[TRANSLATION-EXTRACTS]

...

THE FACTS

1. The first applicant, the national radio broadcaster Radio France, is a company incorporated under French law whose registered office is in Paris. The other two applicants, Mr Michel Boyon ("the second applicant") and Mr Bertrand Gallicher ("the third applicant"), are French nationals born in 1946 and 1957 respectively. The three applicants were represented before the Court by Mr B. Ader, a lawyer practising in Paris, and Mr A. de Chaisemartin, a barrister at the *Conseil d'Etat* and the Court of Cassation.

The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. In its issue no. 1272, dated 1 February 1997, the weekly magazine *Le Point* published an "investigation" headlined "Vichy: Around the Papon Case". Several pages focused on Mr Michel Junot, under the headline "1942-1943 Revelations: Michel Junot, deputy to mayor Jacques Chirac on the Paris City Council from 1977 to 1995, was Deputy Prefect at Pithiviers in 1942 and 1943. In that capacity, he was responsible for maintaining order in the two internment camps in his district, Pithiviers and Beaune-la-Rolande". The article included the following passages:

> "... Until now, [Michel Junot] has always maintained that the internment camps in his district, Pithiviers, and Beaune-la-Rolande some twenty kilometres away, were not under his control. His main duties were to inspect the local districts and to compile '*general and confidential information*' files on local dignitaries. The Pithiviers camp? '*it was not under my jurisdiction. I never set foot in it*' he told *L' Express* magazine in 1990.
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> An outright denial which is, however, inconsistent with several documents not previously published which *Le Point* has managed to obtain. Documents which clarify his field of activity.
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> ... when he was appointed Deputy Prefect at Pithiviers on 9 June 1942 ... the camps at Pithiviers and Beaune-la-Rolande, originally intended for German prisoners of war, were already being used as internment camps prior to their inmates being deported, the first having left on 8 May 1942.

Michel Junot, who was to remain in office for exactly a year to the day, took up his post in Pithiviers on 24 August 1942, that is, less than a month before the departure, on 20 September 1942, of a fresh transport of Jewish deportees.

On that day a thousand detainees arrested during house-to-house searches in the Paris region, including 163 children under 18, were put on transport no. 35 and shipped off to Auschwitz via Drancy, the camp to the north of Paris.

On the eve of their departure, Michel Junot informed the Prefect of his concerns about maintaining order. '*I hereby inform you that I have just been notified of the entrainment of 1,000 Jews from the Pithiviers camp tomorrow from 5 p.m. onwards at Pithiviers railway station, and that all the gendarmes in my district apart from one officer per squad are therefore required to assist with the entrainment ...*'. ...

Two days later, on 2 September, Junot did not hide his satisfaction when sending the Prefect the following report: '*The day of 20 September 1942 went very smoothly throughout my district. The limited police presence planned for the afternoon of 20 September could not be deployed ... because all the gendarmes in the area, except for one officer per squad, were required for the entrainment of the Jewish detainees of the Pithiviers camp, whose departure I was suddenly notified of on 19 September at 3 p.m. The entrainment was to take place between 4 and 7 p.m. at Pithiviers station at the far end of the avenue de la République where the Communists had called on ... the inhabitants of Pithiviers to demonstrate at 6.30 p.m., and I was concerned that some incidents might occur which could disrupt an orderly departure. But nothing of the sort happened and the town remained perfectly calm.*' ...

Then, in a '*monthly report*' drafted eight days later for his superiors, he scrupulously went over the events again.

On 30 September 1942 he reported in detail on the situation in the two '*internment camps'*, as he headed the third paragraph of his report. '*The Beaune-la-Rolande camp, which has been empty since the end of August, has been cleaned*', Junot stated. '*The conditions there are now excellent. Two transports of Jews passed through and spent twenty-four hours there before leaving for Drancy. There are only about twenty detainees left at the camp, doing maintenance work.*'

Michel Junot went on: '*The Pithiviers camp has been occupied since the end of August by 1,800 Jewish internees of all categories, French and foreign, men, women and children, some arrested during the August and December 1941 round-ups, others for having infringed the regulations of the occupying forces (demarcation line, wearing the star of David, etc.). All of them, except those married to Aryans and a few mothers of young children, were placed on trains bound for Germany on 20 September. Finally the last internees left Pithiviers in the evening of the 24th for Beaune-la-Rolande so as to clear the camp, which was due to receive Communist internees. In fact this last Jewish transport spent only twenty-four hours in Beaune before being sent on to Drancy on the orders of the occupying forces.*'

Drancy was the last stop in France before they were deported to Germany and the final solution: their physical destruction. ...

On reading this dry civil servant's prose, the Acting Prefect of the Loiret, Jacques Marti-Sane, expressed his satisfaction in writing. He was pleased with the orderliness which had prevailed during the entrainment of the deportees, who until then had been

crammed into huts surrounded by barbed wire and picked out by searchlight beams from the watchtowers.

In an internal memorandum dated 1 October 1942 – another document not previously published – the Acting Prefect informed the head of the first division of the prefecture, who was responsible for organisation and surveillance: '*The Pithiviers Deputy Prefect may be called upon to intervene in the matter of the camps in an emergency and on my express instructions. In any event, in his capacity as the government representative in Pithiviers, he has the right to monitor the proper functioning of the camps. Accordingly, it seems to me essential that all instructions sent to the camp commander should be copied to the Pithiviers Deputy Prefect, so that he is not bypassed.*' ...

No fewer than seven transports left from camps in the Loiret between June and September 1942, the last one under Junot's responsibility.

In his October report, the Deputy Prefect expressed his concerns over the difficulty in maintaining order in Beaune-la-Rolande, which was full of '*French and foreign Jews who have contravened the regulations of the occupying forces (in particular, attempts to cross the demarcation line) and whom the German police have sent to the Beaune camp*'. As a conscientious official, Michel Junot went so far as to suggest: '*If there is a further rise in the number of internees, we should make plans to strengthen the security arrangements.*'

In the same report, he pointed out that Communists were gradually replacing the Jews in Pithiviers, though there were still 1,574 of the latter on 30 October 1942 compared with 1,798 on 26 September.

'*The presence of this camp inside my district means that the sub-prefecture is receiving a number of letters asking for leave to visit and even for people to be released. I have had some standard-form replies drafted explaining that I have no power to take such measures and that only the Prefect who took the internment decision has any authority in that respect. There is nothing to report from the camp, which is guarded most efficiently by a detachment of gendarmes*', he wrote. ...”

An interview with Michel Junot was also published as part of the investigation.

4. At 5 p.m. on 31 January 1997 the third applicant, who is a journalist with France Info (a radio station controlled by the applicant company), broadcast the following report:

“According to the weekly magazine *Le Point*, a former deputy mayor of Paris supervised the deportation of a thousand French and foreign Jews in 1942. Michel Junot, now aged 80, was Deputy Prefect of Pithiviers at the time. He admits that he organised the departure of a transport of deportees to Drancy. Michel Junot, whom General de Gaulle removed from office at the end of the war, claims to have been in the Resistance and subsequently rose through the ranks of the civil service. In his defence, the former deputy mayor of Paris between 1977 and 1995 maintains, like Maurice Papon, that he knew nothing of the fate of the deported Jews and says that the discreet veil of history should be drawn over the crimes of those days.”

The way in which France Info operates is for the presenter to broadcast live, with two news bulletins and two news flashes per half-hour. He then

breaks for an hour to update his information before going on air again. The above-mentioned broadcast was accordingly repeated by the third applicant and by other journalists sixty-two times between 6 p.m. on 31 January and 11.04 a.m. on 1 February, in either the same or a slightly different form. However, the broadcasts systematically specified that the report was based on an article published in *Le Point.* After 11 p.m., a number of news bulletins and flashes mentioned the fact that, “unlike Maurice Papon”, Michel Junot had never issued any orders for anyone to be arrested, interned or transferred to Drancy, sometimes adding that he was “responsible only for keeping order”.

On 1 February 1997, from 5.45 a.m. onwards, several news bulletins and flashes (broadcast at 6.45, 7, 7.15, 8, 8.15, 8.23, 8.30, 8.45 and 9.33 a.m.) mentioned that Michel Junot denied the allegations published in *Le Point*. The applicants maintained that this point was made systematically after 11.04 a.m.

5. Mr Junot brought proceedings in the Paris Criminal Court against the second applicant, who is publishing director of the applicant company (the publisher), the third applicant and the applicant company as being principal, accessory and civilly liable respectively for the offence of public defamation of a civil servant, contrary to sections 29, first paragraph, and 31, first paragraph, of the Freedom of the Press Act of 29 July 1881 (“the 1881 Act”).

In their defence, the applicants argued that the case under section 31 of the 1881 Act was inadmissible, because Mr Junot had been retrospectively stripped of his status as a civil servant at the time of the Liberation. They also contended that the prosecution's case against the second applicant was inadmissible: the disputed statement had been broadcast live and its content could not therefore be construed as having been “fixed prior to being communicated to the public” within the meaning of section 93-3 of the Audiovisual Communication Act of 29 July 1982 (“the 1982 Act”). Moreover, they submitted that the third applicant had acted in good faith. In that connection, they argued that public interest in the period of the Occupation had been revived by the news of the Papon trial; that the third applicant had been in possession of the article published in *Le Point* on the previous day along with three agency dispatches; that it had been reasonable to link the cases of Mr Junot and Mr Papon because both men had held high public office during the Occupation and had enjoyed brilliant political careers; that the use of the conditional tense and the absence of any personal comment about Mr Junot demonstrated the journalist's caution; and that France Info had reported Mr Junot's denials from 6 a.m. on 1 February onwards.

6. By a judgment of 25 November 1997, the Paris Criminal Court (Seventeenth Division) found the second and third applicants guilty as principal and accessory respectively of the offence of public defamation of a

civil servant. It fined them 20,000 French francs (FRF) and ordered them jointly to pay FRF 50,000 in damages. It also found the applicant company civilly liable and ordered by way of civil remedy that an announcement informing the public of the content of its judgment be broadcast on France Info every thirty minutes during a twenty-four hour period in the month following the date on which the judgment became final.

As to the defamatory nature of the disputed allegations, the judgment reads as follows:

> "Mr Junot is alleged ... to have personally played an active role in the deportation of Jews in his capacity as Deputy Prefect of Pithiviers. This allegation, which undoubtedly damages the honour of the civil party, is moreover aggravated by the connection made between the case of Mr Papon – who has been committed for trial before the Gironde Assize Court to answer charges that he participated in crimes against humanity – and that of Mr Junot, with the suggestion that the latter was seeking to evade responsibility for the crimes committed during that period, over which he believes that 'the discreet veil of history should be drawn.'
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> The fact that it was specified that, 'unlike Maurice Papon', Michel Junot 'did not issue any orders for anyone to be arrested, interned or transferred to Drancy' in no way detracts from the seriousness of the charge levelled at the civil party; the same can be said of the use of the conditional tense throughout the broadcasts.
>
> The allegations in question also cast doubt on Mr Junot's membership of the Resistance, which was reported as a mere 'claim' on his part, and suggested that he had been stripped of his status by General de Gaulle at the end of the war. These words also damage the civil party's honour and reputation."

The court found that Mr Junot had never lost the rank of Deputy Prefect, and that he should be considered as having been acting in that capacity in Pithiviers at the time of the facts alleged against him and accordingly to have been exercising public authority. It found that section 31 of the 1881 Act was therefore applicable.

In relation to the good faith of the third applicant, the court found as follows:

> "There being a presumption that defamatory statements are made in bad faith, it is for the defendants to prove their good faith.
>
> It should first be noted that the repetition of defamatory statements already published in another medium does not in any way provide the person who repeats them with a defence; such journalistic practice is particularly to be deprecated, because it means that a statement that has not been verified by anyone who reports it acquires the appearance of an absolute certainty.
>
> This is what happened with Mr Junot: having assumed that the enquiries made by his *Le Point* colleagues were reliable, Bertrand Gallicher simply repeated the magazine's allegations against the civil party without checking them.
>
> As evidence that he had carried out a serious investigation, Bertrand Gallicher told the Court that he had been in possession of the article published in *Le Point* on the

previous day, as well as three agency dispatches; however these dispatches, which simply quoted large sections of the magazine article, could not, without more, provide the journalist with a legal defence.

The journalist also produced the documents mentioned in *Le Point*: the Prefect's memorandum of 1 October 1942, Michel Junot's notes of 19 and 22 September 1942 and the monthly reports for September and October 1942; however, these documents did not give him grounds for asserting that Michel Junot, Pithiviers Deputy Prefect, had supervised the deportation of a thousand Jews and had admitted having organised the departure of a transport of Jewish deportees.

Neither the memorandum from the Prefect of the Loiret dated 1 October 1942 specifying that the Pithiviers Deputy Prefect must be copied in on all the instructions given to the camp commander, nor the memorandum of 19 September 1942 to the Prefect signed by Michel Junot and expressing his concerns about keeping order on 20 September 1942 in the event of Communist demonstrations because all the gendarmes in the district had been drafted in to help with the 'entrainment of 1,000 Jews', nor the report drawn up by Michel Junot on 22 September 1942 on the events of the day, which had been 'perfectly calm', prove that Michel Junot, Deputy Prefect, had played a personal part in the organisation and departure of that transport for Drancy. In fact, what these documents show is that he complained of having been notified only belatedly of the 'entrainment of 1,000 Jews', that he did not receive copies of all the instructions sent to the camp commander, a memorandum from the Prefect having been required to ensure that he was not 'bypassed' and that his concern was to maintain order outside the camps.

Michel Junot's monthly reports for September and October 1942 do not carry any more evidential weight in this respect; while the first mentions that most of the Jews in the Pithiviers camp had been 'entrained' on transports bound for Germany on 20 September 1942; while both report on the occupancy rate of the two internment camps situated in his district and thus establish his 'responsibility in principle' for the camps (using Mr Serge Klarsfeld's formula); while they keep the Prefect informed of relations with the German forces and the circumstances in which the anti-Jewish laws were being applied and in fact show that Mr Junot was performing his functions of Deputy Prefect under the Occupation with zeal and determination, and without being troubled by too many scruples, they nonetheless do not prove that he played a personal part in the deportation of Jews or that he organised the departure of a transport of Jewish deportees.

Turning to the other documents cited by the defence, namely a letter dated 19 September 1942 from the secretary-general for the police on the *Conseil d'Etat* to the Orléans Regional Prefect and the latter's reply dated 21 September 1942, and a memorandum dated 19 September 1942 from the Pithiviers Deputy Prefect to the captain of the gendarmerie and police superintendent, they cannot be regarded by the Court as having any evidential weight, since they are merely summarised on a plain sheet of paper.

In short, the documents in Bertrand Gallicher's possession did not give him grounds for alleging that Mr Junot was guilty of having participated in crimes against humanity.

Nor did these documents entitle the presenters who came on air after 0.33 a.m. on 1 February to repeat the allegation that the plaintiff had supervised the Jewish

internment camps of Pithiviers and Beaune-la-Rolande and the maintenance of order in both camps.

Lastly, the testimony of Mrs Mouchard-Zay recounting the dramatic circumstances of the various round-ups of Jewish men, women and children, the conditions in which they were transferred to and arrived in the two camps of Pithiviers and Beaune-la-Rolande, and the dramatic change in public opinion which coincided with these events, does not prove that Mr Junot played any part in the organisation of these deportations.

While being aware of the professional constraints imposed by the need to break news rapidly, which is inherent in the very nature of radio, the Court notes that the journalists, far from merely reporting raw news objectively, endorsed the interpretation adopted by some of their fellow journalists, while at the same time making a connection with the 'Papon case', no doubt with the intention of making the story more sensational.

The disputed broadcasts were therefore particularly careless and contributed to the spread of rumour by repeating defamatory allegations.

In relation to the allegation that Mr Junot was not a genuine member of the Resistance, the Court finds that the evidence produced by the defence is insufficient to cast doubt on his Resistance activities, which in any event have been vouched for by Jean-Claude Aaron, the leader of the Masséna network, by Colonel Rémy and by several people of Jewish descent who described the help he had given them during the Occupation.

For all of the above reasons, the Court is unable to accept that the third applicant acted in good faith.”

The court found the second applicant, in his capacity as publishing director, not liable for the first broadcast, which had been made live by the third applicant on 31 January at 6 p.m. It found, however, that the same statement had been repeated either in full or in condensed form by the various presenters who subsequently went on air, and considered that such “systematic repetition of the disputed statements” should be construed as “rolling broadcasting” within the meaning of section 93-3 of the 1982 Act. The court concluded as follows:

“[The second applicant], as publishing director, whose duty it is to control what is broadcast on the channel for which he is responsible, is therefore liable in law as principal for the offence of defamation.”

7. On appeal by the applicants, the Paris Court of Appeal (Eleventh Criminal Appeal Division) upheld the judgment of 25 November 1997 by a ruling of 17 June 1998.

The court found that the documents produced by the applicants “portray[ed] an official dedicated to fulfilling his functions of maintaining public order and defending the political interests of the government [and did] not support, without overstating the case, an assertion that Mr Junot [had] supervised the camps or played a role in the deportation of the Jews”.

The court noted the following in relation to the liability of the second applicant under section 93-3 of the 1982 Act:

> "... This section is intended to absolve the publishing director of an audiovisual operator of liability for live broadcasts whose contents he is unable effectively to monitor and control. But this cannot be said of a rolling news bulletin whose content may be monitored and controlled by making the necessary arrangements to that effect. It is significant in this respect that such steps were taken from the morning of 1 February onwards, when the content of the disputed statement was amended. Moreover, it would be stretching the concept of prior determination to contend that it must involve mechanical recording. Content may also be fixed by a communication method based on repetition which effectively requires it to be fixed but not necessarily by mechanical means. Therein lies the difference from 'live' broadcasting involving no repetition."

Moreover, by way of civil remedy, the court ordered the following announcement to be read out on France Info every two hours during a twenty-four hour period in the month following the date when the judgment became final:

> "By a judgment of the Paris Court of Appeal (Eleventh Division – Section A), Mr Bertrand Gallicher, journalist, and Mr Michel Boyon, publishing director of Radio France, were each fined FRF 20,000 and ordered to pay damages for having defamed Mr Michel Junot, former Deputy Prefect of Pithiviers. This judgment follows the broadcasting, on 31 January and 1 February 1997, of news bulletins falsely alleging that Mr Michel Junot had played a part in the deportation of a thousand Jews and wrongly casting doubt on his membership of the Resistance."

On the subject of the broadcasting of the above announcement, the judgment reads as follows:

> "The Court is minded to uphold the order for the broadcasting of an announcement by France Info, which seems to be a remedy proportionate to the damage suffered but which the defence considers to be contrary to the provisions of Articles 6 and 10 of the Convention ...
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> The Court does not agree, because freedom of expression under Article 10 of the Convention ... may be subject to such restrictions as may be necessary ... for the protection of the reputation of others, which is the case here. It is true that the effect of this order, as indicated by the defence, will be to reduce the 'editorial space' available to France Info, but the written press are already in the same position and it is difficult to find a justification for discriminating between the various media in that respect.
>
> Lastly, it would be wrong to deny the claimant, whose rights are equally important, the concrete remedy of broadcasting an announcement purely on the ground that the audiovisual medium is different from the traditional medium of the written press.
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> Further, nothing in the order to broadcast an announcement may be construed as infringing the right to a fair trial within the meaning of Article 6 of the Convention ..."

8. The applicants appealed on points of law. They submitted that the Court of Appeal had failed to apply the principle whereby the criminal law must be strictly interpreted, in that it had extended the scope of the

presumption raised by section 93-3 of the 1982 Act (whereby the publishing director is liable as principal where "the content of the disputed statement has been fixed prior to being communicated to the public") to cover a "communication method based on repetition". Relying on Articles 6 and 10 of the Convention, they also complained of the order in the disputed ruling to broadcast the above announcement on France Info, the essence of their argument being that "there [was] no legal basis for the publication of a judicial announcement, which [was] nothing less than punishment for a civil wrong".

By a judgment of 8 June 1999, the Court of Cassation (Criminal Division) dismissed the appeal for the following reasons, *inter alia*:

> "... In finding the publishing director liable as principal for the offence created by section 93-3 of the Audiovisual Communication Act of 29 July 1982, the Court of Appeal both for its own and for imported reasons ruled that the broadcasts containing the disputed statements had been, with the exception of the first bulletin, systematically broadcast on a rolling basis in exactly the same or in condensed form over a twenty-four hour period.
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> It further found that this type of broadcasting allowed the publishing director to exercise control over the content before it was broadcast to the public.
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> The court applied the law correctly in so ruling.
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> The content of an announcement which is broadcast on a rolling basis must properly be construed as having been fixed prior to being communicated to the public within the meaning of section 93-3 [cited above]. ...
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> ... although the criminal courts may order the publication of their judgments by way of penalty only if they are expressly authorised to do so by law, they may issue such an order by way of a remedy at the request of the civil party. Such a remedy, when ordered in a form achievable under the technical constraints of the medium in which publication is ordered, [does not breach] the Convention provisions cited in the appeal."

9. The announcement referred to in paragraph 7 above was broadcast on France Info between 31 July and 1 August 1999.

B. Relevant domestic law

1. Criminal provisions

...

11. Section 93-3 of the Audiovisual Communication Act of 29 July 1982 provides:

> "In the event of one of the offences provided for in Book IV of the Freedom of the Press Act of 29 July 1881 being committed by an audiovisual operator, the editorial

director ... shall be prosecuted as the principal offender provided that the content of the disputed statement has been fixed prior to it being communicated to the public.

...

When the ... publishing director is prosecuted, the maker of the statement shall be prosecuted as an accessory.

...”

2. *The Freedom of Communication Act (Law no. 86-1067 of 30 September 1986, as amended)*

(a) Freedom of audiovisual communication

12. Section 1 of the Freedom of Communication Act of 30 September 1986 guarantees freedom of audiovisual communication in the following terms:

“Audiovisual communication shall be free.

The exercise of this freedom may be subject only to such restrictions as are necessary for the protection of human dignity, of the freedoms and rights of others, and of pluralism in the expression of ideas and opinions, for the maintenance of public order, in the interests of national security and public service, by reason of the constraints inherent in communication media and for ensuring the development of a national audiovisual production industry.

The *Conseil supérieur de l'audiovisuel* [Higher Audiovisual Council], an independent regulator, shall secure the exercise of this freedom as provided for in this Act.

It shall ensure equal treatment; preserve the independence and impartiality of the public radio and television sector; promote free competition and the establishment of non-discriminatory relations between publishers and distributors of services; ensure the quality and diversity of programmes, the development of national audiovisual production and creation, and the defence and positive presentation of the French language and French culture. It may make proposals to improve the quality of programmes.

It may issue recommendations to publishers and distributors of audiovisual communication services relating to compliance with the principles set out in this Act. Such recommendations shall be published in the Official Gazette.”

(b) The national programme providers and Radio France

13. Section 43-11 of the Act lays down the following requirements for the national programme providers:

“[They] shall carry out public service missions in the general interest. They shall provide all sections of the public with a range of programmes and services

distinguished by diversity and pluralism, the pursuit of quality and innovation, and respect for human rights and the democratic principles defined in the Constitution.

They shall provide a varied selection of analogue and digital programmes in the fields of information, culture, education, entertainment and sport. They shall foster democratic debate, exchanges between different sections of the population, social inclusion and citizenship. They shall promote the French language and showcase the regional and local diversity of the cultural and linguistic heritage of France. They shall contribute to the development and broadcasting of intellectual and artistic works and civic, economic, social, scientific and technical knowledge, and to educating the public on audiovisual and media issues.

They shall make appropriate arrangements to facilitate access to their programmes by deaf and hearing-impaired persons.

They shall ensure the integrity, independence and pluralism of news provision and the pluralist expression of various currents of thought and opinion in accordance with the principle of equal treatment and with the recommendations of the *Conseil supérieur de l'audiovisuel.*

The public-sector audiovisual operators, in carrying out their missions, shall contribute to audiovisual activity outside France, to the prestige of the French-speaking world and to the spread of French culture and the French language throughout the world. They shall seek to develop new services to enrich or extend their programmes, and new technology for the production and broadcasting of audiovisual programmes and services.

An annual report shall be presented to Parliament on compliance with the provisions of this section."

Section 44.III of the Act specifies that, as a national programme provider, Radio France must create and schedule local and national radio programmes to be broadcast throughout the whole or any part of metropolitan France, promote regional expression through its radio stations located in every part of France, and showcase its artistic heritage and creativity, in particular through the music groups which it manages and supports.

The terms of reference of the national programme providers are prescribed by decree and define their obligations, particularly those relating to their educational, cultural and social missions, and lay down conditions for the scheduling of commercials (section 48 of the Act).

Moreover, each provider enters into a contract with the government setting out its objectives and means over a period of three to five years and determining, in accordance with the public-service missions defined in section 43-11: development priorities, including its commitments to diversity and innovation in programme creation; the projected cost of its activities for each year of the contract, and the quantitative and qualitative performance and results indicators which are to apply; its allocation of public money with an indication of how much must be dedicated as a matter

of priority to the development of programme budgets; its forecast revenue from its own resources, including that derived from advertising and sponsorship; and the economic outlook for its pay services (section 53.I of the Act).

14. Each year, when the finance bill is voted on, Parliament authorises the levying of a tax, known as the "licence fee", payable for the use of a television receiver, and approves the apportionment of the public money allocated to the licence fee account among France Télévision, Radio France, Radio France Internationale, Réseau France Outre-mer, ARTE-France and the Institut national de l'audiovisuel (section 53.III of the Act).

15. The *Conseil superieur de l'audiovisuel* (CSA) is responsible for ensuring that those companies comply with their legal and regulatory obligations, and has enforcement powers to that effect (sections 48-1 et seq. of the Act).

16. Radio France, whose capital is wholly owned by the State, is in principle subject to company law and its memorandum and articles of association are approved by decree (section 47 of the Act). Its board of directors consists of twelve members with a five-year term: two members of Parliament appointed by the National Assembly and the Senate respectively, four government representatives, four "suitably qualified candidates" appointed by the CSA and two staff representatives. One of its members is appointed Chairman by the CSA (sections 47-2 and 47-3 of the Act).

(c) "Private" radio operators

17. The "permanent" private radio companies which use terrestrial frequencies must be the holders of a licence granted by the CSA before they may begin broadcasting (section 22 of the Act). The licensing procedure consists of several stages: the CSA publishes an invitation to tender specifying the geographical coverage areas and types of radio service (five types are defined for private radio in order to ensure diversity and balance among the radio services available in each region); at the closing of the bids, the CSA decides which tenders are admissible and draws up a shortlist; on the basis of the undertakings given by the tenderers, it then lists the frequencies which may be assigned; and lastly, after entering into an agreement with each operator, it issues broadcasting licences for a maximum term of five years, renewable twice without a call for tenders for a maximum further term of five years each time.

The CSA issues these licences after "assessing the public interest in each proposal, in the light of the priority requirements of maintaining pluralism among currents of sociocultural opinion, the diversity of operators and the need to avoid any abuse of a dominant position and anti-competitive practices" (section 29 of the Act).

Under section 28 of the Act, the agreement entered into by the operator "specifies the particular rules applicable to the service, given the extent of

the service area, the share of advertising revenue, the principle of equality of treatment between the various services and the competition conditions specific to each service". It also contains the applicable codes of ethics and specific programme commitments: quotas of songs in French (in principle a minimum of 40%) and the proportion reserved for "new talent" (a minimum of 20% in principle), rules for the scheduling and maximum duration of advertising, local programming quotas (not less than three hours per day) and the daily duration of local advertising.

18. The CSA is responsible for ensuring that the programme providers comply with their legal and regulatory obligations, and has enforcement powers to that effect (sections 42 et seq. of the Act).

C. Recommendation No. R (96) 10 of the Committee of Ministers of the Council of Europe to member States

19. At the 573rd meeting of the Ministers' Deputies on 11 September 1996, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting, whose recitals reiterate that "the independence of the media, including broadcasting, is essential for the functioning of a democratic society" and stress "the importance which [the Committee of Ministers] attaches to respect for media independence, especially by governments".

The Committee of Ministers recommends that the governments of member States "include in their domestic law or in instruments governing public service broadcasting organisations provisions guaranteeing their independence" in accordance with a set of appended guidelines. The guidelines specify among other things that the legal framework governing public service broadcasters should clearly stipulate their editorial independence and institutional autonomy, especially in areas such as: the definition of programme schedules; the development and production of programmes; the editing and presentation of news and current affairs programmes; the organisation of the activities of the service; recruitment, employment and staff management within the service; the purchase, hire, sale and use of goods and services; the management of financial resources; the preparation and implementation of the budget; the negotiation, preparation and signature of legal documents relating to the operation of the service; and the representation of the service in legal proceedings and *vis-à-vis* third parties. They provide in particular that "the programming activities of public service broadcasting organisations shall not be subject to any form of censorship" and that "no *a priori* control of the activities of public service broadcasting organisations shall be exercised by external persons or bodies except in exceptional cases provided for by law".

The “guidelines” further provide, among other things, that the rules governing the status of the boards of management and supervisory bodies of public service broadcasters should be defined in a manner which avoids placing the boards at risk of any political or other interference.

They also state that the rules governing the funding of public service broadcasters should be based on the principle that member States undertake to maintain and, where necessary, establish an appropriate, secure and transparent funding framework that guarantees public service broadcasters the means necessary to accomplish their missions. They specify that, where the funding is based either entirely or in part on a regular or exceptional contribution from the State budget or on a licence fee, the decision-making power of authorities external to the public service broadcaster in question regarding its funding should not be used to exert, directly or indirectly, any influence over the editorial independence or institutional autonomy of the broadcaster.

COMPLAINTS

20. The applicants complained under Article 7 § 1 of the Convention that the scope of the criminal law had been over-extended: in finding that “the content of the disputed statement [had] been fixed prior to being communicated to the public” in circumstances where all the news bulletins and flashes in question had been broadcast live, the domestic courts had found the second and third applicants criminally liable “by analogy” with section 93-3 of the Audiovisual Communication Act (Law no. 82-652 of 29 July 1982 – “the 1982 Act”).

21. Relying on Article 6 § 2 of the Convention and the presumption of innocence, the applicants submitted that section 93-3 of the 1982 Act raised an irrebuttable presumption that the publishing director was liable: his liability was automatically and necessarily inferred from his position, leaving him unable to produce evidence in his defence such as his conduct or the conditions in which news was published or broadcast. The domestic courts had thus inferred the second applicant's criminal liability from the repetition of a statement and his position as publishing director.

Relying on Article 6 § 1 of the Convention, the applicants contended that, as interpreted by the domestic courts, the effect of section 93-3 of the 1982 Act was to undermine the equality of arms in that the publishing director's liability was automatically inferred from the mere fact that a statement had been broadcast on a rolling basis – the prosecution not being required to prove criminal intent – whereas the defendant was deprived of the possibility of establishing facts “capable of exonerating him”.

22. Relying on Articles 7 and 10 of the Convention taken together, the applicants complained that the applicant company had been ordered to broadcast an announcement by way of remedy for the damage caused to the civil party. According to them, such an order was in effect a "penalty" devised by the court without it having any basis in law; accordingly, it was contrary to the principle that there must be a legal basis for a penalty and was a "disproportionate interference with the exercise of freedom of information and expression".

23. Relying on Article 10 of the Convention, the applicants alleged that their right to the freedom to "impart information" had been infringed by the sanctions and orders imposed on them by the domestic courts.

THE LAW

1. *On the capacity of the national radio broadcaster Radio France to apply to the Court*

24. The Government contended that, because it belonged to the public sector, the national radio broadcaster Radio France did not have the requisite capacity to apply to the Court under Article 34 of the Convention.

They noted that under that Article, only natural persons, non-governmental organisations and groups of individuals could make applications. Plainly, Radio France was neither a natural person nor a group of individuals; nor was it a non-governmental organisation.

On the last point, the Government referred to *The Holy Monasteries v. Greece* (judgment of 9 December 1994, Series A no. 301-A), in which, they contended, the Court had laid down the criteria defining a non-governmental organisation for the purposes of Article 34 of the Convention. They noted the relevance in that context of the organisation's origins, constitution, mission, rights and independence.

Firstly, the Government submitted that both the existence and the memorandum and articles of association of Radio France were directly prescribed by law. It had been created under section 37 of the Audiovisual Communication Act (Law no. 82-652 of 29 July 1982 (repealed)). Its continued existence was provided for by the Freedom of Communication Act (Law no. 86-1067 of 30 September 1986), which assigned it the mission of creating and scheduling radio programmes (section 44.III), provided for its memorandum and articles of association to be approved by decree (section 47) and set out terms of reference defining its obligations (section 48). By legal convention, it followed that its merger and liquidation were also prescribed by law.

Secondly, the Government stated that section 43-11 of the 30 September 1986 Act expressly provided that Radio France carried out “public service missions in the general interest”, which were set out in that section and in section 44.III of that Act; the terms of reference – approved by decree on 13 November 1987 – included more than a hundred obligations, concerning its educational, cultural and social missions in particular. Thus, the activities of Radio France were not dictated by commercial considerations, but by the need to ensure quality, balance and pluralism in the provision of information throughout the whole of France, including those areas poorly served by the rest of the media; it was not required to be profitable. In any event, a number of the radio stations which came under its aegis only attracted low ratings; their existence was justified essentially by the pursuit of an objective in the general interest and their continued existence depended on their remaining in the public sector. The Government argued on that basis that Radio France carried out a public-service mission and was “established for public-administration purposes” within the meaning of the Court's case-law.

Thirdly, Radio France was under government supervision. That was borne out by its official name – national programme provider Radio France – and by the fact that under section 47 of the Freedom of Communication Act its capital was wholly owned by the State. Moreover, the composition of its decision-making bodies was intended to ensure that the government's interests were represented: the twelve members of its board of directors included two members of Parliament appointed by the National Assembly and the Senate, four government representatives and four suitably qualified persons appointed by the CSA, which itself consisted of nine members appointed by the President of the Republic and by the Presidents of the National Assembly and the Senate; likewise, its Chairman was appointed and removed by the CSA (sections 47-2 and 47-3 of the Freedom of Communication Act). Moreover, its policies were set by the government: section 53 of the Freedom of Communication Act required it to enter into “contracts of objectives” with the government which determined its “development priorities”; its terms of reference included programming obligations. Lastly, its activities were controlled by State authorities. Every year, Parliament determined Radio France's allocation of resources; a government report on compliance with the contracts of objectives and a document outlining the activities of the operators in which Radio France held more than half of the capital were annexed to the finance bill. Radio France was also required to submit an annual report on its compliance with its missions and terms of reference to the Minister for Communications and to the CSA.

Fourthly, Radio France was financed by taxes (section 53 of the Freedom of Communication Act) or, at any rate, by a compulsory levy having

features which, for the purpose of determining the admissibility of the application, made it not substantially different from a tax.

Fifthly, Radio France was subject to special public-service obligations going beyond ordinary law: its staff were subject to certain obligations based on the need to ensure public-service continuity (section 57.III of the Freedom of Communication Act); it was under an obligation to provide certain services free of charge (clause 101 of its terms of reference) and to help finance certain arrangements (clauses 99, 102 and 104 of its terms of reference); it could raise advertising and sponsorship revenue only within certain limits (section 48 of the Freedom of Communication Act and clause 46 of its terms of reference); the terms of reference of the national companies in which it held shares had to reflect fundamental public-service principles, notably the principles of equality and neutrality (Constitutional Council, decision no. 86-217 DC of 18 September 1986).

Lastly, the mere fact that Radio France was subject to company law (section 47 of the Freedom of Communication Act) did not give it the status of a “non-governmental organisation” within the meaning of Article 34 of the Convention. Radio France had the advantage of not being dependent on advertising revenue because it was State-financed, and the decision that it should not be governed by public law had been prompted by the concern to avoid any undue distortion of competition with private radio companies; it had not taken Radio France outside the public sector. Moreover, French law made a distinction between the structural and functional concepts of public service: thus a public body could be entrusted with activities that had nothing to do with public service while a private body could be entrusted with a public-service mission. In any event it was only by way of derogation that the Companies Act (Law of 24 July 1966) was applicable to Radio France.

25. The applicants submitted that Radio France, which operated a number of radio stations – including France Info – was a limited company registered in the commercial and companies registers and was therefore to be classified as a private-law rather than a public-law body.

Moreover, according to the applicants, in *The Holy Monasteries*, cited by the Government, the Court had held that a legal person was a “non-governmental organisation” within the meaning of Article 34 of the Convention provided that it did not exercise governmental powers, had not been established for public-administration purposes and was not under the supervision of the State. Radio France fulfilled those criteria.

In relation to the first criterion, the applicants maintained that the Government were confusing the concepts of “governmental powers” and “exercise of a public-service activity”. They submitted that, according to Professor Chapus (*Droit administratif général,* vol. 1, Montchrestien 2001, p. 469 et seq.), a leading authority on French administrative law, governmental powers could be divided into the power to act, which

amounted to a general power to take unilateral action affecting persons and assets in the general interest, and the power to protect, which was characterised by the enjoyment of a legal monopoly, immunity from seizure of assets and rules intended to protect the public purse. Radio France did not exercise any powers of that nature: it did not have the power to take unilateral decisions binding on third parties (or even the power to issue regulations governing the internal organisation of the public service which it provided), it did not enjoy a legal monopoly (it operated in a sector open to competition), it could not recover its debts independently by means of enforceable orders, and it could not enter into administrative contracts containing special clauses in its favour derogating from private law. Moreover, any disputes to which it was a party were subject to the exclusive jurisdiction of the ordinary courts rather than to the jurisdiction of the administrative courts.

The applicants further stressed that Radio France had no administrative functions. Firstly, as provided for by section 1 of the Freedom of Communication Act, the audiovisual sector was left to free competition while the public sector was subject to independence and impartiality requirements. Secondly, that Act had exempted Radio France from the duty to assist in decentralising the public broadcasting service; accordingly the Government had incorrectly stated that it was helping to extend coverage to certain geographical areas and had thus been established for public-administration purposes. Thirdly, even though they were termed "public-service missions", the missions assigned to Radio France by section 43-11 of the Freedom of Communication Act did not have any public-administration purposes. The position was not altered by the fact that Radio France's activities were governed by numerous State regulations, since private operators were subject to similar regulatory constraints. Section 28 of the Freedom of Communication Act required private radio stations to obtain a licence before they began broadcasting, and the licence was subject to the conclusion of an agreement with the CSA. Such an agreement was likely to contain a number of obligations concerning the characteristics of the programmes, the proportion of works in French, the broadcasting of educational and cultural programmes, the duration of advertising, a commitment to the French language and the prestige of the French-speaking world, increased access to programmes for deaf and hearing-impaired persons, etc.

In other words, the role of Radio France was not properly speaking to manage a public service, but only to carry out public-service missions as part of its industrial and commercial activities. Accordingly, it should be defined in terms of an ethical approach to the pursuit of its industrial and commercial activities, which was prescribed by its terms of reference and mission obligations and whose underlying philosophy was to serve its

audience of citizens under the supervision of the CSA, a regulator independent of government.

In reality, the mere fact that a legal person such as Radio France exercised its activity in a competitive sector was in itself sufficient to make it a "non-governmental organisation" within the meaning of Article 34 of the Convention: in fact, that had been the view taken by the current Agent of the Government when he was legal adviser at the *Conseil d'Etat* (see R. Abraham, *Convention européenne des Droits de l'Homme article par article,* Economica 1995, pp. 585 et seq.). In any event, Radio France had for a number of years been following commercial management practices; for example, like its competitors it had made audience ratings a key criterion of its strategy.

The applicants further submitted that the facts that the State owned the whole of its capital, that it was financed out of public money and that it was subject to parliamentary control were not sufficient to characterise Radio France as being under State control. They stressed that, contrary to what the Government argued, Radio France's policies were not determined by the State. The Freedom of Communication Act established its structural independence: under sections 47-2 and 47-3, only four of the twelve members of its board of directors were appointed by the government. Moreover, its chairman was appointed by the CSA, an independent administrative authority, and such an appointment was, according to the Constitutional Council, intended precisely to secure its independence and to help ensure the freedom of communication enshrined in Article 11 of the Declaration of the Rights of Man and the Citizen (Constitutional Council, decision no. 89-259 DC of 26 July 1989, *Recueil*, p. 66). It would be paradoxical if a private-law company whose independence from government was guaranteed by the Constitution were held to be a governmental organisation. The applicants moreover challenged the Government's assertion that Radio France was "financed by taxes, and therefore through the exercise of governmental powers". It was actually financed by the licence fee – known as the "audiovisual licence fee" – as provided for in section 53 of the Freedom of Communication Act; and, according to the consistent case-law of the Constitutional Council, the licence fee was not a tax but an extra-budgetary levy, in other words a compulsory levy falling wholly or partly outside the legal budget and tax rules for determining tax revenue, basis of assessment, collection and inspection. Such a levy was raised for economic or social purposes for the benefit of a private or public-law entity (other than the State), local authorities and their institutions. Unlike a tax, for which nothing was given in return, it was levied in return for the provision of a service.

26. The Court observes that a legal entity "claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto" may submit an application to it (see,

for example, *Agrotexim and Others v. Greece*, judgment of 24 October 1995, Series A no. 330-A, and *Société Faugyr Finance S.A. v. Luxembourg* (dec.), no. 38788/97, 23 March 2000), provided that it is a "non-governmental organisation" within the meaning of Article 34 of the Convention.

The term "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, applies not only to the central organs of the State, but also to decentralised authorities that exercise "public functions", regardless of their autonomy *vis-à-vis* the central organs; likewise it applies to local and regional authorities (see, in particular, *Rothenthurm Commune v. Switzerland*, no. 13252/87, Commission decision of 14 December 1988, Decisions and Reports (DR) 59, p. 251; *Municipal Section of Antilly v. France* (dec.), no. 45129/98, ECHR 1999-VIII; *Province of Bari, Sorrentino and Messeni Nemagna v. Italy*, no. 41877/98, Commission decision of 15 September 1998, unreported; *Ayuntamiento de Mula v. Spain* (dec.), no. 55346/00, ECHR 2001-I; and *Danderyds Kommun v. Sweden* (dec.), no. 52559/99, 7 June 2001).

The European Commission of Human Rights reached the same conclusion regarding public-law entities other than territorial authorities: the General Council of Official Economists' Associations in Spain, on the ground that it performed "official duties ... assigned ... by the Constitution and the legislation" (see *Consejo General de Colegios Oficiales de Economistas de España v. Spain*, nos. 26114/95 and 26455/95, Commission decision of 28 June 1995, DR 82-B), and the Spanish national railway company, essentially on the grounds that it was under the control of the government and enjoyed an operating monopoly (see *RENFE v. Spain*, no. 35216/97, Commission decision of 8 September 1997, DR 90-B).

Moreover, in *The Holy Monasteries* (cited above, p. 28, § 49) the Court recognised that the public-law entities concerned had the status of "non-governmental organisation" because they did not exercise "governmental powers", had not been established "for public-administration purposes" and were "completely independent" of the State.

It follows from the above-mentioned decisions and judgment that the category of "governmental organisation" includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.

Under the Freedom of Communication Act of 30 September 1986 as amended ("the Act" – see paragraphs 13-16 above), the State holds all of the capital in Radio France; its memorandum and articles of association are

approved by decree; its resources are to a large extent public; it performs "public-service missions in the general interest" (prescribed by the Act); and it is obliged to comply with terms of reference and to enter into a contract with the State setting out its objectives and means.

However, within the bounds of, *inter alia*, the public-service requirements, section 1 of the Act guarantees freedom of audiovisual communication. That means, firstly, that Radio France does not come under the aegis of the State, but is under the control of the CSA, which the Act terms an "independent authority" and which is responsible in particular for "preserv[ing] the independence and impartiality of the public radio ... sector". It is also significant that only four out of twelve members of its board of directors represent the State and that its Chairman is appointed by the CSA. Secondly, Radio France does not hold a monopoly over radio broadcasting; it operates in a sector open to competition, since the Act permits private companies and associations to use the terrestrial frequency spectrum, subject to certain conditions and under the supervision of the CSA; it is also governed essentially by company law, does not enjoy any powers beyond those conferred by ordinary law in the exercise of its activities and is subject to the jurisdiction of the ordinary rather than the administrative courts.

Thus, although Radio France has been entrusted with public-service missions and depends to a considerable extent on the State for its financing, the legislature has devised a framework which is plainly designed to guarantee its editorial independence and its institutional autonomy (that being consistent with Recommendation No. R (96) 10 of the Committee of Ministers of the Council of Europe to member States on the guarantee of the independence of public service broadcasting, whose recitals reiterate that the independence of the media is essential for the functioning of a democratic society – see paragraph 19 above). In this respect, there is little difference between Radio France and the companies operating "private" radio stations, which are themselves also subject to various legal and regulatory constraints (see paragraphs 17-18 above). Moreover, the Act, which clearly places radio broadcasting in a competitive environment, does not confer a dominant position on Radio France.

The Court accordingly concludes that the national company Radio France is a "non-governmental organisation" within the meaning of Article 34 of the Convention and that the Government's objection should be dismissed.

...

For these reasons, the Court, by a majority,

Declares admissible, without prejudging the merits of the case, the applicants' complaints under Article 7 § 1, Article 6 §§ 1 and 2, and Article 10 of the Convention.

...