56 S.Ct. 444
80 L.Ed. 660, 1 Media L. Rep. 2685
(Cite as: 297 U.S. 233, 56 S.Ct. 444)

Supreme Court of the United States.

GROSJEAN, Sup'r of Public Accounts of Louisiana
v.
AMERICAN PRESS CO., Inc., et al.

No. 303.

Argued Jan. 13, 14, 1936.
Decided Feb. 10, 1936.

Suit by American Press Company, Incorporated, and others against Alice Lee Grosjean, Supervisor of Public Accounts for the State of Louisiana. From a decree for plaintiffs (10 F.Supp. 161), the defendant appeals.

Affirmed.

West Headnotes

[1] Federal Courts ⚿335
170Bk335
(Formerly 106k327)

Where bill by nine newspaper publishers sought to restrain collection of state license tax on ground that statute authorizing it violated Fourteenth Amendment, and record supported allegation that in respect of each of six of plaintiffs, jurisdictional amount was involved, District Court had jurisdiction (Acts La. No. 23 of 1934, s 1; Jud.Code, s 24(1), 28 U.S.C.A. s 41(1); Const. Amend. 14, s 1).

[2] Federal Civil Procedure ⚿1742(4)
170Ak1742(4)
(Formerly 170Ak1742.3, 106k3511/2, 106k351)

Where bill, supported by record, showed that as to each of six of the nine plaintiffs, jurisdictional amount was involved, motion to dismiss bill in its entirety held property denied. Jud.Code, § 24(1), 28 U.S.C.A. § 1331 et seq.

[3] Appeal and Error ⚿866(1)
30k866(1)
(Formerly 106k356(13))

Where motion to dismiss, for insufficiency of amount involved, was directed to bill, filed by nine plaintiffs, in its entirety, whether bill should have been dismissed as to three of plaintiffs held not presented for review. Jud.Code, § 24(1), 28 U.S.C.A. §§ 1331, 1332, 1341, 1342, 1345, 1354, 1359.

[4] Federal Courts ⚿7
170Bk7
(Formerly 106k262(2))

Where general laws of state afforded no remedy for recovery of taxes paid under protest, and it was speculative whether aggrieved taxpayer could obtain relief under statute imposing license tax on newspaper publishers and providing for $500 find or imprisonment, or both, for violation thereof, newspaper publishers attacking statute as violation of Fourteenth Amendment held without plain, adequate, and complete remedy at law and entitled to apply for equitable relief (Acts La. No. 23 of 1934, ss 1, 5; Const. Amend. 14, s 1).

[5] Constitutional Law ⚿90(1)
92k90(1)
(Formerly 92k90)

[5] Constitutional Law ⚿274.1(1)
92k274.1(1)
(Formerly 92k274)

States are precluded from abridging freedom of speech or of the press, not by the First Amendment, but by the due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14, § 1.

[6] Constitutional Law ⚿255(1)
92k255(1)
(Formerly 92k255)

"Liberty," as used in Fourteenth Amendment, embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well. U.S.C.A.Const. Amend. 14, § 1.

[7] Constitutional Law ⚿206(7)
92k206(7)

[7] Constitutional Law ⚿210(2)
92k210(2)
(Formerly 92k210, 92k252)

Corporation is not a "citizen" within privileges and immunities clause of the Fourteenth Amendment (Const. Amend. 14).

[8] Constitutional Law ⚖84.1
92k84.1
(Formerly 92k84(1), 92k82)

[8] Constitutional Law ⚖274(3.1)
92k274(3.1)
(Formerly 92k274(3), 92k251)

Abridgement clause of the First Amendment expresses one of those fundamental principles of liberty and justice, and, as such, is embodied in the concept "due process of law," and is, therefore, protected against hostile state invasion by due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14, § 1.

[9] Constitutional Law ⚖17
92k17

Range of a constitutional provision phrased in terms of the common law may sometimes be fixed by recourse to the common law, but the doctrine justifying such recourse must yield to more compelling reasons and is subject to the qualification that the common-law rule invoked shall not have been rejected by our ancestors as unsuited to their civil or political conditions.

[10] Common Law ⚖11
85k11
(Formerly 85k1)

Restricted rules of the English law in respect of the freedom of the press, in force when the Constitution was adopted, were never accepted by the American colonists.

[11] Constitutional Law ⚖90.1(4)
92k90.1(4)
(Formerly 92k90)

[11] Constitutional Law ⚖274.1(1)
92k274.1(1)
(Formerly 92k274)

First and Fourteenth Amendments were intended to preclude Congress and the states from adopting any form of restraint upon printed publications, or their circulation, including those restraints which had theretofore been effected by means of censorship, license, and taxation, and from taking any government action which might prevent such free and general discussion of public matters as seems essential to prepare the people for an intelligent exercise of their rights as citizens. U.S.C.A.Const. Amends. 1, 14, § 1.

[12] Constitutional Law ⚖287.2(1)
92k287.2(1)
(Formerly 92k287)

[12] Licenses ⚖7(1)
238k7(1)

State statute imposing license tax for privilege of engaging in business of selling advertising upon all publishers of newspapers or magazines having weekly circulation of more than 20,000 copies held unconstitutional under due process of law clause of Fourteenth Amendment because it abridges the freedom of the press. Acts La. No. 23 of 1934, § 1; U.S.C.A.Const. Amend. 14, § 1.

Constitutional Law ⚖90(1)
92k90(1)

Freedom of speech and of the press, which are protected from congressional infringement by First Amendment, are among fundamental personal rights and liberties protected by Fourteenth Amendment from invasion by state action. U.S.C.A.Const. Amends. 1, 14.

Constitutional Law ⚖252
92k252

Corporation is a "person" within due process clause of Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

Licenses ⚖7(1)
238k7(1)

State statute imposing license tax for privilege of engaging in business of selling advertising upon all publishers of newspapers or magazines having weekly circulation of more than 20,000 copies held unconstitutional. Acts La. No. 23 of 1934, § 1.

*235 *233 Appeal from the District Court of the United States for the Eastern District of Louisiana.

*236 Messrs. Charles J. Rivet, of New Orleans, La., and Gaston L. Porterie, Atty. Gen., for appellant.

*237 Messrs. Esmond Phelps, of New Orleans, La., and Elisha Hanson, of Washington, D.C., for appellees.

*243 Mr. Justice SUTHERLAND delivered the

opinion of the Court.

This suit was brought by appellees, nine publishers of newspapers in the state of Louisiana, to enjoin the enforcement against them of the provisions of section 1 of the act of the Legislature of Louisiana known as Act No. 23, passed and approved July 12, 1934, as follows: 'That every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited, by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two per cent. (2%) of the gross receipts of such business.'

The nine publishers who brought the suit publish thirteen newspapers; and these thirteen publications are the *241 only ones within the state of Louisiana having each a circulation of more than 20,000 copies per week, although the lower court finds there are four other daily newspapers each having a circulation of 'slightly less than 20,000 copies pert week' which are in competition with those published by appellees both as to circulation and as to advertising. In addition, there are 120 weekly newspapers published in the state, also in competition, to a greater or less degree, with the newspapers of appellees. The revenue derived from appellees' newspapers comes almost entirely from regular subscribers or purchasers thereof and from payments received for the insertion of advertisements therein.

The act requires every one subject to the tax to file a sworn report every three months showing the amount and the gross receipts from the business described in section 1. The resulting tax must be paid when the report is filed. Failure to file the report or pay the tax as thus provided constitutes a misdemeanor and subjects the offender to a fine not exceeding $500, or imprisonment not exceeding six months, or both, for each violation. Any corporation violating the acts subjects itself to the payment of $500 to be recovered by suit. All of the appellees are corporations. The lower court entered a decree for appellees and granted a permanent injunction. (D.C.) 10 F.Supp. 161.

[1][2][3] First. Appellant assails the federal jurisdiction of the court below on the ground that the matter in controversy does not exceed the sum or value of $3,000, as required by paragraph 1 of section 24 of the Judicial Code (28 U.S.C.A. s 41(1) . The case arises under the Federal Constitution; and the bill alleges, and the record shows, that the requisite amount is involved in respect of each of six of the nine appellees. This is enough to sustain the jurisdiction of the District Court. The motion was to dismiss the bill--that is to say, the bill in its entirety--and in that form it was properly denied. No motion to dismiss was made or considered *242 by the lower court as to the three appellees in respect of whom the jurisdictional amount was insufficient, and that question, therefore, is not before us. The Rio Grande, 19 Wall. 178, 189, 22 L.Ed. 60; Gibson v. Shufeldt, 122 U.S. 27, 32, 7 S.Ct. 1066, 30 L.Ed. 1083.

[4] Second. The objection also is made that the bill does not make a case for equitable relief. But the objection is clearly **446 without merit. As pointed out in Ohio Oil Co. v. Conway, 279 U.S. 813, 815, 49 S.Ct. 256, 73 L.Ed. 972, the laws of Louisiana afford no remedy whereby restitution of taxes and property exacted may be enforced, even where payment has been made under both protest and compulsion. It is true that the present act contains a provision (section 5) to the effect that where it is established to the satisfaction of the Supervisor of Public Accounts of the state that any payment has been made under the act which was 'not due and collectible,' the supervisor is authorized to refund the amount out of any funds on hand collected by virtue of the act and not remitted to the state treasurer according to law. It seems clear that this refers only to a payment not due and collectible within the terms of the act, and does not authorize a refund on the ground that the act is invalid. Moreover, the act allows the supervisor to make remittances immediately to the state treasurer of taxes paid under the act, and requires him to do so not later than the 30th day after the last day of the preceding quarter; in which even the right to a refund, if not sooner exercised, would be lost. Whether an aggrieved taxpayer may obtain relief under section 5 is, at best, a matter of speculation. In no view can it properly be said that there exists a plain, adequate, and complete remedy at law. Davis v. Wakelee, 156 U.S. 680, 688, 15 S.Ct. 555, 39 L.Ed. 578; Union Pac. R. Co. v. Board of Com'rs of Weld County, 247 U.S. 282, 285, 38 S.Ct. 510, 62 L.Ed. 1110.

Third. The validity of the act is assailed as violating the Federal Constitution in two particulars: (1) That it abridges the freedom of the press in contravention of the due process clause contained in section 1 of the Fourteenth *243 Amendment; (2) that it denies appellees the equal protection of the laws in contravention of the same amendment.

[5] 1. The first point presents a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the Federal Constitution provides that 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' While this provision is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.

In the case of Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232, this court held that the term 'due process of law' does not require presentment or indictment by a grand jury as a prerequisite to prosecution by a state for a criminal offense. And the important point of that conclusion here is that it was deduced from the fact that the Fifth Amendment, which contains the due process of law clause in its national aspect, also required an indictment as a prerequisite to a prosecution for crime under federal law; and it was thought that since no part of the amendment could be regarded as superfluous, the term 'due process of law' did not, ex vi termini, include presentment or indictment by a grand jury in any case; and that the due process of law clause of the Fourteenth Amendment should be interpreted as having been used in the same sense, and as having no greater extent. But in Powell v. State of Alabama, 287 U.S. 45, 65, 68, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, we held that in the light of subsequent decisions the sweeping language of the Hurtado Case could not be accepted without qualification. We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded *244 against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.

[6] That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation, has likewise been settled by a series of decisions of this court beginning with Gitlow v. People of State of New York, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138, and ending with Near v. State of Minnesota, 283 U.S. 697, 707, 51 S.Ct. 625, 75 L.Ed. 1357. The word 'liberty' contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well. Allgeyer **447 v. State of Louisiana, 165 U.S. 578, 589, 17 S.Ct. 427, 41 L.Ed. 832.

[7] Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. Paul v. Virginia, 8 Wall. 168, 19 L.Ed. 357. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. Covington & L. Turnpike Road Co. v. Sandford, 164 U.S. 578, 592, 17 S.Ct. 198, 41 L.Ed. 560; Smyth v. Ames, 169 U.S. 466, 522, 18 S.Ct. 418, 42 L.Ed. 819.

The tax imposed is designated a 'license tax for the privilege of engaging in such business,' that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of 2 per cent. on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising; and, second, its direct *245 tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (Magnano Co. v. Hamilton, 292 U.S. 40, 45, 54 S.Ct. 599, 78 L.Ed. 1109, and cases cited), it well might result in destroying both advertising and circulation.

[8] A determination of the question whether the tax is valid in respect of the point now under review requires an examination of the history and circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment, since that clause expresses one of those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270, 48

A.L.R. 1102), and, as such, is embodied in the concept 'due process of law' (Twining v. State of New Jersey, 211 U.S. 78, 99, 29 S.Ct. 14, 53 L.Ed. 97), and, therefore, protected against hostile state invasion by the due process clause of the Fourteenth Amendment. Cf. Powell v. State of Alabama, supra, 287 U.S. 45, at pages 67, 68, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527. The history is a long one; but for present purposes it may be greatly abbreviated.

For more than a century prior to the adoption of the amendment--and, indeed, for many years thereafter--history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the gaencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing. As early as 1644, John Milton, in an 'Appeal for the Liberty of Unlicensed Printing,' assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views 'without previous censure'; and declared the impossibility of finding any man base enough to accept *246 the office of censor and at the same time good enough to be allowed to perform its duties. Collett, History of the Taxes on Knowledge, vol. I, pp. 4--6. The act expired by its own terms in 1695. It was never renewed; and the liberty of the press thus became, as pointed out by Wickwar (The Struggle for the Freedom of the Press, p. 15), merely 'a right or liberty to publish without a license what formerly could be published only with one.' But mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press.

In 1712, in response to a message from Queen Anne (Hansard's Parliamentary History of England, vol. 6, p. 1063), Parliament imposed a tax upon all newspapers and upon advertisements. Collett, vol. I, pp. 8--10. That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt. Stewart, Lennox and the Taxes on Knowledge, 15 Scottish Historical Review, 322--327. There followed more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal. In the article last referred to (p. 326), which was written in 1918, it was pointed out that these taxes constituted one of the factors that aroused the American colonists to protest against **448 taxation for the purposes of the home government; and that the revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies.

These duties were quite commonly characterized as 'taxes on knowledge,' a phrase used for the purpose of describing the effect of the exactions and at the same time condemning them. That the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people, went almost without question, even on the part of *247 those who defended the act. May (Constitutional History of England, 7th Ed., vol. 2, p. 245), after discussing the control by 'previous censure,' says: '* * * a new restraint was devised in the form of a stamp duty on newspapers and advertisements,--avowedly for the purpose of repressing libels. This policy, being found effectual in limiting the circulation of cheap papers, was improved upon in the two following reigns, and continued in high esteem until our own time.' Collett (vol. I, p. 14), says: 'Any man who carried on printing or publishing for a livelihood was actually at the mercy of the Commissioners of Stamps, when they chose to exert their powers.'

Citations of similar import might be multiplied many times; but the foregoing is enough to demonstrate beyond peradventure that in the adoption of the English newspaper stamp tax and the tax on advertisements, revenue was of subordinate concern; and that the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved. The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. Upon the correctness of this conclusion the very characterization of the exactions as 'taxes on knowledge' sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake; for, as Erskine, in his great speech in defense of Paine, has said, 'The liberty of opinion keeps governments themselves in

due subjection to their *248 duties.' Erskine's Speeches, High's Ed., vol. I, p. 525. See May's Constitutional History of England (7th Ed.) vol. 2, pp. 238--245.

In 1785, only four years before Congress had proposed the First Amendment, the Massachusetts Legislature, following the English example, imposed a stamp tax on all newspapers and magazines. The following year an advertisement tax was imposed. Both taxes met with such violent opposition that the former was repealed in 1786, and the latter in 1788. Duniway, Freedom of the Press in Massachusetts, pp. 136, 137.

[9] The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see Pennsylvania and the Federal Constitution, 1888, p. 181), the predominant influence must have come from the English experience. It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the two forms of taxation already described. Such belief must be rejected in the face of the then well-known purpose of the exactions and the general adverse sentiment of the colonies in respect of them. Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that *249 law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist. Cf. Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Ry. **449 Co., 294 U.S. 648, 668, 669, 55 S.Ct. 595, 79 L.Ed. 1110. And, obviously, it is subject to the qualification that the commonlaw rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions. Den ex dem. Murray v. Hoboken Land & Improvement Co., 18 How. 272, 276, 277, 15 L.Ed. 372; Waring et al. v. Clarke, 5 How. 441, 454--457, 12 L.Ed. 226; Powell v. State of Alabama, supra, 287 U.S. 45, at pages 60--65, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

[10][11] In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two wellknown and odious methods.

This court had occasion in Near v. State of Minnesota, supra, 283 U.S. 697, at pages 713 et seq., 51 S.Ct. 625, 75 L.Ed. 1357, to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357), meant 'principally although not exclusively, immunity from previous restraints or (from) censorship.'

Judge Cooley has laid down the test to be applied: 'The evils to be prevented were not the censorship of the press merely, but any action of the government by *250 means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' 2 Cooley's Constitutional Limitations (8th Ed.) 886.

It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

[12] The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other periodicals of the country, it is safe to say, have shed

and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

In view of the persistent search for new subjects of taxation, it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our *251 national existence has undertaken to impose a tax like that now in question.

The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

2. Having reached the conclusion that the act imposing the tax in question is unconstitutional under the due process of law clause because it abridges the freedom of the press, we deem it unnecessary to consider the further ground assigned, that it also constitutes a denial of the equal protection of the laws.

Decree affirmed.

56 S.Ct. 444, 297 U.S. 233, 80 L.Ed. 660, 1 Media L. Rep. 2685

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844 F.2d 800
64 Rad. Reg. 2d (P & F) 1309, 15 Media L. Rep. 1161
(Cite as: 844 F.2d 800, 269 U.S.App.D.C. 182)

United States Court of Appeals,
District of Columbia Circuit.

NEWS AMERICA PUBLISHING, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
The Committee for Media Diversity, et al., Wilbert A. Tatum, Intervenors.

No. 88-1037.

Argued Feb. 11, 1988.
Decided March 29, 1988.

Petition was filed for review of Federal Communications Commission order. Petitioner challenged provision in appropriations legislation precluding use of funds to extend time period of current grants of temporary waivers of newspaper broadcast cross ownership rules. The Court of Appeals, Williams, Circuit Judge, held that provision violated First and Fifth Amendment guarantees.

Vacated and remanded.

Sportswood W. Robinson, III, Circuit Judge, filed a dissenting opinion.

West Headnotes

[1] Constitutional Law ⚖250.5
92k250.5

Standard of review applicable upon challenge to provision in appropriations legislation, precluding use of funds to extend time period of current grants of temporary waivers of newspaper broadcast, cross ownership rules, was a test more stringent than minimum rationality criteria typically used for conventional economic legislation under equal protection analysis. U.S.C.A. Const.Amends. 1, 5, 14.

[2] Constitutional Law ⚖90.1(8)
92k90.1(8)

[2] Constitutional Law ⚖90.1(9)
92k90.1(9)

[2] Constitutional Law ⚖296(1)
92k296(1)

[2] Telecommunications ⚖384
372k384

Provision in appropriations legislation, precluding use of funds to extend time period of current grants of temporary waivers of newspaper broadcast cross ownership rules, violated First and Fifth Amendment guarantees; at time legislation was enacted, sole holder of temporary waiver of cross ownership rule, which precluded granting television broadcast licensc to party who owned or controlled daily newspaper in same community, was one corporation and provision was thus underinclusive. Act Oct. 22, 1987, § 1 et seq., 101 Stat.1329; U.S.C.A. Const.Amends. 1, 5.

*801 **183 Petition for Review of an Order of the Federal Communications commission.

Howard M. Squadron and Burt Neuborne, with whom Wade R. Metcalf, New York City, Michael R. Sonner and James P. Denvir, Washington, D.C. were on the brief, for appellant.

Diane S. Killory, Gen. Counsel, with whom Daniel M. Armstrong, Associate Gen. Counsel, and C. Grey Pash, Jr., Counsel, F.C.C., Washington, D.C. were on the brief, for appellee.

Kenneth Berlin, Washington, D.C., for intervenor, Wilbert A. Tatum.

Andrew Jay Schwartzman and David W. Danner, Washington, D.C., were on the brief, for intervenors, Committee for Media Diversity, et al.

Timothy B. Dyk, Patrick J. Carome and Teresa D. Baer, Washington, D.C., were on the brief, for intervenor, CBS, Inc.

Floyd Abrams, New York City, and W. Terry Maguire were on the brief, for amicus curiae, American Newspaper Publishers Ass'n, urging reversal.

Burton R. Shapiro, New York City, was on the brief for amicus curiae, American Civil Liberties Union Foundation and the New York Civil Liberties Union, urging reversal.

Marshall E. Lippman, New York City, was on the brief for amicus curiae, Newspaper and Mail

Deliverers Union of New York and Vicinity, urging reversal.

Steven R. Ross, Gen. Counsel to the Clerk, Charles Tiefer, Deputy Gen. Counsel to the Clerk, Michael L. Murray, Asst. Counsel to the Clerk and Janina Januzelski, Asst. Counsel to the Clerk, U.S. House of Representatives, Washington, D.C., were on the brief, for amici curiae, Speaker and Bipartisan Leadership Group of the U.S. House of Representatives, urging affirmance.

Before ROBINSON, SILBERMAN and WILLIAMS, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILLIAMS.

Dissenting Opinion filed by Circuit Judge ROBINSON.

WILLIAMS, Circuit Judge:

On December 22, 1987 Congress passed and the President signed a 471-page Continuing Resolution (printed only in a 1,194-page Conference Report) appropriating all of the funds for the federal government *802 **184 for fiscal year 1988. Pub.L. No. 100-202, 101 Stat. 1329 (1987). On page 34, in a 379-word paragraph entitled "Federal Communications Commission Salaries and Expenses," sandwiched between a proviso concerning VHF channel assignments to educational stations and a restriction on cellular telephone systems in rural areas, appeared the following provision:

> Provided, further, that none of the funds appropriated by this Act or any other Act may be used to repeal, to retroactively apply changes in, or to begin or continue a re-examination of the rules of the Federal Communications Commission with respect to the common ownership of a daily newspaper and a television station where the grade A contour of the television station encompasses the entire community in which the newspaper is published, *or to extend the time period of current grants of temporary waivers to achieve compliance with such rules....*

Making Further Continuing Appropriations for the Fiscal Year Ending September 30, 1988, H.Rep. No. 498, 100th Cong., 1st Sess. 34 (1987) ("*Conference Report* ") (emphasis added). The provision's sponsor was Senator Hollings, and we will refer to it as the Hollings Amendment or simply the Amendment. As of December 22 the sole holder of any temporary waiver of the sort specified in the italicized phrase was News America Publishing, Inc. Under the natural and we think only reasonable construction of the phrase, its sole effect was to forbid extension of those waivers.

Despite the Amendment, News America applied to the Federal Communications Commission on January 14, 1988 for extensions of its waivers. The Commission denied the requests on January 19, 1988, finding that the Amendment barred any such extension and declining to consider News America's petition or its constitutional challenges to the Amendment. *News America Publishing, Inc.*, FCC 88-19, slip op. at 2 (Jan. 19, 1988). Naturally it did not reach the merits of News America's application. News America petitioned for review, moving for expedited treatment and for a stay of the FCC's order. We granted both motions and stayed the Commission's ruling until 45 days following our decision in this appeal.

The critical last 18 words of the Amendment are general in form but not in reality; they burden a single publisher/broadcaster. We conclude that under the First and Fifth Amendments we must scrutinize such legislation under a test more stringent than the "minimum rationality" criterion typically used for conventional economic legislation under equal protection analysis. Although the decisions of the Supreme Court and this circuit leave some doubt as to the exact characterization of the proper standard, any that is appreciably more stringent than "minimum rationality" requires invalidation of the challenged phrase. [FN1]

FN1. News America also challenges the remainder of the Hollings Amendment, which forbids FCC re-examination of the newspaper-television cross-ownership rules. That proviso is not ripe for review at this time. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). It is far from clear that, once the FCC has opened its door to News America's application, the Amendment's barrier to FCC rethinking of the cross-ownership rules will be an obstruction to relief.

We do not, moreover, believe that the two portions of the Hollings Amendment must stand or fall together. The question of whether one part of a statute is severable from another is primarily one of legislative intent, informed by a general presumption of severability. *Regan v. Time, Inc.*, 468 U.S. 641, 653, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984). Although the two parts of the Amendment are tangentially related, we see no indication that

Congress would not have enacted the first part of the amendment without the second. *See Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976).

Because we do not reach News America's challenge to the first part of the Hollings Amendment, references to the challenged phrase or clause refer only to the last 18 words of the Amendment.

I. BACKGROUND

The FCC's newspaper-broadcast cross-ownership rule provides generally that the Commission may not grant a television broadcast license to a party who owns or controls a daily newspaper in the same *803 **185 community. [FN2] 47 C.F.R. § 73.3555(c). The Commission has, however, provided for both temporary and permanent waivers of the rule. If a broadcast licensee acquires a daily newspaper, the Commission's practice is to grant automatically a temporary waiver for one year or until the license renewal date, whichever is longer. *Second Report & Order*, 50 F.C.C.2d 1046, 1076 n. 25 (1975). Temporary waivers of varying durations are also available if a newspaper publisher acquires a broadcast station. *See, e.g., Metromedia Radio & Television, Inc.*, 102 F.C.C.2d 1334, 1353 (1985), *aff'd Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038 (D.C.Cir.1986).

FN2. The rule provides in relevant part:

No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls a daily newspaper and the grant of such license will result in:

(3) The Grade A contour for a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

47 C.F.R. § 73.3555(c).

The Commission is ready to grant discretionary waivers or extensions on any of several grounds. The owner's having to sell at a distress price is one. *Second Report & Order*, 50 F.C.C.2d at 1085. Another is a showing that "separate ownership and operation of a newspaper and station cannot be supported in the locality." *Id.* Finally, the Commission allows waiver when "for whatever reason" the purposes of the rule would be best served by continued joint ownership. *Id.* The common theme of the last two grounds is obviously to grant a waiver where enforcement of the rule would defeat rather than advance the goal of media diversity. Indeed, in upholding the cross-ownership rules against constitutional attack, the Supreme Court explicitly noted that the availability of waivers--where the station and paper could not survive without common ownership--"underscore[s]" the reasonableness of the rules. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802 n. 20, 98 S.Ct. 2096, 2115 n. 20, 56 L.Ed.2d 697 (1978). [FN3]

FN3. News America vigorously argues that the waiver procedure is essential to the rules' constitutionality. In light of our disposition we need not reach the issue.

Although the *Second Report & Order* also provided for permanent waivers of the newspaper-broadcast cross-ownership rule, *Second Report & Order*, 50 F.C.C.2d at 1076 n. 24, 1085, the burden on an applicant for a permanent waiver is considerably heavier than for a temporary one. *Health & Medicine Policy Research Group*, 807 F.2d at 1042-43; FCC Brief at 27-28 n. 10. Only once, in a case involving "highly unusual facts," FCC Brief at 28 n. 10, has the Commission actually granted a permanent waiver of the newspaper-broadcast cross-ownership rule. *See Field Communications Corp.*, 65 F.C.C.2d 959 (1977). [FN4]

FN4. In *Field Communications*, the Commission granted a permanent waiver to Field Communications, a corporation that, as a consequence of the grandfathering provisions, had been allowed to retain both a newspaper and a television station at the time of the promulgation of the cross-ownership rules in 1975. Field subsequently transferred a controlling interest in the station to another party but reserved the right to repurchase its interest and retained a significant role in affairs of the station. Field then reacquired the station as a result of the liquidation of the other party. In assessing the application for a permanent waiver, the Commission appears to have treated the reacquisition as little more than a *pro forma* transfer of control to a licensee already approved for cross-ownership. *Field Communications*, 65 F.C.C.2d at 961, and the permanent waiver as a virtually inevitable concomitant of the original grandfathering protection.

In view of the exceedingly restricted availability of permanent waivers, News America cannot be faulted for any failure to exhaust that avenue of relief. It is hard to conceive a case where any such application would be more obviously futile. *See Honig v. Doe*, --- U.S. ----, 108 S.Ct. 592, 606, 98 L.Ed.2d 686 (1988); *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330, 89 S.Ct. 548, 551, 21 L.Ed.2d 519 (1969); *Public Utilities Comm'n of California*

v. *United States*, 355 U.S. 534, 539-40, 78 S.Ct. 446, 450-51, 2 L.Ed.2d 470 (1958); *National Wildlife Federation v. Burford*, 835 F.2d 305, 317 (D.C.Cir.1987); *Cutler v. Hayes*, 818 F.2d 879, 891 (D.C.Cir.1987); *Atlantic Richfield Co. v. Dep't of Energy*, 769 F.2d 771, 782 (D.C.Cir.1984); K. Davis, 4 *Administrative Law Treatise* § 26.11 at 464-68 (1983); *see also Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 39 S.Ct. 375, 63 L.Ed. 772 (1919) (exhaustion necessary only where there is an appropriate avenue of relief to exhaust); L. Jaffe, Judicial Control of Administrative Action 426-28 (1965). Quite apart from the narrow availability of permanent waivers generally, it is altogether unrealistic to suppose that an agency as sensitive to congressional desires as the FCC, *see Meredith Corp. v. FCC*, 809 F.2d 863, 872-73 & n. 11 (D.C.Cir.1987) (Commission counsel observes at oral argument that language in committee reports "did not bind them legally, only 'as a practical matter' "), would grant a permanent waiver where Congress indicated hostility to extension of even a temporary one.

***804 **186** News America is a corporation controlled by K. Rupert Murdoch, a recently naturalized American citizen with extensive broadcast and newspaper holdings in Australia, Europe, and North America. Murdoch also controls Fox Television, Inc. ("Fox"), [FN5] which owns numerous television stations throughout the United States.

FN5. Fox was previously known as News America Television, Inc. For the sake of clarity, we refer to this entity throughout simply as "Fox." *See Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1040 n. 1 (D.C.Cir.1986).

In November 1985 and November 1986, Fox secured FCC permission for its acquisition of the licenses, respectively, of WNYW-TV in New York City and WXNE-TV in Boston. Because News America owned the *New York Post* and the *Boston Herald*, these acquisitions required waivers of the cross-ownership rule, which the Commission granted (two years for the New York cross-ownership, 18 months for that in Boston). [FN6] *Metromedia*, 102 F.C.C.2d at 1353 (New York); *Twentieth Holdings Corp.*, 1 F.C.C.Rcd. 1201 (1986) (Boston). Time ran out on March 6, 1988 for the New York interests, and in the absence of waiver extensions will run out on June 30, 1988 for those in Boston. Unless Murdoch sells the Herald or WXNE-TV or secures relief, Fox will face "administrative remedies to assure compliance," *Metromedia*, 102 F.C.C.2d at 1350, presumably including loss of the WXNE-TV license.

FN6. The transaction involving the sale of WNYW-TV from Metromedia to Murdoch also included the transfer of WFLD-TV, a Chicago UHF station, to Fox. At that time News America also owned a major Chicago daily, the *Chicago Sun-Times*. Fox therefore sought and obtained a two-year waiver for the Chicago properties as well. Four months after obtaining the waiver, however, News America sold the *Sun-Times*.

Counsel for News America have informed us by letter that it sold the *Post* effective March 7, thus appearing to moot its claims as to that newspaper and WNYW-TV. This change does nothing, however, to moot News America's constitutional challenge with respect to the *Herald* and WXNE-TV. [FN7]

FN7. Intervenor Committee for Media Diversity argues in a "Suggestion of Partial Mootness" filed March 10 that News America's disposition of the *Post* moots the entire claim. Its argument appears to rest on alleged substantive defects with News America's petition for extension of its Boston waiver. The argument is evidently a suggestion that we should avoid the constitutional question by affirming the Commission's action on grounds never addressed by the Commission. This we may not do. *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). Nor would a remand to the Commission to consider the merits serve any purpose; under its view that the Hollings Amendment is constitutional, it would never reach them.

News America's primary claims [FN8] lie at the intersection of the First Amendment's protection of free speech and the Equal Protection Clause's requirement that government afford similar treatment to similarly situated persons. (Although the Equal Protection Clause appears only in the 14th Amendment, which applies only to the states, the Supreme Court has found its essential mandate inherent in the Due Process Clause of the Fifth Amendment and therefore applicable to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).) Where legislation affecting speech appears underinclusive, ****805 **187*** *i.e.*, where it singles out some conduct for adverse treatment, and leaves untouched conduct that seems indistinguishable in terms of the law's ostensible purpose, the omission is bound to raise a suspicion that the law's true target is the message. Accepting that intuition without making an actual determination of the legislators' motives, the

Supreme Court has for the regulation of speech insisted on a closer fit between a law and its apparent purpose than for other legislation. *See Arkansas Writers' Project v. Ragland,* --- U.S. ----, 107 S.Ct. 1722, 1730, 95 L.Ed.2d 209 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 592, 103 S.Ct. 1365, 1375, 75 L.Ed.2d 295 (1983); *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972).

FN8. News America also contends that the last 18 words of the Hollings Amendment (1) constitute a forbidden Bill of Attainder; (2) violate certain principles of separation of powers; (3) effect a taking of property without adequate compensation in violation of the Fifth Amendment; (4) violate the Due Process Clause of the Fifth Amendment; and (5) violate the presentment clause of Article I because the President was given no "meaningful" opportunity to veto it. We find it unnecessary to address these contentions, however, in view of our finding of a violation of the free speech and equal protection guarantees of the First and Fifth Amendments.

Two circumstances complicate our analysis here. First, two intervenors--*not*, significantly, the FCC--contend that the challenged clause potentially bears upon other publisher/broadcasters than Murdoch. [FN9] Second, special characteristics of broadcasting have led the Supreme Court to give Congress greater latitude in broadcast regulation than it or any state legislature would enjoy in the regulation of printed (or other non-broadcast) speech. We find that in fact the clause covers only Murdoch. Further, we believe that even in broadcast regulation the First and Fifth Amendments demand a better fit between the law and its asserted legitimate purposes than we can find in the Hollings Amendment.

FN9. Citing our decision in *Central Television, Inc. v. FCC,* 834 F.2d 186 (D.C.Cir.1987), intervenor Committee for Media Diversity ("CFMD") also argues that we have no jurisdiction to hear News America's appeal because News America is challenging conditions attached to its broadcast licenses. CFMD Brief at 13-15. This is silly. News America challenges the Hollings Amendment's restrictions on waiver extensions, not the terms of the initial waiver.

II. THE MEANING OF THE CLAUSE

The final 18 words of the Hollings Amendment forbid the Commission from "extend[ing] the time period of *current grants* of temporary waivers to achieve compliance with [the newspaper-television cross-ownership rule]." *Conference Report* at 34 (emphasis added). On their face these words apply only to newspaper-television cross-ownership waivers in effect on enactment, *i.e.*, the two held by Murdoch.

Intervenors Committee for Media Diversity ("CFMD") and Wilbert A. Tatum, [FN10] however, argue that "current" was inserted only to ensure that the Amendment would have retroactive application to News America's waivers. On their view the Amendment would apply to *all* parties who hold temporary waivers during the fiscal year. CFMD Brief at 10; Tatum Brief at 13-14.

FN10. These two intervenors have standing on the basis of their claims that Tatum and the members of CFMD are viewers and readers of affected stations and newspapers. Tatum also claims standing as a potential purchaser of the *Post;* we doubt whether a party hoping to buy a paper at advantageous prices is within the zone of interests sought to be protected or regulated by Congress, but need not reach the issue. CBS Inc. seeks to intervene, raising arguments as to the constitutionality of the cross-ownership rules. We need not examine whether its interests are sufficiently affected by those rules, as we find that issue unripe. *See* note 1, *supra.*
The American Civil Liberties Union Foundation and the New York Civil Liberties Union, the American Newspaper Publishers Association and the Newspaper and Mail Deliverers' Union of New York and Vicinity have filed *amicus* briefs in support of News America; the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives have filed an *amicus* brief in support of the FCC.

The interest in courts' avoiding constitutional questions must of course influence our construction of the statute; it does not, however, require Olympic exegetical acrobatics. *CFTC v. Schor,* 478 U.S. 833, 106 S.Ct. 3245, 3252, 92 L.Ed.2d 675 (1986) (courts may not ignore legislative will in order to avoid constitutional adjudication). To accept intervenors' construction would require no less. First, "current" has a well-accepted meaning in ordinary usage; Webster's *Third New International Dictionary* (1981) defines the word as "occurring in or belonging to the present time: in evidence or *in operation at the time actually elapsing.*" *Id.* at 557 (emphasis added). The only grants of waivers in effect *806 **188 on December 22, 1987 were News America's; other temporary waivers which might be granted during the course of

the fiscal year 1988 could not on December 22 be described as "current grants." In the absence of ambiguity in statutory language, we must give effect to the plain meaning of the words Congress has chosen. *Escondido Mutual Water v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772, 104 S.Ct. 2105, 2110, 80 L.Ed.2d 753 (1984); *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981); *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108-09, 100 S.Ct. 2051, 2056-57, 64 L.Ed.2d 766 (1980); *United Scenic Artists, Local 829, Brotherhood of Painters & Allied Trades, AFL-CIO v. NLRB*, 762 F.2d 1027, 1032 n. 15 (D.C.Cir.1985).

Second, an agency can "extend" only a waiver that exists at the time of extension. Without the word "current," the clause would bar any extension that the Commission might wish to provide during the effective period of the Continuing Resolution, *i.e.*, from December 22, 1987 until September 30, 1988. Thus insertion of the modifier was quite unnecessary to assure inclusion of Murdoch. And, had any member of Congress familiar with the legislation entertained the fear now raised by intervenors, the natural solution would have been to specify "current and future" temporary waivers. We cannot read "current" to mean "current and future."

Third, the Commission, which is the agency charged with administering the statute, interprets the word "current" unsurprisingly to apply solely to temporary waivers outstanding at the time the Continuing Resolution was passed. FCC Brief at 34. (At oral argument the Commission's General Counsel explicitly stated that the brief represented the views of the Commission, not just its lawyers. Transcript of Oral Argument at 36.) We doubt we could accept intervenors' view even if the Commission endorsed it, for the language resolves the issue. *See NLRB v. United Food & Commercial Workers Union*, ---U.S. ----, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987); *INS v. Cardoza Fonseca*, --- U.S. ----, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987). In any event, as the language clearly does not decide the issue in the way intervenors urge, we must accept the Commission's plainly reasonable view. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984).

With language, common sense and the Commission against them, intervenors point to remarks made in Congress approximately one month *after* the Continuing Resolution was adopted. Though at first Senator Hollings stated that his Amendment applied only to Murdoch, *see* 134 Cong.Rec. S63 (daily ed. Jan. 26, 1988), he reversed field the next day and asserted that it applied also to any future temporary waivers which might be granted:

> I want to make sure everyone understands why I authored this law. This law serves the useful purpose of ensuring that the intent set forth in the first half of this amendment, that the FCC not modify the existing criteria for permanent waivers, not be evaded through the successive grants of temporary waivers. This applies to any extension of any temporary waiver which is granted, not just the ourstanding temporary waivers held by Mr. Murdoch.

Id. at S139 (daily ed. Jan. 27, 1988). Senator Kennedy echoed this view:

> At the same time, I want to emphasize that the amendment was not directed specifically at Mr. Murdoch or his waivers, but at all persons who would be similarly situated, and at all waivers, now or in the future, in situations where persons such as Mr. Murdoch would be seeking to evade the cross-ownership rule by obtaining a permanent exemption in the guise of a series of temporary waivers.

Id. at S59 (daily ed. Jan. 26, 1988).

Even in ordinary circumstances courts give little or no weight to such post- enactment statements. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132, 95 S.Ct. 335, 353, 42 L.Ed.2d 320 (1974); *Public Citizen v. Young*, 831 F.2d 1108, *807 **189 1117 (D.C.Cir.1987). Here the timing renders the statements still more suspect. At the time of adoption, the Amendment had received *no* comment whatsoever in any congressional committee or on the floor of either house. The only mention of the provision in the Conference Report was a restatement of the exact language of the Amendment (except that the word "rules" in the Continuing Resolution is replaced by "regulations" in the Report). *Conference Report* at 504. Its very existence was known to only a few legislators; indeed, the Amendment's sponsors apparently neglected to inform either of the two Senators from the *Post's* home state or the junior Senator from Massachusetts of the Amendment or its intended effect. 134 Cong.Rec. at S54 (statement of Senator Symms); *id.* at S55 (same); *id.* at S64 (statement of Senator Packwood); *id.* at S140 (statement of Senator D'Amato); J.A. at 34, 38, 39, 40, 64

(newspaper accounts). Once discovered generally, a few days after enactment, the Hollings Amendment and its evident focus on Murdoch drew sharp attacks from the press and fellow legislators. *See* J.A. at 30-71 (newspaper accounts). Asserting the unconstitutionality of the Amendment, News America petitioned the FCC for an extension on January 14, 1988 and filed this lawsuit on January 21, 1988. The statements of Senators Hollings and Kennedy were made approximately one week later, with full knowledge of the existence of this lawsuit and of News America's legal claims. *See* 134 Cong.Rec. at S59 (Senator Hollings); *id.* at S139 (Senator Hollings); id. at S144 (Senator Kennedy). In short, there is simply no evidence that these post-enactment remarks represented congressional understanding at the time of enactment.

Indeed, the *full* text of the post-enactment Senate discussion, whatever its weight, serves to confirm our view that the Hollings Amendment was directed solely at Rupert Murdoch and his media holdings. The two brief remarks of Senators Hollings and Kennedy on the meaning of the Amendment occurred during debate on Senator Steven Symms's amendment to a civil rights bill--an amendment which would have repealed the Hollings Amendment. Except for those two statements, the discussion focused almost entirely on Murdoch and his temporary waivers. *See* 134 Cong.Rec. S54-69 (daily ed. Jan. 26, 1988); *id.* at S138-47 (daily ed. Jan. 27, 1988). Senator Symms began the debate on his amendment by discussing Murdoch, the effect of the Hollings Amendment on his waivers, and the First Amendment ramifications of what he called "the anti- Murdoch measure." 134 Cong.Rec. at S54-55. Senator Hollings then took the floor to explain "what is really involved about the so-called dark of night and the civil rights of Mr. Murdoch." *Id.* at S56. Hollings addressed himself first to what he perceived to be the problem: "a runaway animal in the FCC." *Id.* He quoted a 1985 letter from Murdoch promising not to seek a permanent waiver and discussed Murdoch's participation in the Freedom of Expression Foundation, a public interest group that had petitioned the Commission for repeal of the cross-ownership rules. [FN11] *Id.* at S57. Hollings then explained the procedure by which his amendment was added to the Continuing Resolution, and attempted to rebut, paragraph by paragraph, a preamble to Senator Symms's amendment that was highly critical of the Hollings Amendment's origins. In explaining the amendment, Senator Hollings stated that

> [Mark Fowler, former Chairman of the FCC] said at his retirement party: "The greatest gift I gave to anybody as Chairman of the FCC was an 18-month waiver to Rupert Murdoch." And everyone ***808** ****190** clapped and said "Whoopee." That is the way we are doing business--cash and carry downtown at the Federal Communications Commission.
> I want to stop it.

Id. at S58. Senator Hollings continued:

> Murdoch is defended. He went to court already. He knows how to get injunctions on the spurious nonsense of some constitutional provision that provides [sic] only to him.

Id. at S59. The Senator concluded by stating that

> [N]obody appeared in opposition to the cross-ownership rules other than this sneaky operation of Rupert Murdoch. Now, I found out that the prevaricator and the manipulator has gotten the high road of the headlines and editorials ...

Id.

Senator Kennedy was then recognized. After noting that he had joined Senator Hollings in adding the amendment to the Continuing Resolution, he stated that the action was intended to preserve the cross-ownership rule. He then said:

> The fundamental question is whether Rupert Murdoch is entitled to thumb his nose at that law and become the only newspaper publisher in America who can buy a television station and keep his newspaper in the same community.
> Mr. Murdoch was well aware of the law when he acquired his television stations in Boston and New York. He had a choice then, and he has a choice now. He can keep his newspaper--or he can keep his broadcasting station. But he cannot keep them both.... The principle is right--and Rupert

FN11. Both Senators Hollings and Kennedy appeared to believe that the FEF was little more than a Murdoch front organization working in concert with News America. *See, e.g.*, 134 Cong.Rec. at S57 (Senator Hollings); *id.* at S59 (same); *id.* (Senator Kennedy). That perception is not borne out by the record in this case. FEF is a nonprofit organization supported by numerous daily newspaper publishers, broadcast licensees, newspaper and broadcast trade associations, and other corporations. J.A. at 307. For instance, the Washington Post and the Times Mirror organization are major contributors; News America apparently is a relatively minor one. News America Reply Brief at 11 n. 8.

> Murdoch is wrong to try to change it. Instead of attacking me, he should try to explain why he thinks he's entitled to an exemption from the law. Mr. Murdoch is one of the most powerful publishers in the world, and he has been using those powers to ignore the will of Congress, subvert the FCC, and evade the cross-ownership rule.

Id. Although Senator Kennedy then stated that "the amendment was not directed specifically at Mr. Murdoch," *id.*, he went immediately from that statement to a lengthy description of Murdoch's media interests, his temporary waivers and extensions, and what he called "Murdoch's effort to subvert the rule" in the FCC. *Id.* Specifically, Senator Kennedy stated that

> It was widely anticipated that Murdoch would go in behind [the FEF] petition and ask the FCC to extend his waivers to sell the New York Post and the Boston Herald until any new FCC proceedings on the cross-ownership rule were completed. In these circumstances, I went to Senator Hollings and urged him to save the cross-ownership rule.

Id. Senator Kennedy made other references to Murdoch: "Congress has learned the hard way to be skeptical about anything Mr. Murdoch says or does," *id.* at 60; "Murdoch should never have received a waiver in the first place, let alone a waiver for the unprecedented period of 2 years," *id.*; "[t]he agency had been captured lock, stock, and barrel by Rupert Murdoch, and it was long past time for Congress to step in," *id.* at 61. Senator Kennedy concluded his discussion of the Hollings Amendment by asserting that "Rupert Murdoch does not deserve an exemption from the cross-ownership rule--and it would be wrong for Congress or the FCC to give him one." *Id.*

Senator Symms then replied to Senators Hollings and Kennedy. In response, Senator Hollings conceded that his Amendment would affect only News America: "Yes, it affects Mr. Murdoch only because he is the only one trying to repeal the rule rather than what he said in his original letter to Senator Wirth, then Congressman Wirth on the House side, that his full intent was to comply." *Id.* at S63.

Senator Wirth himself joined the discussion soon thereafter. After describing his past dealings with Murdoch as chairman of the relevant House committee and inserting a letter from Murdoch into the record, Wirth addressed himself to "the equities involved in this":

> Mr. Murdoch has gotten a waiver and now through a variety of mechanisms is attempting to get a full permanent waiver *809 **191 of the cross-ownership rule. Tell me how fair that is.

Id. at S66. Senator Wirth compared Murdoch's actions with those of CapCities (another holder of a temporary waiver) and then returned to the subject of Murdoch alone:

> Mr. Murdoch has had a waiver for 2 years. He knew going in when he bought Metromedia and owned those newspapers what the rules were. We explained them to him in my office. He wrote back and said "I know what the rules are." Then he went on to say, "I have no intention of going after a permanent waiver." Now what has he done? He has turned around and gone after a permanent waiver. Is 2 years enough time or not enough time to go out and sell those newspapers to avoid the cross-ownership problem?

Id. at S67. Finally, Wirth attempted to defend the Hollings Amendment's exclusive focus on Murdoch's stations:

> The second question raised by the Senator from Idaho [Symms], a good one, is, why is this provision focused just on these two stations? The question is, Why these two stations? The answer is that everybody else complied with the rules except Rupert Murdoch. That is why it is focused on these two stations. It has nothing to do with the politics of Massachusetts. It has nothing to do with editorial cartoons. It has to do with the fact that everybody else complied with the law. The only people who have not complied with the law are the Murdoch group, which is trying to get this permanent waiver. That is why this is focused just on these people.

Id.

The Senate debated Senator Symms's proposal again the following day. Senator D'Amato of New York, concerned that the Hollings Amendment might result in the imminent closure of the *Post*, rose to criticize the Amendment and urge its repeal. Following a short statement by Senator Symms, Senator Wirth again described his past wrangles with Murdoch as a member of the House committee responsible for telecommunications, and then stated

> Who is he to think that he is going to be able to sneak around this set of rules whether he sets up a nonprofit organization, a tax [sic--attacks?]

fairness, and advocates his position, whether he goes around with a lot of very high-powered Washington lawyers, or whatever, and that one man is going to be able to obviate [sic] these rules.

Id. at S141. Wirth then contrasted the conduct of Capital Cities Communications, "an honorable American corporation," with that of "Rupert Murdoch, who arrived here from Australia." *Id.* Finally, Senator Wirth again indicated that the Amendment was directed at "one individual":

What this issue is about is whether one individual is going to be able to circumvent a clearly laid out set of rules and regulations, whether one individual is going to be able to end-run the intent of the FCC, the intent of Congress; whether one individual, having clearly stated he was going to divest, will be allowed to go back on his word.

Id. at S142.

We note that only one Senator made explicit reference to the content of Murdoch's publications. Senator Lowell Weicker, urging that Senator Symms's proposal be tabled, stated:

[A]s one who, by innuendo, has been dragged through the mud by Mr. Murdoch, as one who woke up one morning to read that I had a Communist spy nest in my office because a young intern, unpaid, happened to talk to somebody on the streets of Washington, I can assure you that when it comes to media ownership in the United States, my doubts have nothing to do with his citizenship. I just think he probably is the No. 1 dirt bag owner of any publications or media in this Nation.

Id.

The Supreme Court has recently hinted at a readiness to infer censorial intent from legislative history and to invalidate laws so motivated. *Minneapolis Star & Tribune* *810 **192 *Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 579-80, 103 S.Ct. 1365, 1368-69, 75 L.Ed.2d 295 (1983) (re-examining *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936)). Here the post-enactment debate's exclusive focus on Murdoch, coupled with clues of heated criticism of several senators by Murdoch's papers, *see* 134 Cong.Rec. at S61 (Senator Kennedy notes his past disagreement with *Herald's* editorial board); *id.* at S67 (Senator Wirth states that measure has "nothing to do with the politics of Massachusetts ... [or] editorial cartoons"); *id.* at S143 (Senator Weicker notes *Post'* s criticism of him); J.A. at 35, 41, 43, 46, 47, 56, 63 (journalistic references to *Herald's* past criticism of Senator Kennedy), might support such inferences. [FN12] In view of our conclusion that the Amendment is unconstitutional without concern for motivation (*see* part IV, *infra*), however, we pass over petitioner's claims of illicit purpose.

FN12. Any judicial use of legislators' remarks for imputing an unconstitutional motive to the legislative majority (as opposed to merely inferring the intended *meaning* of ambiguous legislation) raises troubling questions, *see* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1212-17, 1324-34 (1970), but such imputations occur. *See Edwards v. Aguillard*, --- U.S. ----, 107 S.Ct. 2573, 2579, 96 L.Ed.2d 510 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56-57, 105 S.Ct. 2479, 2490-91, 86 L.Ed.2d 29 (1985). We make no such imputation here.

Whatever the congressional motives, the post-enactment debate reveals but a single focus: whether Rupert Murdoch and News America should be denied the opportunity to seek an extension of his temporary waivers. Taken as a whole, that discussion does nothing to undermine what we learn from the language of the Amendment (coupled with the fact that Murdoch's were the only temporary waivers "current" on December 22, 1987): the clause sought simply to prevent any extension of those waivers.

As we will develop below, the closing 18 words of the Hollings Amendment could not withstand more than "minimum rationality" scrutiny *even* if construed as intervenors propose. But the constitutional discussion should proceed on a realistic basis: the clause impinges on a closed class, [FN13] consisting exclusively of Murdoch.

FN13. *I.e.*, Murdoch is not only the sole current member of the class, but is the sole party that can ever be a member.

III. THE STANDARD OF CONSTITUTIONAL REVIEW

[1] News America contends that we should assess the Hollings Amendment under the daunting standard applied by the Supreme Court in *Arkansas Writers' Project v. Ragland*, --- U.S. ----, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75

L.Ed.2d 295 (1983). In *Minneapolis Star*, the state imposed a "use tax" on purchases of ink and paper but exempted the first $100,000 worth, thus restricting the tax to a handful of large newspapers. In *Arkansas Writers' Project*, the state collected a sales tax on general interest magazines, but exempted religious, professional, trade, and sports journals. In both cases the Court held that the exemptions rendered the taxes invalid. In *Minneapolis Star*, the Court said:

> Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.... We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax.... A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action.

460 U.S. at 591-93, 103 S.Ct. at 1375-76. Similarly, in *Arkansas Writers' Project*, the Court said that "to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." 107 S.Ct. at 1728.

*811 **193 The Court, striking both statutes down, analyzed them primarily in First Amendment terms, but in *Arkansas Writers' Project* it expressly noted the overlap with equal protection precepts. 107 S.Ct. at 1726 n. 3 (First Amendment Claims "obviously intertwined with interests arising under the Equal Protection Clause"); *cf. Minneapolis Star*, 460 U.S. at 585- 86 n. 7, 103 S.Ct. at 1372 n. 7 (problem viewed as one "arising directly under the First Amendment"). However characterized, the two cases clearly reflect extraordinary concern for any underinclusiveness where speech is at stake.

The FCC contends that such cases are completely inapplicable, and that we must uphold the statutory classification if it is rationally related to some legitimate governmental interest. FCC Brief at 18. Scrutiny under this view is so casual that validity is virtually assured. *See, e.g., Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980); *Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Insofar as the Commission claims that the broadcast media do not enjoy First Amendment protection identical with the print media, it is plainly correct. *Compare, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (requirement that newspapers provide right of reply invalid), *with Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388, 89 S.Ct. 1794, 1805, 23 L.Ed.2d 371 (1969) (opposite for broadcasters). *See also FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 799, 98 S.Ct. 2096, 2114, 56 L.Ed.2d 697 (1978); *CBS, Inc. v. FCC*, 453 U.S. 367, 394-96, 101 S.Ct. 2813, 2829-30, 69 L.Ed.2d 706 (1981); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 101-02, 93 S.Ct. 2080, 2086, 36 L.Ed.2d 772 (1973); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27, 63 S.Ct. 997, 1014, 87 L.Ed. 1344 (1943); *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 282, 53 S.Ct. 627, 635, 77 L.Ed. 1166 (1933). The Supreme Court has rested this lesser protection on the scarcity of broadcast frequencies "in the present state of commercially acceptable technology" as of 1969, *see Red Lion*, 395 U.S. at 389-90, 89 S.Ct. at 1806-07, and has recognized that new technology may render the doctrine obsolete--indeed, may have already done so. *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n. 11, 104 S.Ct. 3106, 3115-16 n. 11, 82 L.Ed.2d 278 (1984). But it has stuck to the doctrine in the face of that recognition, expressing unwillingness to reconsider it in the absence of a "signal from Congress or the FCC" as to the impact of advances in broadcast technology. *Id.* Although the Commission itself has emphatically indicted the scarcity theory, *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985); *In re Complaint of Syracuse Peace Council*, 1 FCC Rcd 5043 (1987), we will not here speculate on the outcome of any such reconsideration. For purposes of this decision we accept the FCC's contention that broadcast regulations receive more lenient scrutiny than ones affecting other types of speech.

But this conclusion does not take us where the FCC would have us go. The Commission invites us to read *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978) ("*NCCB* "), as establishing the minimum rationality standard for "structural" regulations of the broadcast industry. In that case the Court rejected a constitutional challenge to the very newspaper-broadcast cross-ownership rules

from which Murdoch received temporary waivers. It invoked the scarcity concept and upheld the regulations, saying that "nothing in the First Amendment ... prevent [s] the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." *NCCB*, 436 U.S. at 799, 98 S.Ct. at 2114. Moreover, the Court rejected newspaper publishers' arguments that the regulations unconstitutionally conditioned *812 **194 receipt of a broadcast license on forfeiture of the established First Amendment right to publish a newspaper. The rules, it observed, allowed publishers to own TV stations in communities different from their papers', were not content-based, and were aimed at the promotion rather than the restriction of free speech. *Id.* at 800-01, 98 S.Ct. at 2114-15.

We do not read *NCCB* as supporting the FCC's broad theory. At no point did the Court expressly rely on any "rational basis" standard or cite a single case applying that standard. In fact, the Court examined the Commission's reasoning with care. The rules were generic in substance as well as form, and the Court considered only a facial challenge. It clearly regarded the rules as manifesting a principled effort to find a mix of ownership-dispersion requirements, on the one hand, and government hands-off, on the other, that would maximize free speech. Given the assumed necessity of the agency's " 'choos[ing] among applicants for the same facilities,' " it wrote, "the Commission has chosen *on a 'sensible basis,'* one designed to further, rather than contravene, 'the system of freedom of expression.' " 436 U.S. at 802, 98 S.Ct. at 2115-16 (emphasis added).

Other cases of the Supreme Court and this court echo this view. In *League of Women Voters* the Court invalidated a section of the Public Broadcasting Act that forbade "editorializing" by any non-commercial public station receiving public funds. Although the Court foreswore insistence on a " 'compelling' governmental interest," it stated that "our decisions have generally applied *a different First Amendment standard* for broadcast regulation than in other areas," 468 U.S. at 375, 104 S.Ct. at 3114 (emphasis added). More affirmatively, the Court stated that while the inherent scarcity of the electromagnetic spectrum allowed for a larger degree of governmental regulation of broadcasting than for the print media, "broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." *Id.* at 378, 104 S.Ct. at 3116. The upshot was insistence that the restriction be "narrowly tailored to further a substantial governmental interest." *Id.* at 380, 104 S.Ct. at 3118. [FN14]

FN14. *See also CBS*, 453 U.S. at 395, 101 S.Ct. at 2829 (broadcasters "entitled under the First Amendment to exercise the widest journalistic freedom consistent with its public [duties]") (quoting *Columbia Broadcasting System*, 412 U.S. at 110, 93 S.Ct. at 2090); *National Broadcasting Co.*, 319 U.S. at 227, 63 S.Ct. at 1014 (government may not "choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis").

The Commission implicitly contends that the sort of review applied in *League of Women Voters* is limited to "non-structural" regulations. Clearly one can array possible rules on a spectrum from the purely content-based (*e.g.*, "No one shall criticize the President") to the purely structural (*e.g.*, the cross-ownership rules themselves). On such a spectrum, the prohibition at issue in *League of Women Voters* would be at some remove from pure content, as it forbade "editorializing" of any kind by the covered stations. 468 U.S. at 366, 104 S.Ct. at 3110. By the same token, the Hollings Amendment is far from purely structural. Indeed, it is structural only in form, as it applies to a closed class of one publisher broadcaster. The Supreme Court in *League of Women Voters* clearly saw no inconsistency with *NCCB*, suggesting that it well recognized ambiguities in the content/structure dichotomy, *cf.* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U.Chi.L.Rev. 81 (1978), and in this context steered clear of any effort at rigid categorization. Thus, even if we were to accept the Commission's analysis of *NCCB*, we would not agree that the Amendment should be lumped with the cross-ownership rules and accorded the high deference that the Commission believes the latter received. The Amendment can affect but a single party; on any realistic spectrum, it is far closer to the law *813 **195 invalidated in *League of Women Voters* than to the regulation sustained in *NCCB*.

Insistence on more than minimal scrutiny finds support in our own past decisions. In *Community-Service Broadcasting v. FCC*, 593 F.2d 1102 (D.C.Cir.1978) (en banc), a case decided soon after *NCCB*, [FN15] we found a violation of equal protection in certain clearly "structural" rules of the

FCC--rules requiring only non-commercial educational broadcast stations to retain audio recordings of broadcasts. Although Judge Robinson believed that the regulations could not withstand even minimal scrutiny and thus found it unnecessary to consider whether a less forgiving test was appropriate, *id.* at 1127, four members of the majority agreed that some form of intermediate scrutiny was appropriate. *Id.* at 1122 (opinion of Judge Wright); *id.* at 1124 (concurring opinion of Judge Bazelon). The court stated that even

> ... where *non content*-based distinctions are drawn in a statute affecting First Amendment rights, the Supreme Court has held that the government interest served must be "substantial" and the statutory classification "narrowly tailored" to serve that interest if the statute is to withstand equal protection scrutiny.

Id. at 1122 (emphasis added).

More recently, in *Johnson v. FCC*, 829 F.2d 157 (D.C.Cir.1987), we invoked the First Amendmem on both sides of the dispute in upholding the FCC's rule that its equal-time provisions were not triggered when TV stations aired political debates initiated by non-broadcast entities. Judge Robinson, writing for the court, noted that both broadcasters and the public have "important First Amendment interests," *id.* at 161, *see also id.* at 163, and that the Communications Act "reconciles not only competing policy choices, but also interests of constitutional stature in constant tension with each other [there, broadcasters' speech rights and the ballot access claims of minor-party candidates]." *Id.* at 165. *See also Branch v. FCC*, 824 F.2d 37 (D.C.Cir.1987).

Congress's exclusive focus on a single party clearly implicates values similar to those behind the constitutional proscription of Bills of Attainder. *See* U.S.Const. art. I, § 7, cl. 3. The safeguards of a pluralistic political system are often absent when the legislature zeroes in on a small class of citizens. Justice Jackson's statement, concurring in *Railway Express Agency v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949), is a classic:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id. at 112-13, 69 S.Ct. at 466-67. *See also Minneapolis Star*, 460 U.S. at 585, 103 S.Ct. at 1371 (tax that falls only on small segment of press weakens political constraints and suggests motive to suppress information); *Grosjean v. American Press Co.*, 297 U.S. 233, 250-51, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936) (invalidating tax on newspapers that applied only to 13 of 163 newspapers in Louisiana). Nowhere are the protections of the Equal Protection Clause more critical than when legislation singles out one or a few for uniquely disfavored treatment. [FN16]

> FN15. The court clearly was aware of *NCCB*, as Judge Robinson cited the Supreme Court's decision in his concurring opinion. *See Community- Service*, 593 F.2d at 1132 n. 64.

> FN16. We note that The New York Times Group, although the owner of a newspaper and a radio station in New York, *see* J.A. 125, 130, evidently by virtue of grandfathering, approved the substance of the Hollings Amendment in an editorial, stating that it "forced Rupert Murdoch to sell two newspapers, reinforcing sound federal policy." *See* "Congress: Wrong Even When Right," N.Y. Times, Jan. 6, 1988, at A22, col. 1.

**814 **196 We need not go as far as the Supreme Court in *League of Women Voters*, or this court in *Community-Service Broadcasting*, and require a showing that the Amendment's classification is narrowly drawn to serve a substantial governmental interest. What suffices for this case is that more is required than "minimum rationality."

IV. THE STANDARD APPLIED

[2] The Hollings Amendment strikes at Murdoch with the precision of a laser beam. We must now inquire how well its aim corresponds with any legitimate public purpose.

The Commission defends the Hollings Amendment as a "rational exercise of legislative authority" in response to a perceived threat to the integrity of the newspaper-television cross-ownership rule. Specifically, the FCC posits that "Congress could have rationally believed that a general prohibition against the extension of temporary waivers is a

rational means of ensuring that an applicant for a temporary waiver does not achieve through a successive series of waivers what amounts, in effect, to a permanent waiver." FCC Brief at 30-31. (The reference is only to waivers extant on December 22, 1987, *i.e.*, Murdoch's, as the FCC agrees that only those are covered.) On this view, Congress omitted future waivers from the ban because it anticipated being able to enact some permanent solution before the expiration of the Continuing Resolution.

Measured in terms of this purpose, the Amendment is astonishingly underinclusive. First, the Amendment forbids waiver extensions *only* to News America, not to any other party that might receive a temporary waiver and seek an extension during the fiscal year. If News America sold its Boston station to the *Boston Globe* today, the new owner could seek a temporary waiver and extension. Second, the Hollings Amendment applies only to *extensions* of temporary waivers, not to the granting of temporary waivers themselves. Thus, a broadcast licensee with four years to run on its license who purchases a newspaper today would be granted an *automatic* temporary waiver of four years, and a publisher purchasing a television station today could be granted a temporary waiver of unspecified duration despite the Amendment. The Amendment imposes no limit at all on the *aggregate duration* of waiver-and-extension combinations (other than Murdoch's). Congress could readily have prevented temporary waivers "creeping" into permanence for forbidding *all* temporary waivers (and capping Murdoch's) or by limiting the aggregate duration of waivers and their extensions.

Thus even intervenors' odd interpretation of the word "current" would not save the Hollings Amendment from this obvious objection--it leaves the Commission free to issue new temporary waivers far longer than Murdoch's. This is a sort of anti-grandfathering; we know of no public policy interest in its favor and no party to this proceeding suggests one.

In short, every publisher in the country other than Murdoch can knock on the FCC's door and seek the exercise of its discretion to secure, either by a single temporary waiver or by a waiver coupled with an extension, a period of exemption from the cross-ownership restrictions *longer* than that to which News America is restricted as a matter of law. Congress's device bears only the most strained relationship to the purpose hypothesized by the Commission.

We are perplexed by the suggestions on the floor of the Senate, in the post- enactment discussion of the Amendment (*see supra* pp. 807-809), that Murdoch was seeking unique treatment or a permanent waiver. In this proceeding he has clearly sought only an extension of a temporary waiver, and no one has directed our attention to any application for a permanent waiver. Prior to the Hollings Amendment, there appears to have been nothing unique ***815 **197** about either the status of Murdoch's temporary waivers or of his potential eligibility for extensions. It is only the Amendment that treats him uniquely; all other applicants may apply for--and presumably, on a sufficient showing, receive--exemption for longer periods.

We note that Congress imposed the restriction solely on extensions of waivers of the newspaper-*television* rules, not of the newspaper-radio rules as well. Three temporary waivers of the newspaper-radio rules are currently outstanding, and all three waivers have been extended pending the outcome of an FCC rulemaking proceeding. *See* J.A. at 29. The Supreme Court has already sustained the Commission's distinction between radio and television for purposes of other aspects of the cross-ownership rules, *see NCCB*, 436 U.S. at 815, 98 S.Ct. at 2122, on the basis of TV's much greater importance as a source of news. This omission alone would thus not undermine the Hollings Amendment, as it may rest on sound and well-recognized public policy concerns. It does, however, emphasize the narrowness of the Amendment's focus.

Of course Congress ordinarily need not address a perceived problem all at once. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 305, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813, 96 S.Ct. 2488, 2499, 49 L.Ed.2d 220 (1976); *Williamson*, 348 U.S. at 488, 75 S.Ct. at 464. But courts reject the facile one-bite-at-a-time explanation for rules affecting important First Amendment values. *League of Women Voters*, 468 U.S. at 396, 104 S.Ct. at 3126 (underinclusiveness as basis for striking down ban on editorializing); *Community-Service Broadcasting*, 593 F.2d at 1122; *see also Arkansas Writers' Project*, 107 S.Ct. at 1730; *Minneapolis Star*, 460 U.S. at 592, 103 S.Ct. at 1375. Moreover, contrary to the assertions of FCC counsel at oral argument, Murdoch and News America were more than mere "catalysts" for congressional action aimed at a perceived evil.

Here "evil" and "catalyst" overlap completely; the only "evil" that the Amendment scotched was the possibility that Murdoch might get extensions. In these circumstances, we think the Amendment's underinclusiveness fatal.

V. CONCLUSION

Congress has denied a single publisher/broadcaster the opportunity to ask the FCC to exercise its discretion to extend its waivers. The sole apparent difference between that publisher/broadcaster and all other possible applicants is an accident of timing: its temporary waivers were in effect on December 22, 1987, the others will have been issued thereafter. Further, only News America's aggregate waiver periods are limited to 18 months and two years; all other future grants are free of any such time limit. Whatever Congress's motive, the "potential for abuse" of First Amendment interests is so great in such restrictions, *cf. Minneapolis Star*, 460 U.S. at 592, 103 S.Ct. at 1375, that a bland invocation of Congress's conventional power to approach a problem one step at a time cannot sustain the Amendment.

We vacate the Commission's order in this case and remand to the Commission for consideration of News America's petition in light of the standards and principles that it has hitherto applied. As we observed above, the Supreme Court in sustaining the cross-ownership rules against First Amendment attack found that their "reasonableness" was "underscored" by the availability of waivers where the station and newspaper "cannot survive without common ownership." *NCCB*, 436 U.S. at 802 n. 20, 98 S.Ct. at 2115 n. 20. Thus, whether or not the waiver process is constitutionally compelled, First Amendment values are implicated in the process and require evenhanded treatment of all applicants. We do not, of course, express any opinion as to whether News America is entitled to an extension of its remaining waiver. But we cannot help noticing that removal of the legislative bar on consideration of News America's application will leave in place the "intense political ... pressure from Congress," *Meredith*, 809 F.2d at 872, that gave rise to the Amendment itself. That pressure must, of course, play no role in agency adjudications involving important ***816** ****198** constitutional rights. *Cf. Pillsbury Co. v. FTC*, 354 F.2d 952, 964-65 (5th Cir.1966) (adjudicative decision made under intense congressional pressure "sacrifices the appearance of impartiality" and requires that the resulting order be vacated).

Vacated and Remanded.

SPOTTSWOOD W. ROBINSON, III, Circuit Judge, dissenting:

A congressional focus as narrow as that indicated by the Hollings Amendment [FN1] naturally arouses suspicions about its legal propriety and counsels a reviewing court to examine it closely. Nonetheless, under our constitutional scheme, the Amendment is entitled to even-handed testing under the standard of review appropriate. [FN2] My colleagues, purporting to subject the Amendment to a level of scrutiny characterized as something more than minimum rationality, [FN3] strike the law down. [FN4] I believe, however, that if that standard were properly applied, the Amendment would stand.

FN1. Pub.L. No. 100-202, 101 Stat. 1329 (1987).

FN2. See *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 225 n. 5, 69 S.Ct. 550, 553 n. 5, 93 L.Ed. 632, 637 n. 5 (1949); *Fort Smith Light & Traction Co. v. Board of Improvement*, 274 U.S. 387, 391, 47 S.Ct. 595, 597, 71 L.Ed. 1112, 115 (1927); see also *Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484 (1st Cir.1987) (legislative classification that encompasses only one specific entity is not necessarily irrational or unconstitutional). In *Nixon v. Administrator*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), the Supreme Court noted that an equal protection challenge likely would have failed although the legislation there addressed could affect only one person, who was specifically named. "[M]ere underinclusiveness," the Court said, "is not fatal to the validity of a law under the equal protection component of the Fifth Amendment ... even if the law disadvantages an individual or identifiable members of a group." *Id.* at 471 n. 33, 97 S.Ct. at 2804 n. 33, 53 L.Ed.2d at 908 n. 33 (citations omitted).

FN3. Majority Opinion (Maj.Op.) at 802, 814.

FN4. *Id.* at 815.

I

In evaluating the enactment at issue, we must assess the Government's interest in the legislation and ascertain the extent to which the means chosen advance that interest. [FN5] We cannot hold a federal statute unconstitutional merely because

Congress could have done better; our role is to determine only whether Congress did well enough.

FN5. This is true whether the correct standard is existence of a rational basis, see, e.g., *Mathews v. Lucas*, 427 U.S. 495, 508 n. 14, 96 S.Ct. 2755, 2763 n. 14, 49 L.Ed.2d 651, 662 n. 14 (1976), or the higher standard applied in *FCC v. League of Women Voters*, 468 U.S. 364, 380, 104 S.Ct. 3106, 3118, 82 L.Ed.2d 278, 292 (1984).

The Commission adopted the newspaper-broadcast cross-ownership rules [FN6] in 1975. [FN7] By limiting common ownership of broadcast facilities and daily newspapers in the same community, the Commission sought to promote diversity of program and service viewpoints, a policy grounded primarily in the First Amendment. [FN8] Over time the Commission's position on the rule has shifted, and there have been indications that the Commission may favor revision or outright repeal of the rule. [FN9] In November, 1987, the Freedom of Expression Foundation petitioned the Commission for rulemaking to eliminate the newspaper-broadcast cross-ownership rule, and the Commission put the petition out for public comment. [FN10]

FN6. 47 C.F.R. § 73.3555(c) (1987).

FN7. See *Second Report & Order*, 50 F.C.C.2d 1046 (1975).

FN8. *Id.* at 1048-1049; see notes 16-19 *infra* and accompanying text.

FN9. In fact, the Commission's brief in this court states:
This is not to say that, in the Commission's view, continuing the ban on newspaper/television cross-ownership for another year is necessarily good public policy. Indeed, had Congress not provided otherwise, the Commission might have concluded that the present rule against newspaper/television cross-ownership should have been reviewed to determine whether it continued to serve the public interest.
Brief for Appellee at 16; see note 25 *infra*.

FN10. Public Notice Rep. No. 1695 (Nov. 30, 1987).

On December 22, 1987, Congress enacted a continuing resolution appropriating funds *817 **199 for operation of the Federal Government during fiscal year 1988. [FN11] One portion of the resolution, referred to as the Hollings Amendment, spoke to the cross-ownership rule through a proviso

FN11. Pub.L. No. 100-202, 101 Stat. 1329 (1987).

that none of the funds appropriated by this Act or any other Act may be used to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the rules of the Federal Communications Commission with respect to the common ownership of a daily newspaper and a television station where the grade A contour of the television station encompasses the entire community in which the newspaper is published, *or to extend the time period of current grants of temporary waivers to achieve compliance with such rules.* [FN12]

FN12. Making Further Continuing Appropriations for the Fiscal Year Ending September 30, 1988, H.R.Rep. No. 498, 100th Cong., 1st Sess. 34 (1987) (emphasis added).

The Hollings Amendment reflected the reaction of Congress to what it perceived as the threatened erosion, if not eradication, of the newspaper-broadcast cross-ownership rule. [FN13] The case at bar involves only the last clause of the Amendment, which forbids the Commission from granting extensions of temporary waivers that were in effect when the continuing resolution was passed. Congress recognized the distinct possibility that through indefinite or successive extensions of a temporary waiver, the Commission could grant the equivalent of a permanent waiver without any showing that the heavy burden of justifying such a waiver had been met. [FN14] The final clause of the Amendment affects a class of only one because News America Publishing, Inc. (News America), the appellant, was the only entity holding temporary waivers on the effective date of the legislation. [FN15]

FN13. See 134 Cong.Rec. S63 (daily ed. Jan. 26, 1988) (statement of Sen. Hollings) (proviso serves to ensure that the rule will not be evaded by successive grants of temporary waivers); *Id.* at S59 (statement of Sen. Kennedy) (proviso designed to preserve cross-ownership rule against attempts to obtain permanent exemption in guise of series of temporary waivers). In identifying the underlying purpose of the Amendment, the statements of Senator Hollings, sponsor of the Amendment, and Senator Kennedy, who provided primary impetus for it, must be given weight, particularly in the absence of a more complete legislative history. See, e.g., *Lewis v. United States*, 445 U.S. 55, 63, 100 S.Ct. 915, 919, 63 L.Ed.2d 198, 207-208 (1980) ("[i]nasmuch as Senator Long was the sponsor and floor manager of

the bill, his statements are entitled to weight"); *Simpson v. United States*, 435 U.S. 6, 13, 98 S.Ct. 909, 913, 55 L.Ed.2d 70, 77 (1978) ("[a]lthough [a Congressman's] remarks are of course not dispositive of the issue of [the statute's] reach, they are certainly entitled to weight, coming as they do from the provision's sponsor"). Furthermore, these statements comport with the legislative purpose posited by the Commission. See Brief for Appellee at 30-31.

FN14. See note 13 *supra;* see also Brief for Appellee at 30-31. According to the Commission, "it is clear that the burden of showing that a permanent waiver is warranted is extremely high--and considerably higher than that for a temporary waiver." *Id.* at 27; see *Health & Medicine Policy Research Group v. FCC*, 257 U.S.App.D.C. 123, 127-128, 807 F.2d 1038, 1042-1043 (1986).

FN15. See Brief for Appellee at 13.

II

In analyzing the congressional purpose in enacting the Hollings Amendment, the First Amendment considerations underpinning the cross-ownership rule cannot be ignored. In *FCC v. National Citizens Committee for Broadcasting (NCCB)*, [FN16] the Supreme Court upheld the rule against a facial attack, declaring that the First Amendment is served by achieving " 'the widest possible dissemination of information from diverse and antagonistic sources.' " [FN17] "[F]ar from seeking to limit the flow of information," the Court explained, "the Commission has acted ... 'to enhance the diversity of information heard by the public without on-going government **818 **200 surveillance of the content of speech' "; [FN18] the cross-ownership rule thus was "designed to further, rather than contravene, 'the system of freedom of expression.' " [FN19] Consequently, when Congress's purpose in enacting the Hollings Amendment is assessed, it must be acknowledged that preservation of the cross-ownership rule will promote First Amendment values. And it goes without saying that this factor adds substantial weight to the governmental interest in this legislation.

FN16. 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978).

FN17. *Id.* at 799, 98 S.Ct. at 2114, 56 L.Ed.2d at 716 (quoting *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424-1425, 89 L.Ed. 2013, 2030 (1945)).

FN18. *NCCB, supra* note 16, 436 U.S. at 801-802, 98 S.Ct. at 2115, 56 L.Ed.2d at 718 (quoting *National Citizens Comm. for Broadcasting v. FCC*, 181 U.S.App.D.C. 1, 17, 555 F.2d 938, 954 (1977)).

FN19. *NCCB, supra* note 16, 436 U.S. at 802, 98 S.Ct. at 2115-2116, 56 L.Ed.2d at 719 (quoting T. Emerson, The System of Freedom of Expression 663 (1970)). One of the premises of the decision in *NCCB* was that broadcast regulation is justified at least in part by spectrum scarcity. 436 U.S. at 799, 98 S.Ct. at 2114, 56 L.Ed.2d at 716-717. Although this rationale has been criticized because of changes in television technology, the Supreme Court has refused to abandon it absent guidance from Congress or the Commission. *FCC v. League of Women Voters, supra* note 5, 468 U.S. at 376-377 n. 11, 104 S.Ct. at 3115 n. 11, 82 L.Ed.2d at 289 n. 11.

Furthermore, the congressional endeavor over time to maintain the integrity of the cross-ownership rules has been intense, as has been its concern about abuse of the waiver process. Hearings in July, 1985, before the House Subcommittee on Telecommunications, Consumer Protection and Finance explored, among other things, the Commission's policy on waivers of those rules. [FN20] The Subcommittee's effort to ascertain the rigor with which the Commission would evaluate applications therefor drew a response by the Commission's chairman that only a "compelling case" would justify a waiver. [FN21] In November of 1985, however, the Subcommittee found it necessary to admonish the Commission's chairman to live up to his earlier representations by tightening the standards for granting temporary waivers. [FN22] The Subcommittee reemphasized its position: "As you are well aware, we firmly believe that the cross-ownership rules are vitally important in protecting competition and diversity in the marketplace of ideas and that waivers to those rules should be viewed as an extraordinary, not an ordinary, action." [FN23]

FN20. *Media Mergers and Takeovers: the FCC and the Public Interest, Hearings Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. (1985), *reprinted in part in* 134 Cong.Rec. S65 (daily ed. Jan. 26, 1988).

FN21. MR. FOWLER. I think generally we ought not to grant waivers unless a compelling case is shown which demonstrates that a waiver would neither not disserve the purpose of the rule and would

serve other important public policy goals or that it would serve the purpose of that rule by having granted a waiver. I am generally, though, however, against a policy of liberally granting waivers for two reasons: one, I think it is very poor administrative law; and two, once you do that, I think it is difficult to justify not having to grant other waivers in similar circumstances.

MR. WIRTH. It seems to me that there is an important consideration here in terms of again the standards and criteria that you are using on this front. And it is my concern--and you and I have talked about this in the past--that we underline, underscore, and emphasize to people the importance of concentration and cross-ownership, which is the thrust of what I am getting at. And I would hope that you all, in looking at this, make very clear to the applicants our mutual concern about this and the fact that this is not something that is going to go away. It is not going to disappear as some think it may, and that this is an important concern, and to be as strong and clear about that as possible.

MR. FOWLER. We totally agree, Mr. Chairman.

Id.

FN22. Letter from House of Representatives, Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce, to Mark S. Fowler (Nov. 13, 1985), *reprinted in* 134 Cong.Rec. S65 (daily ed. Jan. 26, 1988).

FN23. *Id.* The Subcommittee's letter further stated:

While temporary waivers may be justified in cases where clear public policy justifications exist, we are very disturbed by the Commission's apparent attitude that temporary waivers are justified solely upon mere allegations that possible financial hardship or distress sales would result if property cannot be disposed of in what has been termed an "orderly" fashion. Clearly, this attitude is nothing more than an open invitation for parties to seek temporary waivers with an expectation that they be routinely, if not automatically, granted.

By your own words [in previous subcommittee testimony], an applicant who seeks a temporary waiver must carry the burden of presenting a compelling case which demonstrates all of the facts that would justify such a waiver, "[a]nd if they do not make that case, they will *not* be granted any kind of a waiver."

It is one thing for a regulatory agency created by Congress to disagree with the Congress over the direction of policy, as you have done on a number of previous occasions. It is quite another for you to come before the Congressional committee responsible for overseeing your agency and make commitments as to how you will exercise your responsibility under the Communications Act and then not give [sic] up to those commitments either in letter or spirit.

Id.

*819 **201 Later that year, the subject was again addressed, this time in the Conference Report on the continuing resolution funding governmental operations for fiscal year 1986:

The conferees are concerned with Commission enforcement of the local cross- ownership rules particularly in light of the number of recent waiver requests to these rules the Commission has considered. The Commission's purpose in granting any waiver to the cross-ownership rules should be to further the public interest; furtherance of the private interest of any applicant or licensee must be subservient to this purpose.

The conferees expect the Commission to review such requests with great scrutiny and not grant a waiver unless the applicant meets the burden of clearly demonstrating why such a waiver should be granted. Any temporary waiver granted should be limited in duration to the minimum amount of time necessary. [FN24]

FN24. H.R.Rep. No. 453, 99th Cong., 1st Sess. 433 (1985), *reprinted in* 134 Cong.Rec. S57 (daily ed. Jan. 26, 1988).

Congress thus had a well documented interest in preserving the cross-ownership rules and in ensuring appropriately limited use of the waiver process. But when, at the close of 1987, Congress took up the continuing resolution for fiscal year 1988, that interest was threatened. Pending at the Commission was a petition for rulemaking seeking revision or repeal of the rule. There was evidence that the Commission no longer supported the rule. [FN25] There was ground, too, for apprehension that the Commission would grant unjustifiably a waiver extension to News America, thereby circumventing the rule. [FN26]

FN25. See note 9 *supra* and accompanying text. Senator Hollings' statements on the floor of Congress indicate apprehension regarding the Commission's position on the rule. It "has been open season over there," he said, "in getting rid of nearly any kind of rule and regulation." 134 Cong.Rec. S56 (daily ed. Jan. 26, 1988). Regarding the deregulatory tendencies of the Commission, the Senator stated that "we have, time and again, set forth admonitions and the FCC has in turn done exactly the opposite." *Id.* "I am trying to catch a runaway Federal Communications Commission. They have been the ones who have been edging to not just another waiver but

permanent repeal." *Id.* at S57.

FN26. News America's petition for an extension of its waiver rested primarily on pendency of the petition for new rulemaking on cross- ownership. See Petition of News America Publishing, Incorporated, for Extension of Waiver, Joint Appendix A 1. News America requested an extension until the expiration of six months following the Commission's action on that petition. *Id.* The debate over repeal of the Hollings Amendment reveals that Congress may have believed that the Commission was inclined to treat News America more favorably than other applicants. Senator Hollings noted a statement made by the outgoing chairman of the Commission at his retirement party: "The greatest gift I gave to anybody as Chairman of the FCC was an 18-month waiver to Rupert Murdoch." 134 Cong.Rec. S58 (daily ed. Jan. 26, 1988). Senator Hollings commented, "and everybody clapped and said 'Whoopee.' That is the way we are doing business--cash and carry downtown at the Federal Communications Commission." *Id.* Senator Kennedy stated that "Mr. Murdoch is one of the most powerful publishers in the world, and he has been using those powers to ignore the will of Congress, subvert the FCC, and evade the cross-ownership rule." *Id.* at S59. Senator Kennedy declared that "we have also learned the hard way to be skeptical about whether the FCC is willing to stand up to him and apply the same rules to him that it applies to everyone else," *id.* at S60, and that "[t]he agency had been captured lock, stock, and barrel by Rupert Murdoch, and it was long past time for Congress to step in," *id.* at S61.

III

Congress enacted the Hollings Amendment to forestall evisceration of the cross**202 -*820 ownership rule. To effect this purpose, one of the means chosen, among others, was to bar the Commission from extending the duration of extant temporary waivers. My colleagues do not characterize the congressional goal as inappropriate or insubstantial, as well they should not. Rather, they fault the Amendment because, they claim, the method used "bears only the most strained relationship" to the asserted purpose. [FN27]

FN27. Maj.Op. at 814.

I am unable to agree. If the aim is to preserve the cross-ownership rule, and waiver extensions endanger the rule, then a prohibition on extensions of waivers--albeit only current ones--does serve the purpose. Far from being "strained," the relationship between means and end is decidedly strong. There cannot be any doubt that the fit between purpose and method in this case is more than close enough to satisfy a test of minimum rationality. The question then becomes whether the means-end relationship is sufficient to satisfy the slightly higher standard of review applicable here--something more than minimum rationality.

I agree with my colleagues that in ascertaining the standard of review to apply, "we need not go as far as the Supreme Court in *FCC v. League of Women Voters*." [FN28] My view, however, does not accord with my colleagues' statement that this case "is far closer to the law invalidated in *League of Women Voters* than to the regulation sustained in *NCCB*." [FN29] *League of Women Voters* featured a challenge to Section 399 of the Public Broadcasting Act of 1967, [FN30] which forbade any noncommercial educational station receiving a grant from the Corporation for Public Broadcasting to "engage in editorializing." [FN31] The Court emphasized, in determining the proper standard of review, that "Section 399 plainly operates to restrict the expression of editorial opinion on matters of public importance, and, as we have repeatedly explained, *communication of this kind is entitled to the most exacting degree of First Amendment protection.*" [FN32] Because *League of Women Voters* arose in the broadcast context, where "strict scrutiny" review is inappropriate, [FN33] the Court required the legislation to be "narrowly tailored to serve a substantial governmental interest." [FN34] The case at bar is significantly distinct. Congress has blocked News America's access to the Commission only for the purpose of requesting an extension of the waiver it presently enjoys. That is a far cry from the content-focused restriction involved in *League of Women Voters*, which outlawed a particular type of highly valued speech. [FN35] The *League of *821 **203 Women Voters* standard of review is unsuitable here.

FN28. *Id.* at 814; see *FCC v. League of Women Voters*, *supra* note 5, 468 U.S. at 380, 104 S.Ct. at 3118, 82 L.Ed.2d at 292.

FN29. Maj.Op. at 812-813.

FN30. 47 U.S.C. §§ 390-399 (1982 & Supp.III 1985).

FN31. *Id.* § 399.

FN32. 468 U.S. at 375-376, 104 S.Ct. at 3115, 82 L.Ed.2d at 289 (emphasis added).

FN33. *Id.* at 376, 104 S.Ct. at 3115, 82 L.Ed.2d at 289.

FN34. *Id.* at 380, 104 S.Ct. at 3118, 82 L.Ed.2d at 292.

FN35. Similarly, I believe we are at some distance from the scenario in *Community-Service Broadcasting, Inc. v. FCC*, 192 U.S.App.D.C. 448, 593 F.2d 1102 (*en banc* 1978). The provision there in controversy required all noncommercial educational stations receiving federal funding to make audio recordings of all broadcasts "in which any issue of public importance is discussed," and to provide a copy upon request to any member of the Commission or the public. See Pub.L. No. 93-84, § 2, 87 Stat. 219 (1973). We deemed this command an obstacle to free expression. First, it was not on its face content neutral, 192 U.S.App.D.C. at 457, 593 F.2d at 1111; indeed, the fact that it regulated only programming concerning issues of public importance indicated "a government purpose intentionally and impermissibly to restrict free speech on the basis of its content," *id.* at 458, 593 F.2d at 1112. Additionally, we found that the legislative history supported the conclusion "that the purpose of the recording requirement was related to suppression of free expression on issues of public importance." *Id.* As Judge Bazelon noted in his concurring opinion, the statute "not only 'touches upon' fundamental First Amendment freedoms, but does so by classifications formulated explicitly in terms of the content of speech." *Id.* at 470, 593 F.2d at 1124. Therefore, while heightened scrutiny may have been appropriate in *Community-Service*, the restriction presented in the case before us is unaccompanied by any similar need for that standard of review. There is no content discrimination here. There is only an attempt by Congress to force compliance with a structural rule it considers of great importance. Accordingly, there is no basis for equating this case with *Community-Service*.

Despite a claim to the contrary, [FN36] it appears to me that my colleagues have, in essence, used a standard equivalent to that applied in *League of Women Voters*. I think it inappropriate to focus solely on alternatives that Congress conceivably could have chosen rather than analyze the adequacy of what Congress actually did. Our task as judges is simply to look for something more than a rational relationship between the Government's purpose and the means employed to achieve it. If the method is substantially related to the Government's interest--a somewhat higher level of inquiry than mere rational relationship--the legislation should survive. A substantial relationship does exist in this case, and an examination of the majority's objections to the Hollings Amendment makes that clear.

FN36. Maj.Op. at 813-814.

IV

My colleagues hold the Amendment unconstitutional because they find it underinclusive in two respects. First, they fault the enactment because it proscribes grants of waiver extensions to News America, the only holder of "current" waivers, [FN37] but "not to any other party that might receive a temporary waiver and seek an extension *during the fiscal year*." [FN38] In other words, "[i]f News America sold its Boston station to the *Boston Globe* today, the new owner could seek a temporary waiver and extension," whereas News America could not. [FN39] Although that is literally true, as a practical matter it ignores reality. In the past, initial waivers bestowed by the Commission have ranged from eighteen months to three years, [FN40] and no requests for initial waivers are now pending; [FN41] consequently, any hypothetical extension request is a long way off. Not only do these "future" waivers present no immediate threat, but Congress is free to anticipate a permanent solution before they ever would. [FN42] To be sure, Congress could have brought future waivers within the purview of the Amendment, but that is not to say that its failure to do so renders this enactment unconstitutional. Rather, Congress may deal with immediate threats as they arise. [FN43]

FN37. See *id.* at 805.

FN38. *Id.* at 814 (emphasis added).

FN39. *Id.*

FN40. Brief for Appellee at 34 n. 19.

FN41. *Id.* at 32 n. 16.

FN42. See Maj.Op. at 814; Brief for Appellee at 34-35.

FN43. E.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813, 96 S.Ct. 2488, 2499, 49 L.Ed.2d 220, 233 (1976); *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d 828, 839 (1966); *Williamson v. Lee Optical*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573 (1955).

Second, my colleagues find the Amendment underinclusive because it "applies only to *extensions*

of temporary waivers, not to the granting of temporary waivers themselves." [FN44] Put another way, theoretically an unextended temporary waiver could endure longer than a temporary waiver that has been extended. This argument strikes me as even more curious than the first. The suggestion is that Congress could either have forbidden all temporary waivers or limited the aggregate duration of waivers plus extensions. [FN45] That reasoning, it seems to me, misses the point, for it is not the length of the waiver alone that subverts the cross-ownership rule. Rather, the larger problem is the potential conversion of something temporary into something perpetual without meeting the higher standards for permanent waivers. [FN46]

FN44. Maj.Op. at 814.

FN45. *Id.*

FN46. See note 14 *supra*. Furthermore, any single waiver of fixed duration, by its nature, will not extend indefinitely. Surely it would be difficult for the Commission in good faith to grant a "temporary" waiver of any duration that could be considered permanent.

*822 **204 A ban on all temporary waivers likely would raise more problems than it would solve and, more importantly, it would not address the kind of circumvention of the rule with which Congress was concerned. Moreover, because the necessity of a waiver and the length appropriate will vary from case to case, a ceiling on the aggregate duration of waivers plus extensions may not have been a prudent alternative. Temporary waivers are intended to provide a reasonable opportunity for orderly divestiture of the newspaper or the broadcast property. [FN47] Congress could logically conclude that one waiver of specified duration would be sufficient to achieve that goal, [FN48] and that extensions of waivers could undermine that purpose, for example, by giving owners an incentive to postpone or avoid divestiture in order to become eligible for an extension when the original waiver expired.

FN47. See, e.g., *Health & Medicine Policy Research Group v. FCC*, *supra* note 14, 257 U.S.App.D.C. at 127-128, 807 F.2d at 1042-1043; *Second Report & Order*, *supra* note 7, at 1047, 1085.

FN48. At the time the rules were adopted, the Commission stated, "we do not contemplate permanent waiver[s], for problems in disposing of these interests would not be expected to endure indefinitely." *Second Report & Order*, *supra* note 7, at 1084 n. 46.

Because of News America's unique status as the only holder of a current waiver, it was the only entity affected by the Hollings Amendment. There is no content discrimination here. [FN49] And, although it may be easy to hypothesize other means by which Congress could have sought to achieve its objectives, the existence of alternatives does not necessarily render the chosen method unconstitutional. When the standard of review to be applied is strict scrutiny, courts have a tendency, appropriate in such cases, to define the Government's interest very precisely and narrowly. Because the countervailing interest is of such extreme importance, courts expect exactitude and compelling justification from the legislature, and give it little if any benefit of the doubt. But the test purportedly applied in this case is not even an "intermediate" standard of review; it simply is something more than minimum rationality. Courts must take care to ensure *823 **205 that they do not in effect engage in strict or intermediate scrutiny when the applicable standard of review demands less. [FN50]

FN49. As my colleagues acknowledge, their lengthy recitation of the debate on the suggested repeal of the Hollings Amendment serves merely to discern the intended meaning of the statutory language. Maj.Op. at 810 & n. 12. That discussion gives no basis for imputing an improper motive to Congress; in fact, it does quite the opposite. There is no evidence during the debate that Congress was endeavoring to censor Murdoch because of his views, as distinguished from his tactical approach to an extension. Rather, Congress was merely trying to ensure compliance with a rule it prized highly, a perfectly legitimate motive and concern. The sole question for decision is whether the means Congress used to address that concern falls within constitutional parameters.

Furthermore, I take issue with the majority's characterization of the Supreme Court's reexamination of *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), as set forth in *Minneapolis Star & Tribune Co. v. Commissioner*, 460 U.S. 575, 579-580, 103 S.Ct. 1365, 1368-1369, 75 L.Ed.2d 295, 301 (1983). See Maj.Op. at 809 ("[t]he Supreme Court has recently hinted at a readiness to infer censorial intent from legislative history and to invalidate laws so motivated"). First, the few equivocal statements culled from the legislative debates to support this proposition are sorely inadequate to support an inference of improper purpose in this case, to the

extent that such is an appropriate judicial inquiry. A fair reading of the Congressional Record fully supports the interpretation that this Amendment's objective was to preserve a rule that Congress valued highly, not to censor speech. This is quite unlike *Grosjean*, where a United States Senator and the Governor of Louisiana had distributed a circular to all members of the state legislature, describing the " 'lying newspapers' as conducting 'a vicious campaign' and the tax as 'a tax on lying, 2 cents a lie.' " *Minneapolis Star & Tribune Co. v. Commissioner*, 460 U.S. at 579-580, 103 S.Ct. at 1369, 75 L.Ed.2d at 301. There is no comparable evidence of illicit purpose in this case. In addition, the Court has stressed the hazards of basing a finding of unconstitutionality on legislative motive that is assertedly unseemly. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 382-385, 88 S.Ct. 1673, 1682-1684, 20 L.Ed.2d 672, 683-685 (1968). Accordingly, I would be extremely hesitant, on the basis of the Court's single statement in *Minneapolis Star*, to read this doctrine into constitutional law, particularly in light of the majority's acknowledgement that its discussion of the matter is dicta and irrelevant to the decision in this case. See Maj.Op. at 809-810 & n. 12.

FN50. There are indications that my colleagues have done just this. For example, they recognize the rule that "Congress ordinarily need not address a perceived problem all at once." Maj.Op. at 815. Nonetheless, they give that rule short shrift on the basis of four cases, all of which use a standard of review higher than that conceded to be applicable in this case. *Id.*

V

In my view, Congress pursued a wholly legitimate purpose when it acted to protect the cross-ownership rule from circumvention or erosion. Because of the First Amendment foundation that underlies the rule, the congressional action at issue here was designed to promote constitutional values. By forbidding the Commission from extending current grants of temporary waivers, Congress selected a method that was more than adequately related to the purpose it sought to achieve. Because I believe this enactment withstands constitutional scrutiny, I respectfully dissent.

844 F.2d 800, 64 Rad. Reg. 2d (P & F) 1309, 269 U.S.App.D.C. 182, 15 Media L. Rep. 1161

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EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF DEMUTH v. SWITZERLAND

(Application no. 38743/97)

JUDGMENT

STRASBOURG

5 November 2002

In the case of Demuth v. Switzerland,

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

Mr J.-P. Costa, *President*,

Mr A.B. Baka,

Mr L. Wildhaber,

Mr Gaukur Jörundsson,

Mr K. Jungwiert,

Mr V. Butkevych,

Mrs W. Thomassen, *judges*,

and Mrs S. Dollé, *Section Registrar*,

Having deliberated in private on 27 September 2001 and 8 October 2002,

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

PROCEDURE

1. The case originated in an application (no. 38743/97) against the Swiss Confederation lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr Walter Michael Demuth ("the applicant"), on 24 October 1997.

2. The Swiss Government ("the Government") were represented by their Agent, Mr P. Boillat, Head of the International Affairs Division of the Federal Office of Justice.

3. The applicant complained under Article 10 of the Convention of the authorities' refusal to authorise him to broadcast a programme on automobiles via cable television.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 27 September 2001 the Court declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section.

8. After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1949 and lives in Zürich, Switzerland.

10. The applicant intended to set up a "specialised television programme", Car TV AG, limited to a particular subject (*Spartenfernsehprogramm*), namely all aspects of car mobility and private road traffic, including news on cars, car accessories, traffic and energy policies, traffic security, tourism, automobile sport, relations between railways and road traffic and environmental issues. The television programme was to be broadcast via cable television in German in the German-speaking areas of Switzerland, and in French in the French-speaking areas. Initially, the programme was to last two hours, to be repeated continuously over the next twenty-four hours and a new one shown once a week; later it was to be extended in duration. The applicant was to be the company's managing director. The programme was to be prepared in close cooperation with industry, automobile associations and the specialist media.

11. On 10 August 1995 the applicant filed with the government in the name of Car TV AG a request for a licence (*Konzessionsgesuch*) to broadcast the intended programme. The Federal Office for Communication replied on 16 August 1995, pointing out the lack of prospects of success of such a request. By a letter of 7 September 1995 the applicant informed the Federal Office that he wished to pursue his request and submitted further documents. From the latter it transpired that Car TV AG

would now include in its programme matters concerning the transport needs of non-motorists and set up an independent programme commission.

12. On 16 June 1996 the Swiss Federal Council (*Bundesrat*) dismissed the request. The Federal Council noted that there was no right, either under Swiss law or Article 10 of the Convention, to obtain a broadcasting licence. With reference to the instructions for radio and television listed in section 3(1) of the Federal Radio and Television Act (*Bundesgesetz über Radio und Fernsehen* – "the RTA"; see "Relevant domestic law" below) the decision continued:

"... The electronic media have the task of conveying content that serves the development of informed democratic opinion. They should furthermore actively contribute to a culture of communication serving as the basis for cultural development and for an integral democratic discourse.

4. Under section 11(1)(a) of the RTA, a licence shall only be granted if radio and television can achieve the aims mentioned in section 3(1) of the RTA as a whole. It is unnecessary that each venture comply with all aspects of the instructions mentioned. Rather, a positive contribution is required which will further the culture of communication in our country and which will under no circumstances run counter to the aims of the RTA.

5. A comprehensive and broad-based democratic discourse is guaranteed first of all by means of programmes which are committed to a *public service* and can be considered to be comprehensive. These are directed at the entire public and have as their subject matter all aspects of political and social life. Specialised programmes concentrate on particular themes and are directed at particularly interested sectors of the public. The result may be the formation of public opinion influenced by the media by way of specific content, and no longer primarily by way of broad-based, comprehensive programmes. Such a development indubitably has consequences for the culture of communication. Communicative integration via the electronic media is impaired, and leads to a society increasingly shaped by segmentation and atomisation.

6. Against this background, the broadcasting of specialised programmes runs counter to the democratic considerations of the general instructions for radio and television (Section 3(1) of the RTA). These instructions are oriented towards the integration and promotion of an integral culture of communication. As a result, stricter conditions must apply to specialised programmes than would be required for a programme with a varied content. Therefore, when examining the conditions for a licence under section 11(1)(a) of the RTA, qualified criteria shall be adduced, since the active contribution of specialised programmes towards the culture of communication must generally be called into question.

7. Nevertheless, granting a licence to specialised programmes continues to remain possible under qualified conditions. A licence shall be considered if the negative effects of the programme are at least compensated by its valuable contents within the meaning of section 3(1) of the RTA. This could be the case with programmes in the areas of culture (music, films, etc.) or the formation of political opinions (parliamentary broadcasts, etc.).

8. The request for a licence by Car TV AG aims at a specialised programme which has car mobility as its content and places the car at its centre. According to the criteria set out in subsections (4)-(6), it must be considered with the greatest restraint. As a result, granting a licence will only be considered if the disadvantages resulting from a specialised programme are compensated by its valuable contents, offering a particular contribution to the general instructions mentioned in section 3(1).

9. However, the orientation of the programme of Car TV AG is not able to offer the required valuable contribution to comply with the general instructions for radio and television. The programme focuses mainly on entertainment or on reports about the automobile. Car TV AG does not therefore meet the requirements for a licence under section 11(1)(a) of the RTA."

II. RELEVANT DOMESTIC LAW

1. The Swiss Federal Constitution

13. Article 55 *bis* §§ 2 and 3 of the Swiss Federal Constitution (*Bundesverfassung*), in the version in force at the relevant time, provided as follows:

"2. Radio and television shall contribute to the cultural development, free expression of opinion and entertainment of the public. They shall have regard to the characteristics of the country and the requirements of the cantons. They shall depict events objectively, and express the variety of opinions adequately.

3. The independence of radio and television and their autonomy in respect of programmes are guaranteed subject to paragraph 2."

14. These provisions are now set out in Article 93 §§ 2 and 3 of the Federal Constitution.

2. The Federal Radio and Television Act ("the RTA")

15. Based on the provisions of the Federal Constitution, section 3(1) of the Swiss Radio and Television Act (*Bundesgesetz über Radio und Fernsehen*) provides:

"*Instructions*

Radio and television shall as a whole:

contribute to the free expression of opinion, to the provision of general, varied and objective information to the public and to their education and entertainment, and convey civic awareness;

have regard to, and bring closer to the public, the diversity of the country and its population and advance the understanding of other peoples;

promote Swiss cultural enterprise and stimulate the public to participate in cultural life;

facilitate contact with Swiss expatriates and promote the presence of Switzerland abroad and understanding of its concerns;

have particular regard to Swiss audiovisual production, namely films;

have particular regard to European productions."

16. Section 5(1) and (2) of the RTA provide:

"*Independence and autonomy*

(1) The operators are free in the manner in which they manage their programmes; they bear the responsibility thereof.

(2) Unless federal law provides otherwise, the operators are not bound by the instructions of the federal, cantonal or municipal authorities."

17. Under section 10(2), nobody is entitled to receive, or to have renewed, a broadcasting licence. Section 10(3) establishes the government, that is the Swiss Federal Council (*Bundesrat*), as the authority that grants broadcasting licences for radio and television.

18. Section 11(1)(a) of the RTA mentions various conditions for the granting of a licence, among which are the conditions stated in section 3(1); namely, that the applicant must be a citizen and resident of Switzerland or a company with its registered office in Switzerland; and that the applicant must disclose his financial situation.

19. Under section 43(1), cable companies are in principle free to transmit all radio and television programmes, although subsection (2) lists certain broadcasts which the cable company is obliged to transmit. Section 48 limits the freedom of cable companies to transmit programmes in so far as they contravene international regulations. In accordance with section 56 of the RTA, the relevant authority shall monitor compliance by all licence holders with international and domestic regulations, although the supervision of programmes is not permitted.

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

20. The applicant complained that the decision of the Federal Council, refusing to grant Car TV AG a broadcasting licence, ran counter to Article 10 of the Convention, which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Submissions of the parties

1. The applicant

21. The applicant accepted that there was no right in principle to broadcast. However, he considered that the authorities' refusal to grant him a licence was arbitrary and discriminatory. In this respect, he noted that the Government no longer relied before the Court on certain arguments, for instance that Car TV AG would bring about the "segmentation and atomisation" of society. Indeed, the Government's conclusion that a democratic debate was primarily made possible by providing a comprehensive programme was neither proved by the facts nor by research, nor even by anyone's experience. In any event, cable networks were already broadcasting a large number of specialised programmes. Such programmes were very common in Germany and in the United States, yet no research had proved that democratic debate had been disrupted in these countries. In Switzerland in 1997 there were an average of forty-five television and fifty FM radio programmes of various types, thus bringing about integration and a communication culture resulting from the existing media taken as a whole. Nor could it be said that Car TV AG aimed primarily at entertaining the viewer. The application for a licence made it clear that the programme would have been based on a strictly journalistic and pluralistic approach, and would also have provided information on such matters as environmental issues.

22. The applicant further pointed out that the Car TV AG project complied with the various rules and regulations, and that the refusal of the licence was based on arbitrary assumptions. This explained why the reasons given by the government did not correspond to any of the aims justifying an interference set out in Article 10 § 2 of the Convention. The present television programme, like all others, would have made its own contribution towards shaping public opinion. Furthermore, the programme would have duly taken account of the specific linguistic and political situation in Switzerland: for instance, in addition to other measures to ensure pluralism, it was planned to set up a French-language programme. The government had discriminated against the applicant when approving a licence for Top TV, a channel exclusively devoted to weather reporting, and when stating that other channels were already dealing with automobile issues. If the latter point were true,

it would be clear that the public was interested in the topic, which could and should be covered by an additional programme.

23. The applicant concluded by pointing out that in 1997 there were still frequencies available on the cable networks. Indeed, Car TV AG had been assured a channel by the largest cable operator, which was also going to be one of its shareholders. It could not be up to the licensing authority to make its opinion dependent on the availability of channels in the cable networks. Here, section 42 of the RTA contained a "must carry" clause which conclusively regulated this question.

2. The Government

24. The Government contended that there had been no violation of Article 10 of the Convention. The third sentence of Article 10 § 1 of the Convention specifically envisaged the power of States to require broadcasting licences. This requirement applied not only to technical aspects but also, as the Court had pointed out in *Informationsverein Lentia and Others v. Austria*, to other conditions, such as "the nature and objectives of a proposed station, its potential audience at national, regional or local level, [and] the rights and needs of a specific audience" (see judgment of 24 November 1993, Series A no. 276, p. 14, § 32). In Switzerland, there was no audiovisual monopoly. Rather, the mixed system set up by the RTA provided for a plurality of media. Access thereto was nevertheless subject to a licence which was granted if certain conditions were met; the fact that no right was conferred did not contradict the Convention.

25. The Government pointed out that the conditions for a licence applied to all audiovisual media which were called upon to contribute, under Article 55 *bis* § 2 of the Federal Constitution, to the cultural development of the public, to enable them freely to form their opinions and to entertain them. These aims fully corresponded to the requirements of the third sentence of Article 10 § 1 of the Convention. It could not therefore be said that the licensing system in Switzerland contradicted this Convention provision.

26. The Government submitted that the interference with the applicant's rights under Article 10 § 1 of the Convention was "prescribed by law" within the meaning of paragraph 2 of this provision. Reference was made in particular to Article 55 *bis* § 2 of the Federal Constitution and sections 3(1) and 11(1) of the RTA. These provisions were sufficiently accessible. Nor could it be said that the Federal Council's decision of 16 June 1996 was not foreseeable, since general television programmes were better placed to meet the respective conditions than specialised television programmes. However, the latter could also meet the conditions if, for instance, cultural elements were included in the programme.

27. As regards the legitimate aim pursued, the Government considered that the impugned interference, aimed at maintaining a pluralism of information and culture, and contributing to the formation of public opinion, served "the protection of the ... rights of others", within the meaning of paragraph 2 of Article 10 of the Convention. In any event, the interference satisfied the third sentence of Article 10 § 1 of the Convention in that it served the purpose of maintaining the "quality and balance of programmes", as confirmed by the Court in *Informationsverein Lentia and Others* (cited above, p. 15, §§ 33-34).

28. Furthermore, the Government argued that the measure was proportionate as being "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. As the Commission had pointed out, the particular political circumstances in Switzerland had to be taken into consideration (see *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland*, no. 10746/84, Commission decision of 16 October 1986, Decisions and Reports (DR) 49, p. 140). These circumstances were directly reflected in Article 55*bis* § 2 of the Swiss Federal Constitution. In the present case, the request of Car TV AG did not comply with the requirements set out in section 3(1) of the RTA, which specifically aimed at offering a common basis for

information not limited to a particular group of viewers. This aspect was of primordial importance in a country marked by cultural and linguistic pluralism.

29. The Government submitted that the Federal Council would have granted the licence if Car TV AG had included cultural elements in its programme. For instance, another television programme, Star TV, had received such a licence as its aim was the promotion of Swiss and European films. Car TV AG, however, did not include such cultural elements. Moreover, it contained information on motorised mobility which was already part of the licence granted by the Federal Council to the Swiss Radio and Television Company. Clearly, the Federal Council did not say that automobile questions were not worthy of television coverage. The Government referred to the Commission's decision in *Hins and Hugenholtz v. the Netherlands*, which referred to "the aim of pluralism pursued in the Dutch broadcast system and policy" (no. 25987/94, Commission decision of 8 March 1996, DR 84-A, p. 146). Although the Federal Council did not refer to the limited number of broadcasting frequencies, it was a fact that, even on cable television, such frequencies were limited. It was conceivable that the Federal Council would have decided to reserve such a licence for a future broadcasting programme, such as Star TV, which better complied with the cultural requirements for such a programme.

B. The Court's assessment

1. Interference with the applicant's rights under Article 10 § 1 of the Convention

30. In the Court's view, the refusal to grant the applicant a broadcasting licence interfered with the exercise of his freedom of expression, namely his right to impart information and ideas under Article 10 § 1 of the Convention. The question arises, therefore, whether that interference was justified.

2. Relevance of the third sentence of Article 10 § 1

31. In the Government's opinion, the broadcast licensing system in Switzerland was in conformity with the third sentence of Article 10 § 1 of the Convention, which envisages State licensing powers.

32. The applicant accepted that there was no right to obtain a broadcasting licence, although he was of the opinion that in his case the refusal to grant him a licence was arbitrary and discriminatory.

33. The Court reiterates that the object and purpose of the third sentence of Article 10 § 1 is to make it clear that States are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. The latter are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. This may lead to interferences whose aims will be legitimate under the third sentence of paragraph 1, even though they may not correspond to any of the aims set out in paragraph 2. The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2 (see *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, no. 32240/96, § 25, 21 September 2000; *Radio ABC v. Austria*, judgment of 20 October 1997, *Reports of Judgments and Decisions* 1997-VI, pp. 2197-98, § 28; *Informationsverein Lentia and Others*, cited above , p. 14, § 32; and *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, p. 24, § 61).

34. In Switzerland, television broadcasting requires a licence to be issued by the Federal Council in accordance with section 10 of the RTA. Section 3(1) of the RTA sets out various instructions as to

the purposes, functions and content of television programmes (see paragraph 15 above). Thus, the licensing system operated in Switzerland is capable of contributing to the quality and balance of programmes through the powers conferred on the government. It is therefore consistent with the third sentence of paragraph 1 (see, *mutatis mutandis*, *Informationsverein Lentia and Others*, cited above, p. 15, § 33).

35. It remains, however, to be determined whether the manner in which the licensing system was applied in the applicant's case satisfies the other relevant conditions of paragraph 2 of Article 10.

3. "Prescribed by law"

36. It was not in dispute between the parties that the legal basis for the issue of a broadcasting licence lay in Article 55 *bis* § 2 of the Federal Constitution in force at the time and sections 3(1), 10 (3) and 11(1) of the RTA (see paragraphs 15-18 above). The interference complained of was, therefore, "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

4. Legitimate aim

37. The Court has already found that the aim of the interference in the present case was legitimate under the third sentence of Article 10 § 1, in that the licensing system operated in Switzerland is capable of contributing to the quality and balance of programmes (see paragraph 34 above). This is sufficient, albeit not directly corresponding to any of the aims set out in Article 10 § 2 (see above, paragraph 33).

5. "Necessary in a democratic society"

38. The applicant considered the measure unnecessary, pointing out that specialised programmes were common in Germany and the United States, without democratic debate having been disrupted in these countries. Even in Switzerland the government had approved a licence for a television channel reporting exclusively on the weather. The applicant's programme went beyond mere entertainment and would have provided information on such matters as environmental issues.

39. The Government argued that the particular political circumstances in Switzerland had to be taken into account, necessitating cultural and linguistic pluralism as well as a balance between the various regions. Not all these requirements were met in the present case. The licence would have been granted if Car TV AG had included cultural elements in its programme.

40. The Court reiterates that the adjective "necessary" within the meaning of Article 10 § 2 of the Convention implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing the need for an interference, although that margin goes hand in hand with European supervision, whose extent will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict because of the importance – frequently stressed by the Court – of an open and free debate in a democratic society and the free flow of information. The necessity for any interference with political speech must be convincingly established (see, among other authorities, *Tele 1 Privatfernsehgesellschaft mbH*, cited above, § 34, and *Radio ABC*, cited above, p. 2198, § 30).

41. In order to assess the extent of the margin of appreciation afforded to the domestic authorities, the Court must examine the objectives of Car TV AG. It is a private enterprise which intended to broadcast on all aspects of automobiles, in particular news on cars and car accessories, and information on private-vehicle transport. Furthermore, it intended to deal with such matters as energy policies, traffic security, tourism and environmental issues. However, while it could not be excluded that such aspects would have contributed to the ongoing, general debate on the various

aspects of a motorised society, in the Court's opinion the purpose of Car TV AG was primarily commercial in that it intended to promote cars and, hence, further car sales.

42. However, the authorities' margin of appreciation is essential in an area as fluctuating as that of commercial broadcasting (see, *mutatis mutandis*, *markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, pp. 19-20, § 33, and *Jacubowski v. Germany*, judgment of 23 June 1994, Series A no. 291-A, p. 14, § 26). It follows that, where commercial speech is concerned, the standards of scrutiny may be less severe.

43. From this perspective, the Court will carefully examine whether the measure in issue was proportionate to the aim pursued. It will weigh in particular the legitimate need for the quality and balance of programmes in general, on the one hand, with the applicant's freedom of expression, namely his right to impart information and ideas, on the other. In the context of the present case, the Court will also take into account that audiovisual media are often broadcast very widely (see *Informationsverein Lentia and Others*, cited above, p. 13, § 38). In view of their strong impact on the public, domestic authorities may aim at preventing a one-sided range of commercial television programmes on offer. In exercising its power of review, the Court must confine itself to the question whether the measures taken on the national level were justifiable in principle and proportionate in respect of the case as a whole (see *markt intern Verlag GmbH and Klaus Beermann*, cited above, pp. 19-20, §§ 33-34).

44. In the present case, the Government referred before the Court to the particular political and cultural structure of Switzerland, a federal State, as a justification for the refusal to grant the required broadcasting licence. In this respect the Court has regard to the Commission's decision in *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel* (cited above), according to which "the particular political circumstances in Switzerland ... necessitate the application of sensitive political criteria such as cultural and linguistic pluralism, balance between lowland and mountain regions and a balanced federal policy". The Court sees no reason to doubt the validity of these considerations which are of considerable importance for a federal State. Such factors, encouraging in particular pluralism in broadcasting, may legitimately be taken into account when authorising radio and television broadcasts.

45. These considerations are reflected in the instructions set out in section 3(1) of the RTA which require, for instance, that programmes shall contribute "to general, varied and objective information to the public"; that they "shall bring closer to the public the diversity of the country"; and that they shall "promote Swiss cultural enterprise" (see paragraph 15 above).

46. These provisions also provided the basis for the Federal Council's decision of 16 June 1996 not to grant a broadcasting licence to the applicant. In the Court's opinion, it does not appear unreasonable that the Federal Council found that the conditions in section 3(1) of the RTA were not met in the present case since the programmes of Car TV AG "[focused] mainly on entertainment or on reports about the automobile".

47. Furthermore, the Court notes that the Federal Council's decision of 16 June 1996 was not categorical and did not exclude a broadcasting licence once and for all. On the contrary, the Federal Council showed flexibility by stating that a specialised programme such as Car TV AG could obtain a licence if the content of its programme further contributed to the "instructions" listed in section 3(1) of the RTA. In this context, the Court takes note of the Government's assurance before the Court that a licence would indeed be granted to Car TV AG if it included cultural elements in its programme.

48. As a result, it cannot be said that the Federal Council's decision – guided by the policy that television programmes shall to a certain extent also serve the public interest – went beyond the margin of appreciation left to the national authorities in such matters. It is obvious that opinions may

differ as to whether the Federal Council's decision was appropriate and whether the broadcasts should have been authorised in the form in which the request was presented. However, the Court should not substitute its own evaluation for that of the national authorities in the instant case, where those authorities, on reasonable grounds, considered the restriction on the applicant's freedom of expression to be necessary (see *markt intern Verlag GmbH and Klaus Beermann*, cited above, p. 21, § 37).

49. In view of the foregoing, it is unnecessary to examine the Government's further ground of justification, contested by the applicant, for refusing the licence, namely that there were only a limited number of frequencies available on cable television.

50. Having regard to the foregoing, the Court reaches the conclusion that no breach of Article 10 of the Convention has been established in the circumstances of the present case.

FOR THESE REASONS, THE COURT

Holds by six votes to one that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 5 November 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. Dollé J.-P. Costa

Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Gaukur Jörundsson is annexed to this judgment.

J.-P.C.

S.D.

DISSENTING OPINION

OF JUDGE GAUKUR JÖRUNDSSON

To my regret, I cannot share the Court's conclusion that there has not been a violation of Article 10 of the Convention.

I agree with the judgment as to the interference with the applicant's rights under Article 10 § 1 of the Convention and as to the relevance of the third sentence of Article 10 § 1. I also agree that the interference was "prescribed by law" and had a legitimate aim as required by Article 10 § 2 of the Convention.

I disagree, however, with the assessment as to whether the interference was "necessary in a democratic society" within the meaning of this provision.

The adjective "necessary" within the meaning of Article 10 § 2 of the Convention implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing the need for an interference, although that margin goes hand in hand with European supervision, whose extent will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict because of the importance – frequently stressed by the Court – of the rights in question. The necessity for any interference must be convincingly established (see among other authorities, *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, no. 32240/96, § 34, 21 September 2000, and *Radio ABC v. Austria*, judgment of 20 October 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2198, § 30).

Such a margin of appreciation is particularly important in commercial matters (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, pp. 19-20, § 33, and *Jacubowski v. Germany*, judgment of 23 June 1994, Series A no. 291-A, p. 14, § 26).

In order to assess the extent of the margin of appreciation afforded to the domestic authorities in the present case, the objectives of Car TV AG must be examined. In my view, a private broadcasting enterprise which aimed at promoting cars was a commercial venture. Nevertheless, the planned television programme went well beyond the commercial framework, being extended to such subjects as traffic policies, road safety and environmental issues. These matters were indubitably of general and public interest and would have contributed to the ongoing, general debate on the various aspects of a motorised society.

It is therefore necessary to reduce the extent of the margin of appreciation pertaining to the authorities, since what was at stake was not merely a given individual's purely "commercial" interests, but his

participation in an ongoing debate affecting the general interest (see, *mutatis mutandis*, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2330, § 47).

From this perspective, it is necessary to examine carefully whether the measure at issue was proportionate to the aim pursued. In particular, the various reasons adduced for refusing to grant the broadcasting licence should be considered. In that connection the legitimate need for the quality and balance of programmes, on the one hand, should be set against the applicant's freedom of expression, namely his right to impart information and ideas, on the other.

To begin with, I would note that the Federal Council in its decision of 16 June 1996 concluded that it would refuse a television broadcasting licence for Car TV AG on the ground that "the programme [focused] mainly on entertainment or on reports about the automobile". In my view, however, it has not been made sufficiently clear in what respect entertainment in itself calls in question, or indeed

falls to be distinguished from, freedom of information. In any event, topics such as news on energy policies, the relations between railways and road traffic, or environmental issues, all of which Car TV AG intended to broadcast, may well be considered as going beyond mere entertainment, being also of an educational nature.

In my opinion, moreover, it has not been sufficiently demonstrated to what extent, in a highly motorised society such as Switzerland, the television broadcasts of Car TV AG "would lead to a society increasingly shaped by segmentation and atomisation", as the Federal Council stated in its decision of 16 June 1996.

The Government have furthermore referred to the political and cultural structure of Switzerland, a federal State. Attention was drawn to the Commission's decision in *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland*, according to which "the particular political circumstances in Switzerland ... necessitate the application of sensitive political criteria such as cultural and linguistic pluralism, balance between lowland and mountain regions and a balanced federal policy" (no. 10746/84, Commission decision of 16 October 1986, Decisions and Reports 49, p. 140). In my opinion, such considerations are of considerable relevance to a federal State. Nevertheless, in the present case it has not been sufficiently shown in what respect a television programme on automobiles constituted a politically or culturally divisive factor, particularly as the applicant's programme was to be broadcast in the two main Swiss languages: German and French.

In addition, the Government also referred before the Court to the limited number of frequencies as a reason for refusing the licence. However, the applicant claimed that he had the assurance of the largest Swiss cable company that it would transmit Car TV AG's programme. Here, it may be noted that the decision of the Federal Council of 16 June 1996 did not itself refer to any limitation of frequencies as a ground for refusing the licence and, indeed, the Government have not provided further details of this ground of justification. In my opinion, it suffices to note that the Car TV AG programme was to be transmitted via cable companies and that, under section 43(1) of the RTA, the latter in principle, have a free choice in the matter (see paragraph 19 above).

Finally, it is true that the decision of the Federal Council of 16 June 1996 did not exclude granting a licence if the programme was "compensated by valuable contents", in particular "with programmes in the areas of culture ... or of the formation of political opinions ...". In my opinion, however, this could not amount to a valid alternative for the applicant since the purpose of his programme, as the name Car TV AG suggested, was to deal exclusively with matters pertaining to automobiles.

In the circumstances of the case, I conclude that the impugned measure could not be considered as "necessary in a democratic society", in that the interests adduced by the Government did not outweigh the interest of the applicant in imparting information under Article 10 of the Convention. The interference with the applicant's freedom of expression was not therefore justified.

Consequently, there has in my opinion been a violation of Article 10 of the Convention.

EUROPEAN COURT OF HUMAN RIGHTS

In the case of Informationsverein Lentia and Others v. Austria*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Hu Rights and Fundamental Freedoms ("the Convention")** and the relevar provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr A. Spielmann,
Mrs E. Palm,
Mr F. Bigi,
Mr A.B. Baka,
Mr G. Mifsud Bonnici,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 29 May and 28 October 199:

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

Notes by the Registrar

* The case is numbered 36/1992/381/455-459. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applicatic to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came ir force on 1 January 1990.

PROCEDURE

1. The case was referred to the Court by the European Commissi of Human Rights ("the Commission") on 26 October 1992, within the

three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in five applications (nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/ against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by "Informationsverein Lentia", Mr Jörg Haider, "Arbeitsgemeinschaft Offenes Radio", Mr Wilhelm Weber and "Radio Mel GmbH", all Austrian legal or natural persons, on 16 April 1987, 15 May 1989, 27 September 1989, 18 September 1989 and 20 August 199(

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognisec the compulsory jurisdiction of the Court (Article 46) (art. 46). Th object of the request was to obtain a decision as to whether the fac of the case disclosed a breach by the respondent State of its obligations under Articles 10 and 14 (art. 10, art. 14) of the Convention.

3. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated tha they wished to take part in the proceedings and designated the lawye who would represent them (Rule 30); the President gave the lawyers i question leave to use the German language (Rule 27 para. 3).

4. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 4 of the Convention) (art. 43), and Mr R. Ryssdal, the President of th Court (Rule 21 para. 3 (b)). On 13 October 1992, in the presence of the Registrar, the President drew by lot the names of the other seve members, namely Mr R. Bernhardt, Mr L.-E. Pettiti, Mr A. Spielmann, Mrs E. Palm, Mr F. Bigi, Mr A.B. Baka and Mr G. Mifsud Bonnici (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43)

5. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicants' lawyers and the Delec of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequenc the Registrar received the Government's memorial on 15 April and the applicants' memorials - with their claims under Article 50 (art. 50) of the Convention - on 29 and 31 March and on 13 April 1993. On 27 April the Commission produced various documents, which the Registrar had requested on the President's instructions.

6. On 29 March 1993 the President had authorised, by virtue of Rule 37 para. 2, "Article 19" and "Interights" (two international hu rights organisations) to submit written observations on specific aspects of the case. Their observations reached the registry on 11 May.

7. In accordance with the President's decision, the hearing tc place in public in the Human Rights Building, Strasbourg, on 25 May 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr F. Cede, Ambassador, Legal Adviser at the Ministry of Foreign Affairs, Agent
Mrs S. Bernegger, Federal Chancellery, Adviser

(b) for the Commission

Mr J.A. Frowein, Delegate

(c) for the applicants

Mr D. Böhmdorfer, Rechtsanwalt,
Mr W. Haslauer, Rechtsanwalt,
Mr T. Höhne, Rechtsanwalt,
Mr G. Lehner, Rechtsanwalt,
Mr H. Tretter, Counsel

The Court heard addresses by the above-mentioned representatives, as well as their replies to its questions.

AS TO THE FACTS

I. The particular circumstances of the case

A. Informationsverein Lentia

8. The first applicant, an association of co-proprietors and residents of a housing development in Linz, comprising 458 apartment and 30 businesses, proposed to improve the communication between its members by setting up an internal cable television network. The programmes were to be confined to questions of mutual interest concerning members' rights.

9. On 9 June 1978 the first applicant applied for an operating licence under the Telecommunications Law (Fernmeldegesetz, see paragraph 17 below). As the Linz Regional Post and Telecommunicatic Head Office (Post- und Telegraphendirektion) had not replied within six-month time-limit laid down in Article 73 of the Code of Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetz), association applied to the National Head Office (Generaldirektion fü die Post- und Telegraphenverwaltung), attached to the Federal Minist of Transport (Bundesministerium für Verkehr).

The National Head Office rejected the application on 23 November 1979. In its view, Article 1 para. 2 of the Constitutic Law guaranteeing the independence of broadcasting (Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks, "the Constitutional Broadcasting Law", see paragraph 19 below) had vested in the federal legislature exclusive authority to regulate this activity; it had exercised that authority only once, b

enacting the Law on the Austrian Broadcasting Corporation (Bundesges über die Aufgaben und die Einrichtung des Österreichischen Rundfunks see paragraph 20 below). It followed that no other person could app for such licence as any application would lack a legal basis. Furthermore there had been no violation of Article 10 (art. 10) of t Convention since the legislature - in its capacity as a maker of constitutional laws (Verfassungsgesetzgeber) - had merely availed itself of its power to set up a system of licences in accordance wit the third sentence of paragraph 1 (art. 10-1).

10. Thereupon the first applicant complained to the Constitutic Court of a breach of Article 10 (art. 10); the court gave judgment c 16 December 1983.

It took the view that the freedom to set up and operate rac and television broadcasting stations was subject to the powers accor to the legislature under paragraph 1 in fine and paragraph 2 of Article 10 (art. 10-1, art. 10-2) (Gesetzesvorbehalt). Accordingly, an administrative decision could infringe that provision only if it proved to have no legal basis, or its legal basis was unconstitutior or again had been applied in an arbitrary manner (in denkunmöglicher Weise an[ge]wendet). In addition, the Constitutional Broadcasting I had instituted a system which made all activity of this type subject to the grant of a licence (Konzession) by the federal legislature. This system was intended to ensure objectivity and diversity of opinions (Meinungsvielfalt), and would be ineffective if it were possible for everybody to obtain the requisite authorisation. As matters stood, the right to broadcast was restricted to the Austriar Broadcasting Corporation (Österreichischer Rundfunk, ORF), as no implementing legislation had been enacted in addition to the law governing that organisation.

Contrary to its assertions, the first applicant had in fact intended to broadcast within the meaning of the constitutional law, because its programmes were to be directed at a general audience of variable composition. The broadcasting law therefore provided a leg basis for the decision in issue.

Consequently, the Constitutional Court rejected the complai and remitted it to the Administrative Court.

11. On 10 September 1986 the Administrative Court in substance adopted the grounds relied on by the Constitutional Court and in its turn dismissed the first applicant's claim.

B. Jörg Haider

12. From 1987 to 1989 the second applicant elaborated a project for the setting up, with other persons, of a private radio station i Carinthia. He subsequently gave up the idea after a study had shown him that according to the applicable law as interpreted by the Constitutional Court he would not be able to obtain the necessary licence. As a result he never applied for one.

C. Arbeitsgemeinschaft Offenes Radio (AGORA)

13. The third applicant, an Austrian association and a member c the Fédération européenne des radios libres (FERL - European Federat of Free Radios), plans to establish a radio station in southern Carinthia in order to broadcast, in German and Slovene, non-commerci radio programmes, whose makers already operate an authorised mobile radio station in Italy.

14. In 1988 AGORA applied for a licence. Its application was refused by the Klagenfurt Regional Post and Telecommunications Head Office on 19 December 1989 and by the National Head Office in Vienna on 9 August 1990. On 30 September 1991, on the basis of its own case-law (see paragraph 10 above), the Constitutional Court dismisse an appeal from that decision.

D. Wilhelm Weber

15. The fourth applicant is a shareholder of an Italian company operating a commercial radio which broadcasts to Austria and he wish to carry out the same activity in that country. However, in view of the legislation in force, he decided not to make any application to appropriate authorities.

E. Radio Melody GmbH

16. The fifth applicant is a private limited company incorporat under Austrian law. On 8 November 1988 it asked the Linz Regional F and Telecommunications Head Office to allocate it a frequency so tha it could operate a local radio station which it hoped to launch in Salzburg. On 28 April 1989 its application was rejected, a decisior confirmed on 12 July 1989 by the National Head Office and on 18 June 1990 by the Constitutional Court, which based its decision c its judgment of 16 December 1983 (see paragraph 10 above).

II. The relevant domestic law

A. The Telecommunications Law of 13 July 1949 ("Fernmeldegesetz")

17. According to the Telecommunications Law of 13 July 1949, "t right to set up and operate telecommunications installations (Fernmeldeanlagen) is vested exclusively in the federal authorities (Bund)" (Article 2 para. 1). The latter may however confer on natur or legal persons the power to exercise that right in respect of specific installations (Article 3 para. 1). No licence is required certain circumstances, including the setting up of an installation within the confines of a private property (Article 5).

B. The Ministerial Ordinance of 18 September 1961 concerning private telecommunications installations ("Verordnung des Bundesministeriums für Verkehr und Elektrizitätswirtschaft

über Privatfernmeldeanlagen")

18. The Ministerial Ordinance of 18 September 1961 concerning private telecommunications installations lays down inter alia the conditions for setting up and operating private telecommunications installations subject to federal supervision. According to the case-law, it cannot however constitute the legal basis for the grant of licences.

C. The Constitutional Law of 10 July 1974 guaranteeing the independence of broadcasting ("Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks")

19. According to Article 1 of the Constitutional Law of 10 July 1974 guaranteeing the independence of broadcasting,

"...

2. Broadcasting shall be governed by more detailed ru to be set out in a federal law. Such a law must inter alia contain provisions guaranteeing the objectivity and impartiality of reporting, the diversity of opinions, balanc programming and the independence of persons and bodies responsible for carrying out the duties defined in paragraph 1.

3. Broadcasting within the meaning of paragraph 1 sha be a public service."

D. The Law of 10 July 1974 on the Austrian Broadcasting Corporation ("Bundesgesetz über die Aufgaben und die Einrichtung des Österreichischen Rundfunks")

20. The Law of 10 July 1974 on the National Broadcasting Corporation established the Austrian Broadcasting Corporation with t status of an autonomous public-law corporation.

It is under a duty to provide comprehensive news coverage c major political, economic, cultural and sporting events; to this enc it has to broadcast, in compliance with the requirements of objectiv and diversity of views, in particular current affairs, news reports, commentaries and critical opinions (Article 2 para. 1 (1)), and to c so via at least two television channels and three radio stations, or of which must be a regional station (Article 3). Broadcasting time must be allocated to the political parties represented in the natior parliament and to representative associations (Article 5 para. 1).

A supervisory board (Kommission zur Wahrung des Rundfunkgesetzes) rules on all disputes concerning the application c the above-mentioned law which fall outside the jurisdiction of an administrative authority or court (Articles 25 and 27). It is compc of seventeen independent members, including nine judges, appointed f terms of four years by the President of the Republic on the proposal

of the Federal Government.

E. The case-law concerning "passive" cable broadcasting

21. On 8 July 1992 the Administrative Court decided that the Constitutional Law of 10 July 1974 (see paragraph 19 above) did not cover "passive" broadcasting via cable, in other words the broadcast in their entirety by cable of programmes picked up by an aerial. Consequently, the mere fact that such programmes originated from a foreign station and were directed principally or exclusively at an Austrian audience could not constitute grounds for refusing the lice necessary for this type of operation.

F. Subsequent developments

22. On 1 January 1994 a Law on regional radio stations is to er into force (Regionalradiogesetz, Official Gazette (Bundesgesetzblatt no. 1993/506). It will allow the authorities under certain conditic to grant private individuals or private corporations licences to set up and operate regional radio stations.

PROCEEDINGS BEFORE THE COMMISSION

23. The applicants lodged applications with the Commission on various dates between 16 April 1987 and 20 August 1990 (applications nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90). They maintained that the impossibility of obtaining an operating licence an unjustified interference with their right to communicate informat and infringed Article 10 (art. 10) of the Convention. The first anc third applicants also complained of a discrimination contrary to Article 14, read in conjunction with Article 10 (art. 14+10). The fifth applicant alleged in addition a breach of Article 6 (art. 6), inasmuch as it had not been able to bring the dispute before a "tribunal" within the meaning of that provision.

24. The Commission ordered the joinder of the applications on 13 July 1990 and 14 January 1992. On 15 January 1992 it found the complaints concerning Articles 10 and 14 (art. 10, art. 14) admissik declaring that relating to Article 6 (art. 6) inadmissible. In its report of 9 September 1992 (made under Article 31) (art. 31), it expressed the following opinion:

(a) that there had been a violation of Article 10 (art. 10) (unanimously as regards the first applicant and by fourteer votes to one for the others);

(b) that it was not necessary also to examine the case from the point of view of Article 14 (art. 14) (unanimously as regar the first applicant and by fourteen votes to one for the third applicant).

The full text of the Commission's opinion and of the separa opinions contained in the report is reproduced as an annex to this

judgment*.

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* Note by the Registrar: for practical reasons this annex will appea only with the printed version of the judgment (volume 276 of Series of the Publications of the Court), but a copy of the Commission's report is available from the registry.

THE GOVERNMENT'S FINAL SUBMISSIONS

25. The Government asked the Court "to find that there had beer no violation of Article 10 (art. 10), either taken on its own or in conjunction with Article 14 (art. 14+10)".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

26. The applicants complained that they had each been unable tc set up a radio station or, in the case of Informationsverein Lentia, a television station, as under Austrian legislation this right was restricted to the Austrian Broadcasting Corporation. They asserted that this constituted a monopoly incompatible with Article 10 (art. 10), which provides 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 interferer by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring t licensing of broadcasting, television or cinema enterprises
>
> 2. The exercise of these freedoms, since it carries w it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrit or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection 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 contested this claim, whereas the Commissior in substance accepted it.

27. The Court observes that the restrictions in issue amount tc an "interference" with the exercise by the applicants of their freec to impart information and ideas; indeed this was common ground betwe the participants in the proceedings. The only question which arises is therefore whether such interference was justified.

In this connection the fact that Mr Haider and Mr Weber nev applied for a broadcasting licence (see paragraphs 12 and 15 above) of no consequence; before the Commission the Government accepted tha those two applicants could be regarded as victims and the Government did not argue to the contrary before the Court.

28. In the Government's contention, sufficient basis for the contested interference is to be found in paragraph 1 in fine, which, in their view, has to be interpreted autonomously. In the alternati they argued that it also satisfied the conditions laid down in paragraph 2.

29. The Court reiterates that the object and purpose of the thi sentence of Article 10 para. 1 (art. 10-1) and the scope of its application must be considered in the context of the Article as a wh and in particular in relation to the requirements of paragraph 2 (art. 10-2), to which licensing measures remain subject (see the Groppera Radio AG and Others v. Switzerland judgment of 28 March 19S Series A no. 173, p. 24, para. 61, and the Autronic AG v. Switzerlar judgment of 22 May 1990, Series A no. 178, p. 24, para. 52). It is therefore necessary to ascertain whether the rules in question compl with both of these provisions.

A. Paragraph 1, third sentence (art. 10-1)

30. In the Government's view, the licensing system referred to the end of paragraph 1 allows States not only to regulate the techni aspects of audio-visual activities, but also to determine their plac and role in modern society. They argued that this was clear from th wording of the third sentence of paragraph 1 (art. 10-1), which was less restrictive than that of paragraph 2 and of Article 11 (art. 11 and thus allowed more extensive interference by the public authoriti with the freedom in question. By the same token, it left the States a wider margin of appreciation in defining their media policy and it implementation. This could even take the form of a public broadcast service monopoly in particular in cases where, as in Austria, that w the State's sole means of guaranteeing the objectivity and impartial of news, the balanced reporting of all shades of opinion and the independence of the persons and bodies responsible for the programme

31. According to the applicants, the rules in force in Austria, and in particular the monopoly of the Austrian Broadcasting Corporation, essentially reflect the authorities' wish to secure political control of the audio-visual industry, to the detriment of pluralism and artistic freedom. By eliminating all competition, the rules served in addition to protect the Austrian Broadcasting Corporation's economic viability at the cost of a serious encroachme on the freedom to conduct business. In short, they did not comply w the third sentence of paragraph 1.

32. As the Court has already held, the purpose of that provisic is to make it clear that States are permitted to regulate by a licensing system the way in which broadcasting is organised in their

territories, particularly in its technical aspects (see the above-mentioned Groppera Radio AG and Others judgment, Series A no. p. 24, para. 61). Technical aspects are undeniably important, but t grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.

This may lead to interferences whose aims will be legitimat under the third sentence of paragraph 1, even though they do not correspond to any of the aims set out in paragraph 2. The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2.

33. The monopoly system operated in Austria is capable of contributing to the quality and balance of programmes, through the supervisory powers over the media thereby conferred on the authoriti In the circumstances of the present case it is therefore consistent with the third sentence of paragraph 1. It remains, however, to be determined whether it also satisfies the relevant conditions of paragraph 2.

B. Paragraph 2 (art. 10-2)

34. The interferences complained of were, and this is not dispu by any of the participants in the proceedings, "prescribed by law". Their aim has already been held by the Court to be a legitimate one (see paragraphs 32-33 above). On the other hand, a problem arises i connection with the question whether the interferences were "necessa in a democratic society".

35. The Contracting States enjoy a margin of appreciation in assessing the need for an interference, but this margin goes hand ir hand with European supervision, whose extent will vary according to circumstances. In cases such as the present one, where there has be an interference with the exercise of the rights and freedoms guarant in paragraph 1 of Article 10 (art. 10-1), the supervision must be strict because of the importance - frequently stressed by the Court of the rights in question. The necessity for any restriction must b convincingly established (see, among other authorities, the Autronic AG judgment, cited above, Series A no. 178, pp. 26-27, para. 61).

36. The Government drew attention in the first place to the political dimension of the activities of the audio-visual media, whi is reflected in Austria in the aims fixed for such media under Article 1 para. 2 of the Constitutional Broadcasting Law, namely to guarantee the objectivity and impartiality of reporting, the diversi of opinions, balanced programming and the independence of persons and bodies responsible for programmes (see paragraph 20 above). In Government's view, only the system in force, based on the monopoly c the Austrian Broadcasting Corporation, made it possible for the

authorities to ensure compliance with these requirements. That was the applicable legislation and the charter of the Austrian Broadcast Corporation made provision for the independence of programming, the freedom of journalists and the balanced representation of political parties and social groups in the managing bodies.

In opting to keep the present system, the State had in any case merely acted within its margin of appreciation, which had remai unchanged since the adoption of the Convention; very few of the Contracting States had had different systems at the time. In view c the diversity of the structures which now exist in this field, it cc not seriously be maintained that a genuine European model had come i being in the meantime.

37. The applicants maintained that to protect public opinion fr manipulation it was by no means necessary to have a public monopoly the audio-visual industry, otherwise it would be equally necessary t have one for the press. On the contrary, true progress towards attaining diversity of opinion and objectivity was to be achieved or by providing a variety of stations and programmes. In reality, the Austrian authorities were essentially seeking to retain their politi control over broadcasting.

38. The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of gene interest, which the public is moreover entitled to receive (see, for example, mutatis mutandis, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the St is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.

39. Of all the means of ensuring that these values are respecte a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.

As a result of the technical progress made over the last decades, justification for these restrictions can no longer today be found in considerations relating to the number of frequencies and channels available; the Government accepted this. Secondly, for the purposes of the present case they have lost much of their raison d'é in view of the multiplication of foreign programmes aimed at Austria audiences and the decision of the Administrative Court to recognise lawfulness of their retransmission by cable (see paragraph 21 above) Finally and above all, it cannot be argued that there are no equival less restrictive solutions; it is sufficient by way of example to ci

the practice of certain countries which either issue licences subjec to specified conditions of variable content or make provision for fc of private participation in the activities of the national corporati

40. The Government finally adduced an economic argument, namely that the Austrian market was too small to sustain a sufficient numbe of stations to avoid regroupings and the constitution of "private monopolies".

41. In the applicant's opinion, this is a pretext for a policy which, by eliminating all competition, seeks above all to guarantee the Austrian Broadcasting Corporation advertising revenue, at the expense of the principle of free enterprise.

42. The Court is not persuaded by the Government's argument. Their assertions are contradicted by the experience of several Europ States, of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from cour to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed to be groundless.

43. In short, like the Commission, the Court considers that the interferences in issue were disproportionate to the aim pursued and were, accordingly, not necessary in a democratic society. There has therefore been a violation of Article 10 (art. 10).

44. In the circumstances of the case, this finding makes it unnecessary for the Court to determine whether, as was claimed by sc of the applicants, there has also been a breach of Article 14, taker in conjunction with Article 10 (art. 14+10) (see, inter alia, the Ai v. Ireland judgment of 9 October 1979, Series A no. 32, p. 16, para. 30).

II. APPLICATION OF ARTICLE 50 (art. 50)

45. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict wi the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparati to be made for the consequences of this decision or measure the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The Court examined the applicants' claims in the light of t observations of the participants in the proceedings and the criteria laid down in its case-law.

A. Damage

46. Only two applicants sought compensation for pecuniary damag

"Informationsverein Lentia" in the amount of 900,000 Austrian schillings and "Radio Melody" 5,444,714.66 schillings.

They based their claims on the assumption that they would r have failed to obtain the licences applied for if the Austrian legislation had been in conformity with Article 10 (art. 10). This however, speculation, in view of the discretion left in this field t the authorities, as the Delegate of the Commission correctly pointec out. No compensation is therefore recoverable under this head.

B. Costs and expenses

47. As regards costs and expenses, the applicants claimed respectively 136,023.54 schillings ("Informationsverein Lentia"), 513,871.20 schillings (Haider), 390,115.20 schillings ("AGORA"), 519,871.20 schillings (Weber) and 605,012.40 schillings ("Radio Melody").

The Government took the view that the first of those amount was reasonable and that it should, however, in their view, be increa to 165,000 schillings to take account of the proceedings before the Court.

Making an assessment on an equitable basis, the Court awarc 165,000 schillings each to the applicants "Informationsverein Lentia "AGORA" and "Radio Melody", for the proceedings conducted in Austria and in Strasbourg. Mr Haider and Mr Weber, who appeared only before the Convention institutions, are entitled to 100,000 schillings each

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 10 (art. 10);

2. Holds that it is not necessary also to examine the case unc Article 14 read in conjunction with Article 10 (art. 14+10)

3. Holds that Austria is to pay, within three months, in respe of costs and expenses, 165,000 (one hundred and sixty-five thousand) Austrian schillings to each of the applicants "Informationsverein Lentia", "AGORA" and "Radio Melody", ar 100,000 (one hundred thousand) Austrian schillings each to the applicants Haider and Weber;

4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 November 19

Signed: Rolv RYSSDDAL
President

Signed: Marc-André EISSEN

Registrar

61983J0107
Judgment of the Court of 12 July 1984.
Ordre des avocats au Barreau de Paris v Onno Klopp.
Reference for a preliminary ruling: Cour de cassation - France.
Freedom of establishment - Access to the legal profession.
Case 107/83.
European Court reports 1984 Page 02971
Spanish special edition 1984 Page 00687
Swedish special edition VII Page 00653
Finnish special edition VII Page 00635

1 . FREE MOVEMENT OF PERSONS - FREEDOM OF ESTABLISHMENT - ARTICLE 52 OF THE TREATY - DIRECT EFFECT - FAILURE TO ADOPT DIRECTIVES - NO EFFECT
(EEC TREATY , ARTS 52 , 54 AND 57)
2 . FREE MOVEMENT OF PERSONS - FREEDOM OF ESTABLISHMENT - SEVERAL PLACES OF WORK WITHIN THE COMMUNITY - LIBERAL PROFESSIONS
(EEC TREATY , ART . 52)
3 . FREE MOVEMENT OF PERSONS - FREEDOM OF ESTABLISHMENT - ADVOCATES - ACCESS TO THE PROFESSION - ENROLMENT REFUSED BECAUSE OF MAINTENANCE OF CHAMBERS IN ANOTHER MEMBER STATE - INCOMPATIBILIY WITH THE TREATY
(EEC TREATY , ART . 52 ET SEQ .)

1 . IN LAYING DOWN THAT FREEDOM OF ESTABLISHMENT SHALL BE ATTAINED AT THE END OF THE TRANSITIONAL PERIOD , ARTICLE 52 IMPOSES AN OBLIGATION TO ATTAIN A PRECISE RESULT THE FULFILMENT OF WHICH MUST BE MADE EASIER BY , BUT NOT MADE DEPENDENT ON , THE IMPLEMENTATION OF A PROGRAMME OF PROGRESSIVE MEASURES . CONSEQUENTLY THE FACT THAT THE COUNCIL HAS FAILED TO ISSUE THE DIRECTIVES PROVIDED FOR BY ARTICLES 54 AND 57 CANNOT SERVE TO JUSTIFY FAILURE TO MEET THE OBLIGATION .

2 . THE RULE IN ARTICLE 52 OF THE TREATY , ACCORDING TO WHICH THE PROGRESSIVE ABOLITION OF THE RESTRICTIONS ON FREEDOM OF ESTABLISHMENT APPLIES TO RESTRICTIONS ON THE SETTING UP OF AGENCIES , BRANCHES OR SUBSIDIARIES BY NATIONALS OF ANY MEMBER STATE ESTABLISHED IN THE TERRITORY OF ANOTHER MEMBER STATE MUST BE REGARDED AS A SPECIFIC STATEMENT OF A GENERAL PRINCIPLE , APPLICABLE EQUALLY TO THE LIBERAL PROFESSIONS , ACCORDING TO WHICH THE RIGHT OF ESTABLISHMENT INCLUDES FREEDOM TO SET UP AND MAINTAIN , SUBJECT TO OBSERVANCE OF THE PROFESSIONAL RULES OF CONDUCT , MORE THAN ONE PLACE OF WORK WITHIN THE COMMUNITY .

3 . EVEN IN THE ABSENCE OF ANY DIRECTIVE COORDINATING NATIONAL PROVISIONS GOVERNING ACCESS TO AND THE EXERCISE OF THE LEGAL PROFESSION , ARTICLE 52 ET SEQ . OF THE EEC TREATY PREVENT THE COMPETENT AUTHORITIES OF A MEMBER STATE FROM DENYING , ON THE BASIS OF THE NATIONAL LEGISLATION AND THE RULES OF

PROFESSIONAL CONDUCT WHICH ARE IN FORCE IN THAT STATE , TO A NATIONAL OF ANOTHER MEMBER STATE THE RIGHT TO ENTER AND TO EXERCISE THE LEGAL PROFESSION SOLELY ON THE GROUND THAT HE MAINTAINS CHAMBERS SIMULTANEOUSLY IN ANOTHER MEMBER STATE .

IN CASE 107/83
REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE FRENCH COUR DE CASSATION (COURT OF CASSATION) FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN
ORDRE DES AVOCATS AU BARREAU DE PARIS (THE PARIS BAR ASSOCATION)
AND
ONNO KLOPP , OF THE DUSSELDORF BAR ,

ON THE INTERPRETATION OF ARTICLE 52 ET SEQ . OF THE EEC TREATY ,

1 BY A JUDGMENT OF 3 MAY 1983 WHICH WAS RECEIVED AT THE COURT ON 6 JUNE 1983 , THE FRENCH COUR DE CASSATION (COURT OF CASSATION) REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY A QUESTION AS TO THE INTERPRETATION OF ARTICLE 52 ET SEQ . OF THE EEC TREATY IN RELATION TO ACCESS TO THE LEGAL PROFESSION .

2 THE QUESTION WAS RAISED IN PROCEEDINGS BETWEEN THE ORDRE DES AVOCATS AU BARREAU DE PARIS (THE PARIS BAR ASSOCIATION) AND MR KLOPP , A GERMAN NATIONAL AND A MEMBER OF THE DUSSELDORF BAR . MR KLOPP HAD APPLIED TO TAKE THE OATH AS AN AVOCAT AND TO BE REGISTERED FOR THE PERIOD OF PRACTICAL TRAINING AT THE PARIS BAR WHILST REMAINING A MEMBER OF THE DUSSELDORF BAR AND RETAINING HIS RESIDENCE AND CHAMBERS THERE .

3 BY AN ORDER OF 17 MARCH 1981 THE COUNCIL OF THE PARIS BAR ASSOCIATION (HEREINAFTER REFERRED TO AS '' THE PARIS BAR COUNCIL '') REJECTED HIS APPLICATION ON THE GROUND THAT ALTHOUGH MR KLOPP SATISFIED ALL THE OTHER REQUIREMENTS FOR ADMISSION AS AN AVOCAT , ESPECIALLY AS REGARDS HIS PERSONAL AND FORMAL QUALIFICATIONS , HE DID NOT SATISFY THE PROVISIONS OF ARTICLE 83 OF DECREE NO 72-468 (JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE OF 11 . 6 . 1972) AND ARTICLE 1 OF THE INTERNAL RULES OF THE PARIS BAR WHICH PROVIDE THAT AN AVOCAT MAY ESTABLISH CHAMBERS IN ONE PLACE ONLY , WHICH MUST BE WITHIN THE TERRITORIAL JURISDICTION OF THE TRIBUNAL DE GRANDE INSTANCE (REGIONAL COURT) WITH WHICH HE IS REGISTERED .

4 ARTICLE 83 OF THE AFORESAID DECREE PROVIDES THAT : '' AN AVOCAT SHALL ESTABLISH HIS CHAMBERS WITHIN THE TERRITORIAL JURISDICTION OF THE TRIBUNAL DE GRANDE INSTANCE WITH WHICH HE IS REGISTERED '' . ARTICLE 1 OF THE INTERNAL RULES OF THE PARIS BAR PROVIDES : '' AN AVOCAT OF THE PARIS BAR MUST GENUINELY PRACTISE HIS PROFESSION , '' THAT '' IN ORDER TO PRACTISE THE PROFESSION , HE MUST BE A REGISTERED LEGAL PRACTITIONER OR TRAINEE AND MUST HAVE HIS CHAMBERS IN PARIS OR IN THE DEPARTEMENTS OF HAUTS-DE-SEINE , SEINE-SAINT-DENIS OR VAL-DE-MARNE '' AND THAT '' APART FROM HIS PRINCIPAL CHAMBERS BE MAY ESTABLISH A SECOND SET OF CHAMBERS WITHIN THE SAME GEOGRAPHICAL AREA . ''
5 WHEN THE COUR D ' APPEL (COURT OF APPEAL), PARIS , SET ASIDE THE DECISION OF THE PARIS BAR COUNCIL BY JUDGMENT OF 24 MARCH 1982 THE COUNCIL APPEALED TO THE COURT OF CASSATION , WHICH , TAKING THE VIEW THAT THE CASE RAISED A QUESTION CONCERNING THE INTERPRETATION OF COMMUNITY LAW , STAYED THE PROCEEDINGS AND REQUESTED THE COURT OF JUSTICE UNDER ARTICLE 177 OF THE EEC TREATY TO GIVE A PRELIMINARY RULING :
'' BY WAY OF INTERPRETATION OF ARTICLE 52 ET SEQ . OF THE TREATY OF ROME , ON WHETHER , IN THE ABSENCE OF ANY DIRECTIVE OF THE COUNCIL OF THE EUROPEAN COMMUNITIES COORDINATING PROVISIONS GOVERNING ACCESS TO AND EXERCISE OF

THE LEGAL PROFESSION , THE REQUIREMENT THAT A LAWYER WHO IS A NATIONAL OF A MEMBER STATE AND WHO WISHES TO PRACTISE SIMULTANEOUSLY IN ANOTHER MEMBER STATE MUST MAINTAIN CHAMBERS IN ONE PLACE ONLY , A REQUIREMENT IMPOSED BY THE LEGISLATION OF THE COUNTRY WHERE HE WISHES TO ESTABLISH HIMSELF AND INTENDED TO ENSURE THE PROPER ADMINISTRATION OF JUSTICE AND COMPLIANCE WITH PROFESSIONAL ETHICS IN THAT COUNTRY , CONSTITUTES A RESTRICTION WHICH IS INCOMPATIBLE WITH THE FREEDOM OF ESTABLISHMENT GUARANTEED BY ARTICLE 52 OF THE TREATY OF ROME . ' '

6 IN SUBSTANCE THE QUESTION IS WHETHER IN THE ABSENCE OF A DIRECTIVE ON THE COORDINATION OF NATIONAL PROVISIONS CONCERNING ACCESS TO AND EXERCISE OF THE LEGAL PROFESSION ARTICLE 52 ET SEQ . OF THE TREATY PREVENT THE COMPETENT AUTHORITIES OF A MEMBER STATE FROM DENYING PURSUANT TO THEIR NATIONAL LAW AND THE RULES OF PROFESSIONAL CONDUCT IN FORCE THERE A NATIONAL OF ANOTHER MEMBER STATE THE RIGHT TO ENTER AND TO EXERCISE THE LEGAL PROFESSION SOLELY BECAUSE HE MAINTAINS AT THE SAME TIME PROFESSIONAL CHAMBERS IN ANOTHER MEMBER STATE .

7 THE PARIS BAR COUNCIL MAINTAINS FIRST THAT ARTICLE 52 OF THE TREATY HAS ONLY PARTIAL DIRECT EFFECT INASMUCH AS IT EMBODIES THE RULE OF EQUAL TREATMENT BUT DOES NOT NECESSARILY APPLY TO OTHER CASES . ACCORDINGLY IN THE ABSENCE OF DIRECTIVES THE PRACTICAL TERMS OF FREE ESTABLISHMENT DEPEND ON NATIONAL LAW , UNLESS THE LATTER IS DISCRIMINATORY OR CONSTITUTES A PATENTLY UNREASONABLE OBSTACLE OR IS OBJECTIVELY INCOMPATIBLE WITH THE GENERAL INTEREST .

8 THE FIRST PARAGRAPH OF ARTICLE 52 OF THE TREATY PROVIDES FOR THE ABOLITION OF RESTRICTIONS ON THE FREEDOM OF ESTABLISHMENT OF NATIONALS OF A MEMBER STATE IN THE TERRITORY OF ANOTHER MEMBER STATE .

9 IN ORDER TO PROMOTE THE PROGRESSIVE ACHIEVEMENT OF THAT OBJECTIVE THE COUNCIL ADOPTED ON 18 DECEMBER 1961 PURSUANT TO ARTICLE 54 OF THE TREATY A GENERAL PROGRAMME FOR THE ABOLITION OF RESTRICTIONS ON FREEDOM OF ESTABLISHMENT (OFFICIAL JOURNAL , ENGLISH SPECIAL EDITION , SECOND SERIES VOL IX , P . 7). IN ORDER TO IMPLEMENT THE PROGRAMME ARTICLE 54 (2) OF THE TREATY PROVIDES THAT THE COUNCIL IS TO ISSUE DIRECTIVES TO ACHIEVE FREEDOM OF ESTABLISHMENT IN RESPECT OF THE VARIOUS ACTIVITIES IN QUESTION . FURTHERMORE , ARTICLE 57 OF THE TREATY MAKES THE COUNCIL RESPONSIBLE FOR ISSUING DIRECTIVES PROVIDING FOR THE MUTUAL RECOGNITION OF DIPLOMAS , CERTIFICATES AND OTHER EVIDENCE OF FORMAL QUALIFICATIONS AND FOR THE COORDINATION OF THE PROVISIONS LAID DOWN BY LAW , REGULATION OR ADMINISTRATIVE ACTION IN MEMBER STATES CONCERNING THE TAKING UP AND PURSUIT OF ACTIVITIES AS SELF-EMPLOYED PERSONS . ALTHOUGH THE LEGAL PROFESSION IS ALREADY GOVERNED IN RELATION TO FREEDOM TO PROVIDE SERVICES BY COUNCIL DIRECTIVE 77/249 OF 22 MARCH 1977 FACILITATING THE EFFECTIVE EXERCISE BY LAWYERS OF FREEDOM TO PROVIDE SERVICES (OFFICIAL JOURNAL L 78 , P . 17), NO DIRECTIVE ON FREEDOM OF ESTABLISHMENT FOR LAWYERS HAS BEEN ADOPTED UNDER ARTICLES 54 AND 57 OF THE TREATY .

10 NEVERTHELESS , AS THE COURT HAS ALREADY HELD IN ITS JUDGMENT OF 21 JUNE 1974 (CASE 2/74 REYNERS V BELGIUM (1974) ECR 631), IN LAYING DOWN THAT FREEDOM OF ESTABLISHMENT SHALL BE ATTAINED AT THE END OF THE TRANSITIONAL PERIOD , ARTICLE 52 IMPOSES AN OBLIGATION TO ATTAIN A PRECISE RESULT THE FULFILMENT OF WHICH MUST BE MADE EASIER BY , BUT NOT MADE DEPENDENT ON , THE IMPLEMENTATION OF A PROGRAMME OF PROGRESSIVE MEASURES . CONSEQUENTLY THE FACT THAT THE COUNCIL HAS FAILED TO ISSUE THE DIRECTIVES PROVIDED FOR BY ARTICLES 54 AND 57 CANNOT SERVE TO JUSTIFY FAILURE TO MEET THE OBLIGATION .

11 IT IS THEREFORE NECESSARY TO CONSIDER THE SCOPE OF ARTICLE 52 OF THE TREATY AS A DIRECTLY APPLICABLE RULE OF COMMUNITY LAW WITH REGARD TO THE ESTABLISHMENT IN A MEMBER STATE OF A LAWYER ALREADY ESTABLISHED IN

ANOTHER MEMBER STATE AND RETAINING HIS ORIGINAL ESTABLISHMENT THERE .

12 THE PARIS BAR COUNCIL AND THE FRENCH GOVERNMENT MAINTAIN THAT ARTICLE 52 OF THE TREATY MAKES ACCESS AND EXERCISE OF FREEDOM OF ESTABLISHMENT DEPEND ON THE CONDITIONS LAID DOWN BY THE MEMBER STATE OF ESTABLISHMENT . BOTH ARTICLE 83 OF DECREE NO 72-468 AND ARTICLE 1 OF THE INTERNAL RULES OF THE PARIS BAR (CITED ABOVE) ARE APPLICABLE WITHOUT DISTINCTION TO FRENCH NATIONALS AND THOSE OF OTHER MEMBER STATES . THOSE PROVISIONS PROVIDE THAT AN AVOCAT MAY ESTABLISH CHAMBERS IN ONE PLACE ONLY .

13 IN THAT RESPECT THE APPLICANT OBJECTS IN THE FIRST PLACE THAT THE NATIONAL FRENCH LEGISLATION AS APPLIED IS DISCRIMINATORY AND THUS CONTRARY TO ARTICLE 52 OF THE TREATY , FOR WHILST THE PARIS BAR ASSOCIATION HAS ALLOWED OR TOLERATED THE PRACTICE OF CERTAIN OF ITS MEMBERS IN HAVING A SECOND SET OF CHAMBERS IN OTHER COUNTRIES IT WILL NOT PERMIT THE APPLICANT TO ESTABLISH HIMSELF IN PARIS WHILST RETAINING HIS CHAMBERS IN DUSSELDORF .

14 HOWEVER , ACCORDING TO THE DIVISION OF JURISDICTION BETWEEN THE COURT AND THE NATIONAL COURT LAID DOWN IN ARTICLE 177 OF THE EEC TREATY IT IS FOR THE NATIONAL COURT TO DETERMINE WHETHER IN PRACTICE THE RULES IN QUESTION ARE DISCRIMINATORY . THE QUESTION PUT BY THE NATIONAL COURT MUST THEREFORE BE ANSWERED WITHOUT GIVING ANY OPINION ON THE OBJECTION BASED ON A DISCRIMINATORY APPLICATION OF THE NATIONAL LAW IN QUESTION .

15 IN THE SECOND PLACE THE APPLICANT , THE UNITED KINGDOM , THE DANISH GOVERNMENT AND THE COMMISSION CONSIDER THAT THE LEGISLATION OF THE MEMBER STATE OF ESTABLISHMENT , ALTHOUGH APPLICABLE TO ACCESS TO THE PROFESSION AND PRACTICE OF LAW IN THAT COUNTRY , MAY NOT PROHIBIT A LAWYER WHO IS A NATIONAL OF ANOTHER MEMBER STATE FROM RETAINING HIS CHAMBERS THERE .

16 THE PARIS BAR COUNCIL AND THE FRENCH GOVERNMENT OBJECT IN THAT RESPECT THAT ARTICLE 52 OF THE TREATY REQUIRES THE FULL APPLICATION OF THE LAW OF THE MEMBER STATE OF ESTABLISHMENT . THE RULE THAT AN AVOCAT MAY HAVE HIS CHAMBERS IN ONE PLACE ONLY IS BASED ON THE NEED FOR AVOCATS TO GENUINELY PRACTICE BEFORE A COURT IN ORDER TO ENSURE THEIR AVAILABILITY TO BOTH THE COURT AND THEIR CLIENTS . IT SHOULD BE RESPECTED AS BEING A RULE PERTAINING TO THE ADMINISTRATION OF JUSTICE AND TO PROFESSIONAL ETHICS , OBJECTIVELY NECESSARY AND CONSISTENT WITH THE PUBLIC INTEREST .

17 IT SHOULD BE EMPHASIZED THAT UNDER THE SECOND PARAGRAPH OF ARTICLE 52 FREEDOM OF ESTABLISHMENT INCLUDES ACCESS TO AND THE PURSUIT OF THE ACTIVITIES OF SELF-EMPLOYED PERSONS '' UNDER THE CONDITIONS LAID DOWN FOR ITS OWN NATIONALS BY THE LAW OF THE COUNTRY WHERE SUCH ESTABLISHMENT IS EFFECTED . '' IT FOLLOWS FROM THAT PROVISION AND ITS CONTEXT THAT IN THE ABSENCE OF SPECIFIC COMMUNITY RULES IN THE MATTER EACH MEMBER STATE IS FREE TO REGULATE THE EXERCISE OF THE LEGAL PROFESSION IN ITS TERRITORY .

18 NEVERTHELESS THAT RULE DOES NOT MEAN THAT THE LEGISLATION OF A MEMBER STATE MAY REQUIRE A LAWYER TO HAVE ONLY ONE ESTABLISHMENT THROUGHOUT THE COMMUNTY TERRITORY . SUCH A RESTRICTIVE INTERPRETATION WOULD MEAN THAT A LAWYER ONCE ESTABLISHED IN A PARTICULAR MEMBER STATE WOULD BE ABLE TO ENJOY THE FREEDOM OF THE TREATY TO ESTABLISH HIMSELF IN ANOTHER MEMBER STATE ONLY AT THE PRICE OF ABANDONING THE ESTABLISHMENT HE ALREADY HAD .

19 THAT FREEDOM OF ESTABLISHMENT IS NOT CONFINED TO THE RIGHT TO CREATE A SINGLE ESTABLISHMENT WITHIN THE COMMUNITY IS CONFIRMED BY THE VERY WORDS OF ARTICLE 52 OF THE TREATY , ACCORDING TO WHICH THE PROGRESSIVE

ABOLITION OF THE RESTRICTIONS ON FREEDOM OF ESTABLISHMENT APPLIES TO RESTRICTIONS ON THE SETTING UP OF AGENCIES , BRANCHES OR SUBSIDIARIES BY NATIONALS OF ANY MEMBER STATE ESTABLISHED IN THE TERRITORY OF ANOTHER MEMBER STATE . THAT RULE MUST BE REGARDED AS A SPECIFIC STATEMENT OF A GENERAL PRINCIPLE , APPLICABLE EQUALLY TO THE LIBERAL PROFESSIONS , ACCORDING TO WHICH THE RIGHT OF ESTABLISHMENT INCLUDES FREEDOM TO SET UP AND MAINTAIN , SUBJECT TO OBSERVANCE OF THE PROFESSIONAL RULES OF CONDUCT , MORE THAN ONE PLACE OF WORK WITHIN THE COMMUNITY .

20 IN VIEW OF THE SPECIAL NATURE OF THE LEGAL PROFESSION , HOWEVER , THE SECOND MEMBER STATE MUST HAVE THE RIGHT , IN THE INTERESTS OF THE DUE ADMINISTRATION OF JUSTICE , TO REQUIRE THAT LAWYERS ENROLLED AT A BAR IN ITS TERRITORY SHOULD PRACTISE IN SUCH A WAY AS TO MAINTAIN SUFFICIENT CONTACT WITH THEIR CLIENTS AND THE JUDICIAL AUTHORITIES AND ABIDE BY THE RULES OF THE PROFESSION . NEVERTHELESS SUCH REQUIREMENTS MUST NOT PREVENT THE NATIONALS OF OTHER MEMBER STATES FROM EXERCISING PROPERLY THE RIGHT OF ESTABLISHMENT GUARANTEED THEM BY THE TREATY .

21 IN THAT RESPECT IT MUST BE POINTED OUT THAT MODERN METHODS OF TRANSPORT AND TELECOMMUNICATIONS FACILITATE PROPER CONTACT WITH CLIENTS AND THE JUDICIAL AUTHORITIES . SIMILARLY , THE EXISTENCE OF A SECOND SET OF CHAMBERS IN ANOTHER MEMBER STATE DOES NOT PREVENT THE APPLICATION OF THE RULES OF ETHICS IN THE HOST MEMBER STATE .

22 THE QUESTION MUST THEREFORE BE ANSWERED TO THE EFFECT THAT EVEN IN THE ABSENCE OF ANY DIRECTIVE COORDINATING NATIONAL PROVISIONS GOVERNING ACCESS TO AND THE EXERCISE OF THE LEGAL PROFESSION , ARTICLE 52 ET SEQ . OF THE EEC TREATY PREVENT THE COMPETENT AUTHORITIES OF A MEMBER STATE FROM DENYING , ON THE BASIS OF THE NATIONAL LEGISLATION AND THE RULES OF PROFESSIONAL CONDUCT WHICH ARE IN FORCE IN THAT STATE , TO A NATIONAL OF ANOTHER MEMBER STATE THE RIGHT TO ENTER AND TO EXERCISE THE LEGAL PROFESSION SOLELY ON THE GROUND THAT HE MAINTAINS CHAMBERS SIMULTANEOUSLY IN ANOTHER MEMBER STATE .

COSTS

23 THE COSTS INCURRED BY THE UNITED KINGDOM , THE FRENCH AND NETHERLANDS GOVERNMENTS AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . SINCE THE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT .

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE FRENCH COUR DE CASSATION BY JUDGMENT OF 3 MAY 1983 , HEREBY RULES :

EVEN IN THE ABSENCE OF ANY DIRECTIVE COORDINATING NATIONAL PROVISIONS GOVERNING ACCESS TO AND THE EXERCISE OF THE LEGAL PROFESSION , ARTICLE 52 ET SEQ . OF THE EEC TREATY PREVENT THE COMPETENT AUTHORITIES OF A MEMBER STATE FROM DENYING , ON THE BASIS OF THE NATIONAL LEGISLATION AND THE RULES OF PROFESSIONAL CONDUCT WHICH ARE IN FORCE IN THAT STATE , TO A NATIONAL OF ANOTHER MEMBER STATE THE RIGHT TO ENTER AND TO EXERCISE THE LEGAL PROFESSION SOLELY ON THE GROUND THAT HE MAINTAINS CHAMBERS SIMULTANEOUSLY IN ANOTHER MEMBER STATE .

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JUDGMENT OF THE COURT

14 June 2001*

(Right of establishment – Single practice rule – Justification by overriding reasons of general interest)

In Case E-5/00

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court of the Principality of Liechtenstein) for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by

Dr Josef Mangold

on the interpretation of Article 31 of the EEA Agreement.

THE COURT,

composed of: Thór Vilhjálmsson, President, Carl Baudenbacher (Judge-Rapporteur) and Per Tresselt, Judges,

Registrar: Gunnar Selvik

after considering the written observations submitted on behalf of:

- Dr Josef Mangold, represented by Toni Jäger;
- the Government of Liechtenstein, represented by Christoph Büchel, Director, EEA Coordination Unit, and Frank Montag, Rechtsanwalt;
- the Government of Iceland, represented by Högni S. Kristjánsson, Legal Officer, Ministry of Foreign Affairs, acting as Agent;
- the Government of Norway, represented by Helge Seland, Assistant Director General, Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;
- the Commission of the European Communities, represented by Maria Patakia and John Forman, Legal Advisers, Legal Service, acting as Agents;

having regard to the Report for the Hearing,

after hearing the oral observations of the Government of Liechtenstein, the EFTA Surveillance Authority, represented by Michael Sanchez Rydelski, and the Commission of the European Communities at the hearing on 6 March 2001,

there are fundamental differences in the scope and purposes of the Community legal order and the EEA legal order.

7. The Court has consistentiy heid that, when one is interpreting the EEA Agreement, it is necessary always to take into account that the objective of the Contracting Parties was to create a dynamic and homogeneous European Economic Area (see, *inter alia*, Case E-3/98 *Rainford-Towning* [1998] EFTA Court Report 205, at paragraph 17). This point of departure has particular weight with regard to fundamental principles, such as the freedom of establishment set out in Article 31 EEA. The Court has, at the same time, recognised that there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and has stated that these differences might, under specific circumstances, lead to differences in interpretation (see Case E-2/97 *Mag instruments* v *California Trading Company Norway* [1997] EFTA Court Report 127, at paragraph 25 et seq.). In the present case, the Court has not been presented with any specific circumstance which would compel it to disregard the case-law of the Court of Justice of the European Communities in respect of Article 43 EC (see Case E-3/98 *Rainford-Towning*, cited above, at paragraph 21). Therefore, the Court cannot accept the contention of the Government of Liechtenstein to the effect that the case-law of the Court of Justice of the European Communities is not relevant to the consideration of the EEA provisions raised in the present case.

8. In this case, the national court is essentially asking whether a national provision stating that a dentist seeking a licence to practise in Liechtenstein may not operate more than one practice, regardless of location, is compatible with the provisions of the EEA Agreement.

9. The pursuit of an economic activity by an EEA national in an EEA State other than his State of nationality may, under the EEA Agreement, be governed by the chapter on the free movement of workers, or the chapter on the right of establishment, or the chapter on services, these being mutually exclusive (see Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, at paragraph 20).

10. In the present case, the Complainant, resident in and a national of Austria, seeks to up and pursue, on a stable and continuous basis, activities as a self-employed dentist in Liechtenstein, maintaining permanent premises there. This follows from the Complainant's own pleadings. Therefore, the case must be dealt with under the rules on the freedom of establishment (see Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, cited above, at paragraphs 23 to 25).

11. Freedom of establishment is one of the fundamental principles of the EEA Agreement. Chapter 2 of Part III of the EEA Agreement contains the principal treaty provisions relating to the freedom of establishment within the EEA. Article 31 EEA provides as follows:

    1. "Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

       Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

    2. Annexes VIII to XI contain specific provisions on the right of establishment."

12. This provision is specific and far-reaching. It refers explicitly to self-employed persons, and to the setting up of agencies, branches or subsidiaries. This indicates that the right

national rule with regard to secondary establishments. The fact that the contested national rule is not contrary to the provisions of the EEA Agreement relating to the freedom to provide services does not affect the compatibility of that national rule with the provisions of the EEA Agreement on the freedom of establishment.

23. The Court concludes from the foregoing that a single practice rule such as that at issue in the main proceedings constitutes a restriction on the freedom of establishment within the meaning of Article 31 EEA.

24. The Court must now examine whether this restriction can be objectively justified so as permit the continued application of such a single practice rule.

25. Non-discriminatory national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, such as the single practice ruie at issue in the present case, can be justified only if they fulfil the following conditions: they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective (see, to this effect, Case C-424/97 *Haim* [2000] ECR I-5123, at paragraph 57, and, most recently, Case C-108/96 *Mac Quen and Others* v *Grandvision Belgium*, judgment of 1 February 2001, not yet reported, at paragraph 26).

26. The Government of Liechtenstein has submitted that the underlying main objective of the single practice rule is the maintenance of the financial equilibrium of the Liechtenstein social security system. Protecting this equilibrium must be held to be an overriding reason based on the general interest, justifying a restriction on the freedom of establishment in this case. It is argued that if the single practice rule were disallowed, Liechtenstein would experience a significant increase in the number of medical and dental practitioners. Such an increase in the supply of medical and dental services in the country would simultaneously cause an artificial increase in the demand for such services. This would again lead to a corresponding rise in the expenditure relating to medical and dental treatment in the Liechtenstein social security system. The Government of Liechtenstein has submitted that such increases in expenditure might threaten the sustainability of a health care system accessible to all.

27. Moreover, the Government of Liechtenstein has submitted that reasons connected with the maintenance of the high quality of medical and dental services provided in Liechtenstein must also be taken into account. The single practice rule ensures the availability and continuity of presence of the practitioner. Medical and dental practitioners who establish a second practice would not be able to provide the necessary continuous and permanent medical and dental care for their patients as practitioners who exclusively operate one practice in the country.

28. The Court recalls that EEA law does not detract from the powers of the EEA States to organise their social security systems. In the absence of harmonisation at the EEA it is for each EEA State to determine whether and to what extent expenses for medical and dental treatment are to be borne by the social security system.

29. Economic considerations alone cannot justify a barrier to one of the fundamental freedoms provided for in the EEA Agreement (see Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, at paragraph 41). However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system, and of jeopardising the sustainability of a health care system accessible to all, might nevertheless constitute an overriding reason in the general interest capable of justifying a barrier of that kind (see, *inter alia*, Case C-158/96 *Kohll* v *Union des Caisses de Maladie*, cited above, at paragraphs 41 and 50).

30. The Court notes from the information presented to it that, under the Liechtenstein health system, most of the costs for dental treatment will in fact be borne by the patients themselves. Only certain types of dental treatment appear to be covered by the social security system. Therefore, an increase in the demand for dental services would not

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ADVISORY OPINION OF THE COURT

10 December 1998*

(Right of establishment – Residence requirement for

managing director of a company)

In Case E-3/98

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Verwaltungsbeschwerdeinstanz des Fürstentums Liechtenstein (Administrative Court for the Principality of Liechtenstein) for an Advisory Opinion in the appeal against the decision of the Government of the Principality of Liechtenstein by

Herbert Rainford-Towning

on the interpretation of Articles 31 *et seq.* and 112 of the EEA Agreement and Protocol 15 to the EEA Agreement.

THE COURT,

composed of: Bjørn Haug (Judge-Rapporteur), President, Thór Vilhjálmsson and Carl Baudenbacher, Judges,

Registrar: Gunnar Selvik

after considering the written observations submitted on behalf of:

- Mr Herbert Rainford-Towning, Complainant, represented by Counsel Mr Alexander Ospelt;

- The Government of the Principality of Liechtenstein, represented by Counsel Christoph Büchel, acting as Agent, and Dr. Frank Montag;

– the Government of Norway, represented by Mr Aasmund Rygnestad, Head of Division, Royal Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Ms Anne-Lise H. Rolland, Officer, Legal & Executive Affairs, acting as Agent;

– the Commission of the European Communities (hereinafter the "EC Commission"), represented by Ms Christina Tufvesson and Ms Maria Patakia, both members of its Legal Service, acting as Agents.

having regard to the Report for the Hearing,

dated 2 May 1992 (EEA)?

2 If the answer to the first question is that the Liechtenstein business law provision of a requirement of residence for a managing director of a Liechtenstein company is not in conformity with the EEA, whether in view of the specific case of Liechtenstein – Protocol 15, safeguard measures in accordance with Article 112 EEA, and the declaration of the EEA Council on the freedom of choice of residence (recte: free movement of persons) – could the requirement of residence nevertheless be justified with the consequence that the provisions of the Business Law (Article 17, cf. Article 6 paragraph 1a) are in conformity with the EEA?

3 Do the grounds of public policy, public security or public health justify the business law provisions concerning the requirement of residence, either instead of or in addition to the special situation in Liechtenstein or on account of the exceptional provision of Article 33 EEA?

8. Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Legal background

1. EEA law

9. The questions submitted by the national court concern the interpretation of Articles 31 and 33 EEA.
10. Article 31 EEA, in Part III, Free Movement of Persons, Services and Capital, Chapter 2, Right of Establishment, reads:

"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. Annexes VIII to XI contain specific provisions on the right of establishment."

11. Article 33 EEA in the same Chapter reads:

"The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

2. National law

12. Article 6, paragraph 1a, of the Liechtenstein Business Act reads as follows:

"The holder of a business right must appoint a managing director, if he has no residence in the country. The managing director must fulfil the personal and professional requirements regarding the operation of the business, have his residence in the country, and be in the position to occupy himself in the business accordingly."

individuals and economic operators as regards the four freedoms and the conditions of competition;"

19. Furthermore, in accordance with Article 6 EEA, without prejudice to future developments of case law, the provisions of the EEA Agreement must, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Community, be interpreted in their implementation and application in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of the EEA Agreement (2 May 1992).
20. In accordance with Article 3(2) of the Agreement between the EFTA States on establishment of a Surveillance Authority and a Court of Justice, the EFTA Court and the EFTA Surveillance Authority, in the interpretation and application of the EEA Agreement, are to pay due account to the principles laid down by the relevant rulings by the ECJ given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the EC Treaty, in so far as they are identical in substance to the provisions of the EEA Agreement.
21. Admittedly, there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and it cannot be ruled out that such differences may, under specific circumstances, lead to differences in the interpretation, as in the *Maglite* case, cited above. But where parallel provisions are to be interpreted without any such specific circumstances being present, homogeneity should prevail.

The first question

22. By its first question, the national court seeks to establish whether a requirement in national law that a managing director of a legal person registered in the country concerned must have his residence in that country is in conformity with the EEA Agreement and in particular Articles 31 *et seq.* EEA.
23. The *Court* notes that it is not clear from the request whether the questions should be assessed from the perspective of the company Tradeparts AG or from the perspective of the Complainant Mr Rainford-Towning. However, since both parties consider that Mr Rainford-Towning is to be regarded as a self-employed person and not as an employee, the relevant provision of the EEA Agreement would in any case be Article 31, and the scope of that provision is not affected by which perspective is chosen.
24. The *Complainant*, the *Government of Norway*, the *EFTA Surveillance Authority* and the *EC Commission* all submit that it follows from the case law of the ECJ that the residence requirement in the Liechtenstein Business Acts constitutes covert discrimination contrary to Article 31 EEA. The Complainant also submits that, when seen in connection with the limitations on the right of foreigners to take up residence in Liechtenstein established pursuant to Article 112 EEA and Protocol 15 to the EEA Agreement (see below), the residence requirement even constitutes overt discrimination.
25. By contrast, the *Government of Liechtenstein* takes the view that the residence requirement does not constitute either overt or covert discrimination contrary to Article 31 EEA.
26. The *Court* notes that, according to the second paragraph of Article 31(1) EEA, freedom of establishment includes, in the case of nationals of a Contracting Party, "the right to take up and pursue activities as self-employed persons... under the conditions laid down for its own nationals by the law of the country where such establishment is effected...".
27. It is settled case law of the ECJ that the rules of equal treatment prohibit not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result, see, e.g., the judgments of the ECJ in C-350/96 *Clean Car Autoservice* [1998] ECR I-2521 (hereinafter "*Clean Car Autoservice*"), at paragraph 27, and Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279, at paragraph 33.
28. It is true that provisions such as those in the Liechtenstein Business Act appiy without regard to the nationality of the person to be appointed as manager.
29. However, national rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Contracting Parties, as non-residents are in the majority of cases foreigners, see the judgment of the ECJ in Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225, at paragraph

effectively in the business than a person whose place of residence is nearer to the place of business. However, whether or not this is the case will to a great extent depend on the nature of the business concerned and the available means of communication. In a small country like Liechtenstein, it would also be possible for a managing director to live in the neighbouring Contracting Party Austria and still be at a very short distance from the place of business in Liechtenstein.

37. It must be concluded, therefore, that a national provision such as that at issue in the main proceedings, which requires the managing director of a legal person to reside in the State concerned, constitutes indirect discrimination contrary to Article 31 EEA.

The third question

38. By its third question, which will be dealt with before the second question for reasons of convenience, the national court asks whether the residence requirement may be justified under Article 33 EEA for reasons of public policy, public security or public health.
39. The *Government of Liechtenstein* submits that the residence requirement is justified under Article 33 EEA for reasons of public policy, especially because of the particular situation of Liechtenstein. The *Complainant*, the *Government of Norway*, the *EFTA Surveillance Authority* and the *EC Commission* submit that Article 33 EEA, in accordance with the case law of the ECJ concerning Article 56(1) EC, must be interpreted narrowly and does not justify a residence requirement such as that at issue in the present case.
40. Concerning the special situation of the Principaiity of Liechtenstein, the *Court* notes that the EEA Council recognized expressly in its Declaration on free movement of persons (OJ 1995 L 86/80) that "Liechtenstein has a very small inhabitable area of rural character with a unusually high percentage of non-national residents and employees. Moreover, it acknowledges the vital interest of Liechtenstein to maintain its own national identity." This has called for special transitory provisions in respect of Liechtenstein and the Contracting Parties shall, in case of difficulties, endeavour to find a solution which allows Liechtenstein to avoid having recourse to safeguard measures. For the Court, however, the situation must be that the obligations of Liechtenstein are decided on the basis of the decisions of the Contracting Parties at any time.
41. The Court observes, with regard to the justifications based on Article 33 EEA, that a general rule of the kind at issue in the main proceedings cannot be justified on any grounds of public security or public health.
42. As regards justification on grounds of public policy, as envisaged in Article 33 EEA, it must be held that, in so far as it may justify special treatment of foreign nationais who are subject to the EEA Agreement, recourse to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society, see the judgments of the ECJ in *Clean Car Autoservice*, cited above, at paragraph 40; and Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, at paragraphs 33 *et seq*.
43. Here, however, it does not appear from the documents in the case that any such interest is liable to be affected if the owner of an undertaking is free to appoint, for the purpose of exercising that undertaking's trade, a managing director who does not reside in the State concerned.
44. Consequently, a national provision such as that at issue in the main proceedings, which requires the managing director of a legal person to reside in the State concerned, cannot be justified on grounds of public policy within the meaning of Article 33 EEA.

The second question

45. By its second question the national court asks whether Protocol 15 to the EEA Agreement, Article 112 EEA or the EEA Council Declaration on free movement of persons (OJ 1995 L 86/80) may serve to justify the residence requirement contained in the Liechtenstein Business Act.
46. Among those who have submitted observations to the Court, it is common ground that none of the above instruments may serve to justify the residence requirement at issue in the main proceedings.
47. With regard to Protocol 15, which establishes transitional periods on the free movement

Gunnar Selvik Bjørn Haug

Registrar President

DÓMUR EFTA-DÓMSTÓLSINS
14. júlí 2000*

(Frjálsir fjármagnsflutningar – ríkisábyrgð á lánum – mismunandi hátt ábyrgðargjald vegna erlendra og innlendra lána)

Mál E-1/00

BEIÐNI um ráðgefandi álit EFTA-dómstólsins, samkvæmt 34. gr. samningsins milli EFTA-ríkjanna um stofnun eftirlitsstofnunar og dómstóls, frá Héraðsdómi Reykjavíkur í máli sem rekið er fyrir dómstólnum

Lánasýsla ríkisins

gegn

Íslandsbanka-FBA hf.

varðandi túlkun á 4., 40., 42 og 61. gr. EES-samningsins.

DÓMSTÓLINN,

skipaður Þór Vilhjálmssyni, forseta, Carl Baudenbacher og Per Tresselt (framsögumanni), dómurum,

dómritari: Gunnar Selvik

---

* Beiðni um ráðgefandi álit er á íslensku.

hefur með tilliti til skriflegra greinargerða frá:

- Stefnanda, Lánsýslu ríkisins. Í fyrirsvari er Sveinn Sveinsson, hrl.

- Stefnda, Íslandsbanka-FBA hf. Í fyrirsvari er Baldur Guðlaugsson, hrl.

- Ríkisstjórn Íslands. Í fyrirsvari sem umboðsmaður er Högni S. Kristjánsson, lögfræðingur í utanríkisráðuneytinu.

- Ríkisstjórn Noregs. Í fyrirsvari sem umboðsmaður er Helge Seland, deildarstjóri í Konunglega utanríkisráðuneytinu.

- Eftirlitsstofnun EFTA. Í fyrirsvari sem umboðsmaður er Peter Dyrberg, deildarstjóri lagadeildar.

- Framkvæmdastjórn Evrópubandalaganna. Í fyrirsvari sem umboðsmenn eru Christina Tufvesson og John Forman, lögfræðilegir ráðgjafar hjá lagadeild.

með tilliti til skýrslu framsögumanns,

og munnlegs málflutnings Lánasýslu ríkisins, Íslandsbanka-FBA hf., ríkisstjórnar Noregs, Eftirlitsstofnunar EFTA og framkvæmdastjórnar Evrópubandalaganna þann 30. maí 2000,

kveðið upp svohljóðandi

dóm

Málsatvik og meðferð máls

1 Með beiðni dagsettri 1. febrúar 2000, sem skráð var í málaskrá dómstólsins 7. febrúar 2000, óskaði Héraðsdómur Reykjavíkur eftir ráðgefandi áliti í máli sem rekið er fyrir dómstólnum milli Lánasýslu ríkisins og Íslandsbanka-FBA hf. Samkvæmt ákvörðun frá 15. maí 2000 hafa Fjárfestingarbanki atvinnulífsins hf. og Íslandsbanki hf. sameinast. Hið nýja félag, Íslandsbanki-FBA hf., hefur tekið við öllum réttindum og skuldbindingum Fjárfestingarbanka atvinnulífsins hf. Vegna þessarar sameiningar eru aðilar málsins fyrir Héraðsdómi Reykjavíkur nú Lánasýsla ríkisins (hér eftir stefnandi) og Íslandsbanki-FBA hf. (hér eftir stefndi).

2 Ágreiningsefnið fyrir Héraðsdómi Reykjavíkur varðar íslensk lagaákvæði um ábyrgðargjald. Allt fram til ársins 1998 var reglur um ríkisábyrgð að finna í lögum um ríkisábyrgðir nr. 37/1961, eins og þeim var breytt með lögum nr. 65/1988. Hinn 1. janúar 1998 tóku gildi ný lög um ríkisábyrgðir, sbr. lög nr. 121/1997.

3 Í 8. gr. eldri laga um ríkisábyrgðir nr. 37/1961 sagði að bankar, lánasjóðir, lánastofnanir og aðrir þeir aðilar sem lögum samkvæmt nutu ábyrgðar ríkissjóðs, skyldu greiða ábyrgðargjald til ríkissjóðs af skuldbindingum sínum gagnvart erlendum aðilum. Gjald þetta skyldi greiða ársfjórðungslega og nema 0.0625% af höfuðstóli gjaldskyldra skuldbindinga eins og hann var að meðaltali á hverju tímabili.

4 Ákvæði 6. gr. nýju laganna um ríkisábyrgðir, sbr. lög nr. 121/1997, kveða á um að ábyrgðargjald skuli greiða vegna allra lána sem njóta ríkisábyrgðar, hvort sem þeirra er aflað innanlands eða erlendis. Þó skal ábyrgðargjald nema 0.0625% á ársfjórðungi af meðaltali höfuðstóls gjaldskyldra erlendra skuldbindinga á hverju tímabili, en 0.0375% á ársfjórðungi af meðaltali höfuðstóls gjaldskyldra innlendra skuldbindinga.

5 Stefndi, Fjárfestingarbanki atvinnulífsins hf., var stofnaður með lögum nr. 60/1997 og hefur verið starfræktur frá 1. janúar 1998. Í samræmi við 9. gr. nefndra laga, tók Fjárfestingarbanki atvinnulífsins hf. yfir allar þáverandi skuldbindingar Iðnlánasjóðs, þ.m.t. öll lán sem Norræni fjárfestingarbankinn hafði veitt, en sá banki var stofnaður sameiginlega af ríkisstjórnum Norðurlanda. Ríkissjóður hefur tekið á sig ábyrgð á öllum skuldbindingum Iðnlánasjóðs og þar af leiðandi einnig á lánum frá Norræna fjárfestingarbankanum. Í 9. gr. segir jafnframt að ríkissjóður skuli áfram ábyrgjast allar þær skuldbindingar Iðnlánasjóðs, sem ríkisábyrgð var á við stofnun Fjárfestingarbanka atvinnulífsins hf., þar til þær eru að fullu efndar.

6 Stefnandi, Lánasýsla ríkisins, er ábyrg fyrir ríkisábyrgðarsjóði, en sjóðurinn fer með málefni sem varða ríkisábyrgðir, m.a. útreikning, álagningu og innheimtu ábyrgðargjaldsins. Með bréfi, dagsettu 17. apríl 1998, upplýsti Fjárfestingarbanki atvinnulífsins hf. stefnanda um að Iðnlánasjóður hefði ekki greitt ríkisábyrgðargjaldið til ríkisábyrgðarsjóðs vegna skuldbindinga sinna við Norræna fjárfestingarbankann síðan um mitt ár 1995. Í bréfinu lýsti Fjárfestingarbanki atvinnulífsins hf. þeirri skoðun sinni að Norræni fjárfestingarbankinn væri ekki erlendur aðili í skilningi 6. gr. laga nr. 121/1997 og að greiða bæri ríkisábyrgðargjald eins og um skuldbindingar gagnvart innlendum aðila væri að ræða.

7 Hinn 23. janúar 1998 óskaði stefnandi eftir því að fjármálaráðuneytið úrskurðaði um það hvort líta bæri á skuldbindingar gagnvart Norræna fjárfestingarbankanum sem skuldbindingar gagnvart erlendum aðila við útreikning ríkisábyrgðargjaldsins. Í bréfi sínu, dagsettu 9. mars 1998, staðfesti fjármálaráðuneytið að líta bæri á Norræna fjárfestingarbankann sem erlendan

aðila og að ríkisábyrgðargjaldið skyldi lagt á eins og um ríkisábyrgð á lánum frá erlendum aðila væri að ræða.

8 Fjárfestingarbanki atvinnulífsins hf. féllst ekki á þessa niðurstöðu fjármálaráðuneytisins og hafði frá 1. janúar 1998 greitt ábyrgðargjaldið vegna skuldbindinga sinna við Norræna fjárfestingarbankann eins og um skuldbindingar gagnvart innlendum aðila væri að ræða.

9 Stefnandi hefur höfðað mál fyrir Héraðsdómi Reykjavíkur og gerir kröfu um greiðslu ábyrgðargjalds sem miðast við að Norræni fjárfestingarbankinn sé erlendur aðili.

10 Við meðferð málsins fyrir Héraðsdómi Reykjavíkur hefur stefndi haft uppi nokkrar málsástæður sem varða það hvort reglur um mismunandi hátt ríkisábyrgðargjald, eftir því hvort um erlendan eða innlendan lánveitanda er að ræða, fái samræmst EES-samningnum.

11 Héraðsdómur Reykjavíkur ákvað að senda EFTA-dómstólnum beiðni um ráðgefandi álit varðandi eftirfarandi spurningar:

> *"Er það samrýmanlegt samningnum um Evrópska efnahagssvæðið, einkum 4., 40., 42. og 61. gr. hans, að í landslögum ríkis sem aðild á að samningnum sé kveðið á um:*
>
> *a. Að lántakandi sem nýtur ábyrgðar ríkissjóðs skuli greiða ábyrgðargjald af lánum sem hann tekur hjá aðilum í öðrum aðildarríkjum samningsins en ekki af lánum sem hann tekur hjá innlendum aðilum?*
>
> *b. Að lántakandi sem nýtur ábyrgðar ríkissjóðs skuli greiða hærra ábyrgðargjald af lánum sem hann tekur hjá aðilum í öðrum aðildarríkjum samningsins en af lánum sem hann tekur hjá innlendum aðilum?"*

12 Vísað er til skýrslu framsögumanns um frekari lýsingu löggjafar, málsatvika og meðferðar málsins, svo og um greinargerðir sem dómstólnum bárust. Þessi atriði verða ekki nefnd eða rakin nema að því leyti sem forsendur dómsins krefjast.

Álit dómstólsins

13 Kjarni spurningarinnar frá Héraðsdómi Reykjavíkur er hvort EES-samningurinn, einkum 4, 40, 42 og 61 gr. hans, útiloki að aðilar sem njóta góðs af ríkisábyrgðum, þurfi að greiða hærri ábyrgðargjöld vegna lána frá lánveitendum í öðrum aðildarríkjum samningsins en vegna lána frá innlendum lánveitendum.

Skýring 40 gr. EES-samningsins

14 Það er ein af meginreglum EES-samningsins að fjármagnsflutningar skuli vera frjálsir. Í 4. kafla samningsins er sett fram meginreglan um fjármagnsflutninga innan EES. Í 40. gr. samningsins segir:

> "Innan ramma ákvæða samnings þessa skulu engin höft vera milli samningsaðila á flutningum fjármagns í eigu þeirra sem búsettir eru í aðildarríkjum EB eða EFTA-ríkjum né nokkur mismunun, byggð á ríkisfangi eða búsetu aðila eða því hvar féð er notað til fjárfestingar. Í XII. viðauka eru nauðsynleg ákvæði varðandi framkvæmd þessarar greinar."

15 Í viðauka XII er vísað í tilskipun ráðsins 88/361/EBE frá 24. júní 1988 (hér eftir nefnd "tilskipun") um framkvæmd 67. gr. sáttmálans. Tilskipunin var í gildi á þeim tíma sem hér skiptir máli. Í 1. gr. hennar segir:

> "Aðildarríkin skulu, í samræmi við eftirfarandi ákvæði, aflétta hömlum á fjármagnsflutningum milli þeirra sem búsettir eru í aðildarríkjunum. Til að auðvelda beitingu þessarar tilskipunar skulu fjármagsnflutningar flokkaðir í samræmi við skrá í I. Viðauka."

16 Orðalag 40. gr. EES-samninsgins er sambærilegt við orðalag þeirrar greinar sem áður var 1. mgr. 67. gr. Rómarsáttmálans. Í samningnum um Evrópusambandið er gert ráð fyrir nýjum ákvæðum um "Fjármagn og greiðslur" sem skyldu verða hluti Rómarsáttmálans, þ.m.t. 73. gr. b, sem efnislega samsvarar 1. gr. tilskipunar ráðsins nr. 88/361/EBE. Eftir gildistöku Amsterdamsáttmálans verður 73. gr. b Rómarsáttmálans að 56. gr.

17 Með 40. gr. EES-samningsins og tilskipuninni eru afnumin höft á fjármagnsflutningum milli aðildarríkja samningsins.

18 Dómstóllinn þarf fyrst að taka afstöðu til þess hvort lánveitingar eins og um er fjallað í aðalmálinu eru fjármagnsflutningar í skilningi 40. gr. EES-samningsins.

19 Hugtakið "fjármagnsfluningar" er hvorki skilgreint í 40. gr. EES-samningsins né í tilskipuninni. Engu að síður má ráða umfang þess, sem í 40. gr. og 1. gr. tilskipunarinnar telst fjármagnsflutningur, af því sem fram kemur í skrá yfir fjármagnsflutninga í 1. viðauka við tilskipunina (sjá meðal annars málið C-222/97 *Trummer og Mayer* [1999] ECR I-1661, 21. liður; og málið Case C-35/98 *Staatssecretaris van Financiën* gegn *B.G.M. Verkooijen* [2000] ECR I-0000, 27. liður).

20 Í VIII. hluta skrárinnar eru peningalán og lánsfrestir talin ein tegund fjármagnsflutninga. Í inngangi segir að til fjármagnsflutninga teljist "- allar þær aðgerðir sem nauðsynlegar eru við fjármagnsflutninga: ákvörðun um viðskipti og framkvæmd þeirra og yfirfærslur tengdar þeim."

21 Að auki hefur dómstóll Evrópubandalaganna áður komist að þeirri niðurstöðu að peningalán frá banka í öðru aðildarríki sé fjármagnsflutningur í skilningi tilskipunarinnar (sjá málið C-484/93 *Svensson og Gustavsson* [1995] ECR I-3955).

22 Það er niðurstaða dómstólsins á grundvelli þess sem rakið var, að lántökur eins og þær sem fjallað er um í aðalmálinu séu fjármagnsflutningar í skilningi 40. gr. EES-samningsins, sbr. tilskipunina.

23 Í öðru lagi þarf dómstóllinn að ganga úr skugga um hvort það séu takmarkanir á frjálsum fjármagnsflutningum ef landsréttarreglur sem leggja á aðila, sem njóta góðs af ríkisábyrgðum, að greiða hærri ábyrgðargjöld vegna lána frá erlendum lánveitendum en innlendum.

24 Reglur í landsrétti sem mæla fyrir um hærri ábyrgðargjöld af lánum frá erlendum en innlendum lánveitendum hafa ekki óhjákvæmilega þau áhrif að erlend lán verði óhagstæðari en innlend. Önnur atriði, svo sem vaxtastig, geta ráðið úrslitum fyrir lántakendur þegar þeir taka afstöðu til lánstilboða. Fyrir þá geta hagkvæmir skilmálar sem erlendir lánveitendur bjóða skipt meiru en ókostir sem felast í hærri ábyrgðargjöldum. Þetta getur leitt til þess að lántakendur semji um lán við erlenda lánveitendur en ekki innlenda.

25 Engu að síður hljóta erlend lán að verða dýrari en innlend ef af þeim er tekið hærri ábyrgðargjald en ef lægra gjaldið væri á þau lagt. Hið sama er þegar lántakandi, sem á aðgang að ríkisábyrgð verður að greiða ábyrgðargjald vegna erlendra lána en ekki vegna innlendra lána. Ákvæði í landsrétti eins og þau sem um er fjallað í aðalmálinu fela í sér innbyggða mismunun milli lána frá erlendum og innlendum lánveitendum. Séu aðrir skilmálar hinir sömu, leiðir þessi munur til þess að erlend lán verða dýrari en innlend lán.

26 Slík mismunandi meðferð getur valdið því að lántakendur leiti ekki til lánveitenda í öðrum ríkjum á Evrópska efnahagssvæðinu. Af því leiðir að ákvæði um ábyrgðargjald eins og þau sem fjallað er um í aðalmálinu fela í sér takmörkun á frjálsum fjármagnsflutningum.

27 Stefnandi hefur haldið fram að hin umdeildu ákvæði í íslenskum lögum feli ekki í sér takmarkanir andstæðar 40. gr. EES-samningsins, þar sem mismunandi ábyrgðargjöld hafi í raun ekki þýðingu sem máli skipti þegar lántakendur meti hvort lán skuli tekin hjá erlendum eða innlendum lánveitendum.

28 Ekki verður á þessa röksemd fallist. Lagareglan sem hér skiptir máli getur hugsanlega leitt til þess að lántakendur leiti ekki eftir lánum í öðrum ríkjum á Evrópska efnahagssvæðinu. Þetta nægir til að 40. gr. EES-samningsins hafi verið brotin. Ekki þarf að sýna fram á merkjanleg áhrif á fjármagnshreyfingar milli landa.

29 Svarið til Héraðsdóms Reykjavíkur hlýtur því að vera, að reglur í landsrétti aðildarríkis að EES-samningnum séu i ósamræmi við 40. gr. EES-samningsins,

sbr. tilskipun ráðsins 88/361/EBE, ef þær eru þess efnis, að lántakandi, sem á kost á ríkisábyrgð, verði að greiða ábyrgðargjald vegna lána frá aðilum í öðrum aðildarríkjum en ekki vegna lána frá innlendum aðilum. Hið sama er ef lántakandi, sem á kost á ríkisábyrgð, verður að sæta því að greiða hærri ábyrgðargjöld vegna lána frá aðilum í öðrum aðildarríkjum en vegna lána frá innlendum aðilum.

36. gr. EES-samningsins

30 Norska ríkisstjórnin hefur hreyft því að atvik eins og þau sem eru í aðalmálinu ætti að skoða á grundvelli 36. gr. EES-samningsins. Dómstóllinn hefur þegar komist að þeirri niðurstöðu að þær reglur landsréttar sem um er deilt séu andstæðar 40. gr. EES-samningsins. Þess vegna mun dómstóllinn taka afstöðu til þess hvort að af þessu leiði að 36. grein EES-samningsins verði ekki beitt í málinu.

31 Í 36. gr. EES-samningsins er mælt fyrir um að afnema skuli allar takmarkanir á að þjónusta sé veitt, þar á meðal fjármálaþjónusta, á Evrópska efnahagssvæðinu. Í 40. gr. er lagt bann við takmörkun á fjármagnsflutningum á svæðinu. Orðalag þessara tveggja ákvæða og skipan þeirra í mismunandi kafla í samningnum leiðir til þeirrar niðurstöðu að þeim sé ætlað að gilda um mismunandi atvik.

32 Megineinkenni þess máls sem hér er fjallað um er frjáls fjármagnsflutningur. Ákvæðin um mismundandi ábyrgðargjöld sem leiða til þess að ábyrgðin verður dýrari vegna lána frá erlendum lánveitendum fela í sér innlenda ráðstöfun sem með beinum hætti takmarkar fjármagnsflutninga milli landa. Ákvæðin geta einnig með óbeinum hætti takmarkað frelsi til að veita og þiggja þjónustu. Heildarmat á aðstæðum leiðir þó til þeirrar niðurstöðu, að þungamiðja málsins sé frjáls fjármagnsflutningur.

33 Þess er og að gæta, að í 37. gr. EES-samningsins segir: "Með "þjónustu" er í samningi þessum átt við þjónustu ... að því leyti sem hún lýtur ekki ákvæðum um frjálsa vöruflutninga, frjálsa fjármagnsflutninga og frjálsa fólksflutninga." Af þessu má ályktа að yfirleitt verði 40. gr. og 36. gr EES-samningsins ekki beitt saman.

34 Mál þetta verður þess vegna að fjalla um á grundvelli 40. gr. EES-samningsins.

Hið almenna bann við mismunun vegna ríkisfangs

35 Í 4. gr. EES-samningsins kemur fram sú meginregla að á gildisviði samningsins og að teknu tilliti til allra sérreglna sem hann hefur að geyma, skuli bönnuð hverskonar mismunun eftir ríkisfangi. Í dómum dómstólsins kemur fram að 4. gr. gildir aðeins sjálfstætt um aðstæður sem ráðast af rétti Evrópska efnahagssvæðisins þegar ekki er að finna í EES-samningnum sérstakar reglur um

þær sem banna mismunun (sjá málið E-5/98 *Fagtún* [1999] skýrsla EFTA dómstólsins bls. 51, 42. liður).

36 Meginreglan um bann við mismunun kemur fram í 40. gr. EES-samningsins að því er frjálsa fjármagnsflutninga varðar. Þess vegna er ekki þörf á að kanna hvort aðstæður eins og eru í aðalmálinu séu andstæðar 4. gr.

Skýring annarra ákvæða í EES-samningnum

37 Héraðsdómur Reykjavíkur hefur spurt hvort ríkisaðstoð samkvæmt 61. gr. EES-samningsins felist í lögunum sem um er deilt. Í máli E-4/97 *Samtök norskra banka* [1999] skýrsla EFTA dómstólsins 32. og 33. lið, kemur fram, að ríkisaðstoð í skilningi 61. gr. samningsins getur verið til staðar ef um er að ræða ríkisábyrgð til banka í opinberri eigu. Þrátt fyrir það brestur dómstóla í aðildarríkjunum hæfi til að lýsa ríkisaðstoð, sem EFTA-ríki veitir, andstæða EES-samningnum. Af því leiðir, að svar við þeim hluta spurningarinnar sem varðar 61. gr. EES-samningsins hefði ekki í þessu máli þýðingu fyrir Héraðsdóm Reykjavíkur.

38 Vegna þess sem fyrr er sagt um 40. gr. EES-samningsins er ekki þörf á að skera úr því, hvort lög eins og þau sem þetta mál fjallar um séu andstæð öðrum þeim ákvæðum í samningnum sem getið er um í beiðninni um ráðgefandi álit eða aðilar hafi vikið að í málflutningi sínum.

Málskostnaður

39 Ríkisstjórn Íslands, ríkisstjórn Noregs, Eftirlitsstofnun EFTA og Framkvæmdastjórn Evrópubandalaganna sem hafa skilað greinargerð til dómstólsins skulu bera sinn málskostnað. Að því er lýtur að aðilum málsins verður að líta á málsmeðferð fyrir EFTA-dómstólnum sem þátt í meðferð málsins fyrir Héraðsdómi Reykjavíkur og kemur það í hlut þess dómstóls að kveða á um málskostnað.

Með vísan til framangreindra forsendna lætur,

DÓMSTÓLLINN,

uppi svohjóðandi ráðgefandi álit um spurningar þær sem Héraðsdómur Reykjavíkur beindi til dómstólsins 1. febrúar 2000:

Ákvæði í landsrétti aðildarríkis að EES-samningnum sem segja

a. að lántakandi sem nýtur ríkisábyrgðar, skuli greiða ábyrgðargjald vegna lána frá aðilum í öðrum aðildarríkjum en ekki vegna lána frá innlendum aðilum.

eða

b. að lántakandi, sem nýtur ríkisábyrgðar, skuli greiða hærri ábyrgðargjald vegna lána frá aðilum í öðrum aðildarríkjum en lána frá innlendum aðilum

eru ósamrýmanleg 40. gr. EES-samningsins, sbr. tilskipun ráðsins nr. 88/361/EBE.

Thór Vilhjálmsson Carl Baudenbacher Per Tresselt

Kveðið upp i heyrandi hljóði í Luxemborg 14. júlí 2000.

Gunnar Selvik
dómritari

Thór Vilhjálmsson
forseti