AS TO THE ADMISSIBILITY OF

Application No. 12726/87
by AUTRONIC AG
against Switzerland

The European Commission of Human Rights sitting in private on 13 December 1988, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
Mr. C.L. ROZAKIS
Mrs. J. LIDDY

Mr. J. RAYMOND, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 9 January 1987 by AUTRONIC AG against Switzerland and registered on 17 February 1987 under file No. 12726/87;

Having regard to:

- the observations submitted by the respondent Government on 7 April 1988, the reply thereto submitted by the applicant company on 30 June 1988 and the Government's further submissions of 17 August 1988;

- the submissions of the parties at the hearing on 13 December 1988;

Having deliberated,

Decides as follows:
.PA:12726/87

THE FACTS

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

The applicant company, a stock corporation (Aktiengesellschaft) registered under Swiss law, has its seat at Dübendorf in Switzerland. It has specialised in the field of home electronics, inter alia in dish antennae (Parabolspiegel) of 90cm diameter for home use. Before the Commission the applicant company is represented by Mr R. Gullotti, a lawyer practising in Berne.

&-Particular circumstances of the case&S

I.

The application concerns the reception by the applicant company in Switzerland of uncoded Soviet television programmes. These programmes are prepared and broadcast (emitted) in the Soviet Union. They are beamed into space to the Soviet satellite G-Horizont from where they are transmitted to users on the ground. The satellite in question is a telecommunications satellite rather than a broadcasting satellite. It constitutes a fixed, i.e. point-to-point, radio-communications service according to Article 1 para. 22 of the International Radio Regulations, and it employs frequencies which have been allotted to the radiocommunications service (Funkdienst) via telecommunications satellite service. Telecommunications satellites transmit, apart from radio and television programmes, also telephone conversations, telex messages and other data.

While today a number of satellites exist retransmitting television broadcasts which could be received by means of dish antennae, in 1982, at the time when the present application originated, such broadcasts could only be received from the Soviet satellite G-Horizont.

II.

In spring 1982 the applicant company filed a request with the Radio and Television Department of the Board of Directors (General-direktion) of the Swiss Post, Telegraph and Telephone Services (PTT). Therein, it applied for permission to show at the Basle trade fair (Mustermesse) in 1982 the public Soviet television programme which it received by means of a private dish antenna directly from the Soviet satellite G-Horizont.

The Radio and Television Department of the Board of the PTT then wrote to the Soviet Embassy in Berne and inquired about a permission to do so. This was granted by the Soviet authorities on 21 August 1982 for the Basle trade fair.

On 7 July 1982 the applicant company again applied for such a permission for the 1982 FERA exhibition in Zurich lasting from 30 August until 6 September 1982. This exhibition concerns new developments in radio, television and electronics equipment.

The Radio and Television Department of the Board of the PTT then again asked the Soviet authorities for permission, though a reply was never received.

On 14 and 26 July and 6 August 1982 the Radio and Television Department of the Board of the PTT replied that it could not permit the reception of transmissions from the Soviet satellite without the express approval of the Soviet authorities. As long as this approval had not been granted, the PTT was bound by the Radio Regulations to prevent any such reception.

III.

The applicant company was planning to conduct further such demonstrations. It therefore applied on 1 November 1982 to the Radio and Television Department of the Board of the PTT for the issue of a declaratory order (Erlass einer Feststellungsverfügung). The applicant company requested in particular a statement according to which the reception for private use of uncoded transmissions from telecommunications satellites, such as G-Horizont, should not be made dependent on the approval by the authorities of the broadcasting State. The applicant company submitted that the use of particular frequencies did not determine whether or not a programme was to be kept confidential, and Article 23 of the Radio Regulations (see

Relevant international law, below) did not indicate which programmes were confidential.

According to the applicant company, only a licence (Konzession) under Swiss law should be required for the reception of television and radio broadcasts. Such a licence could be granted to everybody as long as the programmes were generally accessible and public and not confidential. There was also no interference with Swiss copyright law since the condition for such protection was the quality of a "work" (Werk). While individual programmes constituted such a work, an entire broadcasting programme did not.

On 13 January 1983 the Radio and Television Department of the Board of PTT dismissed the applicant company's request for a declaratory order. It issued an order that the reception at issue could not be permitted without the approval of the broadcasting State. The order informed the applicant company of the possibility of an appeal.

As to the reasons for its order, the Radio and Television Department found that signals from telecommunications satellites could only be received by specially approved ground stations. According to Article 9 para. 960 of the Radio Regulations (see Relevant international law, below) each State administration could determine for a point-to-point radiocommunication certain frequencies, provided that these emissions were not intended for direct reception by the general public.

The order of 13 January 1983 found, on the one hand, that the broadcasting satellites transmitted radio and television programmes to an undefined number of receiving stations in a defined area. They transmitted on frequencies which were expressly reserved for direct reception. On the other hand, in respect of telecommunications satellites Article 22 of the International Telecommunication Convention obliged all members States to secure the confidentiality of the transmissions. Article 23 of the Radio Regulations rendered this provision more precise. The decision of the Radio and Television Department continues:

<German>

"Somit ist für die Frage, ob eine Sendung für den unmittelbaren Empfang durch die Allgemeinheit bestimmt ist, nicht der Inhalt der übertragenen Funksendung (z.B. ein Fernsehprogramm) massgebend, sondern die Art und Weise der Uebertragung, nämlich ihre Qualifizierung als Fernmelde-verbindung. Daraus folgt, dass mittels Fernmeldesatelliten übertragene Rundfunkprogramme in einem Land nur empfangen werden dürfen, wenn die Fernmeldeverwaltung des Sendelandes ... die Fernmeldeverwaltung des Empfangslandes dazu ermächtigt. Damit wird auch den Bestimmungen betreffend das Fernmeldegeheimnis Rechnung getragen. Es ist nicht einzusehen, weshalb Fernmeldeverwaltungen bestimmte Funksendungen nicht sollten geheimhalten können, da sie doch zur Durchsetzung der Vorschriften von Fernmeldevertrag und Radioreglement verplichtet sind."

<Translation>

"For the question, therefore, whether or not a broadcast destined for the direct reception by the general public, the content of the transmitted radiocommunication (e.g. a television programme) is not relevant. Rather, the means of transmitting is important, in particular its qualification as a telecommunication. It results therefrom that radio and television programmes which have been transmitted over a telecommunications satellite can only be received in a country

if the telecommunications administration of the transmitting State ... has given its approval to the telecommunications administration of the receiving State. Thus, due consideration is taken of telecommunications confidentiality. There are no reasons why telecommunications administrations should not keep certain radiocommunications confidential since they are bound to ensure compliance with the provisions of the International Telecommunications Convention and the Radio Regulations."

IV.

The applicant company thereupon filed an appeal (Beschwerde) which was dismissed, on 20 July 1983, by the Board of Directors of the PTT. After reiterating the decision previously given by its Radio and Television Department to the applicant company, the Board first stated that it was competent to examine the appeal. It continued that the applicant company had an interest worthy of protection in having the contested order quashed within the meaning of Article 48 of the Swiss Administrative Procedure Act.

In the grounds for its decision the Board found that the protection of the information at issue could not depend, as the applicant company had suggested, on whether the transmissions were intended for the use by the general public since in the case of telecommunications satellites at the moment of transmitting it was not clear or generally known which transmissions were intended for the use of the general public. The Board also considered that Article 10 of the Convention only granted the right to receive information from generally accessible sources which the telecommunications satellite did not constitute. Moreover, it was here irrelevant that the transmissions were later intended for general use since at the time of transmission there was a duty to keep the transmitted data confidential.

V.

Against this decision the applicant filed, on 13 September 1983, an administrative law appeal (Verwaltungsgerichtsbeschwerde) to the Federal Court (Bundesgericht) in which it requested the Court to issue a declaratory order to clarify the legal situation for the future. In particular, the Court was requested to declare that the reception for private use of uncoded transmissions of telecommunications satellites intended for the general public should not depend on the approval of the emitting State.

On 7 February 1984, upon request of the Swiss PTT authorities, a member of the direction of the Soviet Gostelradio informed the Swiss PTT by telex that the broadcasts transmitted by the satellite in question were intended for Soviet television viewers and not for other countries. According to the telex, any international use of such signals would have to be resolved on an international level.

On 6 July 1984 the applicant company informed the Federal Court that it had found in a periodical, No. 48 of IRT (Information, Radio and Television), a news item according to which the Soviet telecommunications administration had declined to approve the reception of its programmes in other countries since its broadcasts were intended solely for Soviet television viewers.

During the ensuing proceedings the Federal Court decided on 9 July 1984 to ask the Board of the PTT a number of questions on the factual and legal situation of the case. The reply thereto, counting 22 pages, was submitted by the PTT General Direction on 22 August 1984. On 31 August 1984 the applicant company submitted its own

statements to the questions. On 10 June 1985 the Federal Court Rapporteur informed the applicant company that its administrative court appeal had, for different reasons (umständehalber), so far not been treated and that the applicant company could submit further statements in reply until 16 August 1985.

Meanwhile, on 26 June 1985, the Radio and Television Department of the Board of Directors of the PTT transmitted by telex the following enquiry to the Dutch Telecommunications authorities:

"... In connection with the determination of a request, we would like to know on which conditions reception of TV programmes via telecommunications satellites is permitted in the Netherlands. Please let us also know if the Soviet communications satellite G-Horizont stationar is received in your country (by cable operators)..."

On 1 July 1975 the Dutch authorities replied by telex:

"... The conditions for reception of TV programmes by cable operators in the Netherlands seem to be quite similar to those in your country. The Netherlands PTT issues licences to cable operators, separate for each particular TV programme. With such a licence the operator can install his own TVRO antenna, although it is advisable for him to consult with PTT for frequency coordination purposes in order to avoid interference from terrestrial microwaves. ... A few years ago some reception of the Ghorisont satellite did indeed take place. This was considered illegal because of the absence of agreements with the USSR program provider and satellite operator, and the cable operators were so informed. ..."

The Swiss Radio and Television Department also asked the Finnish Telecomunications authorities about reception of television programmes from satellites. On 8 July 1985 the latter replied by telex:

"... We have permission from the Telecommunications Ministry of USSR to receive as an experiment the Ghorisont signal up to 31.12.1985. Authorisation for distribution has been given in 7 cases so far."

VI.

On 10 July 1986 the Federal Court rejected the applicant company's administrative court appeal. The decision was served on 11 November 1986.

The Federal Court stated in its decision that, while the applicant company had envisaged an abstract determination of the legal situation, it could in fact only complain that it had been unable to receive the transmissions in question at FERA since only such a reception was relevant for the applicant company (kam für sie konkret in Betracht). The Court nevertheless found it unnecessary to resolve whether for this reason the applicant company's request for a declaratory order was inadmissible since it had in any event also failed to demonstrate an interest worthy of protection (schutzwürdiges Interesse).

The Federal Court observed that at that moment there was over Europe, with the exception of the Soviet G-Horizont satellite, no other satellite the emissions of which could be received by a home dish antenna. In fact, the applicant company had received signals of the Soviet satellite since it had no possibility to receive other programmes. As long as this was the case, the Court found that there was hardly a market for such antennae, and only "strange persons" (Sonderlinge) would be inclined to buy such an antenna. While a

German and a French satellite would eventually commence operation it was unclear how these means of transmission should be used, and it could not be estimated how big the interest would be in a direct reception of their programmes, and how many dish antennae would be put into use. Thus, since the applicant company had not demonstrated a direct economic interest, it had no interest worthy of protection in the issue of a declaratory order and the Federal Court therefore refused to enter into the complaint.

&-Relevant international law&S

In the domestic proceedings in which the applicant company was involved, the Swiss authorities referred to various provisions under international law, which may be summarised as follows:

Article 22 of the International Telecommunications Convention states in the version in force at the time:

"Secrecy of Telecommunications.

1. Members agree to take all possible measures, compatible with the system of telecommunication used, with a view to ensuring the secrecy of international correspondence.

2. Nevertheless, they reserve the right to communicate such correspondence to the competent authorities in order to ensure the application of their internal laws or the execution of international conventions to which they are parties."

Article 1 para. 37 of the Radio Regulations, adopted in the framework of the International Telecommunications Union (ITU), states in the version applicable at the time, that signals transmitted via broadcasting satellite in outer space may be directly received by the general public, either individually or collectively, in the case of broadcasting satellites.

Article 9 para. 960 of the Radio Regulations states:

"Any administration may assign a frequency in a band allocated to the fixed service or allocated to the fixed-satellite service to a station authorized to transmit, unilaterally, from one specified fixed point to one or more specified fixed points provided that such transmissions are not intended to be received directly by the general public."

According to Article 23 of the Radio Regulations, States members of the ITU are bound to prevent reception by the general public of certain emissions:

"In the application of the appropriate provisions of the Convention, administrations bind themselves to take the necessary measures to prohibit and prevent:

(a) the unauthorised interception of radiocommunications not intended for the general use of the public;
(b) the divulgence of the contents, simple disclosure of the existence, publication or any use whatever, without authorisation, of information of any nature whatever obtained by the interception of the radiocommunications mentioned in (lit. a above)."

COMPLAINTS

The applicant company complains that the free reception for private use of satellite transmissions which were not codified and were intended for the general public was made subject to the approval

of the emitting State. It alleges a violation of its right under Article 10 of the Convention to freedom of information. It submits that there was no legal basis either under Swiss or international law for the requirement of an approval, and that such a requirement was also disproportionate and unjustified. The interference could not be justified on the ground that the programmes were being transmitted via a telecommunications satellite. Furthermore, the private reception of such transmissions by home antennae did not cause any disturbances.
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PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 22 January 1987 and registered on 17 February 1987.

On 15 October 1987 the Commission decided to bring the application to the notice of the respondent Government and invite them pursuant to Rule 42 para. 2 (b) of the Rules of Procedure to submit observations on the admissibility and merits of the application.

The respondent Government's observations were submitted on 7 April 1988, the reply thereto by the applicant company on 30 June 1988, and the Government's further observations on 17 August 1988.

On 11 October 1988 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application.

At the hearing which was held on 13 December 1988, the parties were represented as follows:

The respondent Government:

Mr. O. JACOT-GUILLARMOD,
Head of the Service of International Affairs
of the Federal Office of Justice, Agent

Mr. B. MÜNGER,
Service of International Affairs of
the Federal Office of Justice,

Mr. A. SCHMID,
Head of the General Law Department
of the PTT Board of Directors,

Mr. H. KIEFFER,
Head of Section, Administration of frequencies
and transmission monopoly (Senderegal) of the Radio
and Television Department of the PTT Board of Directors,
as advisers.

The applicant company:

Mr. R. GULLOTTI,
Fürsprecher, counsel

Mr. Walter STREIT,
assistant counsel.

Mr. Peter KRAUSE, President of the Board of Directors
and proprietor of AUTRONIC AG, was also present.

SUBMISSIONS OF THE PARTIES

A. The respondent Government&S

I. As to the admissibility of the application

1. In respect of the question whether the applicant company can be considered to be a victim, the Swiss Government recall that, in its judgment of 10 July 1986, the Federal Court did not examine the substance of the public law appeal of the applicant company as it found that the latter no longer had a legal interest in the matter. The Federal Court found, in particular, that the telecommunications satellite in question was broadcasting its television programme in Russian, and that there could hardly be said to be an audience in Switzerland capable of following such programmes. For this reason, the Government consider that the applicant company cannot be regarded as a victim within the meaning of Article 25 of the Convention.

2. As regards the question of the exhaustion of domestic remedies, the Government recall that the applicant company's request of 1 November 1982 was clearly of a general and abstract nature. The Government therefore consider that this request does not constitute a valid substitute for an appeal against the refusal of the earlier request of the applicant company of 7 July 1982.

The Government next explain the specific problems concerning the declaratory order which the applicant company requested before the Federal Court.

The competent authority is empowered to make such a declaration, of its own volition or on request, if, in the application for such declaration, the person concerned proves that he has interests worthy of protection (see Section 25 paras. 1 and 2 of the Act on Administrative Procedure). In the present case the Federal Court seriously doubted this. In particular, the act challenged must be of an individual and specific, rather than of a general and abstract nature, for in the latter case the Federal Court would in fact be controlling rules in the abstract which it is not empowered to do in such circumstances.

In this connection the Swiss Government consider that the applicant company could in fact have challenged individual and specific measures directed against it. On 7 July 1982 it had applied to the Swiss PTT authorities for authorisation to receive broadcasts from the Soviet telecommunications satellite at the Zurich exhibition in 1982. The PTT declined by letters of 26 July and 6 August 1982. The Government emphasise that the applicant company failed to appeal against these negative decisions. It is true that the applicant company later explained, in its application of 1 November 1982 for a declaratory order, the reasons why it failed to appeal against the previous decision. In particular, the applicant company claimed to have been under time pressure.

The Government conclude that States are free to define the procedural conditions inter alia for introducing an application for a declaratory order. Since the applicant company did not comply with these conditions, in the Government's view it has not complied with the requirements of the exhaustion of domestic remedies within the meaning of Article 26 of the Convention, and the application should therefore be declared inadmissible.

3. The Government next examine the complaints of the applicant company. The latter wished to carry out a technical demonstration at an exhibition, in particular by demonstrating equipment capable of receiving broadcasts from the Soviet telecommunications satellite.

In the Government's opinion, it is not possible to rely upon Article 10 of the Convention in a purely technical manner without any reference to the substance of the freedom of expression. Undoubtedly

Article 10 must be held to guarantee the right to use the most recent technical apparatus in order to take full advantage of the right guaranteed by that provision. It is not, however, possible to rely on this provision for purely technical purposes, totally disregarding the substance of the "expression" or "information" in question, which are a decisive element in the fundamental rights enshrined in Article 10 of the Convention.

Article 10 of the Convention does not cover the mere technical demonstration, during a specialised exhibition, of equipment permitting the reception of broadcasts from a telecommunications satellite. Such a technical demonstration is more fully protected by the freedom of economic activity which, while not enshrined in the Convention, is guaranteed by the freedom of commerce according to Article 31 of the Swiss Constitution.

As a result, the Government submit that in this respect the application is incompatible ratione materiae with the provisions of the Convention.

The Government conclude that the prohibition in question did not constitute an interference by the Swiss authorities with the rights of the applicant company under Article 10 para. 1 of the Convention, and the Commission is invited to declare this part of the application inadmissible ratione materiae.

II. As to the well-foundedness of the application

In view of the above, the Government submit that it is in principle superfluous to examine further whether there has been an interference with the rights in Article 10 para. 1 of the Convention and whether the grounds of justification mentioned in Article 10 para. 2 of the Convention have been met.

1. The Government recall the nature of the satellite in question by referring to its Message of 20 December 1985 to the Swiss Parliament concerning the Federal Decree on Satellite broadcasting (FF [Feuille fédérale] 1986 I p. 421 et seq.). There, telecommunications satellites were contrasted with direct radio or television broadcasting satellites intended for direct reception by the public (ibid. p. 426). The Message continues:

"Telecommunications satellites have been in use since the beginning of the 1960s. They are used principally for transmitting telephone conversations, data, etc., but are also used for radio and television programmes between certain authorised land stations (point to point links), on the frequencies reserved for that purpose. In accordance with the International Radio Regulations, signals duly protected by secrecy are not intended for the public. (...).

For some years now, telecommunications satellites have also been used to transmit television programmes from a transmitting station to several receiving installations. Under the International Radio Regulations, this kind of relaying from one point to several others forms an integral part of the fixed satellite transmission service and is not part of satellite broadcasting in the strict sense. The receiving of signals is therefore permitted only with the express approval of the telecommunications authorities".

In this light, the Government submit that there are inherent limitations in the possibilities of transmitting the information. These limitations which other States must respect imply that there is no interference with the applicant company's rights under Article 10 para. 1.

2. Moreover, the above explanations demonstrate that this highly sophisticated kind of telecommunications justifies national authorities introducing a particularly strict licensing system. In fact, since such programmes are transmitted by a satellite from one precise point to another precise point, they are subject to two State licensing systems: they have to be authorised both by the State of the place of transmission and by the State in which the receiving station is situated.

As a result, the right of the national authorities to license television broadcasts should be extended to include this requirement of a licence on the international level, in particular the consent from the broadcasting State. In the Government's opinion, such a licensing system is also covered by the third sentence of Article 10 para. 1 of the Convention.

3. As regards the question whether the interference with the applicant company's rights would have been "prescribed by law" within the meaning of Article 10 para. 2 of the Convention, the Government refer to a whole chain of legal provisions providing a legal basis for the measure undertaken by the Swiss authorities, in particular for requiring a licence from the applicant company.

The Government refer first to Article 36 of the Swiss Constitution which provides, inter alia, for the secrecy of letters and telegrams. The 1922 Federal Act on telephone and telegraph correspondence provides in Article 1 a State monopoly for establishing and exploiting all installations serving the electrical or radio-electrical transmissions.

The Government refer next to the Federal Council's Order No 1 on the Telegraph and Telephone Communications Act of 17 August 1983 inter alia to its Articles 50 and 66. Under Article 78 para. 1 (f) a licence is required for a joint antenna enabling the owner to broadcast programmes and provide individual radio broadcasting services received from telecommunications satellites with the authorisation of the PTT which itself requires permission from the Department of Transport, Telecommunications and Energy. Reference is also made to Article 79 para 2 of this Order No 1 which states:

"The authorisation envisaged in Article 78 para. 1 (f) shall be granted if the competent telecommunications authorities have given their agreement and if none of the reasons for refusal laid down in Article 19 are present."

Article 19 states that a licence may be refused if there are serious reasons for supposing that the telecommunications equipment will be used for purposes which are illegal, immoral or contrary to public policy, or are harmful to the overriding interests of the country, of the PTT or of radio broadcasting.

Mention is also made of the Article 28 of Federal Decree on satellite broadcasting of 18 December 1987 under which permission from the relevant Federal Department is required for the retransmission of foreign programmes broadcast by satellite under a foreign licence. Such permission is granted only if the PTT is satisfied that the requirements of Swiss and international telecommunications law are met.

As regards other existing or planned Swiss legislation, by Message of 28 September 1987, the Federal Council brought before the Swiss Parliament a Federal Radio and Television Bill. Section 39 of this Bill prescribes that a licence for the transmission of programmes from telecommunications satellites may be granted only upon prior authorisation from the PTT. Such a licence will in principle be granted only if the State in which the transmitter is situated has given the authorisation required under the International Radio

Regulations.

On the international level, the Government point out that international treaties form part of the Swiss legal order after they have entered into force for Switzerland and thus are directly applicable to both the authorities and individuals. The Government refer here to the fact that the applicant company itself relied before the domestic authorities on the international provisions concerned.

The Government further submit that Article 22 of the ITU Convention is sufficiently precise in that it refers to the protection of the secrecy of telecommunications. In the present case, the broadcasts were confidential insofar as they were transmitted over a telecommunications satellite.

4. The applicant company also claimed during these proceedings that private companies in the same situation in the Netherlands and Finland had obtained the necessary authorisations without difficulty. The Government point out that the Swiss PTT sent telexes to the relevant national authorities. The replies obtained show clearly that these countries also work on the assumption that licences to receive such transmissions may be granted to private companies on their territory only with the prior authorisation of the Soviet authorities, on whose territory the transmitters are situated. The Swiss Government refer in particular to the contents of the Dutch and Finnish replies.

5. The Government consider that the system of rules applying in Switzerland as well as the procedure followed in the case in question are compatible with Article 10 of the Convention. While the situation may change in the future, at present the applicant company would receive the same reply from the Swiss authorities.

In view of the technical specifications of the equipment in question, the existing interferences, both in Switzerland and in the State of transmission, namely the USSR, are not only laid down by national and international law, but are also justified as constituting measures necessary for the protection of the international telecommunications system. This last concept, though it does not appear in so many words among the exceptions listed in Article 10 para. 2, is nevertheless implicit in the notion of "prevention of disorder". Unlimited flow of information on the international level would produce anarchy, and a minimum of order is required precisely to ensure the cultural and political pluralism lying at the heart of Article 10 of the Convention.

6. The Government have accepted that if the applicant company uses its dish antennae this does not imply a risk of interference with other frequencies, though they have indicated that by their nature dish antennae can potentially cause an interference in certain circumstances. There is also no risk of access to other confidential information on the same satellite particularly since such information could be coded. There is furthermore no risk that the reception of such broadcasts will interfere with the reception by other antennae. On the other hand, there is always the possibility that the content of the frequency concerned - e.g. a television broadcast - may change.

III. Conclusions

On the basis thereof the Government invite the Commission to declare the application inadmissible under Articles 26 and 27 of the Convention.

B. The applicant company&S

I. As to the admissibility of the application

1. In respect of the issue of its being a victim, and in particular the decision of the Federal Court of 10 July 1986, the applicant company observes that the Federal Court thereby took the view that in an application for a declaratory order the public rights and obligations involved must be defined with sufficient clarity. In the opinion of the applicant company, the issue was entirely clear, namely whether or not the reception for private use of uncoded transmissions from a telecommunications satellite could be made dependent on the transmitting State's consent. The issue here was a practical and specific one.

The underlying question, however, is not merely that of reception from the G-Horizont satellite, but that of reception from all satellites which, while using telecommunications frequencies, broadcast to the public at large. In its Message on the Federal Decree on satellite broadcasting of 20 December 1985, the Federal Council also refers to this broader question and confirms that in fact most radio broadcasts are also transmitted on telecommunications frequencies. The Government themselves, by referring to the replies of the Dutch and Finnish authorities, demonstrate that these questions have also been a source of controversy in other countries.

It cannot therefore be claimed that the applicant company is addressing a remote and irrelevant problem.

2. As regards the reasons of the applicant company for not pursuing the proceedings brought on 7 July 1982 concerning the Zurich exhibition, the applicant company explain that this exhibition is held annually at the end of August. If the applicant company had followed up all the legal remedies available, it would have had no hope of concluding the proceedings in time. It was not pressure of time which prevented it from proceeding further, but the fact that the proceedings themselves would have become purposeless while they were still pending at the appeal stage.

It was precisely this circumstance which led the applicant company to bring the present proceedings, which are entirely distinct from those relating to the 1982 Zurich exhibition. For the same reason, the applicant company's request for the issue of a declaratory order of 1 November 1982 cannot be regarded as an appeal against, or the attempt to re-open, the proceedings of 1982, but as a separate and independent application in new proceedings.

Undeniably the applicant company has exhausted domestic remedies within the meaning of Article 26 of the Convention by taking these proceedings all the way to the Federal Court. If the time is borne in mind which has passed since 1 November 1982, when the request was filed, it is hard to understand the attitude of the Government.

3. If the Government observe that the questions arising in this case are of interest to other firms as well, the applicant company reply that certain court judgments are indeed decisions of principle and thus of interest also to persons not specifically involved in those proceedings.

In conclusion, the Federal Court was mistaken in failing to examine the administrative court appeal of the applicant company. Nor are there grounds for failing to enter into an examination of the present application.

4. In respect of the Government's submissions that the applicant company cannot rely on the freedom of information as its only concern was a technical one, the latter submits that under the Convention corporations may be considered victims within the meaning of Article 25 of the Convention, and under Swiss law they can rely in particular on the freedom of expression, which includes freedom of the

press. In modern society, the possession of information is of considerable importance for individuals as well as for corporations.

In the applicant company's view, the specific reasons which lead a person or corporation to exercise rights to which he or it is entitled are immaterial. These rights exist in an absolute sense, and can be restricted only on the conditions laid down in Article 10 of the Convention.

The applicant company's reasons for introducing an application before the Commission are not merely technical or economic. Its concern is also with its basic right to obtain information from accessible sources. It wishes to be allowed to receive from the public media the information which those media purvey. The fact that it sought permission to stage a demonstration at the 1982 Zurich exhibition cannot be taken as proof that its concerns in the present proceedings go no further than that. Autronic AG is also active, for instance, in the media field where it supplies

data in the videotext sector. It is thus obliged to keep a close watch on the entire media sector and must be able, as an aspect of freedom of information, to receive information from accessible sources.

Furthermore, the proceedings before the Swiss authorities concerned reception, not merely from the G-Horizont satellite, but from all telecommunications satellites broadcasting uncoded programmes intended for the public. In any case, the existence of economic interests cannot be employed to argue that Article 10 of the Convention has not been violated, since several areas of basic law are applicable in most cases. In fact, under Swiss law the basic rights to freedom of information and freedom of commerce are of equal importance and do not exclude one another.

II. As to the well-foundedness of the application

1. In respect of the Government's submissions under the third sentence of Article 10 para. 1 of the Convention the applicant company again refers to its application of 1 November 1982 for a declaratory order. Thereby, the applicant company sought a ruling that the reception for private purposes of uncoded satellite broadcasts, such as those from G-Horizont, did not require the consent either of the transmitting State, or of the relevant authorities or institutions in the transmitting State, but merely a radio or television receiver's licence, issued in accordance with the relevant provisions of the Broadcasting Act and the accompanying regulations.

The passage quoted by the Government from the Federal Council's Message of 20 December 1985 on the Federal Decree on satellite broadcasting merely reiterates the well-known views of the authorities. It was, however, precisely as a result of this Message that the related problems concerning freedom of information were recognised and brought into the discussion.

Nevertheless, the applicant company submit that it is not the frequency employed, but the content of broadcasts, which determines whether those broadcasts are intended for the general public. Contrary to what the Government say, international telecommunications law does not permit any other conclusion.

2. The main concern of the International Telecommunications Convention is to regulate frequencies to ensure interference-free reception. This view is supported by the international expert opinions submitted by the applicant company. It is also clear that violation of telecommunications secrecy is not at issue in the present case. In short, there is nothing in the international regulations to indicate that the formal criterion of allocation of frequencies should

determine whether or not a broadcast is intended for the public.

The provisions cited by the Government from the Federal Council's Order No 1 on the Telegraph and Telephone Communications Act of 1983 do not apply to the present case which is concerned, not with dissemination via a collective or community antenna, but merely with the reception for private purposes of uncoded broadcasts. There is also no reference in these provisions to the relevant international legal provisions.

The scope of the Federal Decree on satellite broadcasting, which has also been cited by the Government, is made clear from its Article 1 which refers to:

"a. The transmission of radio and television programmes, and similar types of broadcast, via satellite;

b. The reception of radio and television programmes and similar types of broadcast transmitted by satellite".

Article 2 para. (b) indicates what is meant by reception in Article 1:

"b. Reception: The simultaneous, complete and unaltered reception and rediffusion of programmes via community aerials and broadcasting installations."

This shows that the Federal Decree on satellite broadcasting is irrelevant to the present case. One reason for this is also given in the Message itself, which explains that the intention was to avoid unnecessarily prejudicing the Radio and Television Bill.

Article 28 of the Federal Decree on satellite broadcasting, which is cited by the Government, merely states that compliance with Swiss and international telecommunications law must be verified by the Post Office authorities before a licence can be granted. It is precisely on the scope of these rights and obligations, however, that the opinions of the parties differ fundamentally.

It is uncontested that the Government approached the Soviet authorities repeatedly. The applicant company also accepts that the latter simply failed to reply, leaving both the Swiss PTT and applicant company in a state of uncertainty. This also shows how pointless and arbitrary the proceedings are in order to obtain permission. Also interesting here is the telex of 22 July 1982 from the Board of Directors of the PTT which stated that "... these signals can be received easily throughout the area covered by this satellite. This could create a situation comparable to that of a satellite broadcasting service".

3. The applicant company further points out that the replies of the Dutch and Finnish authorities are concerned with licences for reception by means of community antennae and are thus irrelevant to the present case. In fact, there are also European countries, for instance France and the United Kingdom, where the regulations are significantly more liberal. In these countries, a straightforward licence, specifying essentially technical conditions, suffices. This means that there is no adequate basis for restricting freedom of information by making the reception of public broadcasts conditional on the country's consent. The applicant firm's rights under Article 10 of the Convention have accordingly been violated.

4. The applicant company notes that in 1988 eight satellites are serving Europe all of which employ frequencies of the fixed satellite service. Of 48 programmes, only eight are coded. In the present case there has been no justification within the meaning of Article 10 para. 2 by the respondent Government for the interference at issue.

In particular, there was no pressing social need to prohibit the applicant company from receiving the broadcasts. It is on the contrary quite essential in a democratic society to permit the private reception of the contested broadcasts.

III. Conclusion

The applicant company concludes that the application is well-founded.

THE LAW

1. The applicant company complains under Article 10 (Art. 10) of the Convention that the free reception for private use of broadcasts, which were transmitted over a satellite qualified as a telecommunications satellite and which were actually intended for the general public, were made subject to a permission by the Swiss authorities which would only be given after the authorities of the transmitting State had consented thereto.

The applicant company claims to be a victim of this interference under Article 25 (Art. 25) of the Convention in that its concern is not merely a technical one. Rather, it intends to obtain information from accessible sources. The applicant company further considers that Article 10 (Art. 10) of the Convention includes such a guarantee, and that, by applying for a declaratory order to the competent Swiss authorities, the applicant company has complied with the requirements under Article 26 (Art. 26) of the Convention as to the exhaustion of domestic remedies. The applicant company complains that there was no legal basis for the requirement of such consent, and that the implementation of such a requirement was disproportionate and unjustified, in particular since the broadcasts at issue were not confidential.

Article 10 (Art. 10) of the Convention 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 responsibiities, 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."

The Government submit that the applicant company cannot claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention in that the company only has a theoretical interest not worthy of protection under the Convention in pursuing its application. The Government refer here to the decision of the Swiss Federal Court of 10 July 1986 according to which it could hardly be said that there was an audience in Switzerland capable of following such broadcasts.

Under Article 25 para. 1 (Art. 25-1) of the Convention, the Commission "may receive petitions ... from any person ... claiming to be a victim of the rights set forth in (the) Convention".

The Commission notes that the applicant company brought an application for a declaratory order which the Radio and Television Department of the Board of Directors of the PTT dismissed on 13 January 1983. In particular, the Department issued an order that the reception of the broadcasts at issue could not be permitted without the approval of the broadcasting State. The applicant company's appeal was dismissed by the Board of Directors of the PTT and its administrative court appeal by the Federal Court.

The Commission further notes that the Federal Court discussed whether the applicant company's administrative law appeal could be rejected in view of the fact that it envisaged an abstract determination of a legal situation, but the Court did not decide on this basis. Rather, it found that the applicant company had no legal interest in view of the fact that only broadcasts transmitted over a Soviet satellite could at that time be received.

As the Government have confirmed, the decisions of the competent authorities have established that there is no possibility for a private user to obtain consent to receive the broadcasts from the telecommunications satellite. This decision was and is still valid for the applicant.

The Commission does not consider relevant the number of broadcasts that could have been received when the applicant applied for the permission. It notes that, according to both parties' submissions, it is technically possible at present to receive several satellite broadcasts.

Therefore, as the applicant company has been prohibited from receiving the broadcasts at issue, the Commission finds that it can reasonably claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention.

2. The Government submit further that Article 10 (Art. 10) of the Convention does not cover or protect the mere technical demonstration during specialised exhibitions of equipment permitting the reception of broadcasts from a telecommunications satellite. In the Government's opinion, such a technical demonstration would rather be protected by the freedom of commerce which is not part of the Convention rights, but is enshrined in the Swiss Constitution.

The Commission recalls that under Article 25 para. 1 (Art. 25-1) of the Convention it is only the alleged violation of the rights and freedoms set out in the Convention that can be the subject of an application presented by a person, non-governmental organisation or group of individuals.

In the present case the issue arises whether the right claimed by the applicant company of receiving broadcasts, transmitted over a telecommunications satellite, by means of a dish antenna concerns the "freedom to receive and impart information and ideas without interference by public authority" and "regardless of frontiers" within the meaning of Article 10 (Art. 10) of the Convention.

The Commission considers that the freedom of imparting and receiving information may, especially where technical means are at issue, consist of a series of acts which as a whole will constitute the process of communication. By demonstrating the reception from a satellite as well as by the mere reception the applicant company would be part of such a process.

In the Commission's opinion, there can be no doubt that the production and broadcasting of television programmes, on the one hand, and their reception, on the other, concern the rights enshrined in Article 10 para. 1 (Art. 10-1) of the Convention.

It is true that in the present case the applicant company neither produces or broadcasts such programmes, nor has claimed to be part of the general public interested in receiving such programmes. The fact, however, that the applicant company wanted to receive the programmes for commercial purposes, i.e. to sell the equipment, does not alter its position in the communication process at that specific stage. Rather, the technical equipment provided by the applicant company plays an essential role in ensuring that the broadcasts at issue can be received. Without such equipment, right under Article 10 (Art. 10) of the Convention to receive such programmes could not effectively be enjoyed.

Therefore, the Commission cannot reject the application as being incompatible with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

The further question whether the applicant company can claim a right to receive broadcasts from a telecommunications satellite, as distinguished from a direct broadcasting satellite, cannot be decided at the admissibility stage.

3. The Government also submit that the applicant company has not complied with the condition as to the exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention. In the Government's view the applicant company failed to raise a complaint immediately after the Swiss authorities refused it permission to receive the broadcasts concerned at the Zurich trade fair. Moreover, the Government contend that the application for a declaratory order did not comply with the requirements under Article 26 (Art. 26) of the Convention in that the applicant company was in fact requesting the abstract determination of a legal situation.

The Commission considers that a complaint by the applicant company against the Swiss authorities' refusal to permit reception of the broadcasts at the Zurich trade exhibition would have served no useful purpose as any reply to this complaint would have been issued long after the exhibition had been closed.

Rather, the remedy employed by the applicant company, namely the application for a declaratory order must, in the Commission's view, be regarded as being an effective remedy within the meaning of Article 26 (Art. 26) as, had the applicant company's application been successful, a declaratory order would have been issued which would have clarified that the applicant company had the right at issue.

The Commission sees a confirmation for this conclusion in the fact that the PTT authorities themselves in fact discussed and eventually dismissed the applicant company's application for a declaratory order on its merits, rather than rejecting it as being inadmissible, for instance, in that it was requesting the abstract determination of a legal situation.

The fact that the Federal Court did not enter into the merits for other reasons of procedural law does not mean that the applicant company can be held not to have exhausted domestic remedies, since no other remedy was available to determine whether or not the right claimed existed.

The Commission is therefore satisfied that the applicant company has exhausted domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

4. The Government further submit that the right guaranteed in Article 10 (Art. 10) of the Convention only concerns information directed at the general public and not information which has been qualified as restricted because it is transmitted over a telecommunications satellite. The third sentence in Article 10 para.

1 (Art. 10-1) justifies that signals transmitted via telecommunications satellites cannot be received by individuals. A possible interference with the rights under Article 10 para. 1 (Art. 10-1) of the Convention would moreover have been "prescribed by law" and "necessary in a democratic society ... for the prevention of disorder" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

The Commission considers that the applicant company's complaint concerning the Swiss authorities' refusal to grant a permission to receive the broadcasts concerned raises questions of fact and law which are of such complexity that its determination should depend on an examination of the merits. The application is therefore not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other grounds for declaring it inadmissible have been established.

For these reasons, the Commission

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Deputy Secretary to the Commission — President of the Commission

(J. RAYMOND) — (C.A. NØRGAARD)