



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

SECOND SECTION

**CASE OF TELE 1 PRIVATFERNSEHGESELLSCHAFT MBH
v. AUSTRIA**

(Application no. 32240/96)

JUDGMENT

STRASBOURG

21 September 2000

FINAL

17/01/2001

In the case of Tele 1 Privatfernsehgesellschaft mbH v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr G. BONELLO,

Mrs V. STRÁŽNICKÁ,

Mr P. LORENZEN,

Mr W. FUHRMANN,

Mr M. FISCHBACH,

Mr E. LEVITS, *judges*,

and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 25 May 1999 and on 31 August 2000,

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

PROCEDURE

1. The case originated in an application (no. 32240/96) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Tele 1 Privatfernsehgesellschaft mbH, a company with its seat in Austria (“the applicant”), on 2 July 1996.

2. The applicant was represented by Mr Thomas Höhne and Mr Thomas In der Maur, lawyers practising in Vienna (Austria). The Austrian Government (“the Government”) were represented by their Agent, Mr Franz Cede, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant alleged that the Austrian authorities’ decisions refusing it a licence to set up and operate a television transmitter in the area of Vienna violated its right to freedom of expression.

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

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

6. By a decision of 25 May 1999, the Court declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Court having decided, after consulting the parties,

that no hearing on the merits was required (Rule 59 § 2 *in fine*), the applicant replied in writing to the Government's submissions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a limited liability company with its seat in Vienna. On 30 November 1993 it applied to the Telecommunications Office (*Fernmeldebüro*, 'the Telecommunications Office') for Vienna, Lower Austria and Burgenland for a licence to set up and operate a television transmitter in the Vienna area.

9. On 1 June 1994 the Telecommunications Office dismissed the applicant's request. It referred to the Constitutional Law of 10 July 1974 guaranteeing the independence of broadcasting (*Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks*, 'the Constitutional Broadcasting Law'), which provides that broadcasting shall be authorised by federal legislation and noted that such legislation had only been enacted in respect of the Austrian Broadcasting Corporation (*Österreichischer Rundfunk*, 'the ORF') and within the field of regional radio broadcasting. However, no legislation had been adopted in respect of regional television. It followed that the authorisation could not be granted.

10. On 1 December 1994 the Federal Ministry of Public Economy and Transport (*Bundesministerium für öffentliche Wirtschaft und Verkehr*) dismissed the applicant's appeal.

11. On 14 December 1994 the applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*). Referring to the judgment by the European Court of Human Rights in the case of *Informationsverein Lentia and Others v. Austria* (of 24 November 1993, Series A no. 276), the applicant argued that the Ministry's decision was in breach of its right to freedom of expression as guaranteed by Article 10 of the Convention. In particular, it submitted that the Constitutional Broadcasting Law, if interpreted in a way compatible with Article 10, allowed everyone to broadcast freely unless restrictions were laid down by law. As no law regulating private television broadcasting had been enacted, the refusal of an authorisation to set up and operate a television transmitter lacked a legal basis. Alternatively, if one followed the approach of the Constitutional Court's judgment of 16 December 1983, namely that any broadcasting had to be explicitly authorised by federal legislation, the current legal situation was unconstitutional as the legislator had failed to enact legislation except for the ORF and private regional radio broadcasting.

12. On 5 March 1996 the Constitutional Court dismissed the applicant's complaint. Confirming its decision of 16 December 1983, it repeated that, according to the Constitutional Broadcasting Law, broadcasting had to be authorised by federal legislation. So far federal legislation had been enacted for radio and television broadcasting by the *ORF* and for terrestrial broadcasting of regional radio programs. The Broadcasting Ordinance (*Rundfunkverordnung*) contained the legal basis for passive and, following the Constitutional Court's judgment of 27 September 1995, also active cable broadcasting of radio and television programs as of 1 August 1996. However, no legislation had been enacted for terrestrial broadcasting of television programs, apart from the legislation referring to the *ORF*. As a result of this legal situation other broadcasters than the *ORF* were not allowed to organise terrestrial television broadcasting.

13. The Constitutional Court observed that, in the present case, this licensing system was directly prescribed by constitutional law and therefore not subject to review by the Constitutional Court. Moreover, the unlawfulness of terrestrial broadcasting of television programs by private broadcasters originated from the legislator's failure to enact the corresponding implementing legislation. Since this failure was comprehensive and did not only refer to specific areas or questions, the Constitutional Court had no power to review the constitutionality of the legislator's failure to enact the implementing legislation. Only the European Court of Human Rights was competent to find in a legally binding way whether or not the impossibility of terrestrial television broadcasting by stations other than the *ORF* was in breach of the Convention.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Telecommunications Law of 13 July 1949

14. According to the Telecommunications Law (*Fernmeldegesetz*) of 13 July 1949 the "right to set up and operate telecommunications installations is vested exclusively in the federal authorities (*Bund*)" (section 2 (1)). The latter may however confer on natural or legal persons the power to exercise that right in respect of specific installations (section 3 (1)). No licence is required in certain circumstances, including the setting up of an installation within the confines of a private property (section 5).

The Telecommunications Law of 13 July 1949 was annulled by the 1993 Telecommunications Act (section 48 in conjunction with section 53 (1)) with effect of 1 April 1994. According to section 49 (2) of the 1993 Telecommunications Act, the 1949 Telecommunications Law continued to apply to requests for setting up and operating telecommunications installations which were made before its entry into force.

B. The 1965 Broadcasting Ordinance

15. Section 20 (1) of the 1965 Broadcasting Ordinance provides that radio signals must be retransmitted in full to users immediately after being picked up.

Under section 24a of the Ordinance, in the amended version in force since 31 July 1993 (Official Gazette - *Bundesgesetzblatt* - no. 507/1993) the bearers of a licence to operate a shared aerial may, without having to seek further permission, send text via the cable network, using their own equipment (paragraph 1). By means of this type of teletext it is possible, *inter alia*, to impart information to the members of a community or the population of a region in the form of alphanumeric symbols, other graphical signs or pages of teletext. This is an additional service provided to subscribers.

These provisions were set aside by the Constitutional Court's judgment of 27 September 1995 (see paragraph 21 below).

C. The Constitutional Law of 10 July 1974 guaranteeing the independence of broadcasting

16. According to Article 1 of the Constitutional Broadcasting Law

"...

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

3. Broadcasting within the meaning of paragraph 1 shall be a public service. "

D. The Law of 10 July 1974 on the Austrian Broadcasting Corporation

17. The Law of 10 July 1974 on the Austrian Broadcasting Corporation (*Bundesgesetz über die Aufgaben und die Einrichtung des österreichischen Rundfunks*) established the Austrian Broadcasting Corporation with the status of an autonomous public-law corporation.

It is under a duty to provide comprehensive news coverage of major political, economic, cultural and sporting events; to this end, it has to broadcast, in compliance with the requirements of objectivity and diversity of views, in particular current affairs, news reports, commentaries and critical opinions (section 2 (1) (1)), and to do so via at least two television channels and three radio stations, one of which must be a regional station (section 3). Broadcasting time must be allocated to the political parties represented in the national parliament (section 5 (1)).

A supervisory board (*Kommission zur Wahrung des Rundfunkgesetzes*) rules on all disputes concerning the application of the above-mentioned law which fall outside the jurisdiction of an administrative authority or court (sections 25 and 27). It is composed of seventeen independent members, including nine judges, appointed for terms of four years by the President of the Republic on the proposal of the Federal Government.

E. The Constitutional Court's judgment of 16 December 1983

18. In a judgment of 16 December 1983 the Constitutional Court held that the freedom to set up and operate radio and television broadcasting stations was subject to the powers accorded to the legislature under paragraph 1 *in fine* and paragraph 2 of Article 10 of the Convention. The Constitutional Broadcasting Law had instituted a system which made all activity of this type subject to the grant of a licence by the federal legislature. This system was intended to ensure objectivity and diversity of opinions, and would be ineffective if it were possible for everybody to obtain the requisite authorisation. As matters stood, the right to broadcast was restricted to the *ORF*, as no implementing legislation had been enacted in addition to the law governing that organisation.

F. The Administrative Court's judgment of 8 July 1992

19. On 8 July 1992 the Administrative Court decided that the Constitutional Broadcasting Law of 10 July 1974 did not cover "passive" broadcasting via cable, in other words the broadcasting in their entirety by cable of programmes picked up by an aerial. Consequently, the mere fact that such programmes originated from a foreign station and were directed principally or exclusively at an Austrian audience could not constitute grounds for refusing the licence necessary for this type of operation.

G. The Regional Broadcasting Law of 9 July 1993

20. The Regional Broadcasting Law of 9 July 1993 (*Regionalradio-gesetz*), which came into force on 1 January 1994, governs the licensing of local and regional terrestrial radio stations.

It provides for the allocation of one regional radio licence for each of the *Länder* and of two such licences for Vienna and for the allocation of local radio licences as required by local demand (section 2). Any programme has to comply with the principles of objectivity and diversity of opinions (section 4).

H. The Constitutional Court's judgment of 27 September 1995

21. In a judgment of 27 September 1995 the Constitutional Court set aside with effect from 1 August 1996, a passage in the second sentence of section 20 (1) of the Broadcasting Ordinance and its section 24a, i.e. the rules limiting cable distribution to the retransmission of programmes produced by others ("passive cable broadcasting") and the transmission of text, on the ground that it was contrary to Article 10 of the Convention. In that connection the Constitutional Court referred explicitly to the judgment given by the European Court of Human Rights on 24 November 1993 in the case of Informationsverein Lentia and Others v. Austria (*loc. cit.*). Since 1 August 1996 the transmission via cable of original programmes ("active cable broadcasting") has accordingly been legal, just as passive cable broadcasting already was.

I. The 1997 Cable and Satellite Broadcasting Act

22. The 1997 Cable and Satellite Broadcasting Act (*Kabel- und Satelliten-Rundfunkgesetz*), which entered into force on 1 July 1997, provides that satellite broadcasting requires a licence by the Broadcasting Authority (section 3 (1)). Cable broadcasting has to be notified to the authority. The notification has to show that the requirements of sections 5 and 6 are complied with (section 4 (1) and (2)). Cable and satellite broadcasters have to be Austrian nationals or legal persons with seat in Austria (section 5 (1)). Certain legal persons such as public law institutions, the political parties and the *ORF* are excluded from cable and satellite broadcasting (section 5 (2)). The owners of domestic or foreign daily newspapers or weekly periodicals are also excluded from cable and satellite broadcasting (section 6 (1)). When filing a request for a satellite broadcasting licence, the applicant has to show that the requirements of sections 5 and 6 are complied with (section 8 (1)). Further, except where the programme will specialise in a particular area, the applicant has to show that it will comply with the following requirements. It has to respect the principles of objectivity and diversity of opinions and shall reflect public, cultural and economic life of the broadcasting area in an adequate way. Further, it shall give relevant groups of society as well as relevant organisations a possibility to express their opinions (section 8 (2) and section 14).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

23. The applicant complained that the refusal of a licence to set up and operate a television transmitter in the area of Vienna, violated Article 10 of the Convention, which provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

24. The Court finds - and that was not contested by the parties - that the restriction complained of amounts to an “interference” with the applicant’s exercise of its freedom to impart information and ideas. Accordingly, the question arises whether the restriction was justified under Article 10.

25. The Court recalls that the third sentence of Article 10 § 1 makes it clear that States are permitted to regulate by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects but also with regard to other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international instruments. This may lead to interferences whose aim will be legitimate under the third sentence of paragraph 1, even though they do not correspond to any of the aims set out in paragraph 2. The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2 (see the *Informationsverein Lentia and Others v. Austria* judgment of 24 November 1993, Series A no. 276, p. 14, § 32).

The Court has already held that, through the supervisory powers over the media it conferred on the authorities, the monopoly system operated in Austria was capable of contributing to the quality and balance of programmes and was consistent with the third sentence of paragraph 1 of Article 10 (see the *Informationsverein Lentia and Others* judgment, cited above, p. 15, § 33; and the *Radio ABC v. Austria* judgment of 20 October

1997, *Reports of Judgments and Decisions* 1997-VI, p. 2197-98, § 28). It remains to be ascertained whether in the instant case the system also satisfied the conditions of Article 10 § 2.

A. Whether the interference was “prescribed by law”

26. The applicant contested that the interference was “prescribed by law”, arguing that the Constitutional Broadcasting Law interpreted in conformity with Article 10 of the Convention would oblige the legislator to enact legislation relating to private terrestrial broadcasting. At the time of the contested proceedings as well as to date the impossibility of obtaining a licence for such broadcasting resulted from the inactivity of the legislator. Thus, there was a *de facto* prohibition.

27. The Government, for their part, asserted that the interference complained of had a legal basis in Article 1 (2) of the Constitutional Broadcasting Law, according to which broadcasting has to be authorised by federal legislation (see paragraph 16 above). In the field of terrestrial television broadcasting such legislation has only been enacted with regard to the *ORF*.

28. The Court agrees with the Government that the refusal to grant the applicant a broadcasting licence had a basis in domestic law, namely Article 1 (2) of the Constitutional Broadcasting Law. Further, the Court recalls that it is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law (see the *Barthold v. Germany* judgment of 25 March 1985, Series A no. 90, p. 22, § 48). In its long established case-law, the Austrian Constitutional Court, has interpreted this provision in the sense that broadcasting has to be explicitly authorised by federal legislation (see paragraph 18 above). Accordingly it held in the present case that other broadcasters than the *ORF* were not allowed to organise terrestrial broadcasting as no legislation relating to private television broadcasting had been enacted. In these circumstances, the Court finds that the interference complained of was “prescribed by law”.

B. Whether the interference pursued a legitimate aim

29. The interference served an aim which has already been held by the Court to be a legitimate one (see paragraph 25 above). This has not been contested by the parties.

C. Whether the interference was “necessary in a democratic society”

30. The parties’ argument concentrated on the question whether the interference at issue was “necessary in a democratic society”.

31. The applicant reiterated that at the time the contested decisions were given, the *ORF* still held a complete television broadcasting monopoly. As to the subsequent changes in law, which granted private broadcasters access to cable and satellite broadcasting, the applicant submitted that these alternatives were not comparable to terrestrial broadcasting in terms of viewer accessibility.

32. The applicant argued that the remaining *ORF* monopoly for terrestrial television broadcasting was not justified. Firstly, a third frequency for terrestrial broadcasting was available and could be allocated to various private regional and local broadcasters. Secondly, the programmes of the *ORF*, with the exception of its news broadcasts which were slightly more comprehensive, did not differ substantially from the programmes of German private broadcasters which are accessible via cable and satellite in Austria. The difference in the news coverage however did not justify allocating two frequencies exclusively to the *ORF*. Finally, there were alternatives which would be less restrictive than the *ORF* monopoly for terrestrial broadcasting, such as subjecting licences for private broadcasters to specified conditions or providing for private participation in the activities of the *ORF*. In sum, the remaining *ORF* monopoly on terrestrial television broadcasting was not necessary for achieving the aims set out in the Constitutional Broadcasting Law, but only served to guarantee the *ORF*'s position as a market leader.

The applicant contested the Government's argument that the current technical change from analogue to digital broadcasting justified not to allocate the third frequency at present. Following digitalisation, which allows the processing of much more data on a given number of frequencies and channels, the frequency could be used by several private broadcasters. Moreover, the *ORF* would then only need one frequency for all its programmes.

33. The Government contended that Austrian broadcasting law had undergone a gradual change since the *Informationsverein Lentia and Others* judgment and was now in conformity with Article 10 of the Convention. The remaining terrestrial broadcasting monopoly of the *ORF* was an appropriate means to achieve the aims set out in the Constitutional Broadcasting Law, in particular as the *ORF* is subject to control by the Broadcasting Commission. Due to Austria's topographic situation, there were only three frequencies available for terrestrial television broadcasting, two of which are allocated to the *ORF*. To allocate the remaining frequency to a single private broadcaster would amount to creating a private monopoly. The legislator's decision to reserve the scarce frequencies to the *ORF* while granting private broadcasters access to cable and satellite broadcasting fell within the margin of appreciation left to the Contracting State in this field.

The Government further submitted that a draft law on private television broadcasting had been presented in Parliament, allowing to allocate the third frequency to national and regional private broadcasters. However, the enactment of such legislation had been suspended due to the rapid technical development in the field of television broadcasting, namely the change from analogue to digital transmission. In any case, terrestrial television broadcasting was very cost-intensive and, thus, the short-term allocation of free frequencies to private broadcasters during the transformation period might turn out to be unprofitable.

34. The Court recalls that in assessing the need for an interference the Contracting States enjoy a margin of appreciation, but that margin goes hand in hand with European supervision, whose extent will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict because of the importance - frequently stressed by the Court - of the rights in question. The necessity for any interference must be convincingly established (see among other authorities, the *Informationsverein Lentia and Others* judgment cited above, p. 15, § 35; and the *Radio ABC* judgment cited above, p. 2198, § 30).

In order to determine whether that is so in the present case, the Court will examine each of three different periods separately.

1. *First period: from the application to the Telecommunications Office (30 November 1993) to the taking of effect of the Constitutional Court's judgment of 27 September 1995 (1 August 1996)*

35. The Court notes that during this first period there was no legal basis whereby a licence to set up and operate a television transmitter could be granted to any station other than the *ORF*. In that respect the situation of the applicant was therefore no different from that of the applicants in the *Informationsverein Lentia and Others* case mentioned above.

Accordingly, there was a breach of Article 10 during the period in question.

2. *Second period: from the taking of effect of the Constitutional Court's judgment of 27 September 1995 (1 August 1996) to the entry into force of the Cable and Satellite Broadcasting Act (1 July 1997)*

36. The Court notes that following the Constitutional Court's judgment of 27 September 1995 which took effect on 1 August 1996, private broadcasters were free to create and transmit their own programmes via

cable net without any conditions being attached, while terrestrial television broadcasting was still reserved to the *ORF*.

37. The Government's main argument was that the scarcity of frequencies resulting from Austria's topographic situation, justified reserving these frequencies to the *ORF* in order to achieve the aims set out in the Constitutional Broadcasting Law.

38. The Court has already held that as a result of the technical progress made over the last decades, justification for such far-reaching restrictions as a broadcasting monopoly of a national station can no longer be found in considerations relating to the number of frequencies and channels available (see the *Informationsverein Lentia and Others* judgment, cited above, p. 16, § 39). The question therefore arises whether giving private broadcasters access to cable broadcasting while reserving terrestrial television broadcasting to the *ORF* provided a solution - less restrictive than the former complete broadcasting monopoly of the *ORF* - which is compatible with Article 10 of the Convention.

39. The applicant contested this, arguing in particular that cable television was not comparable to terrestrial television in terms of viewer accessibility. Referring to a survey carried out by the *ORF*, it submitted that out of an estimated number of 762,000 households in Vienna which receive terrestrial television only 425,000, i.e. 56 %, receive cable television. The Government confirmed these figures. Further, the Government, referring to information obtained from the Organisation of Telecommunications and Broadcasting Enterprises, submitted that there was an estimated number of 798,000 households in Vienna having access to the cable net as cable installations are available in the building where they are located. The applicant, relying on information obtained from the leading Vienna cable net company, provided somewhat similar figures. Out of an estimated 850,000 households receiving television, about 435,000 were already connected while 415,000 which were not yet connected, had access to the cable net as cable installations were available in the building in which they are located or at least in the neighbouring building. However, the applicant pointed out that this would entail installation costs.

40. The Court notes that, despite certain discrepancies, it transpires from the above figures that almost all households receiving television in Vienna have the possibility to be connected to the cable net. In these circumstances, the Court is satisfied that, in the Vienna area, cable television broadcasting offered private broadcasters a viable alternative to terrestrial television broadcasting. Thus, the interference with the applicant's right to impart information resulting from the impossibility to obtain a licence for terrestrial broadcasting can no longer be regarded as being disproportionate to the aims pursued by the Constitutional Broadcasting Act, such as for instance guaranteeing the impartiality and objectivity of reporting and diversity of opinions through a national station.

41. The Court is not convinced by the applicant's argument that private broadcasters should rather have been given access to terrestrial broadcasting, for instance by allowing for private participation in the activities of the *ORF* or by allocating the third available frequency to regional and local private broadcasters as has been done in the field of radio broadcasting by the 1993 Regional Broadcasting Law (see paragraph 20 above). In sum, the Court finds that the situation which obtained in the period under review was compatible with Article 10 of the Convention.

Thus, there was no breach of Article 10 of the Convention during this period.

3. *Third period: since the entry into force of the Cable and Satellite Broadcasting Act (1 July 1997)*

42. The Court notes that under the Cable and Satellite Broadcasting Act which entered into force on 1 July 1997 cable broadcasting has to be notified to the competent authority, whereby the broadcaster has to show that certain conditions are complied with, while satellite broadcasting requires a licence.

However, the applicant has not notified any cable broadcasting activities nor has it submitted an application for a satellite broadcasting licence. Consequently, it is not necessary for the Court to rule on the third period, as it is not its task to rule *in abstracto* whether legislation is compatible with the Convention (see the Radio ABC judgment, cited above, p. 2200, § 37, with further references).

4. *Conclusion*

43. In conclusion, there has been a breach of Article 10 in the first period under review, while there has been no breach of this Article in the second period under review.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

45. The applicant requested a total amount of 402,219,31 Austrian Schillings (ATS) including ATS143,954,31 in respect of pecuniary damage.

It alleges that the pecuniary damage was caused by the refusal of an operating licence. The Government did not comment.

46. The Court considers that the claim for pecuniary damage is based on the assumption that the applicant would have obtained the licence it sought if Austrian legislation had been in conformity with Article 10 of the Convention. That assumption, however, is speculative, regard being had to the authorities discretion in this sphere. Accordingly, no compensation is payable under this head.

B. Costs and expenses

47. The applicant claimed ATS 258,265 as costs incurred for its legal representation in the domestic as well as in the Strasbourg proceedings. The Government did not comment.

48. Making an assessment on an equitable basis and having regard to the sums awarded in comparable cases (see the Informationsverein Lentia and Others judgment, cited above, pp. 17-18, § 47 and the Radio ABC judgment, cited above, p. 2201, § 44) awards the applicant ATS 200,000 under this head.

C. Default interest

49. According to the information available to the Court, the statutory rate of interest applicable in Austria at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention in the period from 30 November 1993 to 1 August 1996;
2. *Holds* that there has been no violation of Article 10 of the Convention in the period from 1 August 1996 to 1 July 1997;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, 200,000 (two-hundred thousand) Austrian schillings for costs and expenses;
 - (b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 21 September 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos L. ROZAKIS
President

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

C.L.R.
E.F.

CONCURRING OPINION OF JUDGE. BONELLO

Together with the majority, I found no violation of Article 10 in relation to the second period (1 August 1996 to 1 July 1997). I concur that in the present case the negative impact on freedom of expression of ORF's monopoly on terrestrial television was almost counteracted by the existence, in that period, of a viable alternative in the form of cable television. The file contains little evidence that the establishment and operation of a cable network lays a disproportionate onus on the broadcaster, or that a link-up with, and subscription to, cable broadcasting constituted a significant financial burden to the subscriber.

My view would have been considerably different were it to be demonstrated that costs to the broadcaster and the viewer are substantially more onerous for cable television than for terrestrial television. Of the constitutive elements of free circulation of ideas and information I hold the following to be among those paramount: (a) that, generally, no one shall be put to a disadvantage (financial or otherwise) to others imparting or receiving similar ideas or information; and (b) that the pernicious effects of a media monopoly can only be properly neutralised by the existence of easily accessible alternatives which weight the viewer with no heavier millstone than that imposed by the monopoly.

In conditions of equality of arms between conventional and cable television, the protection of Article 10 does not agonise unduly. I would have voted for a violation had the alternative only been available as entertainment for plutocrats.