AS TO THE ADMISSIBILITY OF

Application No. 20915/92
by FAMILIAPRESS ZEITUNGS-GmbH
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 30 November 1994, the following members being present:

MM. A. WEITZEL, President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

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

Having regard to the application introduced on 21 July 1992 by Familiapress Zeitungs GmbH against Austria and registered on 6 November 1992 under file No. 20915/92;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 24 February 1994 and the observations in reply submitted by the applicant on 21 April 1994;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a limited company registered in Vienna which is publishing a weekly newspaper. Before the Commission the applicant is represented by Mr. M. Graff, a lawyer practising in Vienna.

A. Particular circumstances of the case

In May 1989, the Kronenzeitung ("Krone") - a Viennese newspaper - reported on an attempted rape and, on the same page, reproduced a poem entitled "Rhymed in the wind" ("In den Wind gereimt") which read as follows:

<German>

"Weh dir, du greifst heut im Büro

der Frau Kollegin auf den Po!
Doch wenn sie selber wen umschwirrt
und ihn umturtelt und umgirrt
mit Busen ohn' Befestigung,
ist das nicht auch Belästigung?"

<Translation>

"Woe betide you, if you grasp today
an office colleague's bottom!
But if she herself flutters around someone
And bills and coos and teases him,
With unsupported breast,
Is that not pestering, too?"

In June 1989, a journalist of another newspaper commented upon the above poem as follows:

<German>

"Die alten Herren von der "Krone"
Jucken Reste der Hormone.
Ein Busen ohn' Befestigung:
Hurra! Sie spür'n Verfestigung.
Daß endlich einmal packerte
Von Seite 5 die Nackerte
Die Sabbergreise im Büro:
O warme Hand am kalten Po!
Das macht Winde die sich reimen.
Wär's nicht zum Lachen, müßt' man weinen.
O Angst! O Lust! Und doch auch lästig:
Immer geil und ewig gestrig."

<Translation>

"The old men of the "Krone"
Are itched by leftover hormones.
Breasts without support:
Hurra! They feel a hardening.
If just once
The page 5 nude
Would grab the slobbering old men in their office:
O warm hand on a cold behind!
The very winds that break would rhyme.
If it didn't make you laugh, you had to cry.
O fear! O lust! But such a nuisance, too:
Yesterday's men, forever randy."

In December 1989, in the context of criminal proceedings for defamation brought by the editor of the newspaper "Krone", this journalist was acquitted by the Vienna Court of Appeal.

On 20 December 1989 another newspaper, "Arbeiterzeitung", reported thereupon. It stated that the presiding judge had said that the journalist's answer had not gone beyond the limit of acceptable journalistic expression reacting to a particularly tasteless report which had amounted to an immense provocation for any defender of women's rights.

On 4 January 1990 the applicant published in its regular "Columbus" comic strip series a cartoon entitled "Slimed in the wind" ("In den Wind geschleimt"), showing a raven and an old man, both reading a newspaper and commenting upon its content with the following text (see Annex):

<German>

"Recht sonderbare Themen hat
Der Verseschmied vom Kleinformat.
Erzwingt der Mann des Weibes Huld,
Dann ist sie meistens selber schuld!
Die Dichterin, so meint er keck
lebt wie die Made in dem Speck!
Wenn ich das alles hier so lese,
dann drängt sich förmlich auf die These
Wer bei den Frauen kommt zu kurz,
läßt in der KRONE seinen Furz!"

<Translation>

"The themes this tabloid's versesmith has
are most odd.
If a man forces a woman's favour,
mostly she has herself to blame!
The poetess, he boldly claims,
lives like the maggots in the ham!
But as I read all this
I can't help thinking
that just those who have no joy with women
have "farted" in the 'Krone'."

On 11 January 1990, the editor of the newspaper "Krone" brought injunction proceedings under Section 1 of the Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb) and Section 1330 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch) against the applicant with the Vienna Commercial Court (Handelsgericht).

On 8 February 1990 the Vienna Commercial Court issued a preliminary injunction order against the applicant prohibiting it from further publishing the statement: "Those who have no joy with women have farted in the 'Krone'." The Vienna Commercial Court found in particular that there was no journalistic controversy between the applicant and the "Krone", initiated by the plaintiff itself. In this respect the Commercial Court noted the lapse of 7 months since the two publications in May 1989 and January 1990. The Commercial Court observed that during this time, the applicant did neither reply to the opinions expressed in the poem, nor otherwise comment upon this controversy. A press controversy which could possibly justify its publication did therefore no longer exist.

Moreover, the average reader of the applicant's newspaper would not be able to establish a link between the cartoon and the poem after 7 months. The challenged cartoon was at the time in question an incomprehensible attack upon a competitor on the occasion of the previous poem and the criminal proceedings. Such statements could not be justified by any consideration of freedom of the press. If such statements were permitted, a low level of political culture in Austria would be furthered. The decision was based upon S. 1 of the Unfair Competition Act.

On 20 April 1990, the Vienna Court of Appeal (Oberlandesgericht), upon the applicant's appeal (Rekurs), quashed the decision of 8 February 1990. The Court of Appeal found that, in the media market, not every publication of a newspaper company relating to a competitor was based upon a competitive intent. Only general defamation of a competitor without any reference to the reasons for the criticism had to be considered as unfair competition. In the present case, the Court of Appeal confirmed that there had been an ideological controversy between the applicant and the "Krone". The applicant's competitive intent (Wettbewerbsabsicht) completely stood back, and, therefore, a contravention against the Unfair Competition Act could not be assumed. The incriminated cartoon was directed against the hints in the plaintiff's newspaper dated 31 May 1989 that it was in most cases the women's own fault, if they were victims of sex crimes. Though there

was a considerable lapse of time between both publications, the average reader of the applicant's newspaper had been in a position to realise that, in the incriminated cartoon, the plaintiff was accused of publishing opinions of woman-haters and sexists. As, in the newspaper, the opinion had been expressed that it was in most cases the women's own fault, if they were victims of sexual assaults or sex crimes, persons who had no joy with women were entitled to express their opinions. The - though harsh - criticism made by the applicant had thus not been irrelevant in the circumstances. It had to be regarded as attempt to influence the public opinion, i.e. that the tendencies published in the "Krone" were wrong and only be held by persons who "had no joy with women".

On 9 October 1990, the Austrian Supreme Court (Oberster Gerichtshof), upon appeal (Revisionsrekurs) of the plaintiff, quashed the Appeal Court's decision, and confirmed thereby the preliminary injunction of 8 February 1990.

According to the Supreme Court, the relevant provisions of the Unfair Competition Act presupposed activities for the purposes of competition, and the existence of a competitive intention was a question of fact. In case of disparaging remarks about a competitor, there was a factual presumption of a competitive intention. The competitive intent must not necessarily have been the sole or most important purpose of the activity concerned, it should only not completely stand back behind the real purpose. Whether this is the case is a question of law to be judged on the basis of the established facts. The applicant had only referred to its interest to inform the public and a press controversy with the plaintiff on an ideological and socio-political subject, namely the opinion expressed in the poem published in plaintiff's newspaper of 31 May 1989 close to a report on an attempted sex crime that a woman exposed to sexual approaches had in most cases caused this situation by her provocative behaviour.

The Supreme Court considered that a controversy between two newspapers often aimed at furthering the public opinion, and not at competition. However, a reaction - without any particular reason - seven months after an opinion on a specific subject had been expressed in the newspaper of a competitor could, in no way, be regarded as an actual ideological controversy. Moreover, the press had no legitimate interest to disparage a competitor. In the present case, the Supreme Court found that, having regard to the wording of the incriminated cartoon and its interpretation by the average reader, the plaintiff's newspapers was unnecessarily disparaged on the grounds that its employees were insulted and its contents generally depreciated. Consequently, it had to be assumed that the applicant had acted for the purposes of competition.

The Supreme Court also observed that this kind of defamatory publication could not be justified under the right to freedom of expression as guaranteed by Article 10 of the Convention.

The Supreme Court concluded that the applicant company had contravened against Section 1 of the Unfair Competition Act.

On 19 April 1991 the Vienna Commercial Court issued in the main proceedings a prohibitory injunction ordering the applicant to restrain publishing the challenged last sentence of the cartoon and to publish in its weekly a revocation on its own expenses.

On 7 October 1991 the Vienna Court of Appeal dismissed the applicant's appeal. The Court of Appeal followed the reasoning of the Supreme Court's decision. It stated in particular that even a newspaper could not rely upon an alleged need for information in order to justify a disparagement of competitors.

On 3 December 1991 the Supreme Court did not grant leave to

appeal of the judgment. This decision was served on the applicant on 23 January 1992.

B. Relevant domestic law

Section 1 of the Unfair Competition Act (Bundesgesetz gegen den unlauteren Wettbewerb) reads as follows:

<German>

> "1. Wer im geschäftlichen Verkehr zu Zwecken des Wettbewerbes Handlungen vornimmt, die gegen die guten Sitten verstoßen, kann auf Unterlassung und Schadenersatz in Anspruch genommen werden."

<Translation>

> "1. Any person who in the course of business commits, for purposes of competition, acts contrary to honest practices, may be enjoined from further engaging in those acts and held liable for damages."

Section 1330 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch) provides as follows:

<German>

> "(1) Wenn jemandem durch Ehrenbeleidigung ein wirklicher Schaden oder Entgang des Gewinnes verursacht worden ist, so ist er berechtigt, den Ersatz zu fordern.
>
> (2) Dies gilt auch, wenn jemand Tatsachen verbreitet, die den Kredit, den Erwerb oder das Fortkommen eines anderen gefährden und deren Unwahrheit er kannte oder kennen mußte. In diesem Fall kann auch der Widerruf und die Veröffentlichung desselben verlangt werden..."

<Translation>

> "(1) Anybody who, due to defamation, suffered a real damage or loss of profit, may claim for compensation.
>
> (2) The same applies if anyone is disseminating facts, which jeopardize someone's reputation, gain or livelihood, the untruth of which was known or must have been known to him. In this case there is also a right to claim a revocation and the publication thereof..."

COMPLAINTS

The applicant complains under Article 10 of the Convention about the Austrian court decisions under the Unfair Competition Act, prohibiting it from publishing parts of a cartoon.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 21 July 1992 and registered on 6 November 1992.

On 1 December 1993 the Commission decided to communicate the application to the respondent Government for observations on the admissibility and merits.

On 24 February 1994 the Government submitted their observations. The observations in reply by the applicant were submitted on 21 April 1994.

THE LAW

The applicant complains under Article 10 (Art. 10) of the Convention about the Austrian court decisions under the Unfair Competition Act, prohibiting it from publishing parts of a cartoon.

Article 10 (Art. 10), so far as relevant, reads as follows:

> "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.."
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ..., for the protection of health or morals, for the protection of the reputation or rights of others, ..."

a. The Government maintain that the applicant failed to comply with the six-months' time-limit under Article 26 (Art. 26) of the Convention. According to the Government the relevant period started to run when the decision of the Vienna Court of Appeal of 7 October 1991 was served, i.e. on 22 October 1991, as the applicant's appeal on points of law against this decision did not constitute an effective remedy.

The Government submit in particular that, according to S. 502 para. 1 of the Code of Civil Procedure a remedy against the judgment of an appeal court is only admissible if the decision depends on a question of law of importance for the protection of legal unity, legal security or the development of the law. However, in the present case the Supreme Court had already pronounced its legal view on its decision of 9 October 1990 in the context of the proceedings concerning the preliminary injunction. In the main proceedings, the Vienna Commercial Court and the Vienna Court of Appeal had relied on this view. Finally, the Supreme Court, in its decision of 3 December 1991, did not grant the applicant company leave to appeal on points of law.

The applicant company submits that the appeal on points of law, which it had lodged with the Supreme Court against the decision of the Vienna Court of Appeal of 7 October 1991, had suspensive effect and was an ordinary legal remedy.

The Commission recalls that the period of six months runs from the date of the final domestic decision after effective and sufficient remedies have been used (No. 11763/85, Dec. 9.3.89, D.R. 60 p. 128).

The Commission notes that there were two sets of proceedings in the present case, namely the provisional proceedings concerning the preliminary injunction, and the main proceedings, in which the contested injunction became final. The Commission notes that in the first set of proceedings the courts, in particular the Supreme Court, had already given rather extensive reasoning. However, the fact that the applicant company also lodged an appeal on points of law to the Supreme Court in the context of the main proceedings should not be held against it. Thus, the six-months'-period started to run on 23 January 1992, when the Supreme Court's decision of 3 December 1991 was served. The application was introduced on 21 July 1992.

Therefore the application is in compliance with the requirements laid down in Article 26 (Art. 26) of the Convention.

b. As regards the merits of the application, the Government submit that, although there was an interference with the applicant's right to freedom of expression under Article 10 para. 1 (Art. 10-1), this interference was justified under Article 10 para. 2 (Art. 10-2). It

was prescribed by law, namely by S. 1 of the Unfair Competition Act, and necessary for the protection of morals and of the rights and the reputation of others as well as for the preservation of order. In particular the opinion expressed by the applicant did not contribute to a political debate or to another topic of general interest. For the vast majority of readers there was no discernible connection between the cartoon at issue and the poem printed in the "Krone" seven months before. Thus, the applicant's statement did not appear as a criticism but as an insult, which, for commercial interests, disparaged one of his competitors, namely the "Krone", in an unqualified and unnecessary manner. Even if the applicant company did not act only for competitive reasons but also intended to contribute to a public discussion on sexism, the actual controversy was by no means adequate for the seriousness of this issue.

The applicant company submits that the interference with its right to freedom of expression was not necessary within the meaning of Article 10 para. 2 (Art. 10-2). In particular, the present case concerned a dispute in the media about a topic of general interest, namely sexism in today's society. The comic strip was not published for commercial or competitive reasons but as a contribution to the above topic, only two weeks after the acquittal of the journalist, who had also criticised the "Krone". Thus the comic strip and, in particular, its final verse, the repetition of which was prohibited by the injunction, had to be considered in this context. Moreover, the comic strip at issue was, although it was itself provocative, within the limits of acceptable criticism, as it was a reaction to an equally provocative poem in the "Krone".

After an examination of this issue in the light of the parties' submissions, the Commission considers that it raises questions of fact and law which can only be determined by an examination of the merits. It follows that this complaint cannot, therefore, be declared inadmissible as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for inadmissibility have been established.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION ADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (A. WEITZEL)