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

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Obliging a national public-service broadcaster to run a commercial that concerned the public interest did not breach its freedom of expression

In today's **Chamber** judgment[1] in the case of Schweizerische Radio- und Fernsehgesellschaft and publisuisse SA v. Switzerland (application no. 41723/14) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The two applicant companies in this case complained about the obligation imposed on them to run a commercial which, in their view, was damaging to their reputation.

The first applicant company is a nation-wide public-service television and radio broadcaster, and the second applicant operated as an advertising sales company until its activities were taken over by another firm in 2016.

The Court held that the obligation imposed on the applicant companies to run the disputed commercial did not amount to a disproportionate interference with their right to freedom of expression, and that it had therefore been "necessary in a democratic society".

The Court noted, among other findings, that the interference with the applicant companies' freedom of expression was provided for by Article 35, paragraph 2, of the Federal Constitution, which states that any person who performs a task on behalf of the State is required to respect fundamental rights and to contribute to implementing them.

In this connection, it noted that the advertisement in question fell outside the regular commercial context inciting the public to purchase a particular product. The commercial formed part of a multi-media campaign by which the association *Verein gegen Tierfabriken*, active in the fields of animal and consumer protection, was seeking to raise awareness about its website and disseminate information about animal protection. In the Court's view, this was an aspect which concerned a debate of general interest.

It reiterated that, in view of its particular position in the Swiss media landscape, the first applicant company was required to accept critical opinions and to provide an outlet for them on its broadcasting channels, even if this involved information or ideas that offended, shocked or disturbed. Such were the demands of pluralism, tolerance and broadmindedness, without which there was no democratic society. In addition, it had been obvious to television viewers that the commercial represented the opinion of a third party. It was admittedly presented in a very provocative manner, but was clearly a commercial that was unrelated to the programming offered by the first applicant company.

Principal facts

The first applicant, *Schweizerische Radio- und Fernsehgesellschaft* (SSR), is a private-law association which provides nation-wide public-service radio and television broadcasts on the basis of a licence issued to it by the Swiss Confederation.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

The second applicant, *publisuisse*, was an advertising sales company in which SSR held a 99.8% stake. In 2016 the firm Admeira SA took over the latter's activities, and it was removed from the companies register in the same year.

In September 2011 *Verein gegen Tierfabriken*, an association which is active in the areas of animal and consumer protection, booked advertising space through the second applicant, with a view to broadcasting a commercial that it had produced.

For seven seconds, the commercial displayed the association's logo and website address, and the text "*What the other media do not mention"* (*Was andere Medien totschweigen*). The website's address and the text were read out by an off-screen voice. This first version of the commercial was broadcast 18 times over the period from 23 to 31 December 2011.

In the meantime, in November 2011 the association asked the second applicant to run a modified version of the commercial, in which the initial text had been replaced by the following message: "What Swiss Television does not mention" (*Was das Schweizer Fernsehen totschweigt*). Authorisation to broadcast this amended version of the advertisement was refused, on the grounds that it was damaging to commercial interests and image (*geschäfts- und imageschädigend*) as set out in the second applicant's general terms and conditions.

In February 2012 the association filed a complaint with the Independent Radio and Television Appeal Board (AIEP) against the first applicant, alleging that the refusal to broadcast the amended version of the commercial amounted to a form of censure. AIEP rejected that complaint.

The association subsequently applied to the Second Public-Law Division of the Federal Supreme Court, which found in its favour in November 2013. The judgment was notified to the applicant companies in December 2013. The Federal Supreme Court held, among other points, that the refusal to broadcast the contested commercial amounted to a restriction on the association's right to freedom of information, even if the second applicant company's general terms and conditions included an exclusion clause with regard to programmes which were damaging to its commercial interests or image. It also found that the disputed commercial did not correspond to one of the categories of programmes for which the Federal Radio and Television Act prohibited broadcasting, and that the first applicant company had also failed to show that the commercial represented an illegal interference with its personality rights or the principle of fair competition. The Federal Supreme Court considered that the commercial was admittedly unusual in that it attacked the first applicant company directly, but that a mere fear that it could damage the latter's reputation was not sufficient to justify a refusal to broadcast it, since freedom of expression allowed, *inter alia*, criticism not only of public authorities, but also of individuals or private companies which were performing a task on behalf of the State.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) of the Convention, the applicant companies complained about having been obliged to broadcast a commercial, which, in their view, was damaging to their reputation.

The application was lodged with the European Court of Human Rights on 28 May 2014.

Judgment was given by a Chamber of seven judges, composed as follows:

Paul **Lemmens** (Belgium), *President*,
Georgios A. **Serghides** (Cyprus),
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
Georges **Ravarani** (Luxembourg),
María **Elósegui** (Spain),
Peeter **Roosma** (Estonia),

and also Milan **Blaško**, *Section Registrar.*

Decision of the Court

Article 10 (freedom of expression)

The Court considered that the obligation to broadcast the disputed commercial amounted to an "interference by a public authority" in the applicant companies' right to freedom of expression.

As to whether the interference was prescribed by law, the Court noted that the Federal Radio and Television Act did not in principle prohibit the commercial in question from being broadcast. It also noted that, under Article 35 § 2, of the Federal Constitution, any person who performed a task on behalf of the State was required to respect fundamental rights and to contribute to implementing them. This was particularly the case where a private company was granted a licence for a task falling within the public-service field. In this connection, the Federal Supreme Court had held that, although the first applicant company was entitled to full autonomy with regard to editorial choices in its programming, this was not the case with regard to advertising, given that this activity was intended to generate revenue to fund its programmes. It had held that this secondary economic activity was closely linked to the company's legal mandate. It had argued that, as a privileged holder of a franchise concession from the Swiss Confederation, and already the recipient of public funding through the audiovisual licence fee, the first applicant company did not enjoy the same freedom as a private company, even though it was bound to advertisers through private-law contracts. It had held that the particular position in the Swiss media landscape conferred on the first applicant company by its mandate gave the two applicant companies significant advantages on the advertising market. It had concluded that the applicant companies were also required to comply, in the area of advertising, with fundamental rights within the meaning of Article 35 § 2 of the Federal Constitution. Taking into account the margin of appreciation afforded to the Contracting Parties, especially in the area of advertising, the Court held that the Federal Supreme Court's findings had been neither manifestly ill-founded nor arbitrary. It noted that other more nuanced solutions, or even the opposite reasoning, could admittedly have been envisaged, but that the Federal Supreme Court's line of argument was not new and arose from its case-law.

Having regard to their mandate and their position, the Court considered that the applicant companies – which could always have had recourse, if necessary, to appropriate legal advice and which, in addition, were highly specialised professionals in the audiovisual field, – could not reasonably allege that the application of Article 35 § 2 of the Federal Constitution and the legal consequences arising from it had not been foreseeable. It followed that the interference had been "prescribed by law".

As to the legitimacy of the interference, the Court considered that it had been intended to guarantee the pluralism that was necessary in the functioning of a democratic society and the "protection of the rights of others".

As to the proportionality of the interference, the Court noted that the disputed advertisement fell outside the regular commercial context inciting the public to purchase a particular product. It had formed part of a multi-media campaign by which the association was seeking to raise awareness about its website and the information regarding animal protection to be found on it. The association, which considered that this information was not being communicated in the programming of other media, and in particular that of the first applicant company, was thus attempting to draw attention to this point. In this context, the Court held that the association was entitled to exercise its freedom of expression to that end.

The Court noted that the commercial in issue differed from the first variant of the commercial – which the applicants had agreed to broadcast – only in that, rather that claiming that the media in general

were suppressing the information published by the association, it specifically implied that it was the first applicant company which was suppressing that information. It considered that this aspect of the association's campaign concerned a debate of public interest.

In those circumstances, the Court reiterated the importance that it attached in its case-law to the fundamental role played in a democratic society by freedom of expression, guaranteed by Article 10 of the Convention, in particular where it served to impart information and ideas of general interest, and the particular role of audiovisual media in this regard. Because of their power to convey messages through sound and images, such media had a more immediate and powerful effect than print. The function of television as a familiar source of entertainment in the intimacy of the viewer's home further reinforced its impact.

The Court also noted that the applicant companies considered that they had been repudiated, and that their reputation had been damaged by the disputed commercial. In this connection, the Supreme Federal Court had held that a mere fear that the advertisement could damage the latter's reputation was not sufficient to justify a refusal to run it, since freedom of expression allowed, *inter alia*, criticism not only of public authorities, but also of individuals or private companies which were performing a task on behalf of the State.

The Court could see no reason to depart from this assessment. It reiterated that, given its particular position in the Swiss media landscape, the first applicant company was required to accept critical opinions and to provide an outlet for them on its broadcasting channels, even if this involved information or ideas that offended, shocked or disturbed. Such were the demands of pluralism, tolerance and broadmindedness without which there was no democratic society. In addition, it noted that it had been obvious to television viewers that the commercial represented the opinion of a third party. It was admittedly presented in a very provocative manner, but was clearly a commercial that was unrelated to the programming schedules offered by the first applicant company.

The Court also took note of the Report by the Swiss Federal Council of 17 June 2016, stating that the programming offer by private television channels which had no public-service mandate or received no share of the licence fee was "essentially focused on entertainment" and attached only "secondary importance to general political information and to cultural or educational programmes". In the Court's view, it was clear that these private channels or the advertising blocks broadcast on foreign channels could not reach the same audience in Switzerland as the first applicant company.

In consequence, the Court considered that the obligation imposed on the applicant companies to run the disputed commercial had not amounted to a disproportionate interference with their right to freedom of expression, and that it had therefore been "necessary in a democratic society".

It followed that there had been no violation of Article 10 of the Convention.

The judgment is available only in French.

Press contacts
During the current public-health crisis, journalists can continue to contact the Press Unit via echrpress@echr.coe.int.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.