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

SECOND SECTION

CASE OF VgT VEREIN GEGEN TIERFABRIKEN v. SWITZERLAND

(Application no. 24699/94)

JUDGMENT

STRASBOURG

28 June 2001

FINAL

28/09/2001

In the case of VgT Verein gegen Tierfabriken v. Switzerland,

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

Mr C.L. ROZAKIS, *President*,
Mr A.B. BAKA,
Mr L. WILDHABER,
Mr G. BONELLO,
Mr P. LORENZEN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr E. LEVITS, *judges*,
and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 6 April 2000 and on 7 June 2001,

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

PROCEDURE

1. The case originated in an application (no. 24699/94) against the Swiss Confederation 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 VgT Verein gegen Tierfabriken, an association registered in Switzerland ("the applicant association"), on 13 July 1994.

2. The applicant association was represented by Mr L.A. Minelli, a lawyer practising in Forch, Switzerland. The Swiss Government ("the Government") were represented by their Agent, Mr P. Boillat, Head of the International Affairs Division of the Federal Office of Justice.

3. The applicant association alleged that the refusal to broadcast a commercial had breached Article 10 of the Convention. It further complained that it had no effective remedy within the meaning of Article 13 at its disposal to complain about this refusal. The applicant association also complained of discrimination contrary to Article 14 in that the meat industry was permitted to broadcast commercials.

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.

6. By a decision of 6 April 2000 the Court declared the application partly admissible [*Note by the Registry.* The Court's decision is obtainable from the Registry].

7. The applicant association and the Government each filed observations on the merits (Rule 59 § 1). After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The aim of the applicant association is the protection of animals, with particular emphasis on animal experiments and industrial animal production.

9. As a reaction to various television commercials of the meat industry, the applicant association prepared a television commercial lasting fifty-five seconds and consisting of two scenes.

10. The first scene of the film showed a sow building a shelter for her piglets in the forest. Soft orchestrated music was played in the background, and the accompanying voice referred, *inter alia*, to the sense of family which sows had. The second scene showed a noisy hall with pigs in small pens, gnawing nervously at the iron bars. The accompanying voice stated, *inter alia*, that the rearing of pigs in such circumstances resembled concentration camps, and that the animals were pumped full of medicaments. The film concluded with the exhortation: "Eat less meat, for the sake of your health, the animals and the environment!"

11. On 3 January 1994 the applicant association, wishing this film to be broadcast in the programmes of the Swiss Radio and Television Company (*Schweizerische Radio- und Fernsehgesellschaft*), sent a videocassette to the then Commercial Television Company (AG für das Werbefernsehen, now called Publisuisse) responsible for television advertising.

12. On 10 January 1994 the Commercial Television Company informed the applicant association that it would not broadcast the commercial in view of its "clear political character". The company pointed out that an alternative solution would be a film showing the merits of a decent rearing of animals and informing viewers that they were free to enquire into the origin of the meat which they were buying.

13. By a letter of 10 January 1994 the applicant association requested a decision against which it could file an appeal. On 13 January 1994 the Commercial Television Company replied that it was not an official authority giving decisions which could be contested. Nevertheless, it would

be willing to convene a meeting to discuss other possibilities in the presence of a legal adviser.

14. By a letter of 14 January 1994 the applicant association stated that it was not prepared to accept changes to its commercial. It requested a statement of the reasons for the decision and information as to the supervisory authority with which an appeal could be filed.

15. By a letter of 24 January 1994 the Commercial Television Company declined the applicant association's requests as follows:

> "As you have refused the discussion which we have proposed, we see no reason to enter into your propositions as set out in your letters of 14 and 20 January 1994. We regret this development as it serves neither you nor us. We confirm that we cannot broadcast your commercial in the proposed form as it breaches section 14 of the Radio and Television Ordinance [*Radio- und Fernsehverordnung*] as well as our general conditions of business [*Allgemeine Geschäftsbedingungen*]. In addition, the Commercial Television Company cannot be obliged to broadcast commercials which damage its business interests and involve its editorial rights."

16. On 4 February 1994 the applicant association filed a complaint with the Independent Radio and Television Appeal Board (*Unabhängige Beschwerdeinstanz für Radio und Fernsehen*), complaining of the refusal to broadcast the commercial. The latter informed the applicant association on 10 February 1994 that it could only deal with appeals complaining about programmes which had already been broadcast, but that it would transmit the complaint to the Federal Office of Communication (*Bundesamt für Kommunikation*). The Federal Office informed the applicant association on 25 April 1994 that within the framework of the broadcasting provisions the Commercial Television Company was free to purchase commercials and choose its contractual partners as it wished. It further stated that it considered the complaint to be a disciplinary report, and that it saw no reason to take proceedings against the Swiss Radio and Television Company.

17. On 6 July 1994 the applicant association filed a complaint with the Federal Department of Transport, Communications and Energy (*Eidgenössisches Verkehrs- und Energiewirtschaftsdepartement*), which was dismissed on 22 May 1996. In its decision, it found, *inter alia*, that the Swiss Radio and Television Company was the sole institution to provide information in respect of home news (*Inlandsberichterstattung*). In respect of commercial broadcasts, however, the company was in competition with local, regional and foreign broadcasters, and the applicant association was not obliged to have its commercial broadcast over the channels of the company. Moreover, the company acted in matters of advertising as a private entity and did not fulfil a duty of public law when it broadcast commercials. The Federal Department concluded that the Swiss Radio and Television Company could not be ordered to broadcast the commercial at issue.

18. The applicant association's administrative-law appeal (*Verwaltungsgerichtsbeschwerde*), filed by a lawyer and dated 18 June 1996, was dismissed by the Federal Court (*Bundesgericht*) on 20 August 1997. The court noted, with reference to Article 13 of the Convention, that the Federal Office of Communication should have formally afforded the applicant association the opportunity to institute complaints proceedings which, if necessary, could have remedied the matter. As the case was ready for decision, the Federal Court undertook the decision itself. It then balanced the various issues at stake.

19. The judgment proceeded to explain the position of the Swiss Radio and Television Company in Swiss law. The company no longer enjoyed a monopoly and was increasingly subject to foreign competition. However, this did not alter the fact that, according to the applicable law, the Swiss Radio and Television Company continued to operate in the area of programming within the framework of public-law duties with which it was entrusted. The law itself granted it a licence for the broadcasting of national and linguistic regional programmes.

20. The Federal Court further considered that Article 55 *bis* § 3 of the Federal Constitution (*Bundesverfassung*); in the version applicable at the relevant time, ensured the independence of radio and television broadcasting as well as autonomy in programming. However, advertising fell outside the programming obligations of the Swiss Radio and Television Company, the programming activity presupposing an assessment of the informative content by an editor. Only programming activities were covered by Article 55 *bis* of the Federal Constitution and section 4 of the Federal Radio and Television Act (*Bundesgesetz über Radio und Fernsehen*). Viewers should not be influenced in their opinions by one-sided, unobjective or insufficiently varied contributions which disregarded journalistic obligations. Commercials, on the other hand, were by their very nature one-sided as they were in the interest of the advertiser, and were by definition excluded from a critical assessment. For this reason, pursuant to section 18(1) of the Federal Radio and Television Act, they had to be clearly separated from programmes and recognisable as such. Indeed, the Federal Radio and Television Act dealt with advertising and financing, rather than with programming. Furthermore, no right to broadcast a commercial could be derived from the principle of the diversity of programmes or the fact that a competitor's commercial had already been authorised. The judgment continued:

> "Until 1964 [advertising] was completely prohibited on radio and television. Subsequently, it was allowed on television, although it was subject to restrictions in the interests of an optimal implementation of programming duties and to protect other important public interests (youth, health, diversity of the press). Section 18 of the Federal Radio and Television Act today assumes in principle that advertising is admissible but subject to certain limitations. Thus, section 18(5) of the Federal Radio and Television Act prohibits religious and political advertising as well as advertising

> for alcoholic beverages, tobacco and medicaments. The Federal Council may enact further advertising prohibitions for the protection of juveniles and the environment ... On this basis, section 18 of the Federal Radio and Television Act was given a more concrete form in sections 10 et seq. of the Radio and Television Ordinance. These provisions contain no obligation whatsoever to broadcast commercials, and do not declare that advertising is a public-law duty of the broadcaster."

21. In respect of the applicant association's complaint under Article 10 of the Convention, the Federal Court found that the prohibition of political advertising laid down in section 18(5) of the Federal Radio and Television Act served various purposes:

> "It should prevent financially powerful groups from obtaining a competitive political advantage. In the interest of the democratic process it is designed to protect the formation of public opinion from undue commercial influence and to bring about a certain equality of opportunity among the different forces of society. The prohibition contributes towards the independence of the radio and television broadcasters in editorial matters, which could be endangered by powerful political advertising sponsors. According to the Swiss law on communication the press remains the most important means for paid political advertising. Already, financially powerful groups are in a position to secure themselves more space; admitting political advertising on radio and television would reinforce this tendency and substantially influence the democratic process of opinion-forming – all the more so as it is established that with its dissemination and its immediacy television will have a stronger effect on the public than the other means of communication ... Reserving political advertising to the print media secures for them a certain part of the advertising market and thereby contributes to their financing; this in turn counteracts an undesirable concentration of the press and thus indirectly contributes to the pluralistic system of media required under Article 10 of the Convention ..."

22. The Federal Court observed that the applicant association had other means of disseminating its political ideas, for instance in foreign programmes which were broadcast in Switzerland, or in the cinema and the press. The Commercial Television Company had offered the applicant association other possibilities and was also willing to convene a meeting to discuss them with it in the presence of a legal adviser.

23. In respect of the applicant association's complaint about discrimination, the Federal Court found that it was complaining of two situations which were not comparable with each other. Promotions by the meat industry were economic in nature in that they aimed at increasing turnover and were not related to animal protection. On the other hand, the applicant association's commercial, exhorting reduced meat consumption and containing shocking pictures, was directed against industrial animal production. The applicant association was frequently active in the media in order to pursue its aims. In 1992 it had filed a disciplinary complaint in this respect with the Swiss Federal Parliament. The matter became a political issue early in 1994 when the Swiss Federal Council commented on the matter.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General regulations on radio and television

24. Article 55 *bis* of the Swiss Federal Constitution, in the version applicable at the relevant time, provided:

> "1. Legislation on radio and television ... comes within the jurisdiction of the Confederation.
>
> 2. Radio and television shall contribute to cultural development and the free expression of opinions as well as to the entertainment of the audience. They shall consider the particularities of the country and the requirements of the cantons. They shall describe facts objectively and fairly reflect the variety of views.
>
> 3. Within the framework of paragraph 2, the impartiality of radio and television as well as autonomy in the creation of programmes shall be guaranteed. ..."

25. These provisions have been enshrined in Article 93 of the Federal Constitution currently in force.

26. The Federal Radio and Television Act, referring to Article 55 *bis*, in principle requires a licence to broadcast radio and television programmes. Section 26 of the Act grants the licence for national and linguistic regional programmes to the Swiss Radio and Television Company. Section 4 stipulates that the programmes shall be objective and fairly reflect the plurality of events and opinions.

27. The Swiss Radio and Television Company has transferred all aspects of the acquisition and organisation of television advertising to the Commercial Television Company (now called Publisuisse), which is a company established under private law whose activities do not depend on a licence.

B. Regulations on television advertising

28. Commercials are broadcast between programmes at various times of the day. In respect of advertising, the Federal Radio and Television Act provides as follows:

> "Section 18 Advertising
>
> 1. Advertising shall be clearly separated from the rest of the programme and shall be clearly recognisable as such. The permanent programme staff of the broadcaster shall not participate in the broadcasting of commercials ...
>
> 5. Religious and political advertising is prohibited, as is advertising for alcoholic beverages, tobacco and medicaments. To protect juveniles and the environment, the Federal Council may ban other advertisements."

29. In its message (*Botschaft*) of 28 September 1987 to the Swiss Parliament, the Federal Council explained that the prohibition of political advertising "should prevent financially powerful groups from obtaining a competitive political advantage" (*Bundesblatt* 1987, vol. III, p. 734).

30. Section 15 of the Radio and Television Ordinance provides as follows:

> "Section 15 Prohibited advertising
>
> The following shall be prohibited:
>
> (a) religious and political advertising;
>
> (b) advertising for alcoholic beverages and tobacco;
>
> (c) advertising for medicaments in respect of which public advertising is not authorised by medical law;
>
> (d) untrue or misleading advertising or advertising which constitutes unfair competition;
>
> (e) advertising which profits from the natural credulity of children or the lack of experience of youth or abuses their feelings of attachment;
>
> (f) subliminal advertising ..."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

31. The Government claimed, as they had before the Commission, that the applicant association had abused its right of application within the meaning of Article 35 § 3 of the Convention. Thus, when introducing its application it had stated that an administrative-law appeal was not open; yet at the same time it had filed precisely such an appeal with the Federal Court, which in fact led to that court's decision of 20 August 1997.

32. The Court notes that the applicant association filed its application with the Commission on 13 July 1994, complaining of the refusal to broadcast a commercial. Shortly before, on 18 June 1994, it had raised essentially the same complaint by means of an administrative-law appeal before the Federal Court, which handed down its decision on 20 August 1997.

33. The Court recalls its case-law according to which it is not excluded that supplements to an initial application may relate in particular to proof

that the applicant has complied with the conditions of Article 35 § 1 of the Convention, even if he has done so after the lodging of the application, as long as he does so before the decision on admissibility (see *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, pp. 37-38, §§ 89-93). The Court finds no reason to reconsider these issues.

34. It follows that the Government's preliminary objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant association complained that the refusal to broadcast its commercial had infringed 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."

36. The Government contested that submission.

A. Responsibility of the respondent State

37. Before the substance of the matter can be examined, the Court must consider whether responsibility can be attributed to the respondent State.

1. The parties' submissions

38. The applicant association submitted that the State is not permitted to delegate functions to private persons in such a way that fundamental rights are undermined by the resulting "privatisation". As radio and television programmes in Switzerland can be broadcast only under a licence granted by the State, the latter is obliged when drafting the law governing such licences to ensure respect for freedom of expression. This view was already considered, at the time, as part of unwritten Swiss constitutional law. The Government have not been released from the obligation to try to ensure that freedom of information is implemented in this particular area.

39. The applicant association further argued that the different legal bases governing the activities of the Swiss Radio and Television Company, on the one hand, and of the Commercial Television Company, on the other, did not

sufficiently ensure respect for its right to freedom of expression within the meaning of Article 10 of the Convention. The separation of private and public law took too little account of the fact that in certain cases freedom of expression gave a person the right to voice an opinion on social issues in the part of a television programme paid for by advertisers, that is to say, the so-called "commercial break". With reference to *Artico v. Italy*, the applicant association pointed out that the Convention was intended to guarantee, not rights that were theoretical or illusory, but rights which were practical and effective (judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33).

40. The Government submitted that Article 10 of the Convention was not applicable in the present case. The question arose whether this provision encompassed a "right to broadcast", that is, a right of access to a particular medium controlled by a third person. Even if this were to be the case, the Commercial Television Company's refusal to broadcast the commercial did not render the Swiss authorities liable. The latter exercised no supervision over the Commercial Television Company, which was a company established under and governed by private law, and they did not prevent the company from broadcasting commercials. Moreover, section 18(5) of the Federal Radio and Television Act could not serve as a basis to establish the responsibility in the present case of the Swiss authorities. Thus, the reasons given by the Company in its letter of 24 January 1994 when refusing the commercial were of a personal nature, *inter alia*, that it could not be obliged to broadcast commercials which damaged its business interests and involved its editors' rights. With reference to *Gustafsson v. Sweden* (judgment of 25 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 658, § 60), the Government considered that the present case involved relations between private associations, the Commercial Television Company and the applicant association. Even if Article 10 of the Convention were applicable, the Swiss authorities would be responsible only in respect of their positive obligations under this provision.

41. The Government further submitted that the Swiss Radio and Television Company was not exercising a public service when broadcasting advertising and could in this respect rely on the constitutionally guaranteed freedom of trade as well as of contract. This was not altered by the fact that that company had delegated the acquisition of advertising to the Commercial Television Company, although regard had to be had to international and domestic law, including the provisions on the prohibition of advertising in the Federal Radio and Television Act. Both companies were governed by private law. As a result, under private law the question that arose was whether the Swiss authorities were under any positive obligation effectively to ensure freedom of expression among private persons. Under public law the issue that arose concerned the compatibility with Article 10 of the Convention of the prohibition of advertising under section 18(5) of the Federal Radio and Television Act.

42. In respect of the public-law issue in the present case, the Government considered that the requirements under Article 10 of the Convention were fulfilled. Attention was drawn to the Federal Court's decision of 20 August 1997 according to which the applicant association could rely before it on the rights under Article 10 of the Convention, although there was no "right to broadcast". The Federal Court did indeed examine the applicant association's complaints under Article 10, *inter alia*, in the light of the Strasbourg case-law.

43. In respect of the issue under private law, the Government pointed out the leading case-law of the Federal Court according to which constitutional as well as Convention rights shall also apply "horizontally" in relations between private persons. This case-law had meanwhile been enshrined in Article 35 of the Swiss Federal Constitution currently in force. Thus, individuals' rights were guaranteed judicially and by legislation. In the present case, the Federal Court found that the matter was first to be resolved at the level of private law. In fact, the refusal of the Commercial Television Company fell to be examined by an antitrust commission which undoubtedly would have examined the "horizontal" effects of basic rights between private persons.

2. The Court's assessment

44. It is not in dispute between the parties that the Commercial Television Company is a company established under Swiss private law. The issue arises, therefore, whether the company's refusal to broadcast the applicant association's commercial fell within the respondent State's jurisdiction. In this respect, the Court notes in particular the Government's submission according to which the Commercial Television Company, when deciding whether or not to acquire advertising, was acting as a private party enjoying contractual freedom.

45. Under Article 1 of the Convention, each Contracting State "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention". As the Court stated in *Marckx v. Belgium* (judgment of 13 June 1979, Series A no. 31, pp. 14-15, § 31; see also *Young*, *James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, p. 20, § 49), in addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, "there may be positive obligations inherent" in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligation to enact domestic legislation.

46. The Court does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*.

47. Suffice it to state that in the instant case the Commercial Television Company and later the Federal Court in its decision of 20 August 1997, when examining the applicant association's request to broadcast the commercial at issue, both relied on section 18 of the Swiss Federal Radio and Television Act, which prohibits "political advertising". Domestic law, as interpreted in the last resort by the Federal Court, therefore made lawful the treatment of which the applicant association complained (see *Marckx* and *Young, James and Webster*, cited above). In effect, political speech by the applicant association was prohibited. In the circumstances of the case, the Court finds that the responsibility of the respondent State within the meaning of Article 1 of the Convention for any resultant breach of Article 10 may be engaged on this basis.

B. Whether there was an interference with the applicant association's rights under Article 10 of the Convention

48. The responsibility of the respondent State having been established, the refusal to broadcast the applicant association's commercial amounted to an "interference by public authority" in the exercise of the rights guaranteed by Article 10.

49. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It is therefore necessary to determine whether it was "prescribed by law", motivated by one or more of the legitimate aims set out in that paragraph, and "necessary in a democratic society" to achieve them.

C. Whether the interference was "prescribed by law"

50. The applicant association submitted that there was no sufficient legal basis for the interference in its rights by the Commercial Television Company. The commercial which it intended to broadcast could not be considered as "political". It merely contained pictures without any linguistic elements explaining how pigs behaved in natural surroundings and how, in contrast to this, they were kept by human beings, in cramped pens. At most, this qualified as information. The fact that such information could lead to political consequences did not make it political advertising. The primary task of information was to enlighten and to disseminate knowledge that ultimately led to the correct political decisions.

51. The Government contended that any interference with the applicant association's rights was "prescribed by law" within the meaning of Article 10 § 2 of the Convention in that it was based on section 18(5) of the Federal Radio and Television Act, the latter having been duly published and, therefore, accessible to the applicant association. While the term "political" was somewhat vague, absolute precision was unnecessary, and it

fell to the national authorities to dissipate any doubts as to the interpretation of the provisions concerned. In the present case, the Federal Court in its decision of 20 August 1997 considered that the commercial at issue, denouncing the meat industry, was not of a commercial character and in fact had to be placed in the more general framework of the applicant association's militancy in favour of the protection of animals.

52. The Court recalls its case-law according to which the expression "prescribed by the law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Amann v. Switzerland* [GC], no. 27798/95, ECHR 2000-II). However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports* 1998-II, p. 541, § 59, and *Kruslin v. France*, judgment of 24 April 1990, Series A no. 176-A, pp. 21-22, § 29).

53. In the present case, the Federal Court in its judgment of 20 August 1997 relied as a legal basis for the refusal to broadcast the applicant association's commercial on section 18(5) of the Federal Radio and Television Act prohibiting "political advertising". Section 15 of the Radio and Television Ordinance reiterates this prohibition.

54. It is not in dispute between the parties that these laws, duly published, were accessible to the applicant association. The issue arises, however, whether the rules were foreseeable as to their effects.

55. The Court reiterates that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Again, whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, for example, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, pp. 2325-26, § 35, and *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, pp. 31-32, § 66).

56. In the present case, it falls to be examined whether the term "political advertising" in section 18(5) of the Federal Radio and Television Act was formulated in a manner such as to enable the applicant association to foresee that it would serve to prohibit the broadcasting of the proposed television commercial. The latter depicted pigs in a forest as well as in pens in a noisy hall. The accompanying voice compared this situation with

concentration camps and exhorted television viewers to "eat less meat, for the sake of [their] health, the animals and the environment".

57. In the Court's opinion the commercial indubitably fell outside the regular commercial context inciting the public to purchase a particular product. Rather, with its concern for the protection of animals, expressed partly in dramatic pictures, and its exhortation to reduce meat consumption, the commercial reflected controversial opinions pertaining to modern society in general and also lying at the heart of various political debates. Indeed, as the Federal Court pointed out in its judgment of 20 August 1997 (see paragraph 23 above), the applicant association had filed a disciplinary complaint with the Swiss Federal Parliament in respect of these matters.

58. As such, the commercial could be regarded as "political" within the meaning of section 18(5) of the Federal Radio and Television Act. It was, therefore, "foreseeable" for the applicant association that its commercial would not be broadcast on these grounds. It follows that the interference was thus "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

D. Whether the interference pursued a legitimate aim

59. The applicant association further maintained that there was no legitimate aim which justified the interference with its rights.

60. The Government submitted that the refusal to broadcast the commercial at issue aimed at enabling the formation of public opinion protected from the pressures of powerful financial groups, while at the same time promoting equal opportunities for the different components of society. The refusal also secured for the press a segment of the advertising market, thus contributing towards its financial autonomy. In the Government's opinion, therefore, the measure was justified "for the protection of the ... rights of others" within the meaning of Article 10 § 2 of the Convention.

61. The Court notes the Federal Council's message to the Swiss Federal Parliament in which it was explained that the prohibition of political advertising in section 18(5) of the Swiss Radio and Television Act served to prevent financially powerful groups from obtaining a competitive political advantage. The Federal Court in its judgment of 20 August 1997 considered that the prohibition served, in addition, to ensure the independence of broadcasters, spare the political process from undue commercial influence, provide for a degree of equality of opportunity among the different forces of society and to support the press, which remained free to publish political advertisements.

62. The Court is, therefore, satisfied that the measure aimed at the "protection of the ... rights of others" within the meaning of Article 10 § 2 of the Convention.

E. Whether the interference was "necessary in a democratic society"

63. The applicant association submitted that the measure had not been proportionate, as it did not have other valid means at its disposal to broadcast the commercial at issue. The television programmes of the Swiss Radio and Television Company were the only ones to be broadcast and seen throughout Switzerland. The evening news programme and the subsequent national weather forecasts had the highest ratings, namely between 50% and 70% of all viewers. Even with the use of considerable financial resources it would not be possible to reach so many persons via the private regional channels or the foreign channels which could be received in Switzerland.

64. The Government considered that the measure was proportionate as being "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. It was not up to the Court to take the place of the national authorities; indeed, Contracting States remained free to choose the measures which they considered appropriate, and the Court could not be oblivious of the substantive or procedural features of their respective domestic laws (see *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, p. 1551, § 49). In the present case, the Federal Court in its judgment of 20 August 1997 was called upon to examine conflicting interests protected by the same basic right: namely the freedom of the applicant association to broadcast its ideas, and the freedom of the Commercial Television Company and the Swiss Radio and Television Company to communicate information. To admit the applicant association's point of view would be to grant a "right to broadcast", which right would substantially interfere with the right of the Commercial Television Company and the Swiss Radio and Television Company to decide which information they chose to bring to the attention of the public. In fact, Article 10 would then oblige a third party to broadcast information which it did not wish to. Finally, the public had to be protected from untimely interruptions in television programmes by commercials.

65. In this respect the Government pointed out the various other possibilities open to the applicant association to broadcast the information at issue, namely by means of local radio and television stations, the print media and internet. Moreover, the Commercial Television Company had offered the applicant association the possibility of discussing the conditions for broadcasting its commercials, but this had been categorically refused by the latter.

66. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such

are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions. Such exceptions must, however, be construed strictly, and the need for any restrictions must be established convincingly, particularly where the nature of the speech is political rather than commercial (see, *inter alia*, *Hertel*, cited above, pp. 2329-30, § 46, and *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

67. Under the Court's case-law, the adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

68. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see The Sunday Times *v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, pp. 28-29, § 50). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see *Hertel*, cited above).

69. It follows that the Swiss authorities had a certain margin of appreciation to decide whether there was a "pressing social need" to refuse the broadcasting of the commercial. Such a margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of advertising (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, pp. 19-20, § 33, and *Jacubowski v. Germany*, judgment of 23 June 1994, Series A no. 291-A, p. 14, § 26).

70. However, the Court has found above that the applicant association's film fell outside the regular commercial context inciting the public to purchase a particular product. Rather, it reflected controversial opinions pertaining to modern society in general (see paragraph 57 above). The Swiss authorities themselves regarded the content of the applicant association's

commercial as being "political" within the meaning of section 18(5) of the Federal Radio and Television Act. Indeed, it cannot be denied that in many European societies there was, and is, an ongoing general debate on the protection of animals and the manner in which they are reared.

71. As a result, in the present case the extent of the margin of appreciation is reduced, since what is at stake is not a given individual's purely "commercial" interests, but his participation in a debate affecting the general interest (see *Hertel*, cited above).

72. The Court will consequently examine carefully whether the measure in issue was proportionate to the aim pursued. In that regard, it must balance the applicant association's freedom of expression, on the one hand, with the reasons adduced by the Swiss authorities for the prohibition of political advertising, on the other, namely to protect public opinion from the pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity among the different forces of society; to ensure the independence of broadcasters in editorial matters from powerful sponsors; and to support the press.

73. It is true that powerful financial groups can obtain competitive advantages in the area of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely (see *Informationsverein Lentia and Others v. Austria (no. 1)*, judgment of 24 November 1993, Series A no. 276, p. 16, § 38).

74. In the present case, the contested measure, namely the prohibition of political advertising as provided in section 18(5) of the Federal Radio and Television Act, was applied only to radio and television broadcasts, and not to other media such as the press. The Federal Court explained in this respect in its judgment of 20 August 1997 that television had a stronger effect on the public on account of its dissemination and immediacy. In the Court's opinion, however, while the domestic authorities may have had valid reasons for this differential treatment, a prohibition of political advertising which applies only to certain media, and not to others, does not appear to be of a particularly pressing nature.

75. Moreover, it has not been argued that the applicant association itself constituted a powerful financial group which, with its proposed commercial, aimed at endangering the independence of the broadcaster; at unduly influencing public opinion or at endangering equality of opportunity among

the different forces of society. Indeed, rather than abusing a competitive advantage, all the applicant association intended to do with its commercial was to participate in an ongoing general debate on animal protection and the rearing of animals. The Court cannot exclude that a prohibition of "political advertising" may be compatible with the requirements of Article 10 of the Convention in certain situations. Nevertheless, the reasons must be "relevant" and "sufficient" in respect of the particular interference with the rights under Article 10. In the present case, the Federal Court, in its judgment of 20 August 1997, discussed at length the general reasons which justified a prohibition of "political advertising". In the Court's opinion, however, the domestic authorities have not demonstrated in a "relevant and sufficient" manner why the grounds generally advanced in support of the prohibition of political advertising also served to justify the interference in the particular circumstances of the applicant association's case.

76. The domestic authorities did not adduce the disturbing nature of any particular sequence, or of any particular words, of the commercial as a ground for refusing to broadcast it. It therefore mattered little that the pictures and words employed in the commercial at issue may have appeared provocative or even disagreeable.

77. In so far as the Government pointed out that there were various other possibilities to broadcast the information at issue, the Court observes that the applicant association, aiming at reaching the entire Swiss public, had no other means than the national television programmes of the Swiss Radio and Television Company at its disposal, since these programmes were the only ones broadcast throughout Switzerland. The Commercial Television Company was the sole instance responsible for the broadcasting of commercials within these national programmes. Private regional television channels and foreign television stations cannot be received throughout Switzerland.

78. The Government have also submitted that admitting the applicant association's claim would be to accept a "right to broadcast" which in turn would substantially interfere with the rights of the Commercial Television Company to communicate information. Reference was further made to the danger of untimely interruptions in television programmes by means of commercials. The Court recalls that its judgment is essentially declaratory. Its task is to determine whether the Contracting States have achieved the result called for by the Convention. Various possibilities are conceivable as regards the organisation of broadcasting television commercials; the Swiss authorities have entrusted the responsibility in respect of national programmes to one sole private company. It is not the Court's task to indicate which means a State should utilise in order to perform its obligations under the Convention (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, p. 20, § 35).

79. In the light of the foregoing, the measure in issue cannot be considered as "necessary in a democratic society". Consequently, there has been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

80. In the applicant association's submission, it had no effective remedy at its disposal to complain about the refusal to broadcast its commercial. It relied on Article 13 of the Convention, which states:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

81. The Government replied that the Federal Court as the highest domestic instance had dealt with the applicant association's complaint.

82. The Court notes that, upon the applicant association's administrative-law appeal, the Federal Court, in its decision of 20 August 1997, dealt extensively and in substance with the complaints which it raised before the Court. The applicant association therefore had at its disposal a remedy within the meaning of Article 13 of the Convention.

83. It follows that there has been no breach of Article 13 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

84. The applicant association also complained under Article 14 of the Convention, taken in conjunction with Article 10, of discrimination in that its commercial had not been broadcast, whereas the meat industry was regularly permitted to broadcast commercials. Article 14 of the Convention states:

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

85. The Government submitted that the situations complained of were not comparable. Otherwise, for every commercial praising one product, another commercial for another product would have to be broadcast. The difficulties would be even greater in the political sphere.

86. Under the Court's case-law, Article 14 safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in the other normative provisions of the Convention and its Protocols (see The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 43, § 70).

87. In the present case, the Court notes the decision of the Federal Court of 20 August 1997 according to which promotions of the meat industry were economic in nature in that they aimed at increasing turnover, whereas the applicant association's commercial, exhorting reduced meat consumption, was directed against industrial animal production and related to animal protection.

88. As a result, the applicant association and the meat industry cannot be considered to be "placed in comparable situations" as their commercials differed in their aims.

89. There has thus been no violation of Article 14 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. 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. Costs and expenses

91. Under this head the applicant association claimed a total of 22,694.80 Swiss francs (CHF), namely CHF 9,957.60, for the lawyer's costs incurred in the domestic proceedings and CHF 9,371.20 for the lawyer's costs in the Strasbourg proceedings, as well as CHF 3,366 for the costs of the domestic proceedings. If the Government were to dispute these amounts, the applicant association requested the Court to find that the matter was not yet ready for decision. This would enable the applicant association to institute proceedings and to claim these amounts before the domestic courts.

92. The Government considered that the amounts claimed by the applicant association were reasonable. In respect of the lawyer's costs in the Strasbourg proceedings, the Government nevertheless recalled that in its admissibility decision of 6 April 2000 the Court declared the applicant association's complaint under Article 6 § 1 of the Convention inadmissible. As a result, the Government considered the sum of CHF 20,000 adequate for the costs and expenses incurred by the applicant association.

93. The Court is of the opinion that the matter is ready for decision. In accordance with its case-law it will consider whether the costs and expenses claimed were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

94. The Court agrees with the Government that the award of costs and expenses should take into account the fact that part of the applicant association's complaints was declared inadmissible. On this basis, the Court finds the sum of CHF 20,000 reasonable, and awards it to the applicant association.

B. Default interest

95. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there has been no violation of Article 13 of the Convention;

4. *Holds* that there has been no violation of Article 14 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant association, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, for costs and expenses, CHF 20,000 (twenty thousand Swiss francs);
   (b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English, and notified in writing on 28 June 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH
Registrar

Christos ROZAKIS
President