

1984 May 2

[A. LOIZOU, SAVVIDES, LORIS, STYLIANIDES AND PIKIS, JJ.]

OTHON GALANOS AND SON LIMITED,

*Appellants.*

v.

THE CYPRUS BROADCASTING CORPORATION,

*Respondents.*

(Revisional Jurisdiction  
Appeal No. 312).

*Act or decision in the sense of Article 146.1 of the Constitution—Cyprus Broadcasting Corporation—Refusal to grant “frequency discount” in respect of television advertisements—A decision relating to the exercise of powers of the Corporation, under section 17(2)(1) of the Cyprus Broadcasting Corporation Law, Cap. 300A in the commercial sphere of its activities, in the domain of private, and not of public law—It does not come within the ambit of the above Article 146.1 and cannot be challenged by a recourse made thereunder.* 5

*Administrative Law—Administrative acts or decisions—Executory act—Preparatory act—Informative act—Negotiations between appellants and respondent Corporation exploring possibility of concluding an advertising agreement—Refusal of respondent, in the course of such negotiations to offer “frequency discount” to appellants—Is an act of merely preparatory and informative nature lacking executory nature.* 15

The appellants challenged, by means of a recourse, a decision of the respondent Corporation turning down their application for a “frequency discount” in respect of television advertisements. The trial Judge dismissed the recourse on the ground that the act or decision complained of was within the domain of private law and further that it was of a preparatory nature. Hence this appeal. 20

*Held, per Stylianides J., A. Loizou, Savvides, Loris, JJ. concurring and Pikis, J. dissenting, (1) that the duty of the respondent* 25

Corporation under s. 17(1)(c) of the Cyprus Broadcasting Corporation Law, Cap. 300A is due to the State; that the respondent has to operate its property in the sphere of advertisements, when a charge is paid to it, in a commercial way subject, however, to the general policy of the Corporation; that the amount of the charge is not for the promotion of a public purpose; that in fixing the prices for the time of advertisements and in applying a uniform standard practice as to the advertisements on television, the Corporation is not exercising an *imperium* but only it operates as a commercial enterprise in the domain of private law; and that, therefore, the act or decision complained of was within the commercial sphere of the activities of the respondent; it was in the domain of private and not public law and, therefore, not amenable to the jurisdiction of this Court; accordingly the appeal must fail.

(2) That, further, in the particular circumstances of this case the refusal of the respondents is obviously an act of merely preparatory and informative nature in the course of negotiations exploring the possibility of concluding an advertising agreement and as such it lacks the executory nature which could make it possible to challenge it by a recourse under Article 146 of the Constitution, had it been otherwise within the ambit of this Article.

*Appeal dismissed.*

Cases referred to:

- Milliotis v. Republic* (1968) 3 C.L.R. 477 at pp. 479-480;  
*Cyprus Flour Mills Ltd. and Another v. Republic* (1970) 3 C.L.R. 48 at p. 52;  
*Stamatiou v. Electricity Authority of Cyprus*, 2 R.S.C.C. 44 at pp. 45-46;  
*Sevastides v. Electricity Authority of Cyprus* (1963) 2 C.L.R. 497 at p. 500;  
*Greek Registrar of Co-operative Societies v. Nicolaidis* (1965) 3 C.L.R. 164;  
*Constantinides v. Cyprus Broadcasting Corporation*, 5 R.S.C.C. 34 at pp. 39-40;  
*Pitsillos v. C.B.C.* (1982) 3 C.L.R. 208 at p. 217.

**Appeal.**

Appeal against the judgment of the President of the Supreme

Court of Cyprus (Triantafyllides, P.) given on the 26th March, 1983 (Revisional Jurisdiction Case No. 267/82)\* whereby appellants' recourse against the refusal of the respondent for a frequency discount, was dismissed.

A. Skordis, for the appellants.

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P. Polyviou, for the respondents.

*Cur. adv. vult.*

A. LOIZOU J.: The majority judgment of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: This appeal is directed against a decision of the President of the Court whereby he dismissed the recourse of the appellants on the ground that the act or decision complained of is within the domain of private law and further that it is of preparatory nature.

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The appellants are a commercial concern which exclusively imports and distributes in Cyprus products of various foreign manufacturers. They wish to advertise such products on television. The respondents are a statutory corporation established under the law, which runs the sole radio and television station of Cyprus.

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In accordance with the existing practice of the respondents embodied in internal regulations, a "frequency discount" is granted only for advertisements in respect of products of one and the same manufacturer.

The appellants requested the grant to them of a "frequency discount" in respect of advertisements of products of different manufacturers imported and distributed by them. In reply to such a request the respondents stated that they were not willing to change their established practice and they offered to negotiate the granting of "free spots" on television in respect of products advertised by the appellants, and actually made an offer for "free spots" as encouragement for increases in advertising for products represented by the appellants.

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Two days later the respondents, on a telephone request by the appellants for a proposal regarding the number of "free spots"

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\* Reported in (1983) 3 C.L.R. 1139.

which the C.B.C. would exceptionally be prepared to grant to them, gave them further details. This offer was not accepted and the present recourse ensued whereby it was sought to annul the aforesaid decisions, acts or omissions of the respondents.

5 A decision or act may be the subject of a recourse to this Court if it is the result of exercise of an "executive or administrative authority" in the sense in which such words are used in paragraph 1 of Article 146. An "act" or "decision" in the sense of paragraph 1 of Article 146 is an act or decision in the domain only of  
10 public law.

It was canvassed by counsel for the appellants that the act or decision complained of is the result of the exercise of the duties of the Corporation under section 17(1)(c) of the Cyprus Broadcasting Corporation Law, Cap. 300A; the time for advertising and broadcasting by the Corporation is public property; the  
15 Corporation is managing a public ownership; the advertising time on television is a monopoly given by statute to the respondents and, consequently, the decision complained of is a decision within the domain of public law. He cited in support the cases  
20 of *Milliotis v. The Republic*, (1968) 3 C.L.R. 477, at pp. 479-480; and *Cyprus Flour Mills Co. Ltd. and Another v. The Republic*, (1970) 3 C.L.R. 48, at p. 52.

Counsel for the respondents submitted that the decision is one of private law having regard to (a) the general sphere of activities  
25 out of which the issue arose; (b) the nature of the specific power exercised in this particular case; and (c) the nature of the specific act.

The respondent is one of the Corporations established under the law. We see no difference between C.B.C. and other similar  
30 statutory corporations, such as the Electricity Authority of Cyprus or the Cyprus Telecommunications Authority. They have exclusive power within the domain of activities prescribed by the relevant statute.

The general predominant character of the respondents is a  
35 Corporation of public law. Whatever, however, the general and predominant character of the respondents might precisely be, it is only relevant for the purposes of this case to consider whether in relation to the particular function which is the subject

-matter of the recourse, the respondent was acting in the capacity of an organ, authority or person exercising any executive or administrative authority - (*John Stamatiou v. The Electricity Authority of Cyprus*, 3 R.S.C.C. 44, at pp. 45-46).

In *Pelopidas Sevastides v. The Electricity Authority of Cyprus*, (1963) 2 C.L.R. 497, the Electricity Authority, established under the Electricity Development Law, Cap. 171, refused or omitted to supply electricity to a person who had applied for such supply. The following legal issue posed for determination:-

“Whether, as regards the matters complained of in the recourse, the Respondent was acting in the capacity of an ‘organ, authority or person, exercising any executive or administrative authority’, in the sense of paragraph 1 of Article 146 of the Constitution and whether, therefore, the Court has jurisdiction to entertain the recourse.”

At p. 500 the Court said:-

“In determining whether or not a decision, act or omission of a public corporation, such as the Respondent, is ‘a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority’, in the sense of paragraph 1 of Article 146 of the Constitution, due regard must be had not only to its nature and character but also, primarily, to the powers vested in, and duties imposed on, such public corporation and its functions generally, as well as to the particular nature of the decision, act or omission concerned”.

After referring to the provisions of s.12 of the Electricity Development Law, Cap. 171, which imposes the duties on the E.A.C., the Court had this to say:-

“Furthermore, section 15 of the Electricity Law, Cap. 170, which, by virtue of the provisions of sub-section (3) of section 12 of Cap. 171, is made applicable to the respondent, provides that a person shall, on application, be entitled to a supply of electricity on the same terms on which any other person in the same area is entitled in similar circumstances to a corresponding supply of electricity and thus introduces an obligation on the respondent to give equal treatment to all applicants for the supply of electricity.

5 The nature of the duties and functions of the respondent, particularly when considered in conjunction with the power of the respondent to make regulations and its duty to give equal treatment to all persons, are, in the opinion of the Court, such as to bring the duty of securing the supply of electricity, with which the Court is concerned in this Case, within the realm of public law, even if the respondent is, to a certain extent, a commercial undertaking. ....

10 Any decision, act or omission of the respondent, therefore, which, inter alia, amounts to a failure on its part to perform its aforesaid duty, being within the realm of public law, would be 'a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority', in the sense of paragraph 1 of Article  
15 146

It follows, therefore, that the omission or refusal on the part of the respondent, as alleged in this Case, to supply electricity to the applicant concerns the performance of public law duty of the respondent and can, therefore, be  
20 made the subject of a recourse under Article 146 of the Constitution.

It should be added, however, that once a contract has been entered into between the respondent and a consumer of electricity, the compliance, by the parties thereto, with its terms and conditions would, as a rule, come within the  
25 realm of private law and thus not be the subject of a recourse under Article 146 of the Constitution".

In the case of *The Greek Registrar of the Co-operative Societies v. Nicos A. Nicolaidis*, (1965) 3 C.L.R. 164, the following test  
30 was laid:-

"In the opinion of the Court it is primarily the nature and character of a particular act or decision which determines whether or not such act or decision comes within the scope of paragraph 1 of Article 146 of the Constitution. Such  
35 an issue is one which must be decided on the merits and in the circumstances of each particular case and having due regard to such relevant factors as the office and status of the organ, authority, person or body performing such act or taking such decision, as well as to the circumstances and

context in which such act was performed or decision taken. As pointed out by the learned Judge in his Ruling... 'the same organ may be acting either in the domain of private law or in the domain of public law, depending on the nature of its action'. Ultimately, what is the important and decisive factor in this respect is the nature and character of the particular function which is the subject-matter of a recourse". (See also *Charalambides v. The Republic*, (1982) 3 C.L.R. 403).

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In *Miliotis v. The Republic* (supra), a case on which the appellants relied, a hawker was prevented from entering the Famagusta port area which is property of a public nature owned by the Government for public use purposes. The trial Judge said at p. 480:-

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"Of course, the Government may, within certain proper limits, impose restrictions and controls regarding the mode of use by the public of such a property".

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And further down:-

"In the circumstances I think that the total exclusion of the Applicant from the Port Area, as a hawker, was decided upon under the influence of a material misconception as to the extent of the obligation of the Government towards the canteenkeeper. ....

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Of course, nothing in this Judgment should be taken as laying down that the appropriate authorities are precluded from excluding hawkers in general from the Famagusta Port Area, if such step can be taken with lawful authority and on proper grounds; I leave this matter entirely open".

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In *Constantinides v. The Cyprus Broadcasting Corporation*, 5 R.S.C.C. 34, the following was stated on pp. 39-40:-

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"Under section 17 of the Cyprus Broadcasting Corporation Law, Cap. 300A, it is part of the duties of Respondent '(1) (a) to operate by sound or television a public broadcasting service for reception by the public' and also '(1)(d) to promote the development of the Broadcasting service whether in Cyprus or abroad, in accordance, as far as practicable, with recognized international standard practice'; further,

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in doing so, the Respondent is, inter alia, empowered, but not also obliged, to '(2)(e) provide and receive from other persons matter to be broadcast'.

5 The aforesaid duties (1)(a) and (1)(d) are, in the opinion of the Court, public duties.

10 The discharge of duty (1)(a), above, does not appear to be involved, in this Case. Concerning duty (1)(d), above, it has been considered by the Court whether or not the non-acceptance of a contribution might, in certain circumstances amount to a breach of such duty which could vest a corresponding right in the author thereof. The Court has reached the conclusion that the said duty (1)(d) is, by its very nature, a duty due only to the State, which has certain powers in the matter, and no rights of private persons arise in relation thereto. This view is also borne out by the fact that Cap. 300A has made, wherever this was intended to be so, specific provision concerning rights to the service to be provided by Respondent, as e.g. under sub-section (3) of section 19, in relation to political parties.

20 .....  
Coming now to the enabling provisions of section 17(2)(e) above, the Court is of the opinion that they do not involve the performance of a public duty by Respondent. In accordance with the evidence of the Director of the Greek Programmes of Respondent, which on this point has not been contested, the reception of matter to be broadcast presumably pursuant to the said provisions, is made under special agreement entered into specifically for each particular contribution. The Respondent contracts for contribution in the same manner as it may contract for other means necessary for the performance of its public duties; in deciding whether or not so to contract the Respondent is not acting in the domain of public law but in the domain of private law, because the process of seeking, selecting and accepting contributions for its programmes is not part of the public duties of Respondent but a preparatory step which is part and parcel of the commercial activities of Respondent, as such activities have already been recognized by this Court, concerning the Electricity Authority of Cyprus in the Case of *Andreas Marcoullides and The Republic*, R.S.C.C. p. 30, at p. 34.



Under a contract for a contribution, as aforesaid, the Respondent and the contributor meet in a legal situation where both parties are on an equal footing, as in any other private law contractual transaction, and not in an unequal relationship such as existing where a governmental organ exercises power towards a person governed; such latter relationship is indispensable, as a rule, to the notion of an administrative act or decision in the sphere of public law.

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In the light of the above, and as the circumstances in which the contributions of Applicant have not been accepted did not involve any decision by respondent upon a public competition for the purpose, in which case somewhat different considerations might have arisen, the Court is of the opinion that the non-acceptance by Respondent of the contributions of Applicant, as complained of, is not a matter of public law and does not amount to the exercise of administrative or executive authority in the sense of Article 146.1 with the result that this Court has no jurisdiction in this Case."

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In *Pitsillos v. C.B.C.*, (1982) 3 C.L.R. 208, the Full Bench considered only s.19(3) of the Cyprus Broadcasting Corporation Law, Cap. 300A, which provides:-

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"The Corporation shall at all times keep a fair balance in the allocation of broadcasting hours as between political parties".

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And it had this to say at p. 217:-

"Section 19(3), read in the context of the law in its entirety, aims to ensure that broadcasting be instrumental to the promotion of democratic rule, requiring that effective opportunity be given to opposing view-points to be put across to the people. The duty of the Corporation is two-fold: Firstly to the public who have a right to adequate information on political issues, and secondly to political parties who have a right to a proper platform for the ventilation of their views."

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The respondent Corporation was established under s.4 of the Cyprus Broadcasting Corporation Law, Cap. 300A. Its functions and duties are set out in s.17(1). It is an independent

statutory corporation and its activities are partly within the domain of public law and partly of private law. Some of its duties are due only to the State; some are due to the public and others are for the administration of the property of the Corporation. The property of the Corporation is not communal property. The Corporation, judging from its powers and duties and the general provisions of the law, is in general a public corporation with mixed duties and powers - public and private. It has a monopoly for audio and vision broadcasting.

In Greece similar corporations are of private law but that is provided by specific legislation. The general public has an "interest" in the wide sense of the term into the affairs of the Corporation but it has not generally an "interest" in the legal sense of the term. This, however, is not a predominant or even a factor to be taken into consideration in this case. The powers of the Corporation have to be examined in respect of the act or decision complained of. The nature of the act, decision or omission complained of must only be considered.

In the present case the relevant duty imposed on the respondent Corporation is set out in s.17(1)(c) of the Law that reads:-

"Control and operate the property of the Corporation in such manner as it may deem expedient".

Section 17(2)(1) is an enabling provision and reads:-

"17. (2) For the purposes of subsection (1) of this section the Corporation may, either in its own name or through any agent -

(a) .....

(1) accept advertisements for broadcasting with or without charge provided that they do not conflict with the general policy of the Corporation".

This duty under s.17(1)(c) is due to the State. The respondent has to operate its property in the sphere of advertisements, when a charge is paid to it, in a commercial way subject, however, to the general policy of the Corporation. The amount of the charge is not for the promotion of a public purpose.

In fixing the prices for the time of advertisements and in applying a uniform standard practice as to the advertisements on

television, the Corporation is not exercising an *imperium* but only it operates as a *commercial enterprise* in the domain of private law. It is true that only the respondent is authorised by law to display television advertisements. It has a monopoly in this field. This is not, however, a case in which the respondent Corporation refused to accept advertisements of the goods imported by the appellants; it relates to the application of a uniform practice as to "frequency discount" and the offer of "free spots" to the appellants, in the course of an exploratory process for granting "frequency discount" to them.

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It has been strenuously argued that the monopoly of the respondent Corporation, if it is not subject to judicial control, may lead to excess or abuse of power by the Corporation and the persons affected would be remediless.

The question of an arbitrary and in bad faith refusal of acceptance of advertisements is inconsistent with the proper exercise of the powers and duties of the respondent under s.17(2)(1) and it may fall within the domain of public law. But, as we have said earlier, we pronounce only on the issue raised, having regard to the act or decision challenged in the recourse, and we leave entirely open other questions which may arise in the exercise of the powers and duties of the Corporation.

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In the light of the above we hold the view that the act or decision complained of is within the commercial sphere of the activities of the respondent; it is in the domain of private and not public law and, therefore, not amenable to the jurisdiction of this Court.

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This would dispose of the appeal as this Court lacks jurisdiction. With regard to the alleged executory nature of the act complained of, we agree with the first instance Judge that in the particular circumstances of this case the refusal of the respondents is obviously an act of merely preparatory and in-formative nature in the course of negotiations exploring the possibility of concluding an advertising agreement and as such lacks the executory nature which would make it possible to challenge it by a recourse under Article 146 of the Constitution, had it been otherwise within the ambit of this Article.

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In the result the appeal is dismissed with no order as to costs.

PIKIS J.: The appellants, a commercial company in the import trade, were refused a frequency discount for the advertisement of imported products on television, allegedly in breach of the provisions of Article 28 of the Constitution guaranteeing equality before the Administration. They challenged the refusal by recourse to the Court, claiming the annulment of the decision. The theme underlying their recourse was failure to manage soundly the state monopoly of broadcasting entrusted to the respondents. The background to the recourse is briefly this:

5 Applicants claimed a discount, styled under the Regulations of the respondents, as a "frequency discount", merited because of the frequency with which they advertised their products on television. Respondents refused the application on the ground that extension of the frequency discount was restricted to advertisement of products of the same manufacturer. Therefore, it was immaterial that applicants advertised many of their imported products frequently enough, because they emanated from different manufacturers. In other words, the test was not the frequency with which a trader advertised his products but the

10 frequency with which products of the same manufacturer were displayed.

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The learned trial Judge dismissed the recourse without enquiring into its merits, holding that the cause, subject-matter of the recourse, did not sound in public law, being a matter exclusively referable to the commercial activities of the Cyprus Broadcasting Corporation. Support for this view was derived from the case of *Alecos Constantinides v. C.B.C.*, 5 R.S.C.C. 34. The Court also found the recourse was liable to be dismissed for another equally consequential reason, that is, the preparatory nature of the act lacking the executory character necessary to

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30 make it justiciable.

Appellants argued before us that the decision complained of was an act in the domain of public law and drew attention to the distinction between, on the one hand, acts of management by a public body of property of private character and, on the other, acts of management of public property in which the public has an interest (see, *Stassinopoulos - Law of Administrative Disputes* 1964, 4th ed., p. 65). A more pertinent distinction is that between disputes deriving from agreements between public bodies and citizens regulating property matters of a private

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nature and, disputes arising from the unilateral exercise of administrative or executive power bearing on private rights of citizens. In the former case, the dispute is amenable to the jurisdiction of the civil courts, whereas in the latter, depending on the nature of the power and the interest of the public in the matter, it may be amenable to the jurisdiction of administrative courts (see, *Conclusions from Decisions of the Greek Council of State* 1929-59, pp. 234-236).

It is settled that only unilateral acts of the Administration, entailing the exercise of administrative or executive power, are amenable to the revisional jurisdiction of the Supreme Court. The action must be unilateral in the sense that it originates from the exercise of powers vested by law in the Administration, as opposed to rights deriving from an agreement entered into between the parties. An additional requirement for the justiciability of a decision, act or omission of the Administration, is that it must be in the domain of public law. I shall not concern myself, in this case, with numerous decisions of our Courts instancing application of this principle in different situations. Briefly, the matter decided must be of interest to the public or a section of it, in contrast to decisions of interest only to the citizen affected thereby. In the latter category, mostly fall acts purporting to regulate property disputes, for example, a decision resolving a boundary dispute. An act having the above attributes, does not lose its administrative character if its implementation is dependent upon the execution of a contract. The decision to enter into a contract and its terms, if it concerns a matter in the domain of public law, is detachable, for purposes of review, from the contract that follows and may be litigated in proceedings under Article 146.1 of the Constitution. For example, a decision to award a tender, by the Government Tender Board, is justiciable notwithstanding the fact that interpretation and enforcement of any resulting contract is amenable to the jurisdiction of a civil court. Guided by the above principles, we are required, in this appeal, to determine whether the act under review is either preparatory or referable to a matter of private law and, as such, non justiciable under Article 146.1, as the learned trial Judge found. I cannot sustain the judgment of the trial Court on either of the two grounds upon which it is founded. My reasons for so judging, are briefly given below.

5 The Cyprus Broadcasting Corporation is a public corporation, the functioning of which is regulated by law, namely the Cyprus Broadcasting Corporation Law, Cap. 300A. It is entrusted with a State monopoly of sound and vision broadcasting, the management of which is of supreme importance to the public. Undoubtedly, it operates in the domain of public law. And with the manifold expansion of TV audience, the interest of the public in the operation and management of C.B.C. can be said to have increased in proportion corresponding thereto.

10 The Corporation is specifically empowered to accept, broadcast and display advertisements—s.17(2)(1). Advertising is a matter of interest to the public at large and of specific interest to those advertising their products on the mass media. Advertising over television in particular, is, because of the nature and  
15 effect of the display of the advertisement and the magnitude of the audience, a unique method of promoting products. The policy of the Corporation in this area, is a matter pre-eminently falling in the domain of public law, whereas the terms and conditions upon which advertisements are accepted is of specific  
20 interest to the trading community: Consequently, a complaint by a trader, complaining of unequal treatment or improper application of the rules adopted by the Corporation to ensure proper standards and uniform treatment, is justifiable under Article 146.1 of the Constitution. I do not regard the decision  
25 in *Constantinides*, supra, as dictating any other course. Two principles emerge from the decision in *Constantinides*: First, in fashioning their programmes—and that includes choice of their contributories—they discharge a public duty for which they are accountable to the State. Implicit in this principle  
30 is that control in this area is exercised by the body politic and not the judiciary. Second, choice of their collaborators and implementation of contracts entered into with contributories, are referable to the domain of private law because the choice of collaborators is a matter incidental to the commercial activities of the Corporation, whereas contracts executed in this  
35 area are entered into between parties negotiating at arm's length. Underlying this decision is recognition of freedom of activity to the Corporation to secure appropriate contributions for the discharge of its duties under the law. Once the discharge  
40 of these duties is not amenable to judicial review, inevitably

decisions flowing therefrom, are likewise beyond the scope of review.

Here, we are concerned not with the discharge of the general duties of the Corporation but with the evolution and enforcement of its policy in a distinct area directly affecting the rights of a section of the public, viz. the trading community and is of consequence, as earlier explained, to the public at large. Decisions taken in distinct areas of interest to the public, directly affecting the rights of citizens, are liable to judicial review (see, inter alia, *Pitsillos v. C.B.C.* (1982) 3 C.L.R. 208). Any other approach would leave the citizen remediless and deprive the public of the necessary protection through judicial control in this area. In my judgment, the act complained of was in the domain of public law, it signified a unilateral decision of the Administration and had all the attributes of an act justiciable under Article 146.1 of the Constitution.

Nor do I agree with the learned trial Judge that the act was of a preparatory character. Respondents refused a frequency discount. Their refusal was unqualified and as such determinative of the rights of the applicants, in connection with their inability for advertising over the television network. That the respondents offered, as a gesture of good will, free advertising spots, unacceptable as it turned out to the applicants, did not alter the character of the decision and did not sap it of its finality.

I would, for the reasons given above, allow the appeal.

A. LOIZOU J.: In the result the appeal is dismissed by majority justices Savvides, Loris and myself agreeing with the judgment of our Brother Justice Stylianides just delivered and in the circumstances there will be no order as to costs.

*Appeal dismissed by majority with no order as to costs.*