NETHERLANDS ANTILLES: Broadcast monopoly does not violate Article 10 ECHR

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On 15 November 1996, the Dutch Supreme Court (Hoge Raad), the competent court of cassation for the Netherlands Antilles, ruled that the existence of a broadcast monopoly on the Netherlands Antilles is not (yet) in violation with the rights guaranteed in paragraph 1 of Article 10 of European Convention on Human Rights. At the Netherlands Antilles, a relatively small group of Caribbean Islands and an autonomous part of the Kingdom of the Netherlands, the stated-owned company ATM has an exclusive right to exploit a nation-wide cable system. TDS, a subsidiary of ATM, holds a similar license for a pay-per-view system. Both licenses are granted for a period of 10 years. In 1994 Multivision filed an application for a license to exploit a second pay-per-view system by satellite, intended to relay foreign programmes alternated with local Antillean programs. Since TDS has been granted an exclusive right till 2001, the Governor of the Netherlands Antilles rejected the application. Both the Court of Law and the Court of Appeal of the Netherlands Antilles dismissed Multivision's complaint on the refusal. Multivision therefore lodged an appeal against these decisions with the court of cassation, the Dutch Supreme Court.

In all cases Multivision appealed to Article 10 ECHR and especially referred to the European Court of Human Rights judgement in the Lentia case in which the Austrian public broadcast monopoly has deemed disproportionate. In the wake of that decision the Netherlands Supreme Court ruled that the restriction of the freedom of expression, by granting monopolistic broadcast rights -although bound to a time limit- is only allowed when there is a pressing need. Contracting States however, enjoy a margin of appreciation in assessing the need for such an interference. Interesting part of this decision is the conclusion of the Supreme Court that as a result of this margin of appreciation, normally referring to the contracting states, the national Courts itself have to be reticent with respect to the policy choices of the national administration. As a result, the Supreme Court as well as the Antillian Court of Appeal feel, without further investigation, obliged to respect the State's statement that it is financially and economically impossible to exploit a nation-wide pay-television system if at the same time a second license would be granted. The Supreme Court accepted the period of 10 years, in which period TDS will be able to recover its initial costs and fulfil its obligation to build and provide a public nation-wide pay-per-view system, as being reasonable. The granting of more licenses within this time could result in a ruinous

competition between the operators, which would not be in the consumer's interest. Under these circumstances a proportionality exits between the infringement of article 10 ECHR and the protected interest, namely the prevention of disorder (i.c. ruinous competition between providers of pay television) and the protection of right of others (i.c. TDS). Therefore, the refusal was justifiable in principle and proportionate.

Notably, this case has been settled in a summary proceeding, resulting in a limited judicial review. In its verdict, the Antillian Court of Appeal noted that in a normal procedure the result could be different, especially because in this procedure Multivision did not adduced enough arguments to refute the State's assertion that it is financially and economically impossible at the Netherlands Antilles to exploit a second license before the exclusive right of TDS expires.

Hoge Raad 15 november 1996, Multivision vs. De Nederlandse Antillen.

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