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THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

(...)

8. The aim of the applicant association is the protection of animals, with particular emphasis on animal experiments and industrial animal production.

9. As a reaction to various television commercials of the meat industry, the applicant association prepared a television commercial lasting 55 seconds and consisting of two scenes.

10. The first scene of the film showed a sow building a nest for her piglets in the forest. Soft orchestrated music was played in the background, and the accompanying voice referred, *inter alia*, to the sense of family which sows had. The second scene showed a noisy hall with pigs in small pens, gnawing nervously at the iron bars. The accompanying voice stated, *inter alia*, that the rearing of pigs in such circumstances resembled concentration camps, and that the animals were pumped full with medicaments. The film concluded with the exhortation: "eat less meat, for the sake of your health, the animals, and the environment!".

11. On 3 January 1994 the applicant association, wishing this film to be broadcast in the programme of the Swiss Radio and Television Company (*Schweizerische Radio- und Fernsehgesellschaft*), sent a video-cassette to the then Commercial Television Company (*AG für das Werbefernsehen*, now called *Publisuisse*) responsible for television advertising.

12. On 10 January 1994 the Commercial Television Company informed the applicant association that it would not broadcast the commercial in view of its "clear political character". The Company pointed out that it would be possible as an alternative in a film to emphasise an adequate rearing of animals and to inform viewers that they were free to inquire into the origin of the meat which they were buying.

13. By letter of 10 January 1994 the applicant association requested a decision against which it could file an appeal. On 13 January 1994 the Commercial Television Company replied that it was not an official authority giving decisions which could be contested. On the other hand, it would be willing to convene a meeting to discuss other possibilities in the presence of a legal adviser.

14. By letter of 14 January 1994 the applicant association stated that it was not

prepared to accept changes to its commercial. It requested a statement of the reasons for the decision and information as to the supervisory authority where an appeal could be filed.

15. By letter of 24 January 1994, the Commercial Television Company declined the applicant association's requests as follows:

“As you have refused the discussion which we have proposed, we see no reason to enter into your propositions of your letters of 14 and 20 January 1994. We regret this development of events as it serves neither you nor us. We confirm that we cannot broadcast your commercial in the proposed form as it breaches S. 14 of the Radio and Television Ordinance (*Radio- und Fernsehverordnung*) as well as our General Conditions of Business (*Allgemeine Geschäftsbedingungen*). In addition, the Commercial Television Company cannot be obliged to broadcast commercials which damage its business interests and involve its editors' rights.”

16. On 4 February 1994 the applicant association filed a complaint with the Independent Radio and Television Appeal Board *(Unabhängige Beschwerdeinstanz für Radio und Fernsehen*), complaining of the refusal to broadcast the commercial. The latter informed the applicant association on 10 February 1994 that it could only deal with appeals complaining about programmes which had already been broadcast, though it transmitted the complaint to the Federal Office of Communication (*Bundesamt für Kommunikation*). The Office informed the applicant association on 25 April 1994 that within the framework of the broadcasting provisions the Commercial Television Company was free to purchase commercials and choose their contractual partners as they wished. The Office further stated that it considered the complaint as a disciplinary report, and that it saw no reason to proceed against the Swiss Radio and Television Company.

17. On 6 July 1994 the applicant association filed a complaint with the Federal Department for Transport and Energy *(Eidgenössisches Verkehrs- und Energiewirtschaftsdepartement*) which was dismissed on 22 May 1996. In its decision, the Department found, *inter alia*, that the Swiss Radio and Television Company was the sole institution to provide information in respect of home news (*Inlandberichterstattung*). In respect of commercial broadcasts, however, the Company stood in competition with local, regional and foreign broadcasters, and the applicant was not obliged to have his commercial broadcast over the channels of the Company. Moreover, the Company acted in matters of advertising as a private entity and did not fulfil a duty of public law when it broadcast commercials. The Department concluded that the Swiss Radio and Television Company could not be ordered to broadcast the commercial at issue.

18. The applicant association's administrative law appeal (*Verwaltungsgerichtsbeschwerde*), filed by a lawyer and dated 18 June 1996, was dismissed by the Federal Court (*Bundesgericht*) on 20 August 1997. The Court noted, with reference to Article 13 of the Convention, that the Federal Office for Communication should have afforded the applicant association formally the opportunity to institute complaint proceedings which, if necessary, could have remedied the matter. As the case was ready for decision, the Federal Court itself undertook the decision. It then balanced the various issues at stake.

19. The judgment proceeded to explain the position of the Swiss Radio and Television Company in Swiss law. The latter no longer enjoyed a monopoly and was increasingly subjected to foreign competition. However, this did not alter the fact that, according to the applicable law, the Swiss Radio and Television Company continued to act in the area of programmes within the framework of public law duties transferred upon it. The law itself granted it a licence for the broadcasting of national and linguistic regional

programmes.

20. The Federal Court further considered that S. 55bis § 3 of the Federal Constitution (*Bundesverfassung*; in the version applicable at that time) ensured the independence of radio and television broadcasting as well as the autonomy of the programmes. However, advertising fell outside the programme obligations of the Swiss Radio and Television Company, the programme presupposing an assessment of information by an editor. Only the programme activities were covered by S. 55bis of the Federal Constitution and S. 4 of the Federal Radio and Television Act (*Bundesgesetz über Radio und Fernsehen*). The viewers should not be influenced in their opinions by one-sided or unobjective or insufficiently varied contributions which disregarded duties of journalistic care. Commercials, on the other hand, were by their very nature one-sided as they were in the interest of the offering party, and were inherently excluded from a critical assessment for which reason, pursuant to S. 18 § 1 of the Federal Radio and Television Act, they had to be clearly separated from the programme and to be marked as such. Indeed, the Federal Radio and Television Act dealt with matters of advertising together with those of financing, rather than with the programme. There was furthermore no right to broadcast a commercial based on the principle of the diversity of the programme and that a competitor had already been admitted with his contribution. The judgment continued:

"Until 1964 (advertising) was completely prohibited for radio and television. Subsequently, they were admitted on television, though they were subjected to interferences in the interests of an optimal implementation of the duty of programme and to protect other important public interests (youth, health, diversity of the press). S. 18 of the Federal Radio and Television Act today assumes in principle that advertising is admissible but subject to certain limitations. Thus, S. 18 § 5 of the Federal Radio and Television Act prohibits religious and political advertising as well as advertising for alcoholic beverages, tobacco and medicaments. The Federal Council may enact further prohibitions of advertising for the protection of juveniles and the environment. ... On this basis, S. 18 of the Federal Radio and Television Act was enacted in a more concrete form in SS. 10 *et seq*. of the Radio and Television Ordinance. These provisions contain no obligation whatsoever to broadcast commercials, and also do not declare that advertising is a public law duty of the broadcaster."

21. In respect of the applicant association's complaint under Article 10 of the Convention, the Federal Court found that the prohibition of political advertising stated in S. 18 § 5 of the Federal Radio and Television Act served various purposes:

"It should prevent financially powerful groups from obtaining a competitive political advantage. In the interest of democratic process it intends to protect the formation of public opinion from undue commercial influence and to bring about a certain equality of opportunity among the different forces of society. The prohibition contributes towards the independence of the radio and television broadcasters in editorial matters, which could be endangered by powerful political advertising sponsors. According to the Swiss law on communication the press remains the most important means for paid political advertising. Already there financially powerful groups are in a position to secure themselves more space; admitting political advertising to radio and television would reinforce this tendency and substantially influence the democratic process of formation of opinion - all the more so as it is established that television with its dissemination and its immediacy will have a stronger effect on the public than the other means of communication ... The reservation in respect of political advertising in favour of the print media assures these a certain part of the advertising market and thereby contributes to their financing which in turn counteracts an undesirable concentration of the press and thus indirectly contributes towards the pluralistic system of media required under Article

10 of the Convention ...”

22. The Federal Court observed that the applicant association had other means of disseminating its political ideas, for instance in foreign programmes which were broadcast into Switzerland, or in the cinema and the press. The Commercial Television Company had offered the applicant association other possibilities and was also willing to convene a meeting to discuss them with the applicant association in the presence of a legal adviser.

23. In respect of the applicant association's complaint about discrimination, the Federal Court found that the applicant association was complaining of two situations which were not comparable with each other. Promotions by the meat industry were economic in nature in that they aimed at increasing the turnover and were not related to animal protection. On the other hand, the applicant association's commercial, exhorting reduced meat consumption and partly containing shocking pictures, was directed against industrial animal production. The applicant association had repeatedly become active in the media in order to pursue its aims. In 1992 the applicant association had filed a disciplinary complaint in this respect with the Swiss Federal Parliament. The matter became a political issue early in 1994 when the Swiss Federal Council commented on the matter.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General regulations on radio and television

24. S. 55bis of the Swiss Federal Constitution in the version applicable at the relevant time provided:

“1. Legislation on radio and television ... appertains to the Confederation.

2. Radio and television shall contribute to the cultural development, to the free expression of opinions as well as to the entertainment of the audience. They shall consider the particularities of the country and the requirements of the Cantons. They shall describe the facts objectively and adequately reflect the variety of views.

3. Within the framework of § 2, the impartiality of radio and television as well as the autonomy in the creation of programmes shall be guaranteed. ...”

25. These provisions have been enshrined in S. 93 of the Federal Constitution currently in force.

26. The Federal Radio and Television Act, referring to S. 55bis, requires in principle a licence to broadcast radio and television programmes. S. 26 grants the licence for national and linguistic regional programmes to the Swiss Radio and Television Company. S. 4 of the Act stipulates the objectivity of programmes which shall adequately reflect the plurality of events and opinions.

27. This Company has transferred all aspects of the acquisition and organisation of television advertising to the Commercial Television Company (now called “*Publisuisse*”) which is a company established under private law and whose activities do not depend on a licence.

B. Regulations on television advertising

28. Commercials are broadcast in between programmes at various times during the

day. The Federal Radio and Television Act provides in respect of advertising as follows:

“S. 18 Advertising

1. Advertising shall be clearly separated from the rest of the programme and shall be clearly recognisable as such. Permanent programme staff of the broadcaster shall not participate in the broadcasting of commercials ...

5. Religious and political advertising is prohibited, furthermore advertising for alcoholic beverages, tobacco and medicaments. The Federal Council may enact further prohibitions of advertising for the protection of juveniles and the environment.”

29. In its message (*Botschaft*) to the Swiss Parliament of 28 September 1987, the Federal Council explained that the prohibition of political advertising “should prevent that financially strong groups obtain a competitive advantage in politics” (*Bundesblatt* [*Feuille fédérale*] 1987 III 734).

30. S. 15 of the Radio and Television Ordinance provides as follows:

“S. 15 Inadmissible advertising

There shall be prohibited:

a. religious and political advertising;

b. advertising for alcoholic beverages and tobacco;

c. advertising for medicaments in respect of which public advertising is not admitted by medical law;

d. untrue or misleading advertising or advertising which corresponds with unfair competition;

e. advertising which profits from the natural credulity of children or the lack of experience of youth or abuses their feelings of attachment;

f. subliminal advertising ...”

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

31. The Government claimed, as they had before the Commission, that the applicant association had abused its right to petition within the meaning of Article 35 § 3 of the Convention. Thus, when introducing its application it had stated that an administrative law appeal was not open; yet at the same time it had filed precisely such an appeal with the Federal Court which in fact led to that court's decision of 20 August 1997.

32. The Court notes that the applicant association filed its application with the Commission on 13 July 1994, complaining of the refusal to broadcast a commercial. Shortly before, on 18 June 1994, it raised essentially the same complaint by means of an administrative law appeal before the Federal Court which handed down its decision on 20 August 1997.

33. The Court recalls its case-law according to which it is not excluded that supplements to an initial application may relate in particular to the proof that the applicant has complied with the conditions of Article 35 § 1 of the Convention, even if he has done so after the lodging of the application, as long as he does so before the decision of admissibility (see the Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 38, §§ 89-93). The Court finds no reason to reconsider these issues.

34. It follows that the Government's preliminary objection must be rejected.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant association complained that the refusal to broadcast its commercial had infringed 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."

36. The Government contested that submission.

A. Responsibility of the respondent State

37. Before the substance of the matter can be examined, the Court must consider whether responsibility can be attributed to the respondent State.

1. Parties' submissions

38. The applicant association submitted that the State is not permitted to delegate functions to private persons in such a way that fundamental rights are undermined by the resulting “privatisation”. As radio and television programmes in Switzerland can always only be broadcast under a licence granted by the State, the latter is obliged when drafting the law governing such licences to ensure respect for freedom of expression. This view was already enshrined, at the time, as part of unwritten Swiss constitutional law. The Government have not been released from the obligation to try to ensure that freedom of information can be implemented in this particular area.

39. The applicant association further argued that the different legal bases governing activities of the Swiss Radio and Television Company, on the one hand, and of the Commercial Television Company, on the other, did not sufficiently ensure respect for its right to freedom of expression within the meaning of Article 10 of the Convention. The separation of private and public law took too insufficient account of the fact that in certain cases freedom of expression gave a person the right to voice an opinion on social issues in the part of a television programme paid for by advertisers, that is to say the so-called “commercial break”. With reference to the case of Artico v. Italy, the applicant association pointed out that the Convention was intended to guarantee, not rights that were theoretical or illusory, but rights which were practical and effective (see the

judgment of 13 May 1980, Series A no. 37, p. 16, § 33).

40. The Government submitted that Article 10 of the Convention was not applicable in the present case. The question arose whether this provision encompassed a right of “antenna”, i.e. of access to a particular media controlled by a third person. Even if this were to be the case, the Commercial Television Company's refusal to broadcast the commercial did not bring about the responsibility of the Swiss authorities. The latter exercised no supervision over the Commercial Television Company which was a company established under and governed by private law, and they did not prevent the Company from broadcasting commercials. Moreover, S. 18 § 5 of the Federal Radio and Television Act could not serve as a basis to establish the responsibility in the present case of the Swiss authorities. Thus, the reasons given by the Company in its letter of 24 January 1994 when refusing the commercials were of a personal nature, namely that it could not be obliged to broadcast commercials which damage its business interests and involve its editors' rights. With reference to the Gustafsson v. Sweden case, the Government considered that the present case involved relations between private associations, the Company and the applicant association (see judgment of 25 April 1996, Reports 1996-II, p. 658, § 60). Even if Article 10 of the Convention were applicable, the Swiss authorities would only be responsible in respect of its positive obligations under this provision.

41. The Government further submitted that the Swiss Radio and Television Company exercised no public service when broadcasting advertising and could in this respect invoke the constitutionally guaranteed freedom of commerce as well as of contractual freedom. This was not altered by the fact that that Company had delegated the acquisition of advertising to the Commercial Television Company, though regard had to be had to international and domestic law, including the provisions on the prohibition of advertising in the Federal Radio and Television Act. Both companies were governed by private law. As a result, under private law the question arose as to any positive obligation of the Swiss authorities effectively to ensure the freedom of expression among private persons. Under public law the issue arose as to the compatibility with Article 10 of the Convention of the prohibition of advertising under Article 18 § 5 of the Federal Radio and Television Act.

42. In respect of the public law issue of the present case, the Government considered that the requirements under Article 10 of the Convention were fulfilled. Attention was drawn to the Federal Court's decision of 20 August 1997 according to which the applicant association could invoke before it the rights under Article 10 of the Convention., though there was no right to broadcast, i.e. to an “antenna”. The Federal Court did indeed examine the applicant association's complaints under Article 10, *inter alia*, in the light of the Strasbourg case-law.

43. In respect of the issue under private law, the Government pointed out the exemplary case-law of the Federal Court according to which constitutional as well as Convention rights shall also apply “horizontally” in the relations between private persons. This case-law had meanwhile been enshrined in S. 35 of the Swiss Federal Constitution currently in force. Thus, individuals' rights were guaranteed judicially and by legislation. In the present case, the Federal Court found that the matter was first to be resolved on the level of private law. In fact, the refusal of the Commercial Television Company fell to be examined by an antitrust commission which undoubtedly would have examined the “horizontal” effects of basic rights between private persons.

2. The Court's assessment

44. It is not in dispute between the parties that the Commercial Television Company is a company established under Swiss private law. The issue arises, therefore, whether the Company's refusal to broadcast the applicant association's commercial fell within the

respondent Government's jurisdiction. In this respect, the Court notes in particular the respondent Government's submission according to which the Commercial Television Company, when deciding on whether or not to acquire advertising, was acting as a private party enjoying contractual freedom.

45. Under Article 1 of the Convention, each Contracting State “shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention”. As the Court stated in the case of Marckx v. Belgium (judgment of 13 June 1979, Series A no. 31, p. 15, § 31; see also the Young, James and Webster v. the United Kingdom judgment of 13 August 1981, Series A no. 44, p. 20, § 49), in addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, “there may be positive obligations inherent” in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligation to enact domestic legislation.

46. The Court does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*.

47. Suffice it to state that in the instant case the Commercial Television Company and later the Federal Court in its decision of 20 August 1997, when examining the applicant association's request to broadcast the commercial at issue, both relied on S. 18 of the Swiss Federal Radio and Television Act which prohibits “political advertising”. The domestic law, as interpreted in last resort by the Federal Court, therefore made lawful the treatment of which the applicant association complained (see the Marckx and the Young, James and Webster judgments cited above). In effect, political speech by the applicant association was prohibited. In the circumstances of the case, the Court finds that the responsibility of the respondent State within the meaning of Article 1 of the Convention for any resultant breach of Article 10 of the Convention may be engaged on this basis.

B. Whether there was an interference with the applicant association's rights under Article 10 of the Convention

48. The responsibility of the respondent State having been established, the refusal to broadcast the applicant association's commercial amounted to an “interference by public authority” in the exercise of the right guaranteed by Article 10.

49. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It is therefore necessary to determine whether it was “prescribed by law”, motivated by one or more of the legitimate aims set out in that paragraph, and “necessary in a democratic society” to achieve them.

C. Whether the interference was “prescribed by law”

50. The applicant association submitted that there was no sufficient legal basis for the interference in its rights by the Commercial Television Company. The commercial which it intended to broadcast could not be considered as “political”. It merely contained pictorial information without any linguistic elements explaining how pigs behaved in natural surroundings and how, in contrast to this, they were kept by human beings in cramped pens. At most, this information qualified as information. The fact that such information could lead to political consequences did not make it political advertising. The primary task of information was to enlighten and to disseminate knowledge that ultimately led to the correct political decisions.

51. The Government contended that any interference with the applicant association's rights was “prescribed by law” within the meaning of Article 10 § 2 of the Convention in that it was based on S. 18 § 5 of the Federal Radio and Television Act, the latter having been duly published and, therefore, accessible to the applicant association. While the term “political” was somewhat vague, absolute precision was unnecessary, and it fell to the national authorities to dissipate any doubts as to the interpretation of the provisions concerned. In the present case, the Federal Court in its decision of 20 August 1997 considered that the commercial at issue, denouncing the meat industry, was not of a commercial character and in fact had to be placed in the more general framework of the animal association's militantism in favour for the protection of animals.

52. The Court recalls its case-law according to which the expression “in accordance with the law” requires not only that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Amann v. Switzerland* [GC], no. 27798/95, ECHR 1999-II). However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see the *Kopp v. Switzerland* judgment of 25 March 1998, Reports 1998-II, p. 541, § 59; and the *Kruslin v. France* judgment of 24 April 1990, Series A no. 176-A, p. 21 et seq., § 29).

53. In the present case, the Federal Court in its judgment of 20 August 1997 relied as a legal basis for the refusal to broadcast the applicant's commercial on S. 18 § 5 of the Federal Radio and Television Act prohibiting “political advertising”. S. 15 § 1 (e) of the Radio and Television Ordinance reiterates this prohibition.

54. It is not in dispute between the parties that these laws, duly published, were accessible to the applicant association. The issue arises, however, whether the rules were foreseeable as to their effects.

55. The Court reiterates that a norm cannot be regarded as a “law” within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Again, whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, for example, the Hertel v. Switzerland judgment of 25 August 1998, Reports of Judgments and Decisions 1998-VI, p. 2325, § 35; the Malone v. the United Kingdom judgment of 2 August 1984, Series A no. 82, pp. 31-32, § 66).

56. In the present case, it falls to be examined whether the term “political advertising” in S. 18 § 5 of the Federal Radio and Television Act was formulated in a manner such as to enable the applicant association to foresee that it would serve to prohibit the broadcasting of the proposed television commercial. The latter depicted pigs in a forest as well as in pens in a noisy hall. The accompanying voice compared this situation with concentration camps and exhorted television viewers to “eat less meat, for the sake of your health, the animals and the environment”.

57. In the Court's opinion the commercial indubitably fell outside the regular commercial context in the sense of inciting the public to purchase a particular product. Rather, with its concern for the protection of animals, expressed partly in drastic pictures, and its exhortation to reduce meat consumption, the commercial reflected controversial opinions pertaining to modern society in general and also lying at the heart of various political debates. Indeed, as the Federal Court pointed out in its judgment of 20 August 1997 (see above, § 23), the applicant association had in respect of these matters filed a

disciplinary complaint with the Swiss Federal Parliament.

58. As such, the commercial could be regarded as “political” within the meaning of S. 18 § 5 of the Federal Radio and Television Act. It was, therefore, “foreseeable” for the applicant association that its commercial would not be broadcast on these grounds. It follows that the interference was, therefore, “prescribed by law” within the meaning of Article 10 § 2 of the Convention.

D. Whether the interference pursued a legitimate aim

59. The applicant association further maintained that there was no legitimate aim which justified the interference with its rights.

60 . The Government submitted that the refusal to broadcast the commercial at issue aimed at enabling the formation of a public opinion protected from the pressures of powerful financial groups, while at the same time promoting equal opportunities to the different components of society. The refusal also assured to the press a segment of the advertising market, thus contributing towards its financial autonomy. In the Government's opinion, therefore, the measure was justified “for the protection of the ... rights of others” within the meaning of Article 10 § 2 of the Convention.

61. The Court notes the Federal Council's message to the Swiss Parliament in which it was explained that the prohibition of political advertising in S. 18 § 5 of the Swiss Radio and Television Act served to prevent financially strong groups from obtaining a competitive advantage in politics. The Federal Court in its judgment of 20 August 1997 considered that the prohibition served to ensure, in addition, the independence of the broadcaster; to spare the political process from undue commercial influence; to provide for a certain equality of opportunity between the different forces of society; and to support the press which remained free to publish political advertisements.

62. The Court is, therefore, satisfied that the measure aimed at the “protection of the ... rights of others” within the meaning of Article 10 § 2 of the Convention.

E. Whether the interference was “necessary in a democratic society”

63. The applicant association submitted that the measure had not been proportionate, as it did not have other valid means at its disposal to broadcast the commercials at issue. The television programmes of the Swiss Radio and Television Company were the only ones that were broadcast and could be seen throughout Switzerland. The evening news programme and the subsequent national weather forecasts had the highest ratings, namely between 50% and 70% of all viewers. Even with the use of considerable financial resources it would not be possible to reach so many persons via the regional private channels or the foreign stations which could be received in Switzerland.

64. The Government considered that the measure was proportionate as being “necessary in a democratic society” within the meaning of Article 10 § 2 of the Convention. It was not up to the Court to take the place of the national authorities, and indeed Contracting States remained free to choose the measures which they considered appropriate, and the Court could not be oblivious of the substantive or procedural features of their respective domestic laws (see the Worm v. Austria judgment of 29 August 1997, Reports 1997-V, p. 1551, § 49). In the present case, the Federal Court in its judgment of 20 August 1997 was called upon to examine concurring interests protected by the same basic right: namely the freedom of the applicant association to broadcast its ideas, and the freedom of the Commercial Television Company, and the Swiss Radio and Television Company, to communicate information. To admit the

applicant association's point of view would be to grant a “right to an antenna”, which right would substantially interfere with the rights of the Commercial Television Company and the Swiss Radio and Television Company to decide which information they chose to bring to the attention of the public. In fact, Article 10 would then oblige a third party to broadcast information which it did not wish to do. Finally, the public had to be protected from untimely interruptions in the television programmes by means of commercials.

65. In this respect the Government pointed out the various other possibilities open to the applicant association to broadcast the information at issue, namely by means of local radio and television stations, the written press, and internet. Moreover, the Commercial Television Company had offered the applicant association the possibility of discussing the conditions for broadcasting its commercials, though this had been categorically refused by the applicant association.

66. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”. As set forth in Article 10, this freedom is subject to exceptions. Such exceptions must, however, be construed strictly, and the need for any restrictions must be established convincingly, particularly where the nature of the speech is political rather than commercial (see, *inter alia*, the Hertel v. Switzerland judgment cited above, p. 2329, § 46, and the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

67. Under the Court's case-law, the adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression as protected by Article 10.

68. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient” (see the Sunday Times v. the United Kingdom (no. 2) judgment of 26 November 1991, Series A no. 217, p. 29, § 50). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see the Hertel v. Switzerland judgment cited above).

69. It follows that the Swiss authorities had a certain margin of appreciation to decide whether there was a “pressing social need” to refuse the broadcasting of the commercial. Such a margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of advertising (see the markt intern Verlag GmbH and Klaus Beermann v. Germany judgment of 20 November 1989, Series A no. 165, p. 19, § 33; and the Jacubowski v. Germany judgment of 23 June 1994, Series A

no. 291-A, p. 14, § 26).

70. However, the Court has just found that the applicant association's film fell outside the regular commercial context in the sense of inciting the public to purchase a particular product. Rather, it reflected controversial opinions pertaining to modern society in general (see above, § 57). The Swiss authorities themselves regarded the content of the applicant association's commercial as being “political” within the meaning of 18 § 5 of the Federal Radio and Television Act. Indeed, it cannot be denied that in many European societies there was, and is, an ongoing general debate on the protection of animals and the manner in which they are reared.

71. As a result, in the present case the extent of the margin of appreciation is reduced, since what is at stake is not a given individual's purely “commercial” interests, but his participation in a debate affecting the general interest (see the Hertel v. Switzerland judgment cited above).

72. The Court will consequently carefully examine whether the measures in issue were proportionate to the aim pursued. In that regard, it must balance the applicant association's freedom of expression, on the one hand, with the reasons adduced by the Swiss authorities for the prohibition of political advertising, on the other, namely to protect public opinion from the pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity between the different forces of society; to ensure the independence of the broadcasters in editorial matters from powerful sponsors; and to support the press.

73. It is true that powerful financial groups can obtain competitive advantages in the areas of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely (see the Informationsverein Lentia and others v. Austria judgment of 24 November 1993, Series A no. 276, p. 16, § 38).

74. In the present case, the contested measure, namely the prohibition of political advertising as in S. 18 § 5 of the Federal Radio and Television Act, was applied only to radio and television broadcasts, and not to other media such as the press. The Federal Court explained in this respect in its judgment of 20 August 1997 that television had a stronger effect on the public on account of its dissemination and immediacy. In the Court's opinion, however, while the domestic authorities may have had valid reasons for this differential treatment, a prohibition of political advertising which applies only to certain media, and not to others, does not appear to be of a particularly pressing nature.

75. Moreover, it has not been argued that the applicant association itself constituted a powerful financial group which, with its proposed commercial, aimed at endangering the independence of the broadcaster; at unduly influencing public opinion; or at endangering the equality of opportunity between the different forces of society. Indeed, rather than abusing a competitive advantage, all the applicant association intended to do with its commercial was to participate in an ongoing general debate on animal protection and the rearing of animals. The Court cannot exclude that a prohibition of “political advertising” may be compatible with the requirements of Article 10 of the Convention in certain situations. Nevertheless, the reasons must be “relevant” and “sufficient” in respect of the particular interference with the rights under Article 10. In the present case, the Federal

Court in its judgment of 20 August 1997, discussed at length the reasons in general which justified a prohibition of “political advertising”. In the Court's opinion, however, the domestic authorities have not demonstrated in a “relevant and sufficient” manner why the grounds generally advanced in support of the prohibition of political advertising, also served to justify the interference in the particular circumstances of the applicant association's case.

76. The domestic authorities did not adduce the disturbing nature of any particular sequence, or of any particular words, of the commercial as a ground for refusing to broadcast it. It therefore mattered little that the pictures and words employed in the commercial at issue may have appeared provocative or even disagreeable.

77. Insofar as the Government pointed out that there were various other possibilities to broadcast the information at issue, the Court observes that the applicant association, aiming at reaching the entire Swiss public, had no other means than the national television programmes of the Swiss Radio and Television Company at its disposal, since these programmes were the only ones broadcast throughout Switzerland. The Commercial Television Company was the sole instance responsible for the broadcasting of commercials within these national programmes. Regional private television channels and foreign television stations cannot be received throughout Switzerland.

78. The Government have also submitted that admitting the applicant's claim would be to accept a “right to an antenna” which in turn would substantially interfere with the rights of the Commercial Television Company to communicate information. Reference was further made to the danger of untimely interruptions in the television programmes by means of commercials. The Court recalls that its judgment is essentially declaratory. Its task is to determine whether the Contracting States have achieved the result called for by the Convention. Various possibilities are conceivable as regards the organisation of broadcasting television commercials; the Swiss authorities have entrusted the responsibility in respect of national programmes to one sole private company. It is not the Court's task to indicate which means a State should utilise in order to perform its obligations under the Convention (see the de Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, p. 29, § 35).

79. In the light of the foregoing, the measure in issue cannot be considered as “necessary in a democratic society”. Consequently, there has been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

80. In the applicant association's submissions, it had no effective remedy at its disposal to complain about the refusal to broadcast its commercial. It relied on Article 13 of the Convention which states:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

81. The Government replied that the Federal Court as the highest domestic instance had dealt with the applicant association's complaint.

82. The Court notes that, upon the applicant association's administrative law appeal, the Federal Court in its decision of 20 August 1997 dealt extensively and in substance with the complaints which it raised before the Court. The applicant association therefore had

at its disposal a remedy within the meaning of Article 13 of the Convention.

83. It follows that there was no breach of Article 13 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

84. The applicant association also complained under Article 14 of the Convention, taken together with Article 10, of discrimination in that its commercial had not been broadcast, whereas the meat industry was regularly permitted to broadcast commercials. Article 14 of the Convention states:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

85. The Government submitted that the situations complained of were not comparable. Otherwise, for every commercial propagating one product, another commercial for another product would have to be broadcast. The difficulties would even be greater in the political area.

86. Under the Court's case-law, Article 14 safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in the other normative provisions of the Convention and Protocols (see the Sunday Times v. the United Kingdom judgment of 26 April 1979, Series A no. 30, p. 43, § 70).

87. In the present case, the Court notes the decision of the Federal Court of 20 August 1997 according to which promotions of the meat industry were economic in nature in that they aimed at increasing the turnover, whereas the applicant association's commercial, exhorting reduced meat consumption, was directed against industrial animal production and related to animal protection.

88. As a result, the applicant association and the meat industry cannot be considered to be “placed in comparable situations” as their commercials differed in their aims.

89. There has thus been no violation of Article 14 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

(...)

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there has been no violation of Article 13 of the Convention;

4. *Holds* that there has been no violation of Article 14 of the Convention;

(...)

Noot

Varkens in Noot

1. De VGT wil op de privaatrechtelijke Zwitserse reclamezender Publisuisse in het programma van een Zwitserse omroep (Schweizerische Radio- und Fernsehgesellschaft) een ideële reclameboodschap laten uitzenden die als afbrekend tegenover de vleesindustrie kan worden gekwalificeerd. De spot toont eerst een varkensparadijsje (geen Animal Farm) en vervolgens de werkelijkheid van de varkensindustrie. Die werkelijkheid wordt in de spot uitdrukkelijk gekwalificeerd als een concentratiekamp. Men herinnere zich de gelijksoortige uitspraken van Robert Long (Pres. Rb. Amsterdam 30 november 2000, *Elro* AA8696 ; zie ook Schuijt in: *Onrechtmatige Daad* , VII, aant. 72). De uitsmijter luidt: eet minder vlees.

2. Publisuisse weigert de spot uit te zenden vanwege haar duidelijk politieke karakter. Zij baseert die weigering op art. 18 lid 5 van de Zwitserse Federale Radio en Televisiewet dat religieuze en politieke reclame verbiedt, op haar contractvoorwaarden, op haar zakelijke belangen en op haar redactionele rechten.

3. Daarna breekt een Kafkaiaanse procedure doolhof aan. Op het protest tegen de weigering deelt Publisuisse mee dat zij geen instantie is die voor beroep vatbare beslissingen kan geven. Een klacht bij de Onafhankelijke Bezwaarschriftencommissie voor radio en televisie wordt terzijde gelegd, omdat deze commissie alleen oordeelt over reeds uitgezonden programma's. De commissie verwijst de klacht naar het Bundesamt für Kommunikation dat meedeelt dat Publisuisse vrij is om een spot al dan niet uit te zenden. Een volgende klacht bij het Ministerie voor Transport en energie, op basis van mededingingsrechtelijke aspecten, wordt afgewezen omdat Publisuisse geen monopolie positie heeft maar moet concurreren met andere reclamezenders en bovendien op haar geen publiekrechtelijke plicht rust om reclameboodschappen uit te zenden. Het administratief beroep tegen de beslissing van het Bundesamt wordt door het Bundesgericht verworpen. Dat overweegt echter dat, gelet op artikel 13 van het EVRM, het Bundesamt nalatig is geweest klager een behoorlijke procedurele mogelijkheid te bieden. Het Bundesgericht beoordeelt dan de zaak zelf en oordeelt dat op basis van de Zwitserse radio- en televisiewetgeving er geen verplichting bestaat voor de Zwitserse omroep om reclameboodschappen uit te zenden. De vraag of het reclameverbod van artikel 18 lid 5, dat nader is uitgewerkt in artikel 15 van het Radio en televisiebesluit, in strijd komt met artikel 10 EVRM wordt negatief beantwoord. Het verbod van politieke reclame acht het gerecht een juist middel om tegen te gaan dat financieel sterke politieke groeperingen een concurrerend politiek voordeel kunnen behalen, het waarborgt de onafhankelijkheid van het redactionele programma en de advertentiebelangen van de gedrukte media en daarmee de mede door artikel 10 EVRM gewaarborgde pluriformiteit van de media. Bovendien staan de VGT andere middelen ter beschikking om haar boodschap uit te dragen (buitenlandse zenders, de pers of de bioscoop). Dat de vleesindustrie wel reclame mag maken en de VGT niet, ziet het gerecht niet als ongelijke behandeling omdat commerciële reclame en ideële reclame nu eenmaal niet met elkaar te vergelijken zijn. VGT houdt zich inderdaad bezig met een politiek issue; dat blijkt wel uit het feit dat zij de zaak bij het Zwitsers parlement heeft aangekaart.

4. Het belang van deze zaak ligt allereerst in de vraag naar de horizontale werking van het grondrecht van vrijheid van meningsuiting. Publisuisse, de Schweizerische Radio- und Fernsehgesellschaft en VGT zijn privaatrechtelijke rechtspersonen. De Zwitserse regering verweert zich dan ook met het argument dat zij niet verantwoordelijk kan worden gesteld voor de weigering. Haar opvatting is dat het om een privaatrechtelijke kwestie gaat die mededingingsrechtelijk kan worden uitgevochten. Dat argument gaat in de Nederlandse rechtspraak op, althans wanneer het om concurrentieverhoudingen gaat.

Zie Pres. Rb. Den Haag 10 juli 1998, KGK 1998, 1487 (ACSI Internationale Campinggids B.V. tegen ANWB) en daarover Kabel, in: *Praktijkboek Reclamerecht* XIIB, nr. 1). De president oordeelde eiser wiens advertentie door ANWB's blad de Autokampioen werd geweigerd, niet ontvankelijk omdat de Mededingingswet een met voldoende waarborgen omklede rechtsgang bevatte. De vraag is of dit een juiste uitspraak is; in kort geding kan immers ook de Mededingingswet aan de orde worden gesteld (zie Pres. Rb. Breda 13 december 2000, *Elro* AA9060). Wanneer het niet gaat om concurrentieverhoudingen, zoals in dit geval, ligt de zaak in ieder geval anders. Zie Pres. Rb. Amsterdam 1 mei 1998, *Mediaforum* 1998-7/8: 237-239 met ann. Schuijt (Centrum Democraten tegen SBS6).

5. Het Hof maakt korte metten met het argument van de Zwitserse regering. Terecht oordeelt het dat het niet nodig is om een algemene theorie over horizontale werking te ontwikkelen – dat zouden wetenschappers zich ook wel eens mogen aantrekken (zie aldus al Bloembergen *H.N.J.V.* 1969: 55). Het is voldoende dat de weigering berust op de uitleg van een wettelijke regeling; voor die regeling is de Zwitserse Staat verantwoordelijk.

6. Het gaat hier om een weigering door een privaatrechtelijke instantie en om een bevestiging van die weigering door een rechterlijke instantie. De laatste handeling valt niet weg te denken, omdat betrokkene anders niet bij het Hof terecht komt. Niettemin doet zich dan toch de vraag voor of weigering of veroordeling achteraf van reclameboodschappen door een privaatrechtelijke instantie met het argument dat de desbetreffende boodschap in strijd is met de wet, vatbaar is voor toetsing aan artikel 10 EVRM. Wij kennen zo een artikel in artikel 2 NRC: reclameboodschappen mogen niet in strijd zijn met de wet. Het is verdedigbaar dat juist in die gevallen de RCC, ook al is zij een zelfreguleringinstantie, zich iets zou moeten aantrekken van een beroep op artikel 10 EVRM en niet, zoals zij thans doet, zou moeten oordelen dat een dergelijke toetsing een zaak is van de burgerlijke rechter.

7. Kennen wij ook een regeling die politieke reclameboodschappen verbiedt? Niet meer. Sinds 1998 volgt de STER de commerciële omroepen die enige tijd daarvoor hun beleid op dit punt hadden gewijzigd en voortaan ook spots van politieke partijen accepteerden. Voorheen bevatte artikel 20 van de Voorschriften voor de Nederlandse etherreclame de verplichting voor STER om boodschappen te weigeren van levensbeschouwelijke, of politieke aard of herkomst (zie Kabel, 'Weigering van politieke advertenties', *Auteursrecht/AMR* 1993-1: 8). De motivering daarvoor lag waarschijnlijk in de wens het reclamescherm vrij te houden van mogelijk irriterende factoren die de beoogde werking van commerciële reclameboodschappen alleen maar zou kunnen frustreren. Dat artikel verviel met de inwerkingtreding van de Mediawet maar werd door de STER privaatrechtelijk gehanteerd in haar Algemene Voorwaarden. Wij hadden in die tijd dus geen wettelijke regeling, zoals de Zwitsers; de vraag of een weigering gebaseerd op de Algemene Voorwaarden van de STER de toets aan artikel 10 EVRM zou kunnen doorstaan, lijkt, mede gelet op deze uitspraak, wat moeilijker denkwerk te vereisen, maar is toch eenvoudig te beantwoorden. Een kort geding procedure tegen STER op basis van een weigering is uiteraard mogelijk en heeft zich inderdaad al een paar keer voorgedaan (Pres. Rb. Amsterdam 9 mei 1985, *KG* 1985, 152 (Volkskrant tegen STER), bevestigd door Hof Amsterdam 28 november 1985, *KG* 1986, 12; Pres. Rb. Amsterdam 14 december 1990, *KG* 1991, 29 (Regionale Omroep Utrecht tegen STER); Pres. Rb. Amsterdam 14 februari 1992, *Mediaforum* 1992-4: B25 (Sky Radio tegen STER; Pres. Rb. Amsterdam 29 april 1993, *KG* 1993, 209 (AVRO tegen STER)). Een bevestigende uitspraak op basis van een onrechtmatige daadsactie in kort geding is te beschouwen als een vorm van overheidsinmenging in de zin van artikel 10 EVRM en daarmee is allerlei getheoretiseer over horizontale werking van de baan.

8. De beperking wordt door het Hof gekwalificeerd als een beperking ter bescherming

van de rechten van anderen, en het neemt betrekkelijk achteloos de motivering dienaangaande van het Zwitserse gerecht over, te weten dat het gaat om bescherming van de onafhankelijkheid van omroepen, de bescherming van het politieke proces tegen onwenselijke commerciële invloeden en om ondersteuning van de pers; het rept daarbij niet van het pluriformiteitsbeginsel dat door de Zwitserse rechter min of meer als algemeen motief wordt genoemd. Kennelijk ligt dat beginsel toch ten grondslag aan de kwalificatie, omdat op zichzelf bezien de pers geen zelfstandig recht op ondersteuning kan claimen op grond van artikel 10 EVRM en het bij de beperkingen niet alleen kan gaan om economische motieven. Dat wordt later ook bevestigd (zie par. 73).

9. De hamvraag zit hem natuurlijk in de vraag naar de noodzakelijkheid van de beperking. Het Hof oordeelt dat de beperking in dit geval niet noodzakelijk was. Het volgt daarbij de inmiddels klassieke redenering: het gaat hier om het publieke debat, dat houdt in dat het Hof de argumenten over en weer volledig kan toetsen en de vrijheid van meningsuiting dient af te wegen tegen het belang dat met de beperking is gediend, daarbij rekening houdend met alle omstandigheden van het geval (Hertel/Zwitserland) en met het gegeven dat de vrijheid van meningsuiting ook van toepassing is op mogelijk shockerende uitlatingen (Handyside/UK).

10. In concreto zijn de volgende factoren van belang:

a. Een beperking die alleen maar geldt voor bepaalde media en niet voor andere lijkt bepaald niet dwingend noodzakelijk.

b. Het motief voor de beperking, waarborging van pluralisme in de media, is op de adverteerder niet van toepassing: het betreft hier immers geen financieel sterke groepering.

c. De weigering is niet gebaseerd op de concrete vormgeving van de spot.

d. Dat er alternatieven zijn voor de adverteerder is niet relevant, omdat het Zwitserse omroepbestel nu eenmaal zo is georganiseerd dat uitzending via de desbetreffende omroep de enige manier is in Zwitserland om het gehele omroeppubliek te bereiken.

e. Dat er op deze wijze een soort van afdwingbaar toegangsrecht wordt geschapen (*right to an antenna*) kan waar zijn, maar dat is juist mede het gevolg van de manier waarop in Zwitserland de nationale omroep is georganiseerd (zie d.). Het is echter niet aan het Hof om een oordeel te geven over de manier waarop een nationale omroep is georganiseerd.

11. De beleidsvrijheid van een reclamezender die de enige is met een nationaal bereik is dus veel minder groot dan die van de redactie van het gewone omroepprogramma van zo'n zender. Het lijkt tenminste niet goed voorstelbaar dat de redactie van zo'n programma verplicht zou kunnen worden een item uit te zenden zonder voorafgaande concrete rechtsgrond (rectificatieplicht, weerwoord, e.d. naar aanleiding van een eerder uitgezonden programma). In de Nederlandse rechtspraak geldt ten aanzien van de weigering van politieke reclame de *Boycot Outspan* regel: collectieve weigering door persmedia van ideële reclameboodschappen om redenen van fatsoen en goede smaak is alleen dan rechtmatig indien de reclameboodschap naar de in ons land, althans bij de overgrote meerderheid van de bevolking levende opvattingen, in ernstige mate wansmakelijk of onfatsoenlijk zou zijn, en de lezers afkerig zou maken van het blad of het tijdschrift waarin zij is geplaatst (Hof Amsterdam 30 oktober 1981, *NJ* 1981, 422). Die regel biedt m.i. meer weigeringmogelijkheden dan de Handy Side regel die het Hof in deze zaak gebruikt en dat dus nu ten onrechte.

12. De RCC lijkt zich intussen al niets aan te trekken van de Boycot Outspan regel. Zij veroordeelde wegens strijd met het fatsoen en zonder veel motivering een advertentie van de Stichting Wakker Dier met als tekst: “Biggen castreren? Gehoorbeschermers op en ga erbij zitten! De arbeidsinspectie controleert de veiligheid op uw bedrijf.” (RCC 6 september 2000, *Uitspraken* 2000: 332). Met deze ironische tekst stelde de Stichting de praktijk op veel bedrijven aan de kaak waarbij biggen zonder verdoving worden gecastreerd omdat verdoving alleen door een dierenarts mag geschieden, maar castreren kennelijk door de varkensboer zelf mag worden uitgevoerd. Een dergelijke mededeling, gedaan door Robert Long werd door de Amsterdamse President in de hierboven genoemde zaak niet onrechtmatig geacht. Toegevoegd moet worden dat de RCC haar uitspraken in deze geeft in de vorm van een zogenaamd vrijblijvend advies. Wat de materiele norm betreft, maakt dat echter geen verschil.

13. Tenslotte: hoe zou het in ons land aflopen met een weigering door STER van een door de Stichting Varkens in Nood aangeboden spotje. Van toetsing aan een wettelijke regel is ten onzent geen sprake: wij kennen geen verbod van politieke reclame op de STER of op andere reclamezenders. De STER is een privaatrechtelijke organisatie. Toch ligt het bij de STER en bij de andere reclamezenders van binnenlandse regionale en locale en commerciële omroepen wat problematischer. Zij zijn namelijk verplicht zich aan te sluiten bij het stelsel van de RCC (zie respectievelijk de artikelen 61a, 43b lid 2 Mediawet en 52b Mediabesluit). Dat hoeft nog niet te betekenen dat zij niet meer de vrijheid hebben om een eigen, individueel beleid te voeren. Gelet op de 'Biggen castreren' lijn van de RCC, ligt een weigering echter voor de hand. Indien die weigering inderdaad is gebaseerd op het beleid van de RCC bij welks stelsel men wettelijk verplicht is zich aan te sluiten, dan ligt de vraag voor de hand of dat zachte poldermodel voldoende vaste grond biedt om te spreken van overheidsinmenging in de zin van artikel 10 EVRM. Toch blijft het belang van die vraag wat in de lucht hangen. Natuurlijk zal een Nederlandse rechter, geconfronteerd met een vordering tegen STER of IP het belang van de vrijheid van meningsuiting laten meewegen. De exercities omtrent de vraag of het zachte poldermodel gekwalificeerd moet worden als overheidsinmenging verbleekt bij die afweging. En na zo'n afweging ligt in het geval van een bevestigend oordeel de weg naar Straatsburg altijd open (zie boven). Daarbij is van belang dat in ons land televisiereclame alternatieven bestaan: de STER is niet de enige nationale reclamezender.

14. Pas wanneer collectief wordt geweigerd, komt de vraag aan de orde of het Boycot Outspan criterium van het Amsterdamse Hof de toets van artikel 10 lid 2 kan doorstaan. Zo'n geval heeft zich pas voorgedaan bij radioreclame. STER, Sky Radio, Radio 358 en de regionale en locale radiozenders hebben geweigerd een reclamespot van Milieudefensie uit te zenden waarin wordt opgeroepen biologische appelmoes te bestellen bij Hak. Zo moeten consumenten bewijzen dat er vraag is naar biologische producten. De weigering is gebaseerd op het gegeven dat de spot Hak (en ook enkele andere bedrijven zoals Iglo en Mona) in een negatief daglicht stelt (*Adformatie* 3 december 2001). Nu hier concrete bedrijven worden genoemd, ligt m.i. de zaak anders dan in het Zwitserse geval en zal een op het belang van die bedrijven gebaseerde weigering gemakkelijker de toets aan artikel 10 EVRM kunnen doorstaan.

15. Collectieve weigering van een televisiereclamespot van de Stichting Varkens in Nood zal m.i. die toets in beginsel echter niet kunnen doorstaan, na de uitspraak van het Hof. De boodschap is in redactionele vorm al niet onrechtmatig geacht in de uitspraak over Robert Long. Het criterium van het Amsterdamse Hof in de Boycot Outspan uitspraak is als gezegd, gelet op de Handyside uitspraak van het Hof, te beperkend. Belangen van de vleesindustrie en van de televisiereclamezender zijn door het Hof weliswaar niet expliciet maar ongetwijfeld meegewogen. In par. 76 van 'sHof's uitspraak ligt nog een klein addertje onder het gras. Wanneer de Zwitserse overheid de weigering had gebaseerd op de concrete inhoud van de spot (bijvoorbeeld op mogelijke inbreuk op rechten van

anderen, te weten de reputatie van de vleesindustrie) had het Hof wel een uitspraak moeten geven over de vraag of vanwege het provocatieve en wansmakelijke karakter van de uiting de weigering de toets aan artikel 10 EVRM had kunnen doorstaan.