

## FREEDOM OF COMMERCIAL SPEECH IN EUROPE

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**ABSTRACT:** *The European lawyer is not familiar with the notion of commercial speech. The commercial speech doctrine has been originally developed under the First Amendment case law in the United States and does not have its counterpart in Europe. Closer investigation of the European jurisprudence shows, however, that the commercial speech has already and increasingly does give the European courts and scholars a splitting headache.*

**KEYWORDS:** Freedom of Commercial Speech in Europe, EUROPEAN COURTS, THE EUROPEAN LAWYER

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### WHAT ENCOURAGES THE DISCUSSION ON COMMERCIAL SPEECH IN EUROPE?

The European Court of Human Rights has held on several occasions, that statements made in the commercial context shall come within the realm of protection provided for by Article 10 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR). According to Article 10 ECHR “Everyone has the right to freedom of expression”. This is a rather general declaration, as it does not specify which categories of expression are to be protected. The Court noted that it does not distinguish between various forms of expression.<sup>1</sup> Consequently all expression, whatever its content, falls within the scope of Article 10 ECHR. The key question is therefore the scrutiny of the justification for interference under Art. 10 (2) ECHR.<sup>2</sup> The necessity test is less strict with regard to commercial statements than in case of political speech. The states enjoy a wider margin of appreciation in commercial matters, which implies that they may interfere with commercial speech to a greater extent than it would be allowed with regard to other kinds of expression (e.g. political speech).<sup>3</sup> Consequently, the jurisprudence of the European Court of Human Rights encourages the discussion on the extent to which political speech occupies a higher level of constitutional protection.

To speak about fundamental rights in Europe poses a certain risk of neglecting the complexity of the multiple systems of protection of fundamental rights on the European continent. There are three systems to be taken into account: (1) national constitutions, (2) the Council of Europe’s European Convention on Human Rights and Fundamental Freedoms, and the system of protection of fundamental rights and freedoms established in the European Union/Community. Yet, it does not suffice to discuss these three systems separately. The main difficulty when speaking about fundamental rights in Europe is to reveal and analyse the mutual interactions and links between these systems. This paper examines the status of commercial speech in the context of the protection of rights under the European Convention on Human Rights and in the European Community.

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<sup>1</sup> *Müller v. Switzerland* [1988] 13 EHRR 212, para 27.

<sup>2</sup> Munro, *The Value of Commercial Speech*, (2003) 3 *Cambridge Law Journal*, 138.

<sup>3</sup> *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* [1989] 12 EHRR 161.

## WHY DOES COMMERCIAL SPEECH CREATE PROBLEMS?

The need to communicate is the key characteristic of our society. The constitutional right to impart and receive information, encompassed by freedom of expression, is a reflection of this need. The increasing presence of business in society raises a question of the scope of protection accorded to speech by commercial actors.

The source of the problem with commercial speech is the social dimension of business. This notion reflects on one hand the development of advertising techniques and on the other the involvement of business entities in debates on issues of public concern. In today's world of mass communication and increased competition, advertising is constantly meeting new challenges. It becomes more and more sophisticated. But this not only in the sense of developing new techniques to draw consumer's attention to a particular product. The public awareness and sensitivity to social problems and human rights issues tremendously influence business strategies. Businesses are more sensitive to social and human rights issues. Complying with good commercial standards and human rights has obtained an important commercial dimension. More and more often the producers will not try to attract us to a particular product but to the company itself. They sell us an image. Due to all these reasons, advertisements brake existing standards and go beyond definitions that legal systems used to ascribe to them.

The aim of this study is to deal with speech, which includes both commercial and non-commercial elements and constitutes therefore a mix of commercial self-interest and a comment on issues of public concern. The analysis will mainly concentrate on the relationship between freedom of speech and fair competition in cases of disparaging comment by a competitor and statements by business entities about their own activity, which may be capable of distorting competition. Therefore, the influence of constitutional freedom of expression provisions on general clause in unfair competition laws will be analysed.

For the sake of clarity three categories of speech have been singled out in this paper: (1) political speech, which enjoys full constitutional protection, (2) commercial speech (e.g. "purely commercial" advertising), which does enjoy some constitutional protection.<sup>4</sup> It has been assumed, however, that it is basically subject to the strict liability regime of unfair competition and misleading advertising laws. The third (3) category of speech is a so-called mixed speech, including both commercial and non-commercial statements.

Restrictions on advertising constitute the core of commercial speech doctrine (2<sup>nd</sup> group above). Bans on tobacco or professional advertising rise concerns about their compatibility with the fundamental right to freedom of expression. The question how far can governmental regulation go in restricting truthful information on lawful activity is repeatedly dealt with by courts in Europe and United States. In this regard, the American courts emphasise the importance of commercial information for consumer choice. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>5</sup> the US Supreme Court held, that "[p]eople will perceive their own best interests if only they are well enough informed, and ...

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<sup>4</sup> An extensive, comparative study analysing the constitutional parameters of advertising, has been carried out in a form of research project initiated in 1992 by Confederation of European Community Cigarette Manufacturers. The project has been co-ordinated by Professor Wassilios Skouris from the Thessaloniki Centre of International and European Economic Law. National reports were published in 1994 in: Skouris (ed.), *Advertising and Constitutional Rights in Europe* (1994).

<sup>5</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 US 748 (1976).

*the best means to that end is to open the channels of communication rather than to close them...*"<sup>6</sup> Justice Blackman put it quite strongly: "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate".<sup>7</sup>

The third group consists of cases, in which commercial and non-commercial elements of speech are strongly intertwined. It is one of the main aims of this study to establish whether this kind of speech, due to its non-commercial element should be lifted to the higher protection standard accorded traditionally to political speech, or whether it should be subjected to strict liability regimes resulting from unfair competition and misleading advertising laws. The examples of cases belonging to this group are *Markt Intern*<sup>8</sup> and *Hertel*<sup>9</sup> cases decided by the European Court of Human Rights. These cases, which will be discussed in more detail later in this paper, concern disparaging statements by competitors, which constituted part of a public debate. Another case belonging to this group has been decided in Germany<sup>10</sup>. It concerned a dispute between *Kirch-Gruppe* and *Deutsche Bank* over statements about creditworthiness (or lack thereof) of the former, made by the management board's speaker of Deutsche Bank – Mr Breuer. On the occasion of the World's Economic Forum, Mr Breuer had been interviewed in New York about general economic developments in Germany, the situation of Deutsche Bank and, finally - at that time *the* topic in Germany – the situation of the heavily indebted *Kirch-Gruppe*, of which Deutsche Bank happened to be one of the creditors. Mr Breuer implied that *Kirch-Gruppe* would probably not obtain any further help from the financial sector. Deutsche Bank and Mr Breuer were sued for the contractual breach of confidentiality duty through having revealed details about the financial situation of the debtor. Mr Breuer raised the freedom of expression defence by claiming that the information on the lack of creditworthiness of the plaintiff was generally accessible by the public from the media and that the statements made constituted a contribution to a debate on an issue of public concern.

## WHAT IS COMMERCIAL SPEECH?

There is no satisfactory definition of commercial speech, neither in Europe nor in America. The attempts to define commercial speech have constituted the core of commercial speech doctrine in the United States. It is considered useful to take a look at the American developments before analysing how the commercial speech is treated in Europe.

As defined in the First Amendment case law<sup>11</sup> commercial speech is "*a speech that does nothing more than propose a commercial transaction*". Therefore it may also be referred to as transactional speech, whose content is primarily determined by the underlying transaction. "*Such speech indeed raises concerns different from those raised by pure speech, alone because it is intertwined with, and an inseparable component of, the underlying commercial*

<sup>6</sup> *Ibid.*, at 770.

<sup>7</sup> *Ibid.*, at 763.

<sup>8</sup> *Markt Intern v. Germany* (supra note 3).

<sup>9</sup> *Hertel v. Switzerland* [1998] 28 EHRR 534.

<sup>10</sup> OLG München, Urt. v. 10.12.2003, NJW 2004; LG München I, Urt. v. 18.02.2003, NJW 2003, 1046.

<sup>11</sup> *Virginia State Board of Pharmacy* (supra note 5) 762; see also *Edenfield v. Fane*, 507 US 761, 767 (1993); *Lorillard Tobacco Co. V. Reilly*, 533 US 525, 544 (2001); *United States v. United Foods, Inc.*, 533 US 405, 409 (2001).

*transaction itself*.”<sup>12</sup> It is however important to distinguish core transactional speech from non-transactional speech by commercial speakers. The U.S. Supreme Court presented different approaches when defining commercial speech. The attempts to construe a positive definition by stating what commercial speech is, are definitely overshadowed by statements as to what commercial speech is not. It is not speech on which money is spent to project.<sup>13</sup> It is not speech in a form sold for profit.<sup>14</sup> It is not speech that solicits money.<sup>15</sup> It is not speech on a commercial subject.<sup>16</sup> In *Central Hudson*,<sup>17</sup> commercial speech was defined as expression related solely to the economic interests of the speaker and its audience.

The most recent case decided by the California Supreme Court - *Kasky v. Nike*<sup>18</sup> - started anew the debate on the necessity of revision of the American commercial speech doctrine. On June 26, 2003, the U.S. Supreme Court dismissed a previously granted writ of certiorari as improvidently granted.<sup>19</sup> In the background of the dispute lay a debate over globalisation, in particular over the conditions under which multinational corporations invested in developing countries. At some point of this heated debate Nike became target of allegations that the working conditions in its factories in Southeast Asia were dangerous, that workers were underpaid and mistreated, and finally that child labour was being used. To meet with this criticism Nike wrote letters to newspaper editors and to universities and was publishing communications addressed to the general public. Independent investigations were carried out and concluded that some allegations against Nike did have merit. Nike commissioned an independent investigation carried by a former United Nations Ambassador Andrew Young, who then concluded that the charges were false. The results of this investigation were published by Nike in the form of an “editorial advertisement” (i.e. paid political advertisement). Mark Kasky, a California resident acting on behalf of the general public, brought a suit against Nike, under California unfair trade practices and false advertising laws, submitting that the statements were untrue and amounted to misrepresentations. The statutes invoked imposed strict liability (even non-negligent misstatements are actionable, and even truth is not a defence when the truthful statements are deemed misleading). It had been submitted that Nike’s statements, although addressed to the public generally, were also intended to reach and influence actual and potential purchasers of Nike’s products. Nike claimed full First Amendment protection due to the fact that the statements constituted a part of a political debate in which certain allegations were formulated with regard to its practices in the overseas factories. Kasky argued the opposite, claiming that Nike’s speech was commercial and therefore merited only limited, if any, First Amendment protection. The classification of the speech as commercial stems from the fact that Nike took part in a debate only for its own commercial purposes, in order to convince the consumers and therefore maintain or even raise the sales of its products. Kasky alleged that Nike’s statements were

<sup>12</sup> *Nike, Inc., et al. v. Marc Kasky*, On Writ of Certiorari to the Supreme Court of California, Brief of Amicus Curiae, Centre for Individual Freedom in support of Petitioners, February 28, 2003, No. 02-575, p. 6.

<sup>13</sup> Kozinski/Banner, Who’s Afraid of Commercial Speech, (1990) 76 *Virginia Law Review*, 638; *Virginia State Board of Pharmacy* (supra note 5).

<sup>14</sup> *Ibid.*, at 638.

<sup>15</sup> *Ibid.*, at 638.

<sup>16</sup> *Ibid.*, at 638.

<sup>17</sup> *Central Hudson Gas and Electricity Corporation v. Public Service Commission*, 447 US 557, 561 (1980).

<sup>18</sup> *Marc Kasky v. Nike, Inc., et al.*, 27 Cal. 4th 939.

<sup>19</sup> 539 US 1 (2003).

false and misleading and should thus be subjected to unfair competition and false advertising laws' regimes. The California Supreme Court agreed with Marc Kasky.<sup>20</sup>

The question posed in the motion to the U.S. Supreme Court to revise the Kasky judgement was as follows:

“[w]hen a corporation participates in a public debate – writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance – may it be subjected to liability for factual inaccuracies on the theory that its statements are “commercial speech” because they might affect consumers’ opinions about business as a good corporate citizen and thereby affect their purchasing decisions?”<sup>21</sup>

A more detailed analysis of the case falls outside the limited scope of this paper. It has been mentioned in order to give the reader an example of a possible variable of commercial speech which reveals the difficulty of distinguishing between political and commercial speech in order to define the latter.

In the light of numerous efforts by American doctrine and jurisprudence to define commercial speech the question arises whether it is at all possible to fashion such a definition of commercial speech, which would coherently encompass all its variables. As Allan Howard puts it “[a]s a matter of definition, there are no convincing reasons why one definition of commercial speech is better than another”<sup>22</sup> Consequently, a clear and coherent guidance enabling the distinction between commercial and non-commercial speech remains an open question.

## **Part I. Commercial Expression and the European Convention on Human Rights and Fundamental Freedoms**

The European Court of Human Rights held on several occasions that statements made in commercial context shall come within the realm of protection of Article 10 ECHR. The provision of this article reads as follows:

“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 authorities and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

This is a rather general declaration, as it does not specify what categories of expression are to be protected. The Court noted that it does not distinguish between various forms of expression.<sup>23</sup> Consequently, all expression, whatever its content, falls within the scope of Article 10 ECHR. The key question is therefore the scrutiny of the justification for interference under Art. 10 (2) ECHR.<sup>24</sup> It provides that:

<sup>20</sup> *Marc Kasky v. Nike, Inc., et al.* (supra note 18).

<sup>21</sup> *Nike, Inc., et al. v. Marc Kasky*, On Writ of Certiorari to the Supreme Court of California, Brief of Amicus Curiae, Centre for Individual Freedom in support of Petitioners, February 28, 2003, No. 02-575, p. 3.

<sup>22</sup> Howard, The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework, (1991) 41 *Case Western Reserve Law Review*, 1136.

<sup>23</sup> *Müller v. Switzerland* (supra note 1), para 27.

<sup>24</sup> Munro, The Value of Commercial Speech, (2003) 3 *Cambridge Law Journal*, 138.

“[t]he exercise of these freedoms [freedom to hold opinions and to receive and impart information and ideas], 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.”

Thus, for an interference to come within the margin of appreciation it has to be:

- (1) prescribed by law,
- (2) pursuing one or more of the legitimate aims set out in the second paragraph of Art. 10 ECHR and,
- (3) necessary in a democratic society to achieve such aims.

The necessity test is less strict with regard to commercial statements than in case of political speech.<sup>25</sup> The states enjoy a wider margin of appreciation in commercial matters, which implies that they may interfere with commercial speech to a greater extent than would be allowed with regard to other kinds of expression (e.g. political speech).

The commentators point out that advertisement is a form of speech, since - though often in an embellished or exaggerated manner - it aims at conveying information or opinions.<sup>26</sup> The profit-making purpose is considered irrelevant.<sup>27</sup> Neither the financial element nor the competition-related promotional statements are excluded from the ambit of protection of Art. 10 ECHR.<sup>28</sup> The justification for considering advertising a protected form of speech is that an individual (consumer) has got the right to receive information helping him or her to make an informed choice, regardless of whether this information concerns a political party or candidate s/he should vote for or the characteristics of a product s/he is planning on to buy.<sup>29</sup>

According to some opinions, the fact that the speaker defends a particular interest, economic or any other, does not deprive him or her of protection.<sup>30</sup> Nor does the speaker's professional status remove the speech from the realm of protection. In the *Barthold* case the ECtHR held that a rule of professional conduct, prohibiting a veterinary doctor from advertising, could not be invoked so as to prevent him from uttering statements on the need for an emergency veterinary service.<sup>31</sup> The Court held that the strict approach to the prohibition of advertising contained in the professional rules of conduct is not consistent with the freedom of expression. Such an approach, prohibiting the speech if there is even a slightest likelihood that the utterances will entail an advertising effect, deprives the members of a particular

<sup>25</sup> *Markt Intern v. Germany* (supra note 3).

<sup>26</sup> Jayawickrama, *The Judicial Application of Human Rights Law National, Regional and International Jurisprudence* (2002) p. 677.

<sup>27</sup> *Casado Coca v Spain* [1994] 18 EHRR 1.

<sup>28</sup> *Barthold v Germany* [1985] 7 EHRR 383, *Casado Coca* (supra note 27) para 35.

<sup>29</sup> Jayawickrama (supra note 26), p. 677.

<sup>30</sup> *Markt Intern v Germany* (supra note 3), joint dissenting opinion of Judges Golcuklu, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo and Valticos.

<sup>31</sup> *Barthold* (supra note 28) para 61.

profession from contributing to the public debate and hampers the press in its role as public watchdog.<sup>32</sup>

## THE EUROPEAN APPROACH TO COMMERCIAL SPEECH – BALANCING THE INTERESTS AT STAKE

The leading case concerning speech in commercial context - *Markt Intern*<sup>33</sup> - concerned a publisher of a trade bulletin, who represented the interests of small and medium sized retail businesses in their competition with large distribution companies (e.g. supermarkets and mail-order companies). The bulletins published by *Markt Intern* contained information on developments in the market with special emphasis on the commercial practices of large-scale companies. In a bulletin for chemist and beauty product retailers - “*Markt Intern – Dorgerie- und Parfuemeriefachhandel*”, Klaus Beermann described an incident involving an English mail-order firm – Cosmetic Club International. It allegedly did not return the purchase price to a client, who – not satisfied with the goods received - returned them to the seller. The article was based on one incident only and requested further feedback from the readers as to whether the event described constituted general business practice by Cosmetic Club International. The German court denied the freedom of expression protection for *Markt Intern*’s statements on the ground that they were made for the purposes of competition. The Commission (finding that there was a breach of Art. 10 ECHR) stated that the society is based on the articulation of economic interests.<sup>34</sup>

The main analysis in cases concerning speech in commercial context focuses on the third prerequisite for interference mentioned above: **necessary in a democratic society to achieve the aims pursued**. This question has been analysed by the European Court of Human Rights on several occasions already. On this basis, generally applicable criteria to determine the level of protection of the contested speech can be established:

1. the court identifies the interests at stake (e.g. the right to speak freely on one hand and the interests of persons who may be injured by speech on the other),
2. the contested speech is analysed – commercial and non-commercial elements of speech,
3. the weighing of commercial and non-commercial elements takes place within the framework of “public debate” test; the question, which has to be answered in this regard: can the contested speech contribute to a public debate on a particular issue?
4. if the non-commercial element outweighs the commercial, a higher level of protection will be accorded to the contested speech,
5. conflicting interests at stake (see point 1 above) are once again balanced.

The key question in establishing its level of protection is therefore the distinction and weighting between commercial and non-commercial elements of speech. As some commentators put it, the level of protection accorded by the Court will partly depend on the

<sup>32</sup> *Barthold v Germany* (supra note 28). See also: Jayawickrama (supra note 26), p. 681, Ovey/White, *The European Convention on Human Rights* (3<sup>rd</sup> edn. 2001) p. 276, Reid, *A Practitioner’s Guide to the European Convention on Human Rights* (1998) p. 239.

<sup>33</sup> *Markt Intern v. Germany* (supra note 3).

<sup>34</sup> *Ibid.*, para 202 – 03.

extent of the commercial involvement.<sup>35</sup> Consequently, the problem how to define commercial speech becomes highly relevant. Due to its many variables, commercial speech cannot be defined with reference to one characteristic only. Below, the approach to speech in commercial context adopted by the European Court of Human Rights is presented. It has to be noted, however, that in *Markt Intern*<sup>36</sup> and *Jakubowski*<sup>37</sup> cases the Court did not place an emphasis on distinguishing between commercial and non-commercial elements of the speech. By stating that the German authorities did not overstep the margin of appreciation it upheld the reasoning of the German courts.

### **Balancing - what interest does the speech serve?**

Freedom of expression serves the interest on the part of the general public in a free flow of information. In the *Markt Intern* case the European Court of Human Rights referred to the well-established line of the German case-law that statements “*intended to promote, in the context of commercial competition, certain economic interests to the detriment of others disqualifies the ability of the speech to contribute a public debate*”<sup>38</sup>. According to this line of reasoning, as soon as the commercial purpose is identified the speaker’s interests are accorded lower level of protection. Other purposes by which the speaker has been driven when making the statement are usually overshadowed by the commercial objective. The position of the German jurisprudence has been presented in the *Jakubowski* case:

In the first place, the motives of the person concerned and, linked to them, the aim and purpose of the comment are crucial. If the comment is motivated not by personal interests of an economic nature, but by concern for the political, economic, social or cultural interests of the community, if it serves to influence public opinion, the appeal will probably qualify for the protection of Article 5 para. 1 of the Basic Law (German Constitution), even if private and, more particularly, economic interests are adversely affected as a result. Conversely, the importance of protecting the latter interests is the greater, the less the comment is a contribution to public debate on a major issue of public concern and the more it is immediately directed against those interests in the course of business and in pursuit of a self-serving goal (see Constitutional Court Decisions [vol.] 66, 116 at 139) such as improving one’s own competitive position...<sup>39</sup>

According to some opinions, the judgement of the European Court of Human Rights in the *Markt intern* case is unacceptable, because the “[s]uppression of dissemination of true statements is clearly in violation of Art. 10 ECHR”.<sup>40</sup>

### **Distinguishing between commercial and non-commercial elements of speech - a “public debate” test**

The European Court of Human Rights dealt with the question of distinction between commercial and non-commercial elements of speech. In this regard the *Hertel*<sup>41</sup> case provides

<sup>35</sup> Clement/Mole/Simmons, *European Human Rights. Taking a Case under the Convention* (1999), p. 194.

<sup>36</sup> *Markt Intern v. Germany*, (supra note 3).

<sup>37</sup> *Jakubowski v. Germany* [1994] 19 EHRR 64.

<sup>38</sup> 1 BvR 108/80 and others [Entscheidungen des Bundesverfassungsgerichts, volume 62, pp. 230-248] as cited in *Markt Intern v. Germany* (supra note 3), para 19; see also: “Reminder Notice” case, BVerfGE 62, 230 (1982).

<sup>39</sup> *Jakubowski v. Germany* (supra note 37), para 19.

<sup>40</sup> Ellger, *The European Convention on Human Rights and Fundamental Freedoms and German Private Law*, in: Friedmann/Barak-Erez, *Human Rights in Private Law* (2001), p. 174.

for the most clear and helpful hints. The case involved an injunction against Mr. Hertel, who published results of his research, which proved that preparing food in microwave oven had some serious negative effects on human's health. The Swiss Association of Manufactures and Suppliers of Household Electrical Appliances instituted proceedings under the Swiss Unfair Competition Act. The Court held that in this case the margin of appreciation was reduced as the applicant had not made purely commercial statements but had participated in a debate on an issue of public concern.

In determining the scope of margin of appreciation afforded to national authorities the Court tried to establish whether Mr. Hertel could contribute to a debate on issues of public concern:

[A] margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of unfair competition. (...) It is however necessary to reduce the extent of margin of appreciation when what is at stake is not a given individual's purely "commercial" statements, but his participation in a debate affecting the general interest, for example, over public health; in the instant case, it cannot be denied that such a debate existed."<sup>42</sup>

According to the Court's reasoning, a decisive argument in determining the extent of the margin of appreciation afforded to national authorities is the existence of a public debate to which the statement in question may significantly contribute. The criteria applied by the Court in *Hertel* can definitely find a general application in distinguishing between commercial and non-commercial elements of the speech.<sup>43</sup> The first criterion is therefore the existence of a public debate on a particular issue, which is also the subject matter of a contested speech. The second criterion is whether or not the contested speech has got the potential of contributing significantly to the above-mentioned debate.<sup>44</sup> The criteria applied in *Hertel* were also applied in *Barthold*<sup>45</sup> case.

### **Demuth v. Switzerland**

In the case of *Demuth v. Switzerland*<sup>46</sup> the Court clearly departed from its previous approach. The case concerned state grants, or - refusing to grant a broadcasting licence to a private enterprise – Car TV AG. Car TV intended to broadcast a television programme primarily on cars, which would also deal with energy policies, traffic security, environmental issues (all of these being without any doubt issues of public concern). Consequently, the Court established it had to deal with mixed speech, including both – commercial and non-commercial elements. Having done so, the Court did not apply the "*Hertel/Barthold*- public debate" test. It did not consider whether there was a public debate to which the applicant could contribute. Instead, it referred to the enterprise's objectives.

### **The character of the speech determined through reference to the enterprise's objectives**

In the light of the previous case-law an emphasis on the objectives of the enterprise comes somewhat surprisingly. The Court stated that "*the purpose of Car TV AG was primarily*

<sup>41</sup>*Hertel v. Switzerland* (supra note 9).

<sup>42</sup>*Ibid.*, para 47.

<sup>43</sup> Scheyli, Die Abgrenzung zwischen ideellen und kommerziellen Informationsgehalten als Bemessungsgrundlage der „margin of appreciation“ im Rahmen von Art. 10 EMRK, *EuGRZ* 2003, p. 457.

<sup>44</sup> Weber, *Menschenrechte. Texte und Praxis* (2004), p. 338.

<sup>45</sup> *Barthold v. Germany* (supra note 28).

<sup>46</sup> *Demuth v. Switzerland* (2004) 38 EHRR 20.

*commercial in that it intended to promote cars and, hence, further car sales*".<sup>47</sup> Then the Court concludes that "*where commercial speech is at stake, the standards of scrutiny may be less severe*".<sup>48</sup> It seems that the commercial character of the speech was established merely on the basis of the commercial objectives of the enterprise. Consequently the question arises whether the objectives of an enterprise are decisive in determining the character of the speech. When a commercial actor speaks is it always commercial speech?

The judgement in the *Demuth* case has to be criticised. In his dissenting opinion, Judge Jörundsson, pointed out the importance of taking into account the contents of the programme, which "*went well beyond the commercial framework*"<sup>49</sup>, as it intended to deal with issues of great public concern like traffic safety, energy policies, environmental issues. As Judge Jörundsson stated:

"These matters were indubitably of general and public interest and would have contributed to the ongoing, general debate on the various aspects of a motorised society. It is, therefore, necessary to reduce the margin of appreciation pertaining to the authorities, since what was at stake was not merely a given individual's purely "commercial" interests, but his participation in an ongoing debate affecting the general interest."<sup>50</sup>

The analysed case brings into question the approach applied by the Court so far. In as much as the speaker element of the speech has to be taken into account, the objective of the speaker's activity definitely plays a role. It cannot, however, be a decisive factor in deciding what is the scope of protection of a particular statement. The content of the speech and the context in which it has been spoken are much more important and have to be taken into account adequately.

To sum up the arguments in this part of the paper it has to be noted that commercial speech clearly falls within the realm of protection of Art. 10 ECHR. The key question in defining its level of protection is the scrutiny of the justification for restriction in accordance with Art. 10 (2) ECHR. In assessing the extent of the necessity of an interference, the state enjoys a certain margin of appreciation, which is wider in commercial matters. It follows that where commercial speech is at stake, the standards of scrutiny may be less severe.<sup>51</sup> The ECtHR held that a wider margin of appreciation is essential in particular in an area as complex and fluctuating as that of unfair competition.<sup>52</sup> The scope of the margin is however subjected to European supervision. In exercising this supervision, the ECtHR applied a "public debate" test, in that it determined whether there exists a public debate to which the contested statement may significantly contribute. Clearly, the non-commercial element of the speech touching upon the issues of public concern plays an essential role in determining the level of protection of speech in commercial context.

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<sup>47</sup> *Ibid.*, para 42.

<sup>48</sup> *Ibid.*, para 42.

<sup>49</sup> *Demuth v. Switzerland* (supra note 46), dissenting opinion of Judge Joerundsson, p. 435.

<sup>50</sup> *Ibid.*, p. 436.

<sup>51</sup> *Ibid.*, para H9.

<sup>52</sup> *Markt Intern v. Germany* (supra note 3), para 55.

## Part II. Commercial Speech in the Law of the European Union

When established in the 1950s, the European Communities were predominantly concerned with the creation and operation of the common market, based on the four fundamental freedoms (freedom of movement of goods, services, capital and persons). This dominating emphasis has been gradually balanced by the growing concerns about the need to have recourse to the protection of fundamental rights, in order to legitimise the regulation of the common market. Consequently, the internal market law has been influenced by fundamental rights as enshrined in the ECHR and resulting from the constitutional traditions common to the Member States. It remains to be seen if the instinctive assumption, that the EU Charter of Fundamental Rights will mark a watershed in the development of the internal market law, will prove to be true.<sup>53</sup>

The impact of fundamental rights on the internal market law can be dual, in that it concerns either the process of approximation of laws or the limitations imposed on fundamental freedoms. The fundamental rights serve as signposts for the manner in which the process of approximation of law is being carried out, in that the new harmonising rules have to be scrutinised for their conformity with fundamental rights, underpinning the internal market. They serve as a yardstick on which to judge the legality of Community law. The impact of fundamental rights on a fundamental freedom may be dual, in that it may serve either as a limitation to a fundamental freedom or as a limitation to a fundamental freedom. The first aspect embraces situations in which a Member State is imposing a restriction on the freedom of movement and this restriction is claimed to run counter to the requirements of the protection of fundamental rights. The second aspect covers cases in which the Member States rely on the fundamental rights when they justify the exceptions to the fundamental freedoms. The fundamental rights must serve as signposts for the Member States when they rely on exceptions to fundamental freedoms.<sup>54</sup> According to the *ERT* judgment, “*where a Member State relies on an overriding requirement relating to the public interest or on ground for justification stipulated in the Treaty in order to justify a national rule which is likely to obstruct the exercise of a fundamental freedom arising from the Treaty, such justification must be interpreted in the light of the general principles of law and in particular of fundamental rights.*”<sup>55</sup> In this particular case the freedom to provide services had to be interpreted “*in the light of the general principle of freedom of expression embodied in Art. 10 of the European Convention on Human Rights*”.<sup>56</sup> The restriction on broadcasting activities imposed by Greek law had to pass the test of conformity with the right to free speech as incorporated in Art. 10 ECHR. The fundamental right works here as a limitation to a Member State’s limitation to the fundamental freedom.

In the light of the above-mentioned adherence to fundamental rights, it is not surprising, that in the context of an emphasis placed on the economic aspects of market integration, the issues concerning the freedom of commercial expression have been referred to the European Court

<sup>53</sup> For a discussion on the impact of the Charter of Fundamental Rights on the internal market law see: Weatherill, *The EU Charter of Fundamental Rights and the Internal Market*, Francisco Lucas Pires Working Papers Series on European Constitutionalism, Working Paper 2003/03, Lisboa.

<sup>54</sup> Craig/De Burca, *EU Law, Text, Cases, and Materials* (3<sup>rd</sup> edn. 2003) pp. 210 et seq.; De Burca, *Human Rights: The Charter and Beyond*, Jean Monnet Working Paper No.10/01, p. 10 et seq.; Clapham, *A Human Rights Policy for the European Community* (1990) 10 *YBEL* 309.

<sup>55</sup> *ERT v. Dimotiki* Case C-260/89 [1991] ECR I-2925; [1994] 4 C.M.L.R. 546, para 42 et seq; see also: *Familiapress* Case C-368/95 [1997] ECR I-3689, [1997] 3 C.M.L.R. 1329, para 24.

<sup>56</sup> *Ibid.*, para 45.

of Justice for adjudication. The issue of commercial speech was raised on the occasion of the challenge to the legality of the Tobacco Advertising Directive (Directive 98/43/EC of the European Parliament and the Council of 6 July 1998, on the approximation of the laws, regulations, and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products).<sup>57</sup> Germany instituted proceedings seeking the annulment of the Directive. In the discussion on tobacco advertising the lawfulness of restrictions imposed on speech about lawful products comes under close scrutiny. The question whether a restriction allegedly pursuing public health objectives is proportional under the “necessity test” set out in Art. 10 (2) of the European Convention on Human Rights is thoroughly examined. Several possible grounds for annulment have been raised, inter alia the violation of the right to freedom of speech. This paper will analyse the reasoning presented by Advocate General Fennelly in this respect. The issue of compatibility of the restriction on advertising and sponsorship of tobacco products with the right to freedom of expression has not been addressed in the Court’s judgment, due to the fact that it upheld the challenge on the ground of lack of proper Treaty basis and annulled the Directive.

### **SCOPE AND INTERPRETATION OF THE RIGHT TO FREE SPEECH IN THE EU**

The EU Charter of Fundamental Rights, incorporated into the Constitutional Treaty, embodies the right to free expression. Art. II-11 reads as follows:

1. Everyone has the right to freedom of expression. This rights shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Although not explicitly codified, the right to free speech as provided for in Art. II-11 of the Charter, is not a novelty and has been present in the Community legal order. According to the well established case law, fundamental rights form an integral part of the general principles of law, the observance of which the European Court of Justice ensures. Art. 6 of the Treaty on the European Union provides for the protection of fundamental rights in the Community legal order. It reads as follows:

“[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from constitutional traditions common to the Member States , as general principles of Community law.”

The Court draws inspiration from the constitutional traditions of the Member States and international human rights treaties on which the Member States have collaborated or to which they are signatories.<sup>58</sup> The ECHR has been accorded a special role in this respect.

Title VII of the Charter contains general clauses which relate to the interpretation and application of the Charter. Art. II-52 contains a clause defining the conditions for the restrictions on rights and freedoms.<sup>59</sup> According to this provision:

<sup>57</sup> *Germany v. Parliament* Case C-376/98 [2000] ECR I-8419; [2000] 3 C.M.L.R. 1175

<sup>58</sup> See: *Nold KG v. Commission*, Case 4/73 [1974] ECR 491.

<sup>59</sup> For criticism see: Triantafyllou, *The European Charter of Fundamental Rights and the “Rule of Law”*: Restricting Fundamental Rights by Reference, (2002) 39 *CMLR*, 53.

“[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or need to protect the rights and freedoms of others.”

In other words a restriction to pass a scrutiny test must be:

1. prescribed by law,
2. respect the essence of the right or freedom at issue,<sup>60</sup>
3. necessary but proportionate to genuinely meet
  - a. the objectives of general interest recognised by the Union,
  - b. need to protect the rights and freedom of others.

This test greatly resembles the “necessity test” as set out in Art. 10 (2) ECHR.

Art. II-52 (3) of the Charter has special significance in defining the scope of protection of rights and freedom. It reads that:

“[i]nsofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

This provision deals with the relation between Charter and ECHR, already much discussed in the literature.<sup>61</sup> A general clause including ECHR but referring to international human rights instruments and constitutional provisions of Member States is contained in Art. II-53 (which to some extent resembles Art. 53 ECHR on safeguards for existing human rights<sup>62</sup>):

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their specific fields of application, by Union law and international law and by international agreements to

<sup>60</sup> The prerequisite that the limits imposed on rights must be justified by the overall objective pursued by the Community, on condition that the substance of these rights is left untouched, has been established by the ECJ. See: *Nold KG v. Commission* (supra note 58), para 14.

<sup>61</sup> Lemmens, The Relationship between the Charter of Fundamental Rights of the EU and the ECHR: Substantive Aspects, (2001) 8 *MJ*, 49; Lenaerts/de Smijter, The Charter and the Role of the European Courts, (2001) 8 *MJ*, 49; Lenaerts/de Smijter, A “Bill of Rights” for the European Union, (2001) *CMLR*, 290 et seq.; Tulkens, Towards a Greater Normative Coherence in Europe: The Implications of the Draft Charter of Fundamental Rights of the European Union, (2000) 21 *HRLJ*, 329; Parmar, International Human Rights Law and the EU Charter, (2001) 8 *MJ*, 351, McCrudden, The Future of the EU Charter of Fundamental Rights, Jean Monnet Working Paper No.10/01, p. 17 et seq.; Andrej Victor Mykola Wasyl Busch, *Die Bedeutung der Europäischen Menschenrechtskonvention für den Grundrechtsschutz in der Europäischen Union* (2003).

<sup>62</sup> Art. 53 ECHR: Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

The explanations to the Charter state that Art. 53 (Art. II-53 of the Constitutional Treaty) aims at safeguarding the level of protection already afforded. The importance of the ECHR is emphasised. As it has been stated in the explanations: "[t]he level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR, with the result that the arrangements for limitations may not fall below the level provided for in the ECHR."<sup>63</sup>

In Art. II-52 (4) the Charter refers also to the common constitutional traditions of Member States by stating that insofar as "*the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.*"

Last but not least it has to be mentioned that the Constitutional Treaty includes an explicit competence for the Union to accede to the European Convention on Human Rights (Art. II-7 (2)).<sup>64</sup>

### **Freedom of expression submissions in the "Tobacco Advertising" case**

The applicants submitted that "*commercial speech such as advertising by which undertakings can give the public useful information about their products*" comes within the realm of protection of Art. 10 ECHR.<sup>65</sup> On this basis they concluded that such protection exists also in the Community legal order. The defendants on the other hand emphasised that freedom of expression is not absolute and Art. 10 (2) ECHR permits restrictions thereupon in the interests of public health.<sup>66</sup> The dispute in the case at hand concentrated therefore on legitimacy and proportionality of restrictions based on the objectives of public health alongside with the those relative to the achievement of the internal market.

### **Defining commercial speech and its scope of protection in the Community**

Advocate General Fennelly defines commercial speech as:

<sup>63</sup> Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels, 11 October 2000, CHARTE 4473/00 CONVENT 49.

<sup>64</sup> For analysis of the problem of accession, in particular Opinion 2/94 (Opinion 2/94 on Accession of the Community to the ECHR [1996] ECR I-1759), see: Toth, *The European Union and Human Rights: the Way Forward*, (1997) *CMLR* 491 – 529; De Burca, *Human Rights: The Charter and Beyond*, Jean Monnet Working Paper No.10/01, p. 8; Craig/De Burca, (supra note 53), chapter 8; Krueger, *Reflections Concerning Accession of the European Communities to the European Convention on Human Rights*, (2002) 21 *Penn State International Law Review*, 89 - 99; Imbert, *Speech at the Judges' Symposium: The Council of Europe's European Convention on Human Rights and the European Union's Charter of Fundamental Rights*, Luxembourg (16.09.2002), available at <http://www.coe.int>; Lemmens, *The Relationship between the Charter of Fundamental Rights of the EU and the ECHR: Substantive Aspects*, (2001) *MJ*, 49; Krzeminska, *Przystąpienie Unii Europejskiej do Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności*, (2005) *Radca Prawny*, pp. 5 – 11; Wetzel, *Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion between the Luxembourg and Strasbourg Courts*, (2003) *Fordham Law Review*, 2823; Andrej Victor Mykola Wasyl Busch, *Die Bedeutung der Europäischen Menschenrechtskonvention für den Grundrechtsschutz in der Europäischen Union* (2003).

<sup>65</sup> Case C-376/98 (supra note 56), para 54.

<sup>66</sup> *Ibid.*, para 55.

“the provision of information, expression of ideas or communication of images as part of the promotion of a commercial activity and the concomitant right to receive such communication”<sup>67</sup>

A clear statement as to the need for protection of commercial expression follows:

“commercial expression should also be protected in Community law. Commercial expression does not contribute in the same way as political, journalistic, literary or artistic expression do, in a liberal democratic society, to the achievement of social goods such as, for example, the enhancement of democratic debate and accountability or the questioning of current orthodoxies with a view to furthering tolerance or change. However, in my view, personal rights are recognised as being fundamental in character, not merely because of their instrumental, social functions, but also because they are necessary for the autonomy, dignity and personal development of individuals. Thus, individuals’ freedom to promote commercial activities derives not only from their right to engage in economic activities and the general commitment, in the Community context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on *any* topic, including the merits of the goods or services which they market or purchase.”<sup>68</sup>

According to the above-mentioned definition commercial speech encompasses statements strictly linked to the commercial promotion of products and services. This group of statements has been classified in this paper as purely commercial speech, strictly concerned with the achievement of price and sales-volume targets. On the basis of the Advocate General’s opinion a conclusion may be drawn that commercial speech is also protected in the Community. The method of protection accorded to commercial speech under the European Convention on Human Rights is likely to be applied by analogy to the scope of protection accorded to commercial speech in Community legal order. The European Convention on Human Rights has been incorporated by the European Court of Justice to the Community legal order as a source of inspiration in fleshing out the general principles of law. Since the adoption of the Treaty establishing the Constitution for Europe, freedom of expression became a codified right as expressed in the Charter of Fundamental Rights, which was incorporated as a part of the European Constitution. The Charter does not mention commercial expression nor does it explicitly limit the protection to non-commercial (political, literary, artistic etc.) expression. Because the right to freedom of expression has been construed (in terms of its wording) similarly to its concomitant in the ECHR, and moreover on the basis of Art. II-52 (3), insofar as the rights in the Charter correspond to rights guaranteed by the ECHR, “*the meaning and scope of those rights shall be the same as those laid down by the said Convention*”, the protection accorded to commercial speech in the Union’s law will be construed on the basis of the interpretation of Art. 10 ECHR as developed by the ECtHR. This conclusion is all the more legitimate in the light of the European Union’s accession to the European Convention on Human Rights (Art. II-7 (2) Constitutional Treaty).

The ECJ referred, on many occasions, to the case law of the ECtHR. This method of fleshing out the general principles of law and after the adoption of the Constitutional Treaty the provisions of the Charter of Fundamental Rights will continue. It resembles the practice of

<sup>67</sup> Opinion of Advocate General Fennelly, Case C-376/98 (supra note 56), para 153.

<sup>68</sup> *Ibid.*, para 154.

national courts in signatory countries to the ECHR when dealing with cases concerning human rights, of referring to the provisions of the European Convention on Human Rights or case-law of the ECtHR. Of course the intensity of this practice and therefore the intensity of the influence of the Convention on the interpretation and application of national law by national courts differs from country to country (it is for instance a common practice in Poland). In order to safeguard the internal, European-wide consistency of the system of protection of human rights and to avoid the conflict of interpretation between the two European courts the common reference to the ECHR is highly desirable. In light of the future membership of the EU in the ECHR, such a conflict is no longer likely to occur. Preceding the adoption of the Constitutional Treaty and the clear competence for the Union to accede to the Convention discussion on the relationship between the two legal orders, many commentators emphasised that although conflict between the two courts was not likely, accession would have anyway been highly recommended.<sup>69</sup>

To conclude the arguments in this section it has to be noted that commercial speech is clearly recognised by the Community law.<sup>70</sup> Its protection is based on the general statement that all speech regardless of form is protected. The exact scope of protection will be established by reference to the restrictions.

### **Restrictions upon commercial speech in the Community law**

Freedom of expression is not absolute and may be subject to restrictions so as to achieve certain objectives of relevance for the common good or to secure the rights of others.<sup>71</sup>

In the Tobacco Advertising Directive the restriction upon freedom of speech was justified by the need to protect public health.<sup>72</sup> Advocate General stated that the objective of protecting public health is recognised as an objective justifying restriction on speech under the European Convention on Human Rights and as an objective justifying restrictions on the fundamental freedoms in the Community legal order (Art. 36 TEC).<sup>73</sup> The argument put forward in the Tobacco Advertising case is that the reduction of tobacco advertising will reduce the consumption and therefore improve public health.

In scrutinising the proportionality of legislative choices made by the institutions in complex fields, the Court has to examine whether the exercise of discretion is vitiated by a manifest error or a misuse of powers or whether the institutions did not clearly exceed the bounds of their discretion.<sup>74</sup> Advocate General referred to the rules governing the imposition of restrictions on rights under the European Convention on Human Rights and distinguished between the general rule in this regard and the specific case of commercial expression. As a rule the restrictions imposed on the exercise of rights have to be justified by presenting

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<sup>69</sup> Weatherill, *The EU Charter of Fundamental Rights and the Internal Market*, Francisco Lucas Pires Working Papers Series on European Constitutionalism 2003, p. 36.

<sup>70</sup> *Ibid.*, p. 36.

<sup>71</sup> Opinion of Advocate General Fennelly, Case C-376/98 (supra note 56), para 155.

<sup>72</sup> Once again the reference will be made to the opinion of Advocate General Fennelly on this matter. For the sake of argument, in order to discuss the problem of constitutional protection of commercial speech, Advocate Fennelly assumed (contrary to what he has concluded in sections V(i) and (iii) to (v) of his opinion) that Tobacco Advertising Directive was a lawful and proportionate mean to pursue internal market objectives (Opinion of Advocate General Fennelly, Case C-376/98 (supra note 56), para 152).

<sup>73</sup> *Ibid.*, para 156.

<sup>74</sup> *Ibid.*, para 157.

evidence of a pressing social need for their imposition.<sup>75</sup> The commercial expression represents a special case in this regard. The ECtHR held that limits thereupon are acceptable where the competent authorities 'on reasonable grounds' had considered the restrictions to be necessary.<sup>76</sup> Similarly in the *RTL* case, the Advocate General Jacobs referred to two cases of the European Court of Human Rights – *Casado Coca v Spain* and *VGT Verein Gegen Tierfabriken v Switzerland* – and stated that the ECtHR is willing to accept considerable restrictions on commercial advertising and that a wider margin of appreciation for national authorities is important, particularly in an area as complex and fluctuating as that of advertising.<sup>77</sup>

In the Tobacco Advertising case the difference in treatment has been justified by reference to different functions and interactions with more general public interest. The Advocate General concluded that “*political expression serves certain extremely important social interest (...) commercial speech does not normally perform a wider social function of the same significance.*”<sup>78</sup> Consequently the adoption of a similar approach the Community legal order has been advocated:

“where it is established that a Community measure restricts freedom of commercial expression, as the Advertising Directive clearly does, the Community legislator should also be obligated to satisfy the Court that it had reasonable grounds for adopting the measure in question in the public interest. In concrete terms, it should supply coherent evidence that the measure will be effective in achieving the public interest objective invoked – in these cases, a reduction in tobacco consumption relative to the level which would otherwise have obtained – and that less restrictive measures would not have been equally effective.”<sup>79</sup>

### Free Speech Meets Free Movement

The analysis mandated by the concept of commercial speech appears to demand a broad inquiry into the position of the right to free speech in the commercial context of Community market regulation. A discussion on the impact of the right to free speech on the economic law of the internal market reveals an interesting area of conflict between fundamental rights and fundamental freedoms in the Community law context. The fundamental freedoms, on which the common European market is based, have been present in the Community legal order since its very beginning. The fundamental rights, on the other hand, found their way into this system later, through general principles of law, mostly due to the judicial activism of the European Court of Justice. They have come a long way from not being considered at all to

<sup>75</sup> *Sunday Times v. United Kingdom*, judgment of 26 April 1979, Series A, No 30, (1979-80) 2 EHRR 245; *Observer and Guardian v. United Kingdom*, judgment of 26 November 1991, Series A, No 216, (1992) 14 EHRR 153, para 70 – 71 (71. The adjective 'necessary' within the meaning of Article 10(2) of the Convention is not synonymous with 'indispensable' or as flexible as 'reasonable' or 'desirable', but it implies the existence of a pressing social need. 72. The notion of necessity implies that the interference of which complaint is made corresponds to this pressing social need, that it is proportionate to the legitimate aim pursued and that the reasons given by the national authorities to justify it are relevant and sufficient.); *Barthold v. Germany*, [1985] 7 E.H.R.R. 383, para 55.

<sup>76</sup> Opinion of Advocate General Fennelly, Case C-376/98 (supra note 56), para 158; *Markt Intern v. Germany* (supra note 3), para 37; *Groppera v. Switzerland*, judgement of 28 March 1990, Series A, No 173, para 55.

<sup>77</sup> Opinion of Advocate General Jacobs, Case C-245/01 *RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, [2003] ECR I-0000, para 54.

<sup>78</sup> Opinion of Advocate General Fennelly, Case C-376/98 (supra note 56), para 158.

<sup>79</sup> *Ibid.*, para 159.

their full and explicit recognition in the Charter of Fundamental Rights, incorporated into the Constitutional Treaty.<sup>80</sup>

“Art. 10 ECHR is no stranger to the European Court’s case law on free movement.”<sup>81</sup> In the case *Familiapress v. Heinrich Bauer Verlag*<sup>82</sup> the ECJ dealt with the conflict between the fundamental freedom to free movement of goods and the right to freedom of speech. A German magazine granted readers a prize for solving a crossword puzzle. Such practice was not permitted Austria where the publisher intended to sell the said magazine. The relevant Austrian unfair competition law provision was said to protect smaller publishers. The Austrian government submitted that through offering free gifts large publishers were in a better position to attract consumers and eliminate smaller publishers unable to finance this expensive promotion method. The restriction on cross-border trade was therefore justified as serving the objective of maintaining press diversity, which in turn was considered as a mean to safeguard freedom of expression. Clearly, the protection of fundamental rights adversely affected intra-Community trade. The ECJ held that Member States may uphold restrictions on cross-border trade, by appealing to the requirements of safeguarding the protection of fundamental rights. Interestingly, although the ECJ was rather sceptical of the positive effects of upholding the Austrian rule, it left it for the national court to balance the competing interests.<sup>83</sup>

The question of the relationship between the fundamental rights and fundamental freedoms has already commanded considerable attention of the European Court of Justice. The *Schmidberger* case raised the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with fundamental freedom enshrined in the EC Treaty. It regarded the question of the scope of freedom of expression and assembly, as guaranteed by Art. 10 and 11 ECHR, and the free movement of goods, in the circumstances when the former are relied upon as a justification for the restriction of the latter.<sup>84</sup> Schmidberger was a German transport undertaking, essentially involved in transporting steel and timber between southern Germany and northern Italy, using the Brenner motorway in Austria. The Transitforum Austria Tirol, an environmental protection association, gave notice to the Austrian authorities of an intention to hold a demonstration, principally against the pollution caused by the heavy transport in the Tirol region. It would involve blocking of the said route. The competent authorities granted permission. The demonstration had been widely publicised and alternative routes were suggested. Schmidberger brought proceedings against Austria claiming that the authorities failed to

<sup>80</sup> Craig/De Burca, (supra note 53); Pernice, *Grundrechtsgehalte im Europäischen Gemeinschaftsrecht* (1979); Cassese/Clapham/Weiler (Eds.), *Human Rights and the European Community* ( Vol. 3 1991); Von Bogdandy, The European Union as Human Rights Organisation? Human Rights and the Core of the European Union, (2000)*CMLR*, pp. 1307 – 1338; De Burca, Human Rights: The Charter and Beyond, Jean Monnet Working Paper No.10/01;

<sup>81</sup> Weatherill, The EU Charter of Fundamental Rights and the Internal Market, Francisco Lucas Pires Working Papers Series on European Constitutionalism 2003, p. 32.

<sup>82</sup> *Vereinigte Familiapress Zeitungs- und Vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95 [1997] ECR I-3689.

<sup>83</sup> Weatherill, The EU Charter of Fundamental Rights and the Internal Market, Francisco Lucas Pires Working Papers Series on European Constitutionalism 2003, p. 35.

<sup>84</sup> *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republic of Austria*, Case C-112/00, [2003] ECR I-5659, para 77.

guarantee the freedom of movement of goods in accordance with the EC Treaty, and claimed damages in respect of standstill periods, loss of earnings and additional related expenses.<sup>85</sup>

The Advocate General Jacobs pointed out that it was conceivable that cases in which a Member State would invoke the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms, may become more frequent in the future, as many of the grounds of justification currently recognised by the Court could also be formulated as being based on fundamental rights considerations.<sup>86</sup> This statement was strengthened by referral to another case in which the Court was required to reconcile the conflict between the fundamental rights and fundamental freedoms – *Omega Spielhallen- und Automatenaufstellung-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*<sup>87</sup>. In this case, Advocate General Stix-Hackl was dealing with the question of the order of precedence that is to be afforded to fundamental rights as general principles of Community law and pointed out that it is particularly questionable whether there is in fact an order of rank between the fundamental rights applicable as general principles of law and the fundamental freedoms enshrined in the EC Treaty.<sup>88</sup> He concluded by stating:

“it appears to me to be significant that in cases such as this the necessary weighing-up of the interests involved ultimately takes place in the context of the actual circumstances in which in particular fundamental rights are restricted. The need ‘to reconcile’ the requirements of the protection of fundamental rights cannot therefore mean weighing up fundamental freedoms against fundamental rights per se, which would imply that the protection of fundamental rights is negotiable.”

The comparison between the next discussed case – *Commission v. France*<sup>89</sup> - and *Schmidberger* is symptomatic of the need to weigh up the competing interests in the context of the actual circumstances of the case. The Court emphasised that the circumstances characterising the *Schmidberger* case were clearly distinguishable from the situation in the case giving rise to the judgment in *Commission v. France*. In the latter the Commission brought an action against France for failing to guarantee the freedom of movement of goods on ground that the government did not take appropriate measures in protecting importers of agricultural products from Spain against the demonstration of French farmers. The demonstration in *Schmidberger* took place after a permission granted by the competent authorities. It blocked the traffic on a single route and on a single occasion. The demonstrators were undoubtedly exercising their fundamental right by manifesting in public an opinion on a subject of public concern. They did not intend to restrict trade in goods of a particular type or from a particular source. By contrast, the French demonstrators in *Commission v. France* were preventing the free trade in particular type of goods originating from Member States other than France, not only by obstructing the transport thereof, but also by destroying the products in transit and those put on display in shops.<sup>90</sup> Consequently, in *Schmidberger* the Court held that the Austrian authorities were entitled to consider that the outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights to freedom of expression and assembly.

<sup>85</sup> *Ibid.*, para 6 et seq.

<sup>86</sup> Opinion of Advocate General Jacobs, *Schmidberger* (supra note 84), para 89.

<sup>87</sup> *Omega Spielhallen- und Automatenaufstellung-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, ECJ Case C-36/02 [2005] 1 CMLR 5.

<sup>88</sup> *Ibid.*, para 48.

<sup>89</sup> *Commission v. France*, Case C-265/95, [1997] ECR I-6959.

<sup>90</sup> *Schmidberger* (supra note 84), para 82 – 90.

Furthermore, the Court held, that Member States enjoy a wide margin of discretion in circumstances such as those in this case. It remains to be seen whether the scope of margin of discretion will depend on the kind of speech involved. According to the line of reasoning adopted by the ECtHR where commercial speech is at stake, the standards of scrutiny may be less severe<sup>91</sup>. Given the possible variables of commercial speech, the problem becomes more complex. The thesis put forward in this paper is that in cases where the fundamental rights will conflict with the fundamental freedom, the speech in question will come under close scrutiny. Depending on how much it can contribute to the public debate it will be less or more difficult for the Member States to rely on the fundamental right to free speech in restricting the fundamental freedom.

### The “public debate” test in the Community law context

The public debate test has been applied by the ECtHR in determining the level of protection accorded to the speech in a commercial context. The same test has been explicitly applied by the ECJ in the case which gave rise to the preliminary ruling in *Herbert Karner Industrie-Auktionen GmbH and Troostwijk GmbH*<sup>92</sup>. The case concerned Paragraph 30 (1) of the Austrian Law on Unfair Competition. This provision prohibits any public announcements or notices intended for a large circle of persons from making reference to the fact that the goods advertised originate from an insolvent estate when the goods in question, even though that was their origin, no longer form part of the insolvent estate.<sup>93</sup> The provisions of such information is deemed to be capable of attracting consumers, who believe to make purchases at advantageous prices because the company is wound up, not being in the position to determine whether the sale has been organised by the insolvency administrator or by a party who had acquired the goods from the insolvent estate. Kerner and Troostwijk were involved in the sale by auction of industrial goods and purchasing of the stock of the insolvent companies. On the application by Kerner, the Austrian court issued an injunction against Troostwijk, prohibiting Troostwijk to refer in its advertisements for sale that the goods were from an insolvent company. Troostwijk appealed against that injunction, questioning the compatibility of Paragraph 30 (1) Austrian Law on Unfair Competition with the Treaty provisions on freedoms of movement of goods and Art. 10 ECHR embodying the freedom of expression.

The Court recognised that Member States enjoy discretion in balancing the competing interests. In this regard, however, “[w]hen the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising”.<sup>94</sup> On this ground the Court held that the restrictions imposed by Paragraph 30 (1) Austrian Law on Unfair Competition were reasonable and proportionate in the light of the legitimate objectives pursued, namely consumer protection and fair trading.<sup>95</sup> In the light of this judgment a conclusion may be drawn that the Court seems to differentiate between the exercise of freedom of expression which does and does not contribute to a discussion on

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<sup>91</sup> *Demuth v. Switzerland* (supra note 46), para H9.

<sup>92</sup> *Herbert Karner Industrie-Auktionen GmbH and Troostwijk GmbH*, ECJ Case C-71/02 [2004] 2 CMLR 5.

<sup>93</sup> *Ibid.*, para 9.

<sup>94</sup> *Ibid.*, para 51.

<sup>95</sup> *Ibid.*, para 52.

matters of public concern. As a consequence a less strict test is applied in scrutinising the restrictions imposed on the exercise of the right to free speech.

## CONCLUSIONS

Commercial speech comes in many shapes and forms, in many variables. A considerable difficulty in categorising and defining this type (or types) of speech leads to an uncertainty with regard to the scope of its protection. Most commentators on the notion of commercial speech stick with the question whether advertising can be accorded a level of protection equal to political or artistic speech. The thesis put forward in this paper is that an intermediate category of speech has to be singled out, which is a mix of commercial self-interest and comment on issues of public concern. The increasing presence of businesses in the society with their growing involvement in debates on issues of public concern cannot be ignored. The commercialisation of political life and politicisation of commercial life make the distinction between political and commercial not easy. The mere fact that a business entity, in its own name, takes position on a particular issue, cannot automatically lead to the denial of the right to freedom of speech. It has nevertheless proved to be hard to find a point of equilibrium between the rights of commercial actors to freely express their opinion and the requirements of protecting the public, consumers and other competitors against unfair or deceptive practices. Indeed, the commercial statements, even partly commercial are more resistant than political or artistic speech. The commercial actors will always speak - they have to in order to earn money. It may support the thesis that commercial speech even including some non-commercial statements shall be less protected. The possibility of developing some intermediate liability regime for mixed statement should not be excluded.

It has been stated that commercial speech should be defined with reference to a set of characteristics (speaker, content and context). Some hints can be decoded from the case-law of the European Court of Human Rights and German courts. The German courts put an emphasis on the purpose of speech. In *Hertel* and *Barthold* cases, the European Court of Human Rights weighed the commercial and non-commercial elements by applying the “public debate” test. Within its framework the question as to whether or not the contested speech can contribute to the public debate has to be answered. Similarly, commercial speech has been clearly recognised in the Community legal order as meriting protection. This recognition is based on the ECtHR’s interpretation of the scope of application of Art. 10 ECHR. In the *Karner* judgment, the ECJ clearly laid foundations for the “public debate” test in the Community law context. The comparison of the attitudes to commercial speech applied by the two European courts – the European Court of Justice and the European Court of Human Rights – reveals a far reaching coherence of these systems of fundamental rights protection.