COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF MARKT INTERN VERLAG GMBH AND KLAUS BEERMANN v. GERMANY

(Application no. 10572/83)

JUDGMENT

STRASBOURG

20 November 1989

In the case of markt intern Verlag GmbH and Klaus Beermann*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr J.A. CARRILLO SALCEDO,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 April, 28 September and 25 October 1989,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 14 March 1988 and by the Government of the Federal Republic of Germany ("the Government") on 18 April 1988, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an

* Note by the registry: The case is numbered 3/1988/147/201. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

application (no. 10572/83) against the Federal Republic of Germany lodged with the Commission under Article 25 (art. 25) on 11 July 1983 by a German firm of publishers, markt intern Verlag GmbH ("markt intern"), and the editor-in-chief of the information bulletins published by it, Mr Klaus Beermann.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention. The Government's application, which referred to Article 48 (art. 48), invited the Court to find that there had been no such breach.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 25 March 1988, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr J. Cremona, Mr F. Gölcüklü, Mr L.-E. Pettiti, Mr C. Russo and Mr J. De Meyer (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Deputy Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicants on the need for a written procedure (Rule 37 § 1). In accordance with the order made in consequence, the registry received the Government's memorial on 25 October 1988 and then, on 2 November 1988, the applicants' memorial, which, with the President's leave (Rule 27 § 3), was in German.

In a letter of 20 December 1988, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Deputy Registrar, those who would be appearing before the Court, the President directed that the oral proceedings should open on 25 April 1989 (Rule 38). On 13 February 1989 he gave the representatives of the Government leave to plead in German (Rule 27 § 2).

On 17 March and 25 April 1989, the Registrar received from the Commission and the applicants various documents which, in accordance with the President's instructions, he had requested it to produce.

On 30 March 1989, the Chamber decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr J. MEYER-LADEWIG, Ministerialdirigent,
Federal Ministry of Justice, *Agent*,
Mr A. VON MÜHLENDAHL, Regierungsdirektor,
Federal Ministry of Justice,
Mrs S. WERNER, Richterin am Amtsgericht, *Advisers*;

- for the Commission

Mr J.A. FROWEIN, *Delegate*;

- for the applicants

Mr C. TOMUSCHAT, Professor
at Bonn University, *Counsel*.

The Court heard addresses by Mr Meyer-Ladewig and Mr von Mühlendahl for the Government, Mr Frowein for the Commission and Mr Tomuschat for the applicants, as well as their replies to its questions. Mr Tomuschat submitted a number of documents on the occasion of the hearing.

7. On various dates between 30 March and 17 May, the registry received the applicants' claims under Article 50 (art. 50) of the Convention and the Government's observations relating thereto.

AS TO THE FACTS

8. The first applicant, markt intern, is a publishing firm, whose registered office is at Düsseldorf. The second applicant, Mr Klaus Beermann, is its editor-in-chief.

9. Markt intern, which was founded and is run by journalists, seeks to defend the interests of small and medium-sized retail businesses against the competition of large-scale distribution companies, such as supermarkets and mail-order firms. It provides the less powerful members of the retail trade with financial assistance in test cases, lobbies public authorities, political parties and trade associations on their behalf and has, on occasion, made proposals for legislation to the legislature.

However, its principal activity in their support is the publication of a number of bulletins aimed at specialised commercial sectors such as that of chemists and beauty product retailers ("markt intern - Drogerie- und Parfümeriefachhandel"). These are weekly news-sheets which provide information on developments in the market and in particular on the commercial practices of large-scale firms and their suppliers. They are

printed by offset and are sold by open subscription. They do not contain any advertising or any articles commissioned by the groups whose cause they espouse.

Markt intern claims to be independent. Its income is derived exclusively from subscriptions. It also publishes other series of bulletins containing more general consumer information, such as "Steuertip", "Versicherungstip" and "Flugtip", which are aimed respectively at taxpayers, holders of insurance policies and air travellers.

10. On several occasions undertakings which had suffered from the applicants' criticism or their calls for boycotts instituted proceedings against them for infringement of the Unfair Competition Act of 7 June 1909 (Gesetz gegen den unlauteren Wettbewerb - "the 1909 Act").

1. The article published in the "markt intern - Drogerie- und Parfümeriefachhandel" of 20 November 1975

11. On 20 November 1975 an article by Mr Klaus Beermann appeared in the information bulletin for chemists and beauty product retailers. It described an incident involving an English mail-order firm, Cosmetic Club International ("the Club"), in the following terms:

> "'I ordered the April beauty set ... from Cosmetic Club International and paid for it, but returned it a few days later because I was not satisfied. Although the order-form clearly and expressly stated that I was entitled to return the set if I was dissatisfied, and that I would be reimbursed, I have not yet seen a pfennig. There was also no reaction to my reminder of 18 June, in which I gave them until 26 June to reply.' This is the angry report of Maria Lüchau, a chemist at Celle, concerning the commercial practices of this English Cosmetic Club.
>
> On 4 November we telexed the manager of the Club, Doreen Miller, as follows: 'Is this an isolated incident, or is this part of your official policy?' In its swift answer of the following day, the Club claimed to have no knowledge of the set returned by Mrs Lüchau or of her reminder of June. It promised however to carry out a prompt investigation of the case and to clarify the matter by contacting the chemist in Celle.
>
> Notwithstanding this provisional answer from Ettlingen, we would like to put the following question to all our colleagues in the chemists and beauty product trade: Have you had similar experiences to that of Mrs Lüchau with the Cosmetic Club? Do you know of similar cases? The question of whether or not this incident is an isolated case or one of many is crucial for assessing the Club's policy."
>
> "'Habe beim Cosmetic-Club International das Schönheits-Set ... von April bestellt und bezahlt, aber wegen Nichtgefallen nach wenigen Tagen zurückgesandt. Obwohl auf dem Bestellcoupon klar und deutlich geschrieben steht, dass ich bei Nichtgefallen berechtigt bin, das Set zurückzusenden und mir Erstattung zugesichert wird, habe ich bis heute keinen Pfennig wiedergesehen. Auch auf meine Abmahnung vom 18. Juni mit Fristsetzung 26. Juni erfolgte keine Reaktion.' So der empörte Bericht der Celler Drogistin Maria Lüchau über die Geschäftstätigkeit des aus England importierten Cosmetic-Clubs.

Unser Telex vom 4. November an CCI-Geschäftsführerin Doreen Miller: 'Handelt es sich hier um eine Einzelpanne, oder gehört dieses Verhalten zu Ihrer offiziellen Politik?' In seiner prompten Antwort tags drauf will der CCI weder etwas von Frau Lüchaus Set-Retoure noch von ihrer Abmahnung im Juni wissen. Er verspricht aber eine sofortige Untersuchung des Falles sowie eine klärende Kontaktaufnahme mit der Drogistin in Celle.

Unabhängig von dieser vorläufigen Antwort aus Ettlingen unsere Frage an alle Drogerie/Parfümerie-Kollegen: Haben Sie ähnliche Erfahrungen wie Frau Lüchau mit dem Cosmetic-Club gesammelt? Oder sind Ihnen ähnliche Fälle bekannt? Die Ein- oder Mehrmaligkeit solcher Fälle ist für die Beurteilung der CCI-Politik äusserst wichtig."

12. Previously, on 20 September and 18 October 1974 and on 29 October 1975, markt intern had already published articles on the Club and advised retailers and manufacturers to be cautious in their dealings with it because the Club had failed to respect certain dates and promises. On 29 October 1975 markt intern described as correct the Club's statement in a legal pleading that "a change in the attitude of the industry show[ed] that the call for a boycott [had] not failed to make an impression".

2. The interim injunction (einstweilige Verfügung)

13. The Club instituted proceedings in the Hamburg Regional Court (Landgericht) which, on 12 December 1975, pursuant to Articles 936 and 944 of the Code of Civil Procedure, issued an interim injunction prohibiting markt intern from repeating the statements published on 20 November.

3. The proceedings in the main action (Hauptsache)

(a) The proceedings in the Hamburg Regional Court

14. Since the applicants had requested a decision as to the main issue (Articles 936 and 926 of the Code of Civil Procedure), the Club instituted the appropriate proceedings within the time-limit laid down by the court. It asked the court

"to restrain markt intern from publishing in its information bulletins:

1. the statement that Mrs Lüchau had given an angry account of the Club's commercial activities to the effect that she had returned the beauty set - because she was dissatisfied with it - but had not been reimbursed despite sending a reminder,

without stating at the same time that the Club had immediately sent to Mrs Lüchau an enquiry, which it had prepared, for submission to the postal authorities, and that it had assured her that it would reimburse her expenses;

2. the statement that in its immediate response to markt intern, sent on the following day, the Club had stated that it had no knowledge of the beauty set's being returned or of the reminder sent in June,

without making clear at the same time that there was no intention to raise doubts as to the accuracy of the Club's statement;

3. the question asking colleagues of the chemists and beauty product retailers trade whether they had had similar experiences to that of Mrs Lüchau or knew of similar cases - because it was of the greatest importance in assessing the Club's policy to know whether this case was an isolated incident or whether there had been others,

without making clear at the same time that it was not sought to insinuate that the Club's official policy was to accept payment without immediately supplying the products due".

15. The Regional Court gave its decision on 2 July 1976. It dismissed the Club's first head of claim because the statement was accurate and there was no reason to think that markt intern would disseminate it again without indicating what had occurred since the publication of its information sheet of 20 November 1975 (enquiries made to the postal authorities, etc.). On the other hand, it allowed the other two heads of claim, basing its decision on Article 824 of the Civil Code, according to which, "anyone who untruthfully alleges or disseminates a fact liable to affect adversely a person's creditworthiness or to cause him other disadvantages relating to his earning capacity or his career advancement, shall be liable to pay compensation for any such damage he may have caused". It found that Article 823 of the Civil Code was not applicable and left open the question whether the Club could also rely on the 1909 Act.

In the Regional Court's view, in writing that the Club claimed to have no knowledge of the return of the beauty set and of Mrs Lüchau's reminder (the Club's second head of claim), markt intern had not only expressed doubts as to the accuracy of this information but had also virtually asserted, without providing any proof, that the information provided was untruthful.

By inviting chemists to inform it of any "similar experiences" with the Club (the Club's third head of claim), markt intern had solicited information, which, if possible, was to be of a negative character regarding the Club, despite the fact that there were not at that stage sufficient grounds to suggest that the Club's commercial policy was reprehensible.

The Regional Court acknowledged that economic activities were subject to critical review by the press. However, it considered that the principles of the protection of legitimate interests (Article 193 of the Criminal Code) and of the freedom of expression (Article 5 of the Basic Law) did not protect the repetition of untruthful statements.

The court concluded that the applicants' conduct was culpable. Markt intern ought not to have generalised from the case of Mrs Lüchau, the circumstances of which had not yet been clarified, and used it to formulate criticism of the Club. This method of proceeding could not be reconciled with the obligations incumbent on journalists. The defendants ought to have

begun by taking their enquiries further, but not in the form of their request for information from the retailers.

Under the terms of the judgment, for each contravention the applicants were liable to a fine (Ordnungsgeld) or detention (Ordnungshaft) to be fixed by the court, but not exceeding DM 500,000 or six months, respectively.

(b) The proceedings in the Hanseatic Court of Appeal (Hanseatisches Oberlandesgericht)

16. On 31 March 1977 the Hanseatic Court of Appeal found for the applicants and quashed the Regional Court's judgment.

In the Court of Appeal's view, the 1909 Act was not applicable because, by publishing its article on 20 November 1975, markt intern had not acted from competitive motives, in other words with a view to increasing the turnover of chemists and beauty shops, to the detriment of the Club; it had sought to inform its readers that the Club had not dealt as it should have done with a matter concerning one of its own customers. Nor could the Club rely on Articles 824 and 823 of the Civil Code because the allegations published on 20 November 1975 were not untruthful.

As regards the return of the beauty set and Mrs Lüchau's reminder (the Club's first head of claim), the applicants' statements had been consistent with their obligations as journalists. The Criminal Code (Article 193) in principle allowed unfavourable assessments regarding business services in so far as they sought to protect legitimate interests. Article 5 of the Basic Law recognised that the role of the press was to contribute to the forming of public opinion. Finally, there was no risk that markt intern would repeat this particular statement.

The statement that the Club had claimed to have no knowledge of the beauty set and Mrs Lüchau's reminder ("will ... weder ... noch ... wissen") was not objectionable in the circumstances of the case. The form of words merely indicated to the readers that markt intern could not confirm the information provided by the Club.

By its request for information from chemists (the Club's third head of claim), markt intern had not cited facts or made allegations suggesting that the incident in question represented the Club's official policy. It had simply recommended that its readers verify the Club's commercial practices and, indeed, had left open the question whether Mrs Lüchau's case was an isolated incident. It had of course expressed the opinion that it was, in its view, possible that there had been a number of other cases of the same type. This was, however, merely a value judgment.

(c) The proceedings in the Federal Court of Justice (Bundesgerichtshof)

17. The Club appealed to the Federal Court of Justice which, on 16 January 1980, set aside the Hanseatic Court of Appeal's judgment and, varying the Hamburg Regional Court's judgment, ordered the applicants to

refrain from publishing in their information bulletin the statements disseminated by markt intern on 20 November 1975 in the form referred to by the Club in its heads of claim at first instance (see paragraph 14 above).

For each contravention, the applicants were liable to a fine or detention to be fixed by the court, but not exceeding DM 500,000 or six months, respectively.

18. The Federal Court of Justice based its judgment on section 1 of the 1909 Act, according to which:

> "Any person who in the course of business commits, for purposes of competition, acts contrary to honest practices may be enjoined from further engaging in those acts and held liable in damages."

> "Wer im geschäftlichen Verkehre zu Zwecken des Wettbewerbes Handlungen vornimmt, die gegen die guten Sitten verstossen, kann auf Unterlassung und Schadensersatz in Anspruch genommen werden."

(a) Notwithstanding the lack of a competitive relationship between markt intern and the Club, the 1909 Act was said to apply because it was sufficient in this respect that the contested conduct was objectively advantageous to an undertaking, to the detriment of a competitor. That was exactly the aim pursued in this instance. On these points, the Federal Court referred to the established case-law, and in particular its own, concerning the 1909 Act.

In so far as the Court of Appeal had held that the applicants did not intend to intervene in favour of the specialised retail trade to the detriment of the Club, its judgment did not stand up to scrutiny. It had not taken sufficient account of all the circumstances nor attached the correct weight to the evidence adduced. Having regard in particular to the previous reports published by markt intern on the Club (see paragraph 12 above), the Court of Appeal ought to have found that the applicants had not merely provided information as an organ of the press, but had embraced the interests of the specialised chemists trade and, in order to promote those interests, had attacked the Club's commercial practices. The Court of Appeal ought consequently to have concluded that markt intern intended to act in favour of the specialised trade and to the detriment of the Club. In general, it was extremely unusual for the press and the news media to cite an isolated incident such as the case of Mrs Lüchau - according to markt intern it could even have been simply "a breakdown in communications" - in order to raise immediately in public the controversial question whether this case reflected the Club's official policy. The Court of Appeal ought to have regarded markt intern's call for information from its readers concerning negative experiences of a similar type as an even more unusual step, which again revealed the intention to influence the market.

(b) Section 1 of the 1909 Act was thus applicable in this case. It was infringed because the disputed statements were contrary to honest practices on the following grounds:

"By their publication of the article complained of ..., the respondents acted in a way contrary to honest practices within the meaning of section 1 of the 1909 Act. It is immaterial in this connection whether the statements regarding the witness Lüchau (first head of claim) were true. The mere fact that a commercially damaging statement is true does not necessarily constitute a defence against a charge of acting in breach of the principles of fair competition. According to the rules of competition, such statements are acceptable only if they are based on sufficient grounds and if the manner and extent of the criticism in question remains within the limits of what is required by the situation because it is contrary to honest practices to engage in competition by making disparaging statements about competitors (see Federal Court of Justice, Gewerblicher Rechtsschutz und Urheberrecht ("BGH GRUR") 1962, pp. 45 and 48 - Betonzusatzmittel). In this case, at the time of the publication there was not sufficient cause to report this incident. The exact circumstances had not yet been clarified. The appellant in its reply had agreed to undertake an immediate investigation and to contact Mrs Lüchau in order to clarify the position. The respondents were aware that criticism of the appellant could not be fully justified before further clarification had been sought, as they themselves had described the appellant's reply as a provisional answer. Accordingly, they should have taken into consideration that any such premature publication of this incident was bound to have adverse effects on the appellant's business, because it gave the specialised retailers an effective argument which was capable of being used against the appellant with their mutual customers, and one which could be used even if the incident should turn out to be an isolated mishap from which no conclusion could be drawn as to the appellant's business policy. In these circumstances, at all events at the time of the publication, there were not sufficient grounds for reporting this isolated incident. Such conduct is, moreover, very unusual in business competition.

As regards the second head of claim, the appeal on a point of law must be allowed for the simple reason that the sentence: 'The Club claimed to have no knowledge of the set returned by Mrs Lüchau or of her reminder of June' can be understood only in the light of the information contrary to honest competition which is referred to under the first head of claim. As, simply, an additional and related item of information, it qualifies for the same legal assessment, in particular because it was liable to strengthen the unfavourable impression which inevitably resulted from the mere recounting of the incident. The Court of Appeal considered that this was no more than an illustration of the fact that the journalist had not been in a position to verify what had been told to him, but this observation conflicts with its earlier conclusion that the wording used expressed at least serious doubts as to the accuracy of the information and that in this case, consequently, the description of events put forward by the appellant was presented as being, probably, unreliable. The Court of Appeal ought therefore to have stated on what basis it reached a conclusion contrary to the ordinary meaning of the words. It did not do so, so that it may be presumed that at least a significant proportion of the readers of the bulletin would interpret the words employed in accordance with general usage, which was liable to show the appellant in an even more unfavourable light.

The Court of Appeal's dismissal of the third head of claim was based on the following considerations. The question put to chemist and beauty store colleagues asking whether their experiences with the Club had been similar to that of Mrs Lüchau or whether they knew of similar cases, which was said to be very important in assessing the Club's policy, indicated that the respondents considered it possible that a number of cases of this type had occurred. However, this merely represented a value judgment, and as such could not give rise to objections. Yet, under section 1 of the

1909 Act, the decisive issue is not whether the statement is to be regarded as a value judgment or as an allegation of fact. The expression of a value judgment can also exert an unacceptable influence in the field of competition under section 1 of the 1909 Act (see BGH GRUR 1962, p. 47 - Betonzusatzmittel). In this case, there were in any event not sufficient grounds for such a sweeping suspicion. A single case of this type did not constitute evidence for suspecting immediately that the appellant's commercial policy was fraudulent. It is moreover contrary to honest commercial practices to solicit, in such circumstances and at such an early stage, compromising information.

As the respondents were aware of the circumstances giving rise to the criticism that they had acted contrary to honest practices, there can be no reservations, from the subjective point of view, against finding a contravention of section 1 of the 1909 Act. As regards the risk of repetition, regard must be had to the principle laid down by the Federal Court of Justice in its case-law, according to which, where the rules of competition are infringed, there is a presumption of fact that such a risk exists (see Federal Court of Justice, civil cases ("BGHZ") 14, pp. 163 and 171 - Constanze II). This is the case for articles in the press where - as here - the nature of the questions dealt with gives grounds for supposing that the debate was not closed by the publication of the first article (BGHZ 31, pp. 318 and 319 - Alte Herren; BGH, Neue Juristische Wochenschrift ("NJW") 1966, pp. 647 and 649 - Reichstagsbrand). The respondents have not put forward any legally valid evidence that the danger no longer existed."

(d) The proceedings in the Federal Constitutional Court (Bundesverfassungsgericht)

19. The applicants then appealed to the Federal Constitutional Court, claiming a violation of the freedom of the press (Article 5 § 1 of the Basic Law).

Sitting as a committee of three judges, the Constitutional Court decided, on 9 February 1983, not to entertain the appeal. It considered that the appeal did not offer sufficient prospects of success, for the following reasons:

"As the Federal Constitutional Court held in its decision of 15 November 1982 (1 BvR 108/80 and others [Entscheidungen des Bundesverfassungsgerichts, volume 62, pp. 230-248]), the requirements which must be satisfied in order for freedom of expression and of the press to override other legal interests protected under statutes of general application are not fulfilled where an item published in the press is intended to promote, in the context of commercial competition, certain economic interests to the detriment of others. This is the case as regards the statements prohibited by the Federal Court of Justice. The second sentence of Article 5 § 1 of the Basic Law did not therefore require a different interpretation and application of section 1 of the 1909 Act from that given by the judgment appealed.

As that decision is not based on a violation of the second sentence of Article 5 § 1 of the Basic Law (freedom of the press), it is immaterial that the Federal Court did not, in the reasons given for its decision, expressly address the question of the scope of the freedom of the press in relation to the application of section 1 of the 1909 Act."

* * *

20. Mrs Lüchau was not the only customer to complain about the Club. Two others informed the applicants that they had encountered similar

difficulties; the first approached them before the publication of the bulletin of 20 November 1975 and the second after it.

According to its own statements, the Club sold 157,929 beauty sets between 1 December 1974 and 30 November 1975. In 1975, 11,870 identifiable persons returned the sets and were reimbursed.

PROCEEDINGS BEFORE THE COMMISSION

21. In their application of 11 July 1983 to the Commission (no. 10572/83), markt intern and Mr Beermann complained of the restrictions imposed on them by the German courts under section 1 of the 1909 Act.

22. The Commission declared the application admissible on 21 January 1986. In its report of 18 December 1987 (Article 31) (art. 31), it expressed the opinion, by twelve votes to one, that there had been a violation of Article 10 (art. 10). The full text of its opinion is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS BY THE GOVERNMENT TO THE COURT

23. At the hearing on 25 April 1989 the Government requested the Court to hold that this case disclosed no violation by "the Federal Republic of Germany of Article 10 (art. 10) of the European Convention on Human Rights".

AS TO THE LAW

24. The applicants claimed that the prohibition imposed on them by the German courts under section 1 of the 1909 Act and the broad interpretation which those courts gave to that provision had infringed Article 10 (art. 10) of the Convention, according to which:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 165 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

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

The applicants' view was contested by the Government but accepted by the Commission.

A. Applicability of Article 10 (art. 10)

25. The Government primarily disputed the applicability of Article 10 (art. 10). Before the Court they argued that if the case were examined under that provision, it would fall, by reason of the contents of the publication of 20 November 1975 and the nature of markt intern's activities, at the extreme limit of Article 10's (art. 10) field of application. The wording and the aims of the information bulletin in question showed that it was not intended to influence or mobilise public opinion, but to promote the economic interests of a given group of undertakings. In the Government's view, such action fell within the scope of the freedom to conduct business and engage in competition, which is not protected by the Convention.

The applicants did not deny that they defended the interests of the specialised retail trade. However, they asserted that markt intern did not intervene directly in the process of supply and demand. The undertaking depended exclusively on its subscribers and made every effort, as was proper, to satisfy the requirements of its readers, whose preoccupations the mainstream press neglected. To restrict the freedom of expression to news items of a political or cultural nature would result in depriving a large proportion of the press of any protection.

26. The Court recalls that the writer of the article in question reported the dissatisfaction of a consumer who had been unable to obtain the promised reimbursement for a product purchased from a mail-order firm, the Club; it asked for information from its readers as to the commercial practices of that firm. It is clear that the contested article was addressed to a limited circle of tradespeople and did not directly concern the public as a whole; however, it conveyed information of a commercial nature. Such information cannot be excluded from the scope of Article 10 § 1 (art. 10-1) which does not apply solely to certain types of information or ideas or forms of expression (see, mutatis mutandis, the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 19, § 27).

B. Compliance with Article 10 (art. 10)

27. In the Court's view, the applicants clearly suffered an "interference by public authority" in the exercise of the right protected under Article 10 (art. 10), in the form of the injunction issued by the Federal Court of Justice restraining them from repeating the statements appearing in the information bulletin of 20 November 1975. Such an interference infringes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10 (art. 10-2). It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" to achieve such aims.

1. "Prescribed by law"

28. In the Government's view, the legal basis for the interference is to be found not only in section 1 of the Unfair Competition Act of 1909 but also, with regard to two of the three contested statements, in section 14 of the same Act ("prohibition of disparaging statements") and Article 824 of the Civil Code (see paragraph 15 above), as applied by the Hamburg Regional Court.

Like the Commission, the Court notes that, while the Federal Court of Justice reinstated for the most part the judgment delivered on 2 July 1976 at first instance, the grounds given for its decision of 16 January 1980 were its own. The Federal Court of Justice based its decision solely on section 1 of the 1909 Act (see paragraph 18 above). It is not necessary to consider whether it could also have relied on the other provisions cited by the Government.

29. The applicants argued that the disputed interference was not "prescribed by law", because it was not foreseeable. The relevant German legislation did not indicate the dividing line between freedom of the press and unfair competition. In the first place, section 1 suffered from an indisputable lack of clarity; it was drafted in vague terms ("gute Sitten"/"honest practices") and conferred a wide discretion on the courts. It did not enable the citizen to foresee, to a degree that was reasonable, whether he would be committing an offence. Secondly, its application was not justified in this case because there was no direct competition between markt intern and the Club. The applicants had not acted "for purposes of competition", as is required under the section in question, but merely carried out their duty as journalists.

The Government maintained, on the other hand, that, because of their considerable experience of litigation, the applicants had been familiar with the text and the interpretation of the 1909 Act long before the contested article was published. On this question the Commission shared the Government's view. The Government added that the relevant provisions of

section 1 satisfied the requirements of accessibility and foreseeability laid down in the Court's case-law.

30. The Court has already acknowledged the fact that frequently laws are framed in a manner that is not absolutely precise. This is so in spheres such as that of competition, in which the situation is constantly changing in accordance with developments in the market and in the field of communication (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 22, § 47, and, mutatis mutandis, the Müller and Others judgment, cited above, Series A no. 133, p. 20, § 29). The interpretation and application of such legislation are inevitably questions of practice (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 31, § 49).

In this instance, there was consistent case-law on the matter from the Federal Court of Justice (see, inter alia, BGHZ 14, pp. 163, 170-172 - Constanze II; BGHZ 31, pp. 308, 318-319 - Alte Herren; BGH GRUR 1962, pp. 45 and 48 - Betonzusatzmittel; BGH NJW 1966, pp. 647 and 649 - Reichstagsbrand). This case-law, which was clear and abundant and had been the subject of extensive commentary, was such as to enable commercial operators and their advisers to regulate their conduct in the relevant sphere.

2. Legitimate aim

31. In the view of the Government and the Commission, the contested interference was intended to protect "the rights of others". Initially, the Government also cited the "prevention of disorder" and the "protection of morals", but they did not pursue these submissions before the Court.

According to the actual wording of the judgment of 16 January 1980, the contested article was liable to raise unjustified suspicions concerning the commercial policy of the Club and thus damage its business. The Court finds that the interference was intended to protect the reputation and the rights of others, legitimate aims under paragraph 2 of Article 10 (art. 10-2).

3. "Necessary in a democratic society"

32. The applicants argued that the injunction in question could not be regarded as "necessary in a democratic society". The Commission agreed with this view.

The Government, however, disputed it. In their view, the article published on 20 November 1975 did not contribute to a debate of interest to the general public, but was part of an unlawful competitive strategy aimed at ridding the beauty products market of an awkward competitor for specialist retailers. The writer of the article had sought, by adopting aggressive tactics and acting in a way contrary to usual practice, to promote the competitiveness of those retailers. The Federal Court of Justice and the Federal Constitutional Court had ruled in accordance with well established

case-law, having first weighed all the interests at stake (Güter- und Interessenabwägung).

In addition, in the field of competition, States enjoyed a wide discretion in order to take account of the specific situation in the national market and, in this case, the national notion of good faith in business. The statements made "for purposes of competition" fell outside the basic nucleus protected by the freedom of expression and received a lower level of protection than other "ideas" or "information".

33. The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to a European supervision as regards both the legislation and the decisions applying it, even those given by an independent court (see, as the most recent authority, the Barfod judgment of 22 February 1989, Series A no. 149, p. 12, § 28). Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate (see, inter alia, the above-mentioned Barthold judgment, Series A no. 90, p. 25, § 55).

34. In this case, in order to establish whether the interference was proportionate it is necessary to weigh the requirements of the protection of the reputation and the rights of others against the publication of the information in question. In exercising its power of review, the Court must look at the impugned court decision in the light of the case as a whole (see the above-mentioned Barfod judgment, Series A no. 149, p. 12, § 28).

Markt intern published several articles on the Club criticising its business practices and these articles, including that of 20 November 1975, were not without a certain effect (see paragraph 12 above). On the other hand, the Club honoured its promises to reimburse dissatisfied customers and, in 1975, 11,870 of them were reimbursed (see paragraph 20 above).

The national courts did weigh the competing interests at stake. In their judgments of 2 July 1976 and 31 March 1977, the Hamburg Regional Court and the Hanseatic Court of Appeal explicitly referred to the right to freedom of expression and of the press, as guaranteed by Article 5 of the Basic Law (see paragraphs 15 and 16 above) and the Federal Constitutional Court, in its decision of 9 February 1983, considered the case under that provision (see paragraph 19 above). The Federal Court of Justice based its judgment of 16 January 1980 on the premature nature of the disputed publication and on the lack of sufficient grounds for publicising in the information bulletin an isolated incident and, in doing so, took into consideration the rights and legal interests meriting protection (see paragraph 18 above).

35. In a market economy an undertaking which seeks to set up a business inevitably exposes itself to close scrutiny of its practices by its competitors. Its commercial strategy and the manner in which it honours its commitments may give rise to criticism on the part of consumers and the specialised press. In order to carry out this task, the specialised press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities.

However, even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples. In addition, a correct statement can be and often is qualified by additional remarks, by value judgments, by suppositions or even insinuations. It must also be recognised that an isolated incident may deserve closer scrutiny before being made public; otherwise an accurate description of one such incident can give the false impression that the incident is evidence of a general practice. All these factors can legitimately contribute to the assessment of statements made in a commercial context, and it is primarily for the national courts to decide which statements are permissible and which are not.

36. In the present case, the article was written in a commercial context; markt intern was not itself a competitor in relation to the Club but it intended - legitimately - to protect the interests of chemists and beauty product retailers. The article itself undoubtedly contained some true statements, but it also expressed doubts about the reliability of the Club, and it asked the readers to report "similar experiences" at a moment when the Club had promised to carry out a prompt investigation of the one reported case.

According to the Federal Court of Justice (see paragraph 18 above), there was not sufficient cause to report the incident at the time of the publication. The Club had agreed to undertake an immediate investigation in order to clarify the position. Furthermore, the applicants had been aware that criticisms of the Club could not be fully justified before further clarification had been sought, as they themselves had described the reply of the Club as a provisional answer. In the opinion of the Federal Court they should therefore have taken into consideration that any such premature publication of the incident was bound to have adverse effects on the Club’s business because it gave the specialised retailers an effective argument capable of being used against the Club with their customers, and one which could be used even if the incident should turn out to be an isolated mishap from which no conclusion could be drawn as to the Club’s business policy.

37. In the light of these findings and having regard to the duties and responsibilities attaching to the freedoms guaranteed by Article 10 (art. 10), it cannot be said that the final decision of the Federal Court of Justice - confirmed from the constitutional point of view by the Federal

Constitutional Court - went beyond the margin of appreciation left to the national authorities. It is obvious that opinions may differ as to whether the Federal Court's reaction was appropriate or whether the statements made in the specific case by markt intern should be permitted or tolerated. However, the European Court of Human Rights should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered the restrictions to be necessary.

38. Having regard to the foregoing, the Court reaches the conclusion that no breach of Article 10 (art. 10) has been established in the circumstances of the present case.

FOR THESE REASONS, THE COURT

Holds, by nine votes to nine, with the casting vote of the President (Rule 20 § 3 of the Rules of Court), that there has been no violation of Article 10 (art. 10) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 November 1989.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Judges Gölcüklü, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo and Valticos;

(b) individual dissenting opinion of Judge Pettiti;

(c) individual dissenting opinion of Judge De Meyer;

(d) dissenting opinion of Judge Martens, approved by Judge Macdonald.

R.R.
M.-A.E

JOINT DISSENTING OPINION OF JUDGES GÖLCÜKLÜ, PETTITI, RUSSO, SPIELMANN, DE MEYER, CARRILLO SALCEDO AND VALTICOS

(Translation)

I.

In the field of human rights, it is the exceptions, and not the principles, which "[are] to be interpreted narrowly"[1].

This proposition is especially true in relation to the freedom of expression.

That principle constitutes "one of the essential foundations" of a democratic society[2], "one of the basic conditions for its progress and for the development of every man"[3]; "it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb ..."[4].

"Due regard being had to the importance of freedom of expression in a democratic society"[5], any interference with it must correspond to a "pressing social need", "be proportionate to the legitimate aim pursued" and be justified on grounds which are not merely "reasonable", but "relevant and sufficient"[6].

In the present case these conditions, which the Court has affirmed on several occasions in previous judgments, were not satisfied.

In any event, in the light of the criteria which the Court has applied hitherto, the "necessity" of the measures taken against the applicants was not "convincingly established"[7].

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[1] See inter alia Klass and Others judgment, 6 September 1978, Series A no. 28, p. 21, § 42, and Sunday Times judgment, 26 April 1979, Series A no. 30, p. 41, § 65.

[2] Handyside judgment, 7 December 1976, Series A no. 24, p. 23, § 49; Sunday Times, cited above, p. 40, § 65; Barthold judgment, 25 March 1985, Series A no. 90, p. 26, § 58; Lingens judgment, 8 July 1986, Series A no. 103, p. 26, § 41; and Müller and Others judgment, 24 May 1988, Series A no. 133, p. 22, § 33.

[3] Above-mentioned judgments, Handyside, loc. cit.; Barthold, loc. cit.; Lingens, loc. cit.; and Müller and Others, loc. cit.

[4] Above-mentioned judgments, Handyside, loc. cit.; Sunday Times, loc. cit.; Lingens, loc. cit.; and Müller and Others, loc. cit.

[5] Barfod judgment, 22 February 1989, Series A no. 149, p. 12, § 28; see also Barthold judgment, cited above, loc. cit.

[6] Above-mentioned judgments, Handyside, pp. 22-24, §§ 48-50; Sunday Times, pp. 36 and 38, §§ 59 and 62; Barthold, p. 25, § 55; Lingens, pp. 25-26, §§ 39-40; and Müller and Others, p. 21, § 32.

[7] Barthold judgment, cited above, p. 26, § 58.

It is just as important to guarantee the freedom of expression in relation to the practices of a commercial undertaking as it is in relation to the conduct of a head of government, which was at issue in the Lingens case. Similarly the right thereto must be able to be exercised as much in the interests of the purchasers of beauty products as in those of the owners of sick animals, the interests at stake in the Barthold case. In fact, freedom of expression serves, above all, the general interest.

The fact that a person defends a given interest, whether it is an economic interest or any other interest, does not, moreover, deprive him of the benefit of freedom of expression.

In order to ensure the openness of business activities[8], it must be possible to disseminate freely information and ideas concerning the products and services proposed to consumers. Consumers, who are exposed to highly effective distribution techniques and to advertising which is frequently less than objective, deserve, for their part too, to be protected, as indeed do retailers.

In this case, the applicants had related an incident which in fact occurred, as has not been contested[9], and requested retailers to supply them with additional information. They had exercised in an entirely normal manner their basic right to freedom of expression.

This right was, therefore, violated in their regard by the contested measures.

II.

Having said this, we consider it necessary to make three further observations in relation to the present judgment.

We find the reasoning set out therein with regard to the "margin of appreciation" of States[10] a cause for serious concern. As is shown by the result to which it leads in this case, it has the effect in practice of considerably restricting the freedom of expression in commercial matters.

By claiming that it does not wish to undertake a re-examination of the facts and all the circumstances of the case[11], the Court is in fact eschewing the task, which falls to it under the Convention[12], of carrying out "European

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[8] § 35 of the judgment.

[9] Moreover it was not an "isolated" case (§ 36 of the judgment), because in 1975 the undertaking in question had to reimburse 11,870 of its clients (§§ 20 and 34 of the judgment).

[10] §§ 33 and 37 of the judgment.

[11] § 33 of the judgment.

[12] Above-mentioned judgments in Handyside, p. 23, § 49; Sunday Times, p. 36, § 59; and § 33 of the present judgment.

supervision"[13] as to the conformity of the contested "measures" "with the requirements" of that instrument[14].

On the question of the need to "weigh the competing interests at stake"[15], it is sufficient to note that in this case the interests which the applicants sought "legitimately" to protect[16] were not taken into consideration at all[17].

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[13] Article 19 of the Convention.

[14] Judgment in the case "relating to certain aspects of the laws on the use of languages in education in Belgium", 23 July 1968, Series A no. 6, p. 35, § 10.

[15] § 34 of the judgment.

[16] § 36 of the judgment.

[17] For the rest, we agree substantially with the arguments put forward in §§ 3 to 7 of the dissenting opinion of Judge Martens to which Judge Macdonald has given his approval (see pp. 28-30 below).

INDIVIDUAL DISSENTING OPINION OF JUDGE PETTITI

(Translation)

In addition to the observations put forward in the joint dissenting opinion, I wish to make the following comments.

Freedom of expression is the mainstay of the defence of fundamental rights. Without freedom of expression, it is impossible to discover the violation of other rights.

In this field the States have only a slight margin of appreciation, which is subject to review by the European Court. Only in rare cases can censorship or prohibition of publication be accepted. This has been the prevailing view in the American and European systems since 1776 and 1789 (cf. First Amendment, United States Constitution; case-law of the supreme courts of the United States, Canada, France, etc.).

This is particularly true in relation to commercial advertising or questions of commercial or economic policy, in respect of which the State cannot claim to defend the general interest because the interests of consumers are conflicting. In fact, by seeking to support pressure groups - such as laboratories -, the State is defending a specific interest. It uses the pretext of a law on competition or on prices to give precedence to one group over another. The protection of the interests of users and consumers in the face of dominant positions depends on the freedom to publish even the harshest criticism of products. Freedom must be total or almost total, except where an offence is committed (for example misleading advertising) or where an action is brought for unfair competition, but in those circumstances the solution is not censorship but criminal prosecution or civil proceedings between the undertakings. The arsenal of laws caters for the punishment of misleading advertising.

The limitation of the freedom of expression in favour of the States' margin of appreciation, which is thereby given priority over the defence of fundamental rights, is not consistent with the European Court's case-law or its mission. Such a tendency towards restricting freedoms would also run counter to the work of the Council of Europe in the field of audio-visual technology and trans-frontier satellites aimed at ensuring freedom of expression and protecting the rights of others including those of users and consumers of communication media.

The problem is all the more serious because often the States which seek to restrict the freedom use the pretext of economic infringements or breaches of economic legislation such as anti-competition or anti-trust provisions to institute proceedings for political motives or to protect "mixed" interests (State - industrial) in order to erect a barrier to the freedom of expression (the Eastern block countries provide numerous examples, but the States of the Council of Europe follow this practice too).

The economic pressure which groups or laboratories can exert should not be underestimated. In certain cases this pressure has been such that it has delayed the establishment of the truth and therefore put back the prohibition of a medicine or substance dangerous for the public health.

The economic press of numerous member States publishes each day articles, millions of copies of which are circulated, containing criticism of products in terms a hundred times stronger than those in question in the markt intern case. It is this freedom accorded to that press which ensures the protection of the public at large.

INDIVIDUAL DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

In addition to the observations contained in the joint dissenting opinion[1], I consider it to be necessary to make the following comments.

1. It is questionable whether the "aim" of the interference contested by the applicants was sufficiently "legitimate" to justify that interference, because in fact the measure was designed not to protect "rights of others" in the strict sense, but rather to defend mere commercial interests.

2. Ultimately the Court undertook "a re-examination of the facts and all the circumstances" of the case by adopting, in paragraphs 34 to 37 of the judgment, the disputed assessment of the national courts.

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[1] See pages 23-25 above.

DISSENTING OPINION OF JUDGE MARTENS, APPROVED BY JUDGE MACDONALD

(Translation)

1. I am entirely convinced of the correctness of the Court's view that the contested article published by markt intern is in principle protected by the freedom of expression secured under Article 10 (art. 10) of the Convention. The socio-economic press is just as important as the political and cultural press for the progress of our modern societies and for the development of every man. In this connection I refer to the joint dissenting opinion of Judges Gölcüklü, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo and Valticos (hereinabove "the joint dissenting opinion"), and I express my agreement with part I of that opinion.

I also share the Court's opinion that the injunction issued by the Federal Court of Justice constituted an "interference by public authority" which infringes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10 (art. 10-2). Here again I refer to the joint dissenting opinion.

Finally, I agree with the Court that these requirements are satisfied as regards the necessity of being "prescribed by law" and having a "legitimate aim", but I cannot follow the Court in its view that, taking account of the margin of appreciation which the Contracting States enjoy, it should accept that the interference was "necessary in a democratic society". On this point I feel that it is necessary to take the analysis set out in the joint dissenting opinion a step further; indeed this is one of the reasons why I did not feel that I could fully support it.

2. In relation to the third sub-paragraph of paragraph 34 of the Court's judgment, I should like to observe in the first place that, in carrying out the review referred to in the preceding paragraph, the Court ought not to have taken into consideration the decisions of the Hamburg Regional Court and the Hanseatic Court of Appeal, which were both quashed by the decision of a higher court: that of the Federal Court of Justice, which is the only relevant decision as the Constitutional Court found the appeal inadmissible.

3. The Federal Court takes the view that the question whether the contested article published by markt intern was acceptable is to be classified under the law on unfair competition and it is this classification, and the assessments inferred therefrom, which the European Court has endorsed (see paragraphs 33, 35, 36 and 37 of its judgment). In so doing, the European Court has subscribed to an approach which, in my view, is incompatible with the right to the freedom of expression, which the Convention also guarantees to a partisan press organ.

4. The law on unfair competition governs the relationships between competitors on the market. It is based on the assumption that in engaging in

competition the competitors seek only to serve their own interests, while attempting to harm those of others. That is why (as the Federal Court notes in its judgment) the German law on unfair competition prohibits persons from engaging in competition by making denigrating statements about their competitors. It is permissible for a competitor to criticise another publicly only if he has sufficient reasons for so doing and if the nature and scope of his criticism remain within the limits required by the situation. In this field, the prohibition on publishing criticism is therefore the norm and it falls to the person who takes the risk of publishing such criticism to show that there were sufficient grounds for his criticism and that it remains within the strictest limits. In considering whether this proof has been furnished, the court weighs up only the interests of the two competitors.

In the field of freedom of expression the converse is true. In this field the basic assumption is that this right is used to serve the general interest, in particular as far as the press is concerned, and that is why in this context the freedom to criticise is the norm. Thus in this field it falls to the person who alleges that the criticism is not acceptable to prove that his claim is well-founded. In determining whether he has done so, the court must weigh up the general interest, on the one hand, and the individual interests of the party who claims to have been injured, on the other.

5. It follows that to classify under the law on unfair competition the question whether an article published by an organ of the press is acceptable is to place that organ of the press in a legal position which is fundamentally different from that to which it is entitled under Article 10 (art. 10) of the Convention and one which is clearly unfavourable to it. That is why, in my view, for that organ of press, such a classification constitutes a considerable restriction on the exercise of the freedoms guaranteed to it under Article 10 (art. 10). It should therefore be asked whether it can be necessary in a democratic society to restrict the rights and fundamental freedoms of an organ of the press in this way solely because that organ has espoused the cause of specific economic interests, namely those of a particular sector of a specialised trade. I am in no doubt that this question must be answered in the negative. This is clear from the fact that, as far as I know, such a rule extending the scope of the law on unfair competition to the detriment of freedom of the press is unknown in the other member States of the Council of Europe, and rightly so because, in certain respects, all newspapers may be regarded as partisan, having espoused the cause of certain specific interests.

6. In my view, it follows from the foregoing that the Court ought to have considered that in this instance it had to examine a case in which the assessment of the national authorities suffered from a fundamental defect and that, accordingly, it ought itself to have determined whether the interference was necessary in a democratic society. Indeed, in such

circumstances the margin of appreciation plays no role because this margin cannot justify assessments incompatible with the freedoms guaranteed under the Convention. I emphasise this point because, for my part, I do not deny that in the field of freedom of expression the European Court can limit the scope of its review by leaving the States a certain margin of appreciation.

7. In this context I should like to make clear that I cannot agree, either, with the opinion of the Court in so far as it considers that in this instance, in order to determine whether the interference was proportionate, it is necessary to weigh up the requirements of the protection of the reputation and rights of others, on the one hand, and the publication of the information in question on the other (see paragraph 34 of the Court's judgment).

In my view - and here too I find myself in agreement with the joint dissenting opinion - it is necessary to ask whether it was established convincingly (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 25, § 58) that the private interests of the Club were more important than the general interest, in accordance with which not only the specialised reader but also the public as a whole should have been able to acquaint themselves with facts having a certain importance in the context of the struggle of small and medium-sized retail undertakings against the large-scale distribution companies. In answering this question, I, like the authors of the joint dissenting opinion, reach the conclusion that the reply must be negative. Like the Court (see paragraph 35 of its judgment), I take into account the fact that in a market economy an undertaking which seeks to set up a business inevitably exposes itself to close scrutiny of its practices. That is why the Club, which was in that situation, cannot in principle complain that the specialised press, which has given itself the task of defending the interests of its competitors on that market, analyses its commercial strategy and publishes its criticisms thereof. Such criticism contributes, as the Court stressed, to the openness of business activities. Since the freedom of expression also applies to "statements" which hurt, care should be taken not to find such criticism unacceptable too quickly simply because it harms the undertaking criticised. In this instance, it cannot be denied that the article published by markt intern is unfavourable to the Club and reveals a very critical attitude in the latter's regard. On the other hand, it reported an incident which, as has not been contested, in fact occurred and it did not purport to offer a definitive assessment of the Club's commercial practices, but invited retailers to supply additional information. For my part, I am not convinced that it is truly necessary to prohibit such an article in a democratic society.

8. It is for the above reasons that I voted in favour of finding a violation of Article 10 (art. 10).