

## FREEDOM OF EXPRESSION AND THE BROADCASTING MEDIA

### I. European Court of Human Rights' case law

Member States must ensure that the public has access through television and radio to impartial and accurate information and to a range of opinion and comment reflecting the diversity of political outlook within the country. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself. The choice of the means to achieve this aim may vary according to local conditions and falls therefore within the State's margin of appreciation. Thus, for example, while the Court has recognised that a public service broadcasting system is capable of contributing to the quality and balance of programmes, there is no obligation under Article 10 to put in place such a service, provided that some other means are used to the same end.

Where a State does decide to create a public broadcasting system, the domestic law and practice must guarantee that the system provides a pluralistic service, particularly where private stations are still too weak to offer a genuine alternative and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region.

To ensure true pluralism in the audio-visual sector it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed. A situation whereby a powerful economic or political group is permitted to obtain a position of dominance over the audio-visual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society.

In addition to its negative duty of non-interference, member States have a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism. The manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence.

#### **Failure to allocate frequencies to a licensed television broadcaster**

**Centro Europa 7 S.r.l. and Di Stefano v. Italy [GC] - no. [38433/09](#)**

**Judgment 7.6.2012 [GC]**

This case concerns an Italian TV company's inability to broadcast, despite having been granted broadcasting licence. For the Court, the authorities' failure to allocate frequencies to the applicant

<sup>1</sup> This document presents a non-exhaustive selection of the CoE instruments and of the ECHR relevant case law in the field of the audio-visual broadcasting. Its aim is to improve the awareness of the acts or omissions of the national authorities likely to amount to a hindrance of Article 10 of the Convention. This information is not a legal assessment of the alerts and should not be treated or used as such. For more information about the Platform visit [www.coe.int/fom](http://www.coe.int/fom).

company had deprived its licence of all practical purpose since the activity it authorised had been de facto impossible to be carried out for nearly ten years. The domestic legislative framework lacked clarity and precision and did not enable the applicant company to foresee with sufficient certainty when it might be allocated the frequencies in order to start broadcasting. As a result, the laws in question did not satisfy the foreseeability requirements. The authorities did not observe the deadlines set in the licence, thereby frustrating the applicant company's expectations. Accordingly, the applicant company had not been afforded sufficient guarantees against arbitrariness. This shortcoming had resulted in reduced competition in the audiovisual sector. It therefore amounted to a failure by the State to comply with its positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism.

Conclusion: violation of Article 10 (freedom of expression)

### **Accessibility and foreseeability of the domestic law regulating broadcasting**

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**Groppera Radio AG and Others v. Switzerland – [no. 10890/94](#)**

**Judgment 28.3. 1990**

This case concerns a ban on cable retransmission in Switzerland of the programmes broadcast by sound radio from Italy. The main point was whether the domestic law in force of that time was sufficiently accessible and precise to enable those interested to adapt their behavior. In the Court's view, the scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the law in issue, the field it is designed to cover and the number and status of those to whom it is addressed. In the instant case the relevant provisions of international telecommunications law were highly technical and complex; furthermore, they were primarily intended for specialists, who knew, from the information given in the Official Collection, how they could be obtained. It could therefore be expected of a business company wishing to engage in broadcasting across a frontier that it would seek to inform itself fully about the rules applicable in Switzerland, if necessary with the help of advisers. As the 1983 Ordinance and the International Telecommunication Convention had been published in full, the applicant had only to acquaint itself with the Radio Regulations, either by consulting them at the PTT's head office in Berne or by obtaining them from the International Telecommunication Union in Geneva. Therefore, it could not be said that the various instruments were lacking in the necessary clarity and precision. In short, the rules in issue were such as to enable the applicant and their advisers to regulate their conduct in the matter.

On the necessity of the ban, the Court noted that the ban on cable retransmission in Switzerland of programs broadcast by sound radio from Italy was not a form of censorship directed against the content or tendencies of the programs concerned, but a measure taken against a station operating from the other side of the border in order to circumvent the statutory telecommunications system in force in Switzerland. Therefore, the national authorities did not overstep the margin of appreciation left to them under the Convention.

Conclusion: no violation of Article 10 (freedom of expression)

### **Failure to provide reasons for successive refusals to grant a television broadcasting license**

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**Meltex Ltd and Movsesyan v. Armenia – [no. 32283/04](#)**

**Judgment 17.6.2008**

Facts: The applicant company had its licence suspended by the authorities for refusing to broadcast pro-Government material in the run-up to the 1995 presidential elections. In January 1997 the applicant company was granted a five-year broadcasting licence. In October 2000 the Government brought in new

legislation (the Television and Radio Broadcasting Act) establishing the National Television and Radio Commission (“the NTRC”), a public body composed of nine members appointed by the President of Armenia which was entrusted with the licensing and monitoring of private television and radio companies. The Act also introduced a new licensing procedure, whereby broadcasting licences were granted by the NTRC on the basis of calls for tenders. In February 2002 the NTRC announced calls for tenders for various broadcasting frequencies, including the band on which the first applicant operated. At a public hearing in April 2002 it awarded the tender to another company, without stating reasons. The applicant company subsequently made bids for seven other bands, but was unsuccessful on each occasion. Although it challenged the decisions in the courts its claims were dismissed on the grounds that the tender procedure had been carried out in accordance with domestic law.

Law: The NTRC’s refusal to grant the applicant company a broadcasting licence effectively amounted to an interference with its freedom to impart information and ideas. Although the Broadcasting Act defined the criteria on which the NTRC was to make its choice, it did not explicitly require it to give reasons, so that while the NTRC had held public hearings, it had not announced the reasons for its decisions. Consequently, neither the applicant company nor the public were aware of the basis on which the NTRC had exercised its discretion to refuse a licence. The Court noted that the Committee of Ministers’ guidelines on broadcasting regulations called for the open and transparent application of regulations governing licensing procedures and specifically recommended that all decisions taken by regulatory authorities should be duly reasoned. In the Court’s view, a procedure which did not require the licensing authority to give reasons for its decisions did not provide adequate protection against arbitrary interference by a public authority. The interference therefore failed to meet the Convention requirement of lawfulness.

Conclusion: violation of Article 10 (freedom of expression)

See, also, *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, no. [14134/02](#), 11 .10.2007 [Lack of reasoning for decisions refusing to grant a license] : violation of Article 10 (freedom of expression) and 13 (effective remedies) of the Convention

### **Refusal to grant a broadcasting license. A public audio-visual monopoly is a disproportionate interference**

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**Informationsverein Lentia and Others v. Austria - [no. 13914/88; 15041/89; 15717/89; 17207/90](#)  
Judgment 24 .11.1993**

This case concerns an impossibility to set up a radio and a television station, as under the Austrian legislation in force at the relevant time, this right was restricted to the Austrian Broadcasting Corporation, an autonomous public-law corporation.

According to the Austrian Government, only the system in force, based on the monopoly of the Austrian Broadcasting Corporation, made it possible for the authorities to guarantee the objectivity and impartiality of reporting, the diversity of opinions, balanced programming and the independence of persons and bodies responsible for programmes. The Court did not share its views. It stated that a public monopoly was the measure imposing the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need. As a result of the technical progress made over the last decades, justification for these restrictions can no longer today be found in considerations relating to the number of frequencies and channels available. Citing the practice of other countries which either issue licenses subject to specified conditions of variable content or make provision for forms of private participation in the activities of the

national corporation, the Court noted that it cannot be argued that there were no equivalent less restrictive solutions. The experience of several European States of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed by the Government, namely that the Austrian market was too small to sustain a sufficient number of stations to avoid regroupings and the constitution of "private monopolies", to be groundless.

Conclusion: violation of Article 10 of the Convention

See, for other examples of case law on refusal to grant a broadcasting license,

- *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, no. [32240/96](#), [Refusal to grant a broadcasting license because of the public monopoly] 20.10. 1997: violation of Article 10
- *Leveque v. France*, no. 35591/97, 23.11.1999 [Justified refusal to grant a broadcasting license to a local radio] : inadmissible
- *United Christian Broadcasters Ltd v. the United Kingdom*, no. 44802/98, 7.11.2000 [General ban on awarding a national radio license to a body whose objective were of a religious nature]: no violation of Article 10
- *Demuth v. Switzerland*, no. 38743/97, 5.11.2002 [Refusal to grant a broadcasting license to a company wishing to promote cars and car accessories]: non-violation of Article 10
- *Groppera Radio AG and Others v. Switzerland*, no. 10890/94, 28.3.1990 [Ban on cable retransmission in Switzerland of programs broadcast by sound radio from Italy]: no violation of Article 10

#### **Insufficient statutory guarantees of independence of public broadcaster**

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**Manole and Others v. Moldova – no. [13936/02](#)**

**Judgment 17.9.2009**

Facts – In their complaint to the Court, the applicants alleged that, while working as journalists for TMC, they had been subjected to a regime of censorship by the State. The applicants were employed by Teleradio-Moldova (TRM), a State-owned company which at the material time was the only national television and radio station in Moldova. According to the applicants, TRM had, throughout its existence, been subjected to political control. In particular, senior managers were removed and replaced by persons loyal to the Government. Only a trusted group of journalists were used for reports of a political nature, which were edited to present the ruling party in a favourable light. Journalists were reprimanded for using expressions which reflected negatively on the Soviet period or suggested cultural and linguistic links with Romania. Interviews were cut and programmes were taken off the air for similar reasons. Opposition parties were allowed only very limited opportunity to express their views. Journalists transgressing these policies were subjected to disciplinary measures and even interrogated by the police.

Law –The Court noted that there had been a significant bias by TRM towards reporting on the activities of the President and Government, with insufficient access being given to opposition parties. There was also evidence of a policy of restricting discussion or mention of certain topics considered politically sensitive or to reflect badly on the Government. For example, the Audiovisual Council had reported that it was TRM policy to prohibit the use of certain words and phrases, in particular words relating to the shared culture and language of Romania and

Moldova and human-rights violations during the Soviet era and independent data showed a consistent pattern of disproportionate airtime being given to the activities of the President and the Government.

Further, since for most of the period in question TRM had enjoyed a virtual monopoly over audiovisual broadcasting in Moldova, it had been vital from the democratic perspective that it transmit accurate and balanced news and information reflecting the full range of political opinion and debate. Having decided to create a public broadcasting system, the State had been under a strong positive obligation to guarantee a pluralistic audiovisual service by putting in place a legal framework to ensure TRM's independence from political interference and control. This, however, it had failed to do during the relevant period when one political party controlled the Parliament, the Presidency and Government. Thus, although TRM's Statute had been amended to provide that its creative and editorial activity would be protected by law from interference, no suitable structure had been put in place. The Audiovisual Council, which acted as the supervisory body, was composed of members appointed by the Parliament, the President of Moldova and the Government, with no guarantee against dismissal. TRM's management was appointed by Parliament on the proposal of the Audiovisual Council. Even after the replacement of the management board by the Observers' Council, there had been no safeguard to prevent all but one of that body's fifteen members from being appointees loyal to the ruling party.

In sum, the legislative framework had been flawed throughout, in that it did not provide sufficient safeguards against the control of TRM's senior management, and thus its editorial policy, by the political organ of the Government.

Conclusion: violation of Article 10 of the Convention

#### **General ban on paid political advertising on TV and radio**

**Animal Defenders International v. the United Kingdom - no. [48876/08](#)**

**Judgment 22.4.2013 [GC]**

The case concerns a complaint by an NGO that it had been denied the possibility to advertise on TV or radio its campaign seeking to achieve changes in law and to influence public and parliamentary opinion against the use of animals in science, commerce and leisure. The Court weighed in the balance, on the one hand, the applicant NGO's right to impart information and ideas of general interest, with, on the other hand, the authorities' desire to protect the democratic debate from distortion by powerful financial groups with advantageous access to influential media. The Court took into account the process by which the ban had been adopted and reviewed by the judicial authorities; the impact of the ban and any steps that might have been taken to moderate its effect; and what happens in other countries, particularly those where the Convention applies.

As far as the process was concerned, account was taken of the fact that the complex regulatory regime governing political broadcasting in the United Kingdom had been validated by both parliamentary and judicial bodies. There was an extensive pre-legislative review of the ban, which was enacted with cross-party support without any dissenting vote. Allowing a less restrictive prohibition could give rise to abuse and arbitrariness, such as wealthy bodies with agendas being fronted by social advocacy groups created for that precise purpose or creating a large number of similar interest groups, thereby accumulating

advertising time. Given the complex regulatory background, this form of control could lead to uncertainty, litigation, expense and delay.

As to the impact of the ban, the Court noted that the applicant had access to alternative media, both broadcast (radio and television discussion programmes of a political nature or adverts on radio and television on nonpolitical matters via a charitable arm) and non-broadcast (print media, the internet and social media, demonstrations, posters and flyers).

Finally, while there may be a trend away from broad prohibitions, there was no European consensus on how to regulate paid political advertising in broadcasting. A substantial variety of means are employed by the Contracting States to regulate political advertising, reflecting the wide differences in historical development, cultural diversity, political thought and democratic vision. That lack of consensus meant that the UK Government had more room for manoeuvre when deciding on such matters as restricting public interest debate.

Conclusion: no violation of Article 10 (freedom of expression)

See, for other examples of case law on bans to advertise on TV or radio:

- *Murphy v. Ireland*, [no. 44179/98](#), 10.7.2003 [Prohibition of the broadcast of religious advertisement]: non violation of Article 10
- *Vgt Verein gegen Tierfabriken v. Switzerland*, [no.24699/94](#), 28.6.2001 [Prohibition of national advertisement on matter of public interest] : violation of Article 10

### **General ban to broadcast live interviews with the spoke persons of organizations condoning terrorist activities**

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#### **Betty Purcell and others v. Ireland - no. [15404/89](#) Decision 16.04.1991**

This case concerns a general prohibition falling on journalists from broadcasting any interviews or recording of statements uttered by any person whom they know to be a member of one of the proscribed organizations listed in a ministerial order.

The Court noted that the purpose of those restrictions was to deny representatives of known terrorist organisations and their political supporters the possibility of using the broadcast media as a platform for advocating their cause, encouraging support for their organisations and conveying the impression of their legitimacy. Although such restrictions may cause the journalists some inconvenience in the exercise of their professional duties, they do not amount to disproportionate restrictions on their right to freedom of expression.

The Court highlighted in this regard that radio and television are media of considerable power and influence. Their impact is more immediate than that of the print media, and the possibilities for the broadcaster to correct, qualify, interpret or comment on any statement made on radio or television are limited in comparison with those available to journalists in the press. Live statements could also involve a special risk of coded messages being conveyed, a risk which even conscientious journalists cannot control within the exercise of their professional judgment. Given the limited scope of the restrictions imposed on the applicants and the overriding interests they were designed to protect, they can reasonably be considered "necessary in a democratic society".

Conclusion: manifestly ill founded

## II. Other Council of Europe relevant resources

### 1. Committee of Ministers

- [Resolution No. 1](#) on The Future of Public Service Broadcasting (1994)
- [Recommendation no. R\(96\)10 on “The Guarantee of the Independence of Public Service Broadcasting”](#) (1996)
- [Recommendation \(2000\)23 to member states on the independence and functions of regulatory authorities for the broadcasting sector](#) (2000)
- [Recommendation CM/Rec\(2007\)2 on media pluralism and diversity of media content](#) (2007)
- [Declaration](#) on the guarantee of the independence of public service broadcasting in the member states (2006)
- Recommendation [Rec\(96\)10](#) on the guarantee of the independence of public service broadcasting (1996)
- Recommendation [Rec\(2000\)23](#) on the independence and functions of regulatory authorities for the broadcasting sector (2000)
- Recommendation [Rec\(2003\)9](#) on measures to promote the democratic and social contribution of digital broadcasting (2003)
- Recommendation [Rec\(2002\)7](#) on measures to enhance the protection of the neighbouring rights of broadcasting organisations (2002)
- [Declaration](#) on the exploitation of protected radio and television productions held in the archives of broadcasting organisations (1999)
- Recommendation [Rec\(94\)13](#) on measures to promote media transparency (1994)
- Recommendation [Rec\(93\)5](#) containing principles aimed at promoting the distribution and broadcasting of audiovisual works originated in countries or regions with a low audiovisual output or a limited geographic or linguistic coverage on the European television markets (1993)
- Resolution [Res\(92\)70](#) on establishing a European Audiovisual Observatory (1992)
- Recommendation [Rec\(91\)14](#) on the legal protection of encrypted television services (1991)
- Recommendation [Rec\(91\)5](#) on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a transfrontier context (1991)
- Recommendation [Rec\(88\)1](#) on sound and audiovisual private copying (1988)
- Recommendation [Rec\(86\)3](#) on the promotion of audiovisual production in Europe (1986)
- Recommendation [Rec\(86\)2](#) on principles relating to copyright law questions in the field of television by satellite and cable (1986)
- Recommendation [Rec\(84\)22](#) on the use of satellite capacity for television and sound radio (1984)
- Recommendation [Rec\(84\)3](#) on principles on television advertising (1984)
- Resolution [Res\(74\)43](#) on press concentrations (1974)
- Resolution [Res\(70\)19](#) on educational and cultural uses of radio and television in Europe and the relations in this respect between public authorities and broadcasting organisations (1970)
- Resolution [Res\(67\)13](#) on the press and the protection of youth (1967)
- Resolution [Res\(61\)23](#) on the exchange of television programmes (1961)

### 2. Parliamentary Assembly of the Council of Europe

- [Recommendation 1878 \(2009\)](#) “The funding of public service broadcasting”
- [Recommendation 1855 \(2009\)](#) “The regulation of audiovisual media services”
- [Resolution 1636 and Recommendation 1848 \(2008\)](#) “Indicators for media in a democracy”
- [Recommendation 1641 \(2004\)](#) “Public service broadcasting”

- [Recommendation 1228 \(1994\)](#) “Cable networks and local television stations: their importance for Greater Europe”
- [Recommendation 1147 \(1991\)](#) “Parliamentary responsibility for the democratic reform of broadcasting”
- [Resolution 957 \(1991\)](#) “The situation of local radio in Europe”
- [Resolution 937 \(1990\)](#) “Telecommunications: the implications for Europe”
- [Recommendation 1098 \(1989\)](#) “East-West audiovisual co-operation”
- [Recommendation 1096 \(1989\)](#) “European Convention on Transfrontier Television”
- [Recommendation 1077 \(1988\)](#) “Access to transfrontier audiovisual media during election campaigns”
- [Recommendation 1067 \(1987\)](#) “The cultural dimension of broadcasting in Europe”
- [Recommendation 749 \(1975\)](#) “European broadcasting”
- [Recommendation 748 \(1975\)](#) “The role and management of national broadcasting”
- [Recommendation 747 \(1975\)](#) “Press concentrations”

### *3. Conventions and agreements with provisions relevant for the broadcasting media*

- [European Convention on Transfrontier Television](#) (ETS No. 132, 1989) and the [Protocol amending the European Convention on Transfrontier Television](#) (ETS No. 171, 1998)
- [European Agreement on the Protection of Television Broadcasts](#) (ETS No. 34, 1960)
- [European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories](#) (ETS No. 53, 1965)