

The *Hertel* case and the Distinction between Commercial and Non-Commercial Speech, in: Thomas Cottier/Joost Pauwelyn/Elisabeth Bürgi (eds.), *Human Rights and International Trade*, Oxford University Press, Oxford, 2005, pp. 273-278.

Freedom of Expression and Unfair Competition: The Hertel Case and Beyond

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I found the paper of Sangeeta Khorana and Thomas Cottier very stimulating to read and in my opinion it opens an important new field of discussion in the relationship between free trade and human rights.

However, one question was bothering me throughout the presented paper, namely: whether the economic analysis of law is really the right approach for evaluating the legitimacy of primarily non-economic values of society, such as freedom of expression and information? In my view the Hertel case is not only about the efficient functioning of the market and thus I would like to ask whether the market metaphor is not a too simplified one.

In the course of their paper (page 24, first paragraph), the authors "submit that the traditional distinction in constitutional law between commercial speech and political speech remains without an impact in international relations". In the next few paragraphs I would like to question this submission by focussing on the method used by the European Court of Human Rights to assess the margin of appreciation accorded to Contracting States under Article 10 of the European Convention of Human Rights and Fundamental Freedoms (ECHR).

I. The margin of appreciation of Contracting States as a decisive point

In the case in issue, the assessment of the margin of appreciation accorded to Swiss national authorities indeed turned out to be decisive for the findings in the first Hertel judgement by the ECHR.²

Since somebody might not be familiar with the structure of Art. 10 ECHR, let me briefly introduce this important provision:

According to Art. 10 ECHR "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

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² ECHR, Judgement of 25 August 1998, Case of Hertel v. Switzerland, Application no. 25181/94.

interference by public authority". In the instant case Mr. Hertel was prohibited by Swiss courts on pain of Criminal Law penalties from:

- a) making certain statements about microwave ovens being a danger to health , and
- b) from using, in publications and public speeches on microwave ovens, the image of death

(Hier Reproduktion der Titelseite des Journal Franz Weber gem. Beilage einfügen)

The question therefore was whether this interference by the Swiss authorities was a violation of Article 10 ECHR.

It is important to stress that the right protected by Art. 10 ECHR is not absolute. However, any interference by public authority violates the right to freedom of expression of a given individual, unless – according to Art. 10 § 2 ECHR the interference:

- was "prescribed by law",
- served a "legitimate aim,
- and was "necessary in a democratic society".

The crucial question in Hertel was the last point, i.e. whether the prohibition imposed on Hertel by Swiss courts was necessary in a democratic society. According to the case law of the European Court of Human Rights the adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". Contracting States have a certain margin of appreciation assessing whether such a need exists. If the margin of appreciation accorded to national authorities in a certain case is wide, the so-called "European supervision" exercised by the Court shrinks. The decisive question in Hertel was to find out in the concrete case how wide the margin of appreciation of the Swiss authorities was. Considering the importance of the latter question for the outcome of the final judgement it is astonishing, that the Court in this regard only made a very brief statement. The Court said that the Hertel case was substantially different from *markt intern*³ and *Jacobowski*⁴ - two of its leading judgments concerning Unfair Competition Law - since "what is at stake is not a given individual's purely 'commercial' statements, but his participation in a debate affecting the general interest."⁵ With this brief reference to *markt intern* and *Jacobowski* the court says that the margin of appreciation accorded to Contracting States under Art. 10 ECHR is wider where commercial speech is involved and narrower in the case of non-commercial speech.

This distinction implies that the European Court recognises a preferred position of non-commercial speech compared to commercial speech.

Markt intern and *Jacobowski* - as I already mentioned - are two leading judgments of the ECHR concerning Unfair Competition Law. In both cases the Court came to the conclusion that commercial speech was involved and therefore the margin of appreciation of the Contracting State was wide. This finding lead the Court to deny a violation of the freedom of expression.

³ ECHR, Judgement of 20 November 1989, Case of markt intern Verlag GmbH and Klaus Beermann v. Germany, Application no. 10572/83.

⁴ ECHR, Judgement of 23 June 1994, Case of Jacobowski v. Germany, Application no. 15088/89.

⁵ See Hertel, supra, note 2, at Rec. 47.

Let me take a closer look at the reasoning of the court on this point in the two cases and compare it to the reasoning in the Hertel Case:

- Markt intern was a publishing firm. The firm was founded and run by journalists who sought 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.⁶ Its principal activity in support of the less powerful members of the retail trade was the publication of a number of bulletins aimed at specialised commercial sectors, such as that of chemists and beauty product retailers. These bulletins were weekly news-sheets which provided information on developments in the market and in particular on the commercial practices of large-scale firms and their suppliers.⁷ Markt intern's income was derived exclusively from subscriptions. On several occasions companies which had suffered from markt intern's criticism or its calls for boycotts instituted legal proceedings against it for infringement of the German Unfair Competition Act.⁸ The German courts condemned markt intern for violating the Unfair Competition Act. The European Court of Human Rights held that the news bulletins in question were written in a commercial context. Markt intern was not itself a competitor in relation to the companies criticised, but intended to protect the economic interests of its subscribers - i.e. chemists and beauty product retailers. Therefore the margin of appreciation accorded to the German courts was wide. As a consequence of this deference the Strasbourg court came to the conclusion that there had been no violation of Art. 10 ECHR.
- Jacubowski was a journalist who distributed a circular and cuttings with unfavourable statements about the press agency where he was employed. This led to his dismissal. In reaction to that Jacubowski circulated 13 articles from newspapers which gave a critical account of his dismissal and the press agency. These articles reported particularly that the press agency was in a bad financial situation and that some of its clients were preparing to dispense with its services, mainly because of their poor standard and the lack of certain technical facilities.⁹ Shortly afterwards Jacubowski set up his own "public relations" agency. The ECHR held that Jacubowski was in a commercial relationship with the company he criticised, and that the information circulated by him was of a business nature. Accordingly, the finding of the German courts that Jacubowski had violated the UCA was within the margin of appreciation assured to Contracting parties. The ECHR concluded that there had been no infringement of Art. 10 ECHR.

Whereas in Jacubowski and markt intern the publication considered by national authorities to violate the Law against Unfair Competition was written in a commercial context, Mr. Hertel could not expect any commercial benefit from his article. His paper was rather a participation in a debate affecting the general interest.¹⁰ Because of this difference the Court reduced the margin of appreciation of the Contracting State significantly in Hertel compared to the aforementioned cases. The consequence of the strict judicial review exercised by the Court was that Hertel won his case.

⁶ See markt intern, supra, note 3, at Rec. 9.

⁷ See markt intern, supra, note 3, at Rec. 9.

⁸ See markt intern, supra, note 3, at Rec. 10.

⁹ See Jacubowski, supra, note 4, at Rec. 14.

¹⁰ See Hertel, supra, note 2, at Rec. 47.

II. Lessons to be learned

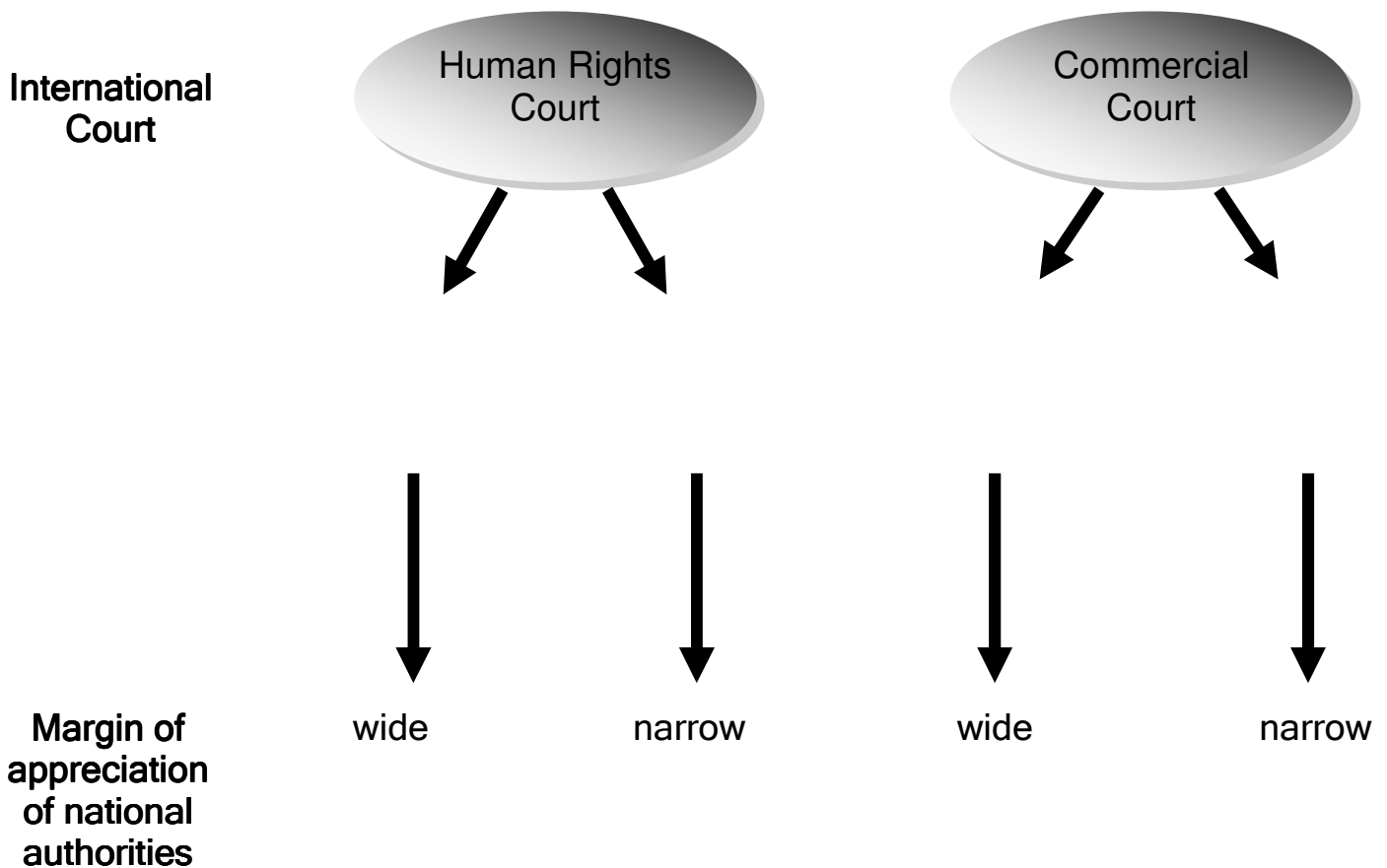
What can be learned from this case law with regard to the relation between international trade law and human rights?

In my view the Hertel case shows mainly two things:

First, that from the point of view of Article 10 ECHR non-commercial speech enjoys stronger protection compared to commercial speech. As Thomas Cottier's and Sangeeta Khorana's paper demonstrates, this hierarchy is backed up by economic analysis.

Second, that an international Court can take hierarchies between values or interests (such as non-commercial vs. commercial speech) into account by granting deference towards national authorities in certain cases.

Balancing Free Speech and Free Trade



In Hertel, because of the qualification of Hertel's communication as non-commercial speech, the court applied a strict standard of review and therefore came to the conclusion, that the Swiss authorities had violated Art. 10 ECHR.

Looking beyond Hertel one may ask whether the instrument of judicial self-restraint could be used by an international commercial court as a means of balancing a conflict between commercial and non-commercial interests in cases where human rights are involved. This has been acknowledged, for instance, by the attorney general of the European Court of Justice in the Familiapress case.¹¹

In the realm of the WTO, deference towards national authorities can be accorded by panels or the Appellate Body where a governmental measure allegedly in conflict with principles of the WTO is mandated by a national statute aiming at the protection of freedom of expression and information.¹² Thinking within the "mindset" of a commercial court, judicial self-restraint in such a situation would mean: according a wide margin of appreciation to this Member State in cases of non-commercial speech.

At this stage of preliminary reflections I imagine that such human rights induced deference might lead a panel or Appellate Body to conduct a less rigorous test where - e.g. in the application of non-discrimination principles - questions of proportionality have to be answered.

III. Conclusion

It is my position that an economic analysis of law, such as the theory of information asymmetry, in a case of conflict between freedom of expression and unfair competition, can help to legitimise a preferred position of non-economic compared to economic speech. Insofar as Thomas Cottier and Sangeeta Khorana suggest to generally giving preference to acts of expression of opinion in contexts of trade and commercial relations, I think that their approach is not complex enough. In my view the Hertel case is not a typical one: In the reality of Western market society, criticism of the behaviour of companies in most cases is not raised by idealistic individuals who are interested in initiating a public debate, such as Hertel, but by big media undertakings whose criticism - if unfair - may cause huge damages to the companies targeted.

The *Contraschmerz*¹³ case gives an appropriate illustration to the above suggestion: A consumer protection programme "Kassensturz" of the SRG (Swiss Broadcasting Corporation) criticised negative side effects of multi-component painkillers by pointing out the health hazards of such drugs, using the example of *Contraschmerz*, a pharmaceutical produced by a relative small enterprise. This criticism caused a decrease in the sale of *Contraschmerz* pills and caused huge damage to its producer. The case landed at the Swiss Federal Court, where

¹¹ "The case-law of the European Court of Human Rights itself leaves not the slightest doubt that a 'commercial message' or, if one prefers, the commercial use of the freedom of expression is also protected by Art. 10. In such instances, however, the Court of Human Rights conducts a less rigorous test of proportionality, on the basis that in this area the States have a greater margin of discretion" (footnotes omitted). Opinion of the Advocate General Tesauro, delivered on 13 March 1997, Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertiebs GmbH v. Heinrich Bauer Verlag*, 26 June 1997, ECR I-03689/1997.

¹² For a theory of standard of review in the realm of the WTO see Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, *Journal of International Economic Law* 6 (forthcoming 2003).

¹³ ECHR, Decision of 12 April 2001, *Schweizerische Radio- und Fernsehgesellschaft (SRG) v. Switzerland*, Application no. 43524/98

SRG was condemned of having violated the Swiss Unfair Competition Act, because it singled out Contraschmerz in its critique without mentioning clearly enough that every other multi-component-anti-pain pharmaceutical on the market produces similar negative side effects. The SRG was prohibited on pain of criminal law penalties to repeat statements such as the one in the instant case and was obliged to compensate damages of the producer of Contraschmerz amounting to CHF 480'000.--. The European Court of Human Rights confirmed this judgement and dismissed a complaint by SRG alleging a violation of Art. 10 ECHR.

This example shows that in many cases the party suffering from asymmetric information in the reality of modern mass media is not the innocent journalist, invoking legitimate concerns of public interest, but producers of goods or services who may risk huge damage because of unfair criticism practised by powerful media companies which may consider scandalising as a tool for attracting the attention of large audiences. Therefore the question whether there is an asymmetry of information has to be carefully analysed on a case to case base. Generally, I submit that the weak party in the game is not necessarily the person expressing his or her own opinion, but the one defending non-economic interests of general importance.

Commercial courts and Human Rights courts on the international level operate under different logic of legal reasoning which might be compared with a difference in the "mindset" of these courts. Difficulties essentially arise any time a Commercial court is confronted with arguments of Human Rights and vice versa. What is needed in my view is a theory of mutual translation between the two mindsets. A theory of diverging standards of review could therefore serve as a means for balancing trade interests and core human rights interests in the area of International Trade Law.