law.⁹³

D. A Major Step

Despite the negative outcome for the applicants, the *Groppera* decision can be considered as a major step because of the applicability of the second paragraph of Article 10 of the Human Rights Convention to broadcasting issues. Two months after *Groppera*, the European Court of Human Rights

87. *Id.* at 25 (para. 65).

88. “According to the Court, the scope of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover, and the number and status of those to whom it is addressed.” *Groppera*, 173 Eur. Ct. H.R. (ser. A) at 26 (para. 68).

89. *Id.*

90. Both interests were invoked by the Swiss government as justifiable reasons for taking the measures against the Groppera station. *Id.* at 27 (para. 69).

91. *Id.* at 27-28 (para. 71) (They even contended that it was tantamount to censorship or jamming.).

92. *See id.* at 11 (para. 18).

93. 173 Eur. Ct. H.R. (ser. A) at 28 (para. 73).

issued another ruling in which Article 10 was applied in a broadcasting case.⁹⁴ This case also arose in Switzerland.

Autronic AG, a private company under Swiss law that specialized in electronics, wanted to demonstrate some of its dish aerials at the Basel Trade Fair in April 1982 by showing programs broadcast in the Soviet Union via the G-Horizont satellite. Autronic obtained permission from the Soviet embassy with the help of the Radio and Television Division of the Head Office of the national Posts and Telecommunications Authority ("PTT").⁹⁵ A request for a similar activity a few months later was denied by the Division because it did not receive a reply from the embassy.⁹⁶

Autronic subsequently applied to the Radio and Television Division for a declaratory ruling that the reception for private use of uncoded television programs from satellites such as G-Horizont should not require the consent of the broadcasting state's authorities. After submission to the Division, and on appeal, the Swiss administrative courts denied the request, Autronic filed a complaint with the European Commission of Human Rights.⁹⁷ Autronic claimed that making the reception of such programs subject to government approval infringed upon Article of the 10 ECPHRFF. The Commission found that there was a violation of Article 10 and the case was referred to the European Court of Human Rights.⁹⁸

E. Autronic: The Court's Decision

The court rejected the argument of the Swiss government that Autronic AG could not claim protection under the right to freedom of expression of Article 10 because it was pursuing purely economic and technical objectives without an interest in the content of the programs: "[Article 10] applies to 'everyone', whether natural or legal persons. . . . Furthermore, Article 10 applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information."⁹⁹ The court added that there was no ground for ascertaining the

94. *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1990).

95. *Id.* at 10 (para. 14).

96. *Id.* at 10-11 (para. 16).

97. *Id.* at 20 (para. 40).

98. *Autronic*, 178 Eur. Ct. H.R. (ser. A) at 20 (para. 41) (decision of the Commission of Mar. 8, 1989).

99. *Id.* at 23 (para. 47).

reason and purpose for which the right to receive information and ideas was exercised.¹⁰⁰

After reiterating its holding of *Groppera* on the meaning of the third sentence of Article 10 § 1,¹⁰¹ the Court of Human Rights applied the various tests of the second paragraph. As in *Groppera*, the court found that the regulations invoked by the Swiss government were sufficiently accessible. Nonetheless, the court expressed its doubts about the regulations' status as "law." It avoided giving an opinion on this issue, however, because it came to the conclusion that the interference with the rights of Autronic was not justified.¹⁰²

The Swiss government claimed two grounds for restricting Autronic's rights, (1) the prevention of disorder in telecommunications and (2) the prevention of the disclosure of information received in confidence.¹⁰³ The government argued that the secrecy of telecommunications of Article 22 of the International Telecommunications Convention covered the transmissions in question, because, even though they were not coded, they were only intended for the Soviet audience and not for recipients in other countries.

The court acknowledged the margin of appreciation enjoyed by Member States in taking measures they deemed appropriate. But, it also pointed to the need for European supervision and the strictness of this supervision in relation to the importance of the rights at stake.¹⁰⁴ The Swiss government maintained that the court should view the case in light of the circumstances of 1982 and it should ignore the technical and legal developments that had taken place since.¹⁰⁵ This was particularly important because, while in 1982 G-Horizont was the only satellite of its kind, at the end of the 1980's several other telecommunications satellites broadcasting television programs had come into service. On the legal front, the European Convention on Transfrontier Television had been concluded on May 5, 1989.¹⁰⁶

The Court of Human Rights rejected the government's submission that the special characteristics of telecommunications satellites justified the interference.¹⁰⁷ The court found that the nature of the broadcasts, i.e.,

100. *Id.*

101. *Id.* at 24 (para. 52).

102. *Autronic*, 178 Eur. Ct. H.R. (ser. A) at 25 (para. 57).

103. *Id.* at 26 (para. 58).

104. *Id.* at 26-27 (para. 61).

105. *Id.* at 27 (para. 62).

106. *Id.*

107. *Autronic*, 178 Eur. Ct. H.R. (ser. A) at 27 (para. 63).

uncoded broadcasts intended for television viewers in the Soviet Union, precluded description of them as "not intended for the general public." The court was not persuaded by the government's argument that imposing a total ban on the reception of signals from telecommunications satellites was the only way of ensuring the secrecy of international correspondence: "[T]he Government had already conceded before the Commission that there was no risk of obtaining secret information by means of dish aerials receiving broadcasts from telecommunications satellites."¹⁰⁸ In other words, the interference with the rights of Autronic was not "necessary in a democratic society."

IV. THE CASES PUT TOGETHER

A. *A Major Boost to Broadcast Freedom?*

At the outset of the 1990's, two bodies of case law on broadcasting had been developed by the two highest European courts. The case law focused mainly on considerations of an economic nature and had the purpose of breaking open the traditional protectionist public service based broadcasting systems of the various Member States of the EC. In the cases which came before the European Court of Human Rights, the most important question was whether broadcasting should be treated in the same way as other forms of expression. Although the court left some room for regulations of a purely technical nature, it essentially answered the question in the affirmative.

On the basis of the cases discussed above, national broadcasting law of the Member States of the EC has to comply with a number of conditions:

- (1) National law has to meet the requirements of the second paragraph of Article 10 of the ECPHRFF, qualified only by the margin of appreciation left to each Member State. This margin is subject to European supervision, however, because it involves fundamental rights;
- (2) Every natural or legal person can claim the fundamental rights of Article 10, irrespective of whether or not the content or the tendencies of the signals transmitted are at stake;
- (3) National broadcasting regulations may not discriminate against foreign nationals or residents, except on grounds of public policy;

108. *Id.*

- (4) Regulations of an economic nature are likely to infringe upon the EEC Treaty, even if they serve or are said to serve non-economic objectives;
- (5) On the other hand, a general non-discriminatory prohibition of broadcast advertising is permitted and measures affecting the national territory of an EC Member State only are not subject to the provisions on the freedom to provide services of the EEC Treaty.

Examining this enumeration without knowledge of the underlying cases, one could easily conclude that the opinions of the Court of Human Rights in *Groppera* and *Autronic* were a major boost to the broadcasting freedom in Europe, causing the abolition of all kinds of restrictive national regulations. The fact of the matter is, however, that the two opinions had a very limited impact on broadcasting activities in the various Member States. The cases' limited impact may be due to several reasons.

First, issues of content were not at stake in either case. *Groppera* and *Autronic* dealt with companies trying to enhance their commercial positions. In *Autronic* in particular, it was obvious that the applicant wanted to demonstrate its dish aerials to potential buyers. The content of the programs picked up from the G-Horizont satellite was completely irrelevant. The purpose of the owners of the *Groppera* radio station was to run a commercial radio program with mostly light music and some information directed at the younger people in the Zürich listening area. The owners were not trying to convey a message, yet they were still prevented from broadcasting. Although at the time the *Groppera* station started operating, the Swiss broadcasting corporation still had a monopoly, this was no longer the case after the 1982 Ordinance created the opportunity for privately owned stations to broadcast at the local level. Nonetheless, the Court of Human Rights was correct in rejecting the Swiss government's argument that the content of the message should be a factor in determining whether the person who wants to convey it can claim Article 10 protection.

The second explanation for the limited impact of the *Groppera* and *Autronic* opinions may be that the broadcasters in the Council of Europe Member States do not consider themselves unduly restricted in their ability to convey ideas and information. Those who feel otherwise may be inclined to await the outcome of the current technical and legal developments.¹⁰⁹

109. It should also be kept in mind that it takes a long time before a case comes before the Court of Human Rights. Parties first have to exhaust their national court system. ECPHRFF, *supra* note 62, at 238 (art. 26).

Finally, the real changes in European broadcasting appear to be triggered mainly by the opinions of the Court of Justice of the EC. In the cases addressed by this court, the content and the tendencies of the programs as such were not at issue. They played a role only in that the governments argued that the measures taken by them were necessary to preserve the public broadcasting system as a vehicle for the transmission of information, entertainment, and culture in the public interest. The court's decisions focused on the issue of whether the national regulations violated the free market principles of the EEC Treaty.

B. Broadcasters as Ordinary Entrepreneurs

Against the background of the European broadcasting systems of 1974, the court in *Sacchi* took a major step by applying the freedom to provide services and the anti-monopoly rules of the EEC Treaty to broadcasting. Thus, the court treated broadcasting organizations as ordinary commercial operations which provide one of the services mentioned in Article 60 of the EEC Treaty. Article 60 lists four types of services: activities of an industrial character, of a commercial character, of craftsmen, and of the professions. Although this enumeration is not exhaustive, it is reasonably representative.¹¹⁰ Broadcasting is apparently considered as an activity of a commercial character or something akin.

In order to fall under the definition of Article 60, a service has to be "normally provided for remuneration."¹¹¹ In his report for the Federation Internationale pour le Droit Europeen (FIDE) Congress of 1984, commentator Ivo E. Schwartz argued that there does not have to be a legal relationship between the provider and the recipient of the service.¹¹² In the case of broadcasting, this relationship is particularly important because, with the exception of pay-television, programs are usually not paid for directly by the viewers. Funding may come from advertising income, sponsors, and other sources. But even if the viewers pay for the programs in the form of a general broadcasting fee or a tax, they do not, and cannot, use all the services. Nobody watches every program. Some people do not watch television at all. Others tune in to foreign stations only.

Schwartz also draws attention to the definition of *companies* in Article 58 of the EEC Treaty. According to this provision, companies which are

110. See SCHWARTZ, *supra* note 20, at 9.

111. EEC TREATY art. 60.

112. *Id.* at 10.

not for profit-making are not covered by the various economic freedoms of the EEC Treaty. Although broadcasting associations are often organized under public law and funded by public money, they also carry out certain other activities with the purpose of creating some extra funds. Schwartz adds that the expression "non-profit-making" is a "concept of Community law within its own meaning, and not a concept of domestic law whose meaning may vary from one Member State to another."¹¹³

In other words, the concept of activities of an economic nature as employed by the EEC Treaty is very broad and has little in common with general economic notions. This also explains why the Court of Justice had little difficulty in applying the economically oriented principles of the EEC Treaty to the cases discussed above. Nonetheless, the EEC Treaty leaves open the possibility of setting these principles aside in cases in which they are outweighed by important considerations such as public health, public security, and public policy.¹¹⁴

C. *The Court of Justice on Culture*

The court, of course, recognizes these exceptions which consider the public's welfare. In *Bond van Adverteerders v. Netherlands*, the court was able to avoid the cable regulations' implications when it stated that the Dutch government had less restrictive and non-discriminatory means of achieving its objectives of pluralism and non-commerciality. In *Commission v. Netherlands*,¹¹⁵ the next case, however, the court was more explicit. In that case, the court dealt with the Media Act which came into force in 1988 as the successor to the 1967 Broadcasting Act, and with

113. *Id.* at 4.

114. EEC TREATY art. 1. Schwartz points out that the exceptions of Article 56(1) do not create a condition precedent to the acquisition of a right to supply a service, but the possibility of imposing restrictions on rights deriving directly from the Treaty in individual cases in which there is sufficient justification. *Id.* at 16.

115. Case 353/89, *Commission v. Netherlands*, reprinted in *Bilage*, 3 MEDIAFORUM 77 (1991) (Neth.). This case has as its companion Case 288/89 *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, reprinted in *Bilage*, 3 MEDIAFORUM 81 (1991) (Neth.). Case 288/89 was referred to the Court of Justice by the highest Dutch administrative court (the Afdeling Rechtspraak Raad van State) and dealt with an appeal filed by a local cable company against the decision of the Commissariaat voor de Media (the government agency charged with broadcasting matters) to refuse the cable operator to retransmit certain foreign programs. The opinions of the Court in both cases are identical with regard to the issue of the retransmission of programs from abroad. Case No. 353/89 also involved the provision of the Dutch Media Act obliging the broadcasting associations to use one particular institution for their production facilities.

Articles 61 and 66 of this Act in particular. It came before the Court of Justice upon the Commission's complaint that these provisions violated the freedom to provide services under Articles 59 through 66 of the EEC Treaty.

Article 66 was the revised version of the provision of the former Cable Regulations which was the subject of the debate in the Cable Regulations case. Under Article 66, Dutch cable operators were permitted to retransmit programs broadcast by foreign broadcasting organizations. These programs had to meet certain conditions, however, if they contained advertisements directed at the Dutch market. Some of these conditions pertained to the advertisements as such: no advertising on Sundays, a clear distinction between advertisements and other programs, and, advertising should not exceed five percent of the total broadcasting time. Other conditions dealt with the way in which advertising was organized: advertising must be administered by an independent legal person (i.e., not the broadcaster or the cable operator); the broadcaster may not contribute to the profits of other organizations; and he must use all the advertising income for his programs.¹¹⁶

In line with its decision in the Cable Regulations case, the Court of Justice found that the conditions of the second category violated the freedom to provide services of the EEC Treaty.¹¹⁷ The Dutch government argued these conditions were identical to those applicable to the Dutch broadcasters and that these conditions were intended to enhance its cultural policies by limiting the influence of advertisers on the programs.¹¹⁸ The court failed to see a relevant connection between these cultural policies and the conditions on the structure of the foreign broadcasting organizations.¹¹⁹

As to the first category, the European Court acknowledged that limitations on the broadcasting of advertisements may be justified by compelling reasons of general interest.¹²⁰ The court said that such limitations may be imposed to protect the consumer against too much commercial advertising, or, in the context of cultural policies, to maintain a certain quality of programs.¹²¹ The court observed, however, that the limitations only applied to the market of advertisements directed at the

116. MEDIAWET art. 1 (Neth.) (Staatsblad 1987).

117. Case 353/89, Commission v. Netherlands, *supra* note 115, at 80.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

Dutch audience. In addition, the restrictions may be lifted for Dutch language programs broadcast in Belgium and intended for the Dutch speaking public in that country.¹²²

The court concluded by saying that, although to a lesser extent, the provisions of Article 66 have the same objective as the former Cable Regulations: the protection of the income to the STER. Such an objective cannot be a justification for restricting the freedom to provide services.¹²³

D. *The Obligation to Use Facilities*

Although the European Court mentioned the cultural aspects, it again essentially avoided treating the issue in a comprehensive manner. The court went into more detail, however, when it dealt with the other issue of the case, the question of whether the EEC Treaty was violated by the preferential position the Dutch Media Act gave to the *Nederlands Omroepproduktie Bedrijf* ("NOB"). The NOB, or Netherlands Broadcasting Production Company, owns and operates the facilities used by the broadcasting associations. These facilities include not only studios, technicians, cameras, equipment for shows, plays and sitcoms, but also a movie archive, orchestras and choirs.

In the past, the broadcasters could make an almost unlimited use of the NOB's services. Under the 1987 Media Act, the production company was given independent commercial and legal status and the broadcasting organizations had to pay for its services.¹²⁴ Although the broadcasters were obliged to use the NOB's facilities, Article 61 of the Media Act provided for an increase in the extent to which they were free to hire the services of other institutions. During the proceedings, the government informed the Commission and the court that the obligation to use the NOB's services would be terminated on January 1, 1991, for television, and on January 1, 1992, for radio.¹²⁵

These provisions did not satisfy the EEC Commission, which was of the opinion that Article 61 discriminated against foreign production companies and thus infringed upon the freedom to provide services of Articles 59 through 66 of the EEC Treaty.¹²⁶ Article 61 was the second target of the Commission's complaint against the Dutch government.

122. Case 353/89, *Commission v. Netherlands*, *supra* note 115, at 80.

123. *Id.* at 80.

124. *MEDIAWET* art. 1 (Neth.) (Staatsblad 1987).

125. Case 353/89, *Commission v. Netherlands*, *supra* note 115, at 79.

126. *Id.* at 78.

The government argued that the measures were necessary to preserve the cultural achievements of the past.¹²⁷ An abrupt abolition of the broadcasters' obligation to use the NOB's services would lead to the latter's bankruptcy.¹²⁸ The government acknowledged that Article 61 of the Media Act was not in accordance with the freedom to provide services. But it contended that the provision was justified by compelling interests such as the maintenance of the freedom of expression of the various social, cultural, and religious trends of Dutch society.¹²⁹ By making available all of its facilities, including movie archives, orchestras, and choirs, the NOB enhanced the plurality and non-commerciality of the Dutch broadcasting system. The government believed that these interests justified even measures of an economic nature.¹³⁰

The Court of Justice responded by holding:

Seen in this light, cultural policies may certainly be a compelling reason of general interest justifying a restriction of the freedom to provide services. The maintenance of a pluralist broadcasting system, which is the objective of the Dutch policies, is connected with the freedom of expression guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, one of the fundamental rights protected by Community law.¹³¹

But the court found that the provisions protecting the NOB's position went beyond what was necessary to achieve the stated objectives. The pluralist nature of the Dutch broadcasting system would not suffer if the broadcasters would have the possibility of using other service companies.¹³² The court agreed with the Commission that there was no need for obliging the broadcasting organizations to hire the NOB's services if they really had an interest in using them.¹³³

127. *Id.* at 79.

128. *Id.*

129. *Id.*

130. Case 353/89, *Commissio*

131. *Id.* at 79 (translation by the author).

132. *Id.*

133. *Id.*

V. CULTURAL POLICIES AND THE FREEDOM TO PROVIDE SERVICES

A. Article 10 of the ECPHRFF and the EEC Treaty

The remaining question concerns what weight should be given to the court's statement regarding the extent to which cultural policies may justify measures restricting the freedom to provide services. Although the statement was made in a general sense, the court also referred to the position of the Dutch government in the underlying case. Nonetheless, in the absence of more cases one can only speculate about the kind of restrictions which, in the interest of a Member State's cultural policies, may be imposed on the freedom to provide services. The preferential treatment given to the Dutch NOB was also clearly unacceptable due to its monopolistic nature.¹³⁴

A second element in the court's opinion is the reference to Article 10 of the ECPHRFF, formally the domain of the Council of Europe and the Court of Human Rights, but adopted by the EC as a fundamental principle of EC law.¹³⁵ By connecting the maintenance of a pluralist broadcasting system to Article of the 10 ECPHRFF, the Court of Justice interpreted this provision. The question arises whether this interpretation comports with the view of the Court of Human Rights.

In the *Groppera* case, the Swiss government argued, *inter alia*, that the interference with the activities of the Groppera station was intended to protect the rights of others, "as it was designed to ensure pluralism, in particular of information, by allowing a fair allocation of frequencies internationally and nationally."¹³⁶ The Court of Human Rights, noting that the Commission of Human Rights expressed no view on this matter in its report, merely found that "the interference in issue pursued both the aims relied on, which were fully compatible with [Article 10 § 2], namely the protection of the . . . telecommunications order and the protection of the rights of others."¹³⁷

When balancing the various interests involved, the court did not elaborate on the pluralism issue in discussing the compatibility of the government's measures with the "necessary in a democratic society" test.

134. *Id.* at 79.

135. Article 10 was not only adopted by the Court but also by the Commission and the Committee of Ministers. See Council Directive 89/552, 1989 O.J. (L 298) 23. See also SCHWARTZ, *supra* note 20, at 18.

136. *Groppera*, 173 Eur. Ct. H.R. (ser. A) at 27 (1990) (para. 69).

137. *Id.*

In other words, the Court of Human Rights seemed to favor a low-key approach to the question of whether there is a connection between general objectives such as pluralism and cultural policies, on the one hand, and Article 10 on the other hand. The court's opinion certainly does not provide much support for the position that pluralism and cultural policies will be easily accepted as grounds for restricting the freedoms listed in the first paragraph. Thus, the interpretation of Article 10 given by the Court of Justice in *EC Commission v. Netherlands* could well exceed the scope of this provision as viewed by the Court of Human Rights. Future opinions will have to clarify this point.

B. Public Broadcasting and the European Treaties

What are the consequences for the compatibility of the traditional public broadcasting systems with both the EEC Treaty and the Human Rights Convention? Given the approach of the Court of Human Rights in *Groppera* and *Autronic*, it seems that certain elements of these systems will continue to be tolerated. But the applicability of the second paragraph of Article 10 to broadcasting clearly limits national governments' ability to regulate radio and television as extensively as in the past. In any case, there is no ground for the position that the maintenance of a public broadcasting system is mandated by Article 10 of the ECPHRFF.

The same may be said of the EEC Treaty. In the 1970's and the early 1980's, the Court of Justice was still willing to accept measures protecting traditional systems and principles. However, recent case law displays a much more critical approach. This trend is indicated, not only by the cases previously discussed, but also by the so-called *Magill* opinions issued by the Court of First Instance of the EC in 1991.¹³⁸ In these cases, provisions affording a far-reaching copyright protection to English and Irish program guides were found incompatible with the EEC Treaty.

Including the *Magill* cases, a number of cases on broadcasting issues are currently pending before the Court of Justice and the Court of First

138. Case 69/89, *Radio Telefis Eireann v. Commission*, 2 CEC (CCH) 114 (Ct. First Instance 1991); Case 70/89, *British Broadcasting Corp. v. Commission*, 2 CEC (CCH) 147 (Ct. First Instance 1991); Case 76/89, *Independent Television Prod., Ltd. v. Commission*, 2 CEC (CCH) 174 (Ct. First Instance 1991). See also Brenda Sufirin, *Comment on the Magill Case*, ENT. L. REV., Mar.-Apr. 1992, at 67, 68.

Instance of the EC.¹³⁹ Several of them deal with attempts by public broadcasting systems to protect their interests against those of private organizations trying to enter the market. For example, in *Screensport v. EBU*,¹⁴⁰ a commercially operated transnational satellite television sports channel service, challenged both the exclusivity of rights to sports events acquired and sponsored by the European Broadcasting Union ("EBU") and the refusal of the EBU to grant Screensport sublicenses.

The EBU is primarily an association of public broadcasting organizations established in 1950.¹⁴¹ All members participate in an institutionalized exchange of television programs, including sports programs, via a European network ("Eurovision"), which is based on reciprocity.¹⁴² The bulk of the exchanges made under Eurovision consists of sports programs.¹⁴³ In 1988, sixteen EBU members entered into a Eurosport Consortium Agreement and subsequently began a joint venture with Sky Television, a commercial broadcasting organization registered in England.

The purpose of the joint venture was to create a European satellite television service for sports programs ("Eurosport").¹⁴⁴ Because of the close connections with the EBU and the public broadcasting organizations of the various members, Eurosport was able to reserve for itself a strong and almost exclusive position in the market of sports programs.¹⁴⁵ Outsiders such as Screensport were left with minor portions of this market. This result was even more striking since only a relatively small portion of

139. Appeals were filed against the decisions of the Court of First Instance in the *Magill* cases, which will now have to be dealt with by the Court of Justice. In addition, the Court of Justice will give opinions on an appeal against a decision of the Commission on certain broadcasting practices in Belgium, Case 211/91, *Commission v. Belgium*, 1991 O.J. (C 245) 13; on a reference made by an Italian appellate court in a case concerning the nature of the television market, Case 170/90, the *Odeon* case, 1990 O.J. (C 169) 16; and on a reference made by the highest administrative court of the Netherlands in a case on the investment of capital in the commercial broadcasting organization RTL-4 made by one of the public broadcasting associations, Case 148/91, the *Veronica* case, 1991 O.J. (C 189) 12. The Court of First Instance will give opinions on appeals against: (1) a decision of the EC Commission in *Screensport v. EBU Members*, Case 91/130, 1991 O.J. (C 153) 25, dealing with the EBU's exclusive position with regard to the broadcast of sports events; and (2) a decision of the Commission in a case dealing with the exclusiveness of movies on German television, Case 157/89, *Commission v. Nefico*, 1991 O.J. (C 14) 32.

140. 1991 O.J. (C 14) 32.

141. 1991 O.J. (L 63) 32 (para. 8).

142. *Id.* (para. 9).

143. *Id.* at 34.

144. *Id.* at 36.

145. *Id.* at 38.

the available material (about fifteen percent) was actually broadcast and Eurosport refused to issue sublicenses.¹⁴⁶

The EC Commission was of the opinion that the joint venture negatively affected the free trade between the Member States and thus constituted an infringement of Article 85(1) of the EEC Treaty.¹⁴⁷ The Commission left open the possibility that "the public mission obligations imposed by the Member States on their national broadcasting organizations render them undertakings entrusted with services of general economic interest."¹⁴⁸ But, the Commission said, "it is highly doubtful that, given the national character of these obligations, they could be interpreted as extending to transnational activities of a collective nature such as Eurosport."¹⁴⁹

The EC Commission also rejected the position taken by Eurosport that the consumers in effect benefited from its sports channel. The Commission pointed to the fact that Sky Television would probably have started its own sports channel had it not entered into the underlying cooperation with the EBU.¹⁵⁰ Finally, the Commission failed to see any technical or economic improvement as claimed by Eurosport.¹⁵¹ Eurosport filed an appeal against the Commission's decision with the Court of First Instance.¹⁵²

In another case, the Court of Justice will have to rule on various restrictions on the freedom to provide services imposed by the legislature of the Flemish community in Belgium.¹⁵³ The law of this community provides, *inter alia*, that television programs from abroad which are transmitted by cable must be in one of the languages of the broadcasting state, that prior authorization is required for the transmission by cable of programs of private broadcasting corporations from abroad, and that fifty-one percent of the capital of the commercial station of the Flemish community must be reserved to publishers of Dutch language periodicals registered in the Dutch-speaking area or in the bilingual area of Brus-

146. 1991 O.J. (L 63) 32 (para. 12).

147. *Id.* at 42.

148. *Id.* at 43.

149. *Id.*

150. *Id.* at 43.

151. 1991 O.J. (L 63) 32 (para. 71).

152. See *supra* text accompanying note 138. For a discussion on sports and information monopolies, see generally SPORT EN INFORMATIEMONOPOLIES (Willem F. Korthals Altes et al. eds., 1991).

153. 1991 O.J. (L 63) 32.

sels.¹⁵⁴ The stated purpose of these measures is the protection of the culture and the language of the Dutch-speaking part of Belgium. But the EC Commission claims that the provisions unjustifiably infringe upon the freedom to provide services of the EEC Treaty.¹⁵⁵

VI. CONCLUSION AND FINAL REMARKS

It appears that public broadcasting, as it has existed for so many years in almost every European country, is challenged in all of its major aspects: exclusivity, non-commerciality, ownership. Even measures with the stated purpose of protecting culture, pluralism, and language are under strict scrutiny of the EC Commission, which vigorously applies the economic principles of the EEC Treaty to the laws and practices of the Member States.

It goes too far to say that the institutions of the EC are at the point of prohibiting national public broadcasting systems on the basis of the Treaty. But little is left if such systems are stripped of their most characteristic features. The cases show that the freedom to provide services is a powerful tool in the demolition of traditional barriers to broadcasting freedom. At stake is not the broadcaster's right to disseminate suppressed information, but his economic ability to exploit a commercial broadcasting organization. This applies not only to the cases dealt with by the institutions of the European (Economic) Community, but also to those of the Court of Human Rights of the Council of Europe, which is more human rights oriented.

Economic principles have become the most important factor in European broadcasting. Arguments of culture, pluralism, and non-commerciality are mainly supplied by governments attempting to preserve their national public broadcasting systems. Perhaps, it is fortunate that broadcast content does not play a role in the cases and the debates, but that may still come.

154. *Id.* at 9. Notably, Belgium no longer prohibits commercial broadcasting or commercial advertising on television.

155. *Id.*

