SCHJØDT

Oslo byfogdembete
Postboks 8003 Dep.
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Oslo, 5. juni 2012
Ref.: #34512-501-2241863.1

BEGJÆRING OM MIDLERTIDIG FORFØYNING

til

OSLO BYFOGDEMBETE

Sak nr.:

Saksøker: Folkets Strålevern v/styrets leder Thomas J. Middelthon
Fjelkensvingen 10
1395 HVALSTAD

Prosessfullmektig: Advokat Halvor Manshaus
v/advokatfullmektig Henrik Bonge
Advokatfirmaet Schjødt AS
Postboks 2444 Solli
0201 OSLO

Saksøkt: Staten v/helse- og omsorgsdepartementet
Postboks 8011 Dep.
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Saken gjelder: Overføring av domenenavn

1. INNLEDNING

På vegne av saksøker Folkets Strålevern ("FS") begjæres herved midlertidig forføyning mot Staten v/helse- og omsorgsdepartementet.

I vedtak fra Domeneklagenemnda av 23. mai ble det, med hjemmel i Regelverket for ".no" vedlegg H punkt 1.3, vedtatt at domenenavnene straalevern.no og stralevern.no skal overføres fra FS til Statens Strålevern ("SS"). Det var SS som var klager i denne saken, men det legges til grunn at det er Staten v/Helse- og omsorgsdepartementet som er rett saksøkt ved begjæring om midlertidig forføyning. For ordens skyld, og for å påskynde saksbehandlingen, sendes et eksemplar av denne begjæring til Statens Strålevern per e-post.

Forføyningskravet i denne begjæring er at saksøkte påbys å tåle at saksøkeren FS, inntil rettskraftig avgjørelse foreligger i saken, disponerer over de aktuelle domener og bidrar til dette.

2. HOVEDKRAV

2.1 De omtvistede domenene representerer ikke noe inngrep i rettigheter tilhørende Statens Strålevern

I Domeneklagenemndas ("Nemnda") vedtak uttales det at "Strålevern" er en del av SS' registrerte navn i Enhetsregisteret. Det vises også til at SS gjerne blir omtalt som "Strålevernet", og at SS har hatt virksomhet knyttet til domenenavnet stralevernet.no siden 2001.

Videre kom Nemnda til at FS var i ond tro ved registreringen av domenenavnene. Det påstås at et enkelt søk i Brønnøysundsregistrene etc. ville avdekket at SS hadde rettigheter til "strålevern", slik at vilkåret til ond tro ble ansett som oppfylt.

FS gjorde de facto søk før registreringen, og søkeresultatene viste at SS opererte under domenet nrpa.no, og ikke et domene som inneholdt variasjoner av den generiske termen "strålevern". Det kan derfor vanskelig påstås at FS var i ond tro rent faktisk ved registreringen av domenenavnet.

Videre registrerer saksøker at domenenavnene barnevern.no, miljovern.no, naturvern.no, dyrevern.no og kulturvern.no tilhører ikke-offentlige interesseorganisasjoner. Saksøker ser ingen grunn til at stralevern.no og straalevern.no skal behandles annerledes enn slike tilsvarende generiske domenenavn.

Rent objektivt kan det heller ikke være tale om at FS har opptrådt i ond tro. Denne side bemerker ytterligere at "Strålevern" uansett – på linje med for eksempel kulturvern, miljøvern og naturvern – er en generisk term som en vanskelig kan oppnå beskyttelse etter f.eks. varemerkeloven, jf. varemerkeloven § 1, slik at registrering og bruk av et slikt domene ikke kan representere noe inngrep i en varemerkerettighet, jf. varemerkeloven § 4. Ei heller kan det ha betydning at SS har "Strålevern" som en del av sitt registrerte navn, når dette ordet er av utpreget generisk karakter. Vern for SS ville først ha oppstått dersom de hadde vært først ute med å registrere de omtvistede domener. Ordet "strålevern" er ikke i seg selv egnet til å skille mellom saksøker eller saksøkt, men er en generisk betegnelse som ikke i seg selv tilhører noen av partene. Dette illustreres ved at begge parter har ordet "strålevern" i sine navn.

Det kan heller ikke være tale om en forvekslingsfare mellom navnene "Folkets Strålevern" og "Statens Strålevern", da førstnevnte skiller seg markant fra SS ved at de kaller seg for nettopp *Folkets* Strålevern. FS gir ikke uttrykk for å være en offentlig aktør; tvert i mot går det tydelig frem av FS' nettsider at FS er en helt annen aktør, med helt andre syn og meninger, enn SS.

Uansett kan ikke SS, ved registrering av sitt navn i Enhetsregisteret, få et vern som innebærer at SS får en enerett til å ta i bruk termen "strålevern". Kravet til særpreg for å få vern vil være det samme ved registrering av foretaksnavn som ved registrering av varemerke, jf. foretaksnavneloven § 3-2, hvor det heter at "*for at et foretaksnavn skal ha vern mot lignende foretaksnavn eller varekjennetegn, må foretaksnavnet oppfylle de krav til særpreg som gjelder etter varemerkeloven § 14*". Det er klart at elementene "Statens" og "Strålevern" er generiske og deskriptive betegnelser, og som isolert sett ikke gir grunnlag for noe utvidet vern. Både FS og SS, står i en posisjon der benytter seg av navn som inneholder termen "strålevern".

Det hitsettes i denne forbindelse til Rt 1979 s 1117. Her uttaler Høyesterett at jo mer deskriptivt et merke er, dess mer skal det til for å anta at det foreligger en forvekslingsmulighet, og dette vil få betydning for hvor nær andres merker kan tillates å komme. På side 1123 i dommen slår førstvoterende fast at "*etter min oppfatning kan ikke retten til et slikt merke i kollisjonstilfeller strekkes så langt at innehaveren ubetinget kan nekte den andre å nytte de samme ordene med et tillegg som peker hen på den annens selskap eller et særpreg ved virksomheten*". Det er nettopp et slikt tilfelle vi har med å gjøre i nærværende sak. Det samme ordet – strålevern – er tatt i bruk av saksøker, men med et tillegg som peker hen på særpreget ved saksøkers virksomhet, nemlig at dette er et tiltak som er av og for folket, og ikke et statlig tiltak. Dette går tydelig frem av nettsiden stralevern.no, der brukeren ikke vil være i tvil om at dette er en ikke-offentlig nettside, noe som i dag også fremgår av nettsidens forside.

Det følger av dette at det ikke foreligger et varemerke eller varemerkelignende ord som kan danne grunnlag for vern mot registrering av de aktuelle domener.

Videre følger det av ovenstående at det ikke foreligger noen ond tro fra saksøkers side. Saksøkte har hatt sin virksomhet under domenet NRPA.no, og benytter dette også som e-postadresse. Enhver som gjør søk etter Statens Strålevern vil få dette opp som den riktige nettadressen. Rent faktisk ble det gjort søk som bekreftet dette. I tillegg har saksøker et navn og driver med opplysning knyttet til stråling som gjør det helt betimelig å benytte et åpent og ledig domene som ligger så tett opp til saksøkers navn og virke.

2.2 Ytringsfrihet

Som et særskilt grunnlag anføres at vedtaket om overføring av domenenavn strider mot ytringsfriheten, jfr EMK art. 10 annet ledd og Grl § 100.

Det hersker stor politisk og faglig uenighet omkring farene ved elektrisk stråling. SS er statens talerør i spørsmål vedrørende stråling, mens FS er en ikke-offentlig interesseorganisasjon som forfekter andre syn og meninger enn det som er statens linje.

FS har kontroversielle meninger som utfordrer de syn som forfektes av SS, men det kan ikke bli slik at en aktør i samfunnsdebatten får sitt handlerom – og sine muligheter til å ytre seg – innskrenket dersom aktøren ikke følger den offisielle linjen.

FS har eksistert i to år, og har også hatt sine nettsider oppe i nærmere to år. SS har med andre ord ventet en lang tid med klagen. Denne kom først våren 2012. Når SS nå krever å få domenenavnene overført til seg, kan det synes som om det heller er innholdet på domenenavnenes nettsider – og ikke domenenavnene som sådan – som er den motiverende faktor.

I slike tilfeller befinner man seg midt inne i kjernen av EMK art 10 (2), jf. grl § 100. Saksøker anfører at bestemmelsene fullt ut kommer til anvendelse i nærværende sak.

Spørsmålet om stråling er sterkt omdiskutert, og det er nettopp ved slike omdiskuterte temaer at det er behov for en reell, polarisert debatt, hvor aktører med ulike meninger får komme til orde.

I denne forbindelse vises det til Hertel v. Switzerland (EMD 59/1997/843/1049). I avsnitt 47 ble det uttalt at

> *It is however necessary to reduce the extent of the 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. It concerned the effects of microwaves on human health.*

Bilag 1: Hertel v. Switzerland, (EMD 59/1997/843/1049)

Temaet om stråling er av åpenbar allmenn interesse, og inngår i en debatt der SS er en faginstitusjon. Slike faginstitusjoner må tåle nettopp den typen utfordringer som FS representerer. FS er en slik utpreget ikke-kommersiell aktør som Hertel-avgjørelsen viser til, og dette medfører igjen en intensiv prøving etter EMK artikkel 10 (2). Dersom det gjøres uklare begrensninger i ytringsfriheten til meningsmotstandere i en offentlig debatt, er det en overhengende fare for at en "chilling effect" oppstår, med andre ord at meningsmotstandere kan bli tilbakeholdne med å ytre sine meninger. Det vises her til Goodwin mot Storbritannia (EMD-1990-17488) og Rt 2010 s 1381.

Konsekvensen av en overføring av domenene bort fra saksøker, ville være at man umiddelbart mister en plattform for saklig opplysning omkring et tema som går rett inn i samfunnsdebatten. På nettsidene er det tilgjengeliggjort en rekke artikler og opplysninger som Statens Strålevern ikke støtter, eller tar direkte avstand fra. Saksøker har investert vesentlige midler i å bygge opp nettsiden og innholdet som der er presentert, og alt markedsmaterialet henviser til denne siden. For brukerne og publikum vil det virke som om organisasjonen har opphørt å eksistere.

Saksøker mener det er grunn til å stille spørsmål ved motivene bak kravet om overføring av domenene. Statens Strålevern har vært klar over de aktuelle nettsidene over lengre tid uten å agere. Saksøker mener det er grunn til å tro at dersom nettsidene hadde hatt et mindre kontroversielt innhold, ville disse fått være i fred. Statens Strålevern har tilsynelatende ved tidligere anledninger også hatt ønske om å hindre uønsket debatt der det foreligger faglig uenighet.

Bilag 2: "Forsker kneblet og ryddet unna", Ukeavisen Ledelse 30. mars 2011

Bilag 3: "Statens Strålevern lyver", DN.no, 30. mars 2011

Saksøker har henvendt seg til saksøkte med sikte på å få til en minnelig ordning både for å kunne områ seg og for å kunne unngå en prosess rundt midlertidig forføyning:

Bilag 4: E-post fra Halvor Manshaus i Advokatfirmaet Schjødt til Martin Høiby i Statens Strålevern, av 1. juni 2012

Dette har imidlertid ikke ført frem, ved at Statens Strålevern kun ønsker å forholde seg til den angitte dato for overføring av domenene.

2.3 Oppsummering

På bakgrunn av det som fremkommer i punkt 2.1 og 2.2 i denne begjæring, finner saksøker at hovedkravet er sannsynliggjort, jf. tvl. § 34-2 (1).

3. SIKRINGSGRUNN

Saksøker anfører at det foreligger sikringsgrunn, jf. tvl § 34-1 (1) (b).

En overføring av domenene til SS vil føre med seg både en vesentlig skade og ulempe for FS. For det første har FS trykket opp en rekke visittkort, flyers og annet markedsmateriell som viser til domenet stralevern.no. Dersom FS mister domenenavnet innebærer dette at alt materiell av denne typen må trykkes på nytt igjen, hvilket vil medføre en – for en interesseorganisasjon uten særlig med midler – betydelig utgift. Videre vil skaden manifestere seg i at FS ikke lenger kan bruke sin nettside som arena for offentlige ytringer, og det er også en fare for at de e-postkontoer som er linket opp mot domenenavnet stralevern.no vil gå tapt for FS ved en overføring av domenet. Det sier seg selv at dette innebærer en klar og åpenbar ulempe for FS.

I tillegg vil mange nå uansett vegre seg for å sende e-poster til en nettadresse som ikke lenger tilhører saksøker, eller der det er usikkert hvem som vil motta en slik henvendelse per e-post.

Etter det ovennevnte finner saksøker at det foreligger sikringsgrunn i nærværende sak, slik at både hovedkravet og sikringsgrunnen er sannsynliggjort etter tvl. § 34-2 (1).

4. PROSESSUELT

Domeneklagenemnda har varslet at overføring vil finne sted onsdag 6. juni, og dermed satt en frist for muligheten til å få en midlertidig forføyning. FS har forsøkt å områ seg ved blant annet å ta kontakt med prosessfullmektig etter at Nemndas avgjørelse ble mottatt. I denne forbindelse har det blitt forsøkt å komme til en minnelig løsning mellom partene. SS ønsket imidlertid ikke å oppnå en slik løsning, jf. bilag 4 til denne begjæring.

Saken reiser ikke spesielt kompliserte spørsmål, og er svært oversiktelig i sin natur. Det er en åpenbar fare ved opphold i nærværende sak, ettersom overføring av domenene skal finne sted onsdag 6. juni. Det anmodes derfor om at tingretten treffer beslutning uten muntlig forhandling, jf. tvl § 32-7 (2). Dette vil også innebære at sakens omfang og sakskostnadene begrenses.

5. SAKSOMKOSTNINGER

Det har medgått i alt 4 timer á 2000 kr. og 2 timer á 4000 kr. til herværende begjæring, totalt kr. 16 000.

6. PÅSTAND

Det nedlegges slik

påstand:

1. Staten v/Helse- og omsorgsdepartementet v/Statens Strålevern pålegges å tåle at Folkets Strålevern disponerer over domenenavnene stralevern.no og straalevern.no inntil rettskraftig avgjørelse foreligger i saken.

2. Staten v/Helse- og omsorgsdepartementet v/Statens Strålevern dømmes til innen to uker fra kjennelsens forkynnelse å betale saksøkerne sakens omkostninger med kr. 16 000 med tillegg av rettens gebyrer.

Dette prosesskrivet i tre eksemplarer, hvorav samtlige er sendt til retten, samt også per e-post til oslo.byfogdembete@domstol.no

ADVOKATFIRMAET SCHJØDT AS

for Halvor Manshaus
Advokat

CASE OF HERTEL v. SWITZERLAND

(59/1997/843/1049)

JUDGMENT

STRASBOURG

25 August 1998

SUMMARY[1]

Judgment delivered by a Chamber

Switzerland *– following publication of article, private individual prohibited under Federal Unfair Competition Act of 19 December 1986 from stating that consumption of food prepared in microwave ovens was danger to human health*

I. ARTICLE 10 OF THE CONVENTION

Not disputed that there had been an interference.

A. "Prescribed by law"

Recapitulation of Court's case-law.
"Foreseeability" of prohibition.

B. Legitimate aim

Protection of rights of others.

C. "Necessary in a democratic society"

Recapitulation of Court's case-law.

Authorities had margin of appreciation to decide whether there had been a "pressing social need" – margin was particularly essential in commercial matters – nevertheless, margin was reduced in case before Court as applicant had not made purely commercial statements, but had participated in a debate affecting the general interest.

Applicant had not had anything to do with editing or writing of publication in question – statements definitely attributable to him were on whole qualified – nothing to suggest that they had had any substantial impact on plaintiff's interests – scope of injunction – measure not necessary in a democratic society.

Conclusion: violation (six votes to three).

II. ARTICLE 6 § 1 AND ARTICLE 8 OF THE CONVENTION

No separate issue arose

Conclusion: not necessary to decide issue (unanimously).

III. ARTICLE 50 OF THE CONVENTION

A. Pecuniary damage

No causal link established.

In the case of Hertel v. **Switzerland**[2],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[3], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr F. MATSCHER,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mrs E. PALM,
Mr L. WILDHABER,
Mr K. JUNGWIERT,
Mr J. CASADEVALL,
Mr V. TOUMANOV,

and also of Mr H. Petzold, *Registrar*, and Mr P.J. Mahoney, *Deputy Registrar*,

Having deliberated in private on 28 March and 24 June 1998,

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

PROCEDURE

1. The case was referred to the Court, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention, by a Swiss national, Mr Hans Ulrich **Hertel** ("the applicant"), on 29 May 1997 and thereafter by the European Commission of Human Rights ("the Commission") and the Government of the Swiss Confederation ("the Government") on 3 June and 15 July 1997 respectively. It originated in an application (no. 25181/94) against **Switzerland** lodged by the applicant with the Commission under Article 25 on 13 September 1994. Having been designated by the initials H.U.H. during the proceedings before the Commission, the applicant subsequently agreed to the disclosure of his identity.

The applications and request referred to Article 48 of the Convention, as amended by Protocol No. 9, which **Switzerland** has ratified. The object of the applications and 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 Articles 6 § 1, 8 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicant designated the lawyer who would represent him (Rule 31).

3. The Chamber to be constituted included *ex officio* Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 3 July 1997, in the presence of the Deputy Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr A. Spielmann, Mr N. Valticos, Mrs E. Palm, Mr K. Jungwiert, Mr J. Casadevall and Mr V. Toumanov (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr Ryssdal, who had died on 18 February 1998, was replaced as President

8. In collaboration with Mr Blanc, a professor at the University of Lausanne and a technical adviser at the Lausanne Federal Institute of Technology, Mr **Hertel** carried out a study of the effects on human beings of the consumption of food prepared in microwave ovens. Over a period of two months, the blood of eight volunteers who followed a macrobiotic diet was analysed before and after consuming eight types of food (some were cooked or defrosted in a microwave oven and the others were raw or cooked by conventional means). A research paper was written. It was dated June 1991 and entitled *Vergleichende Untersuchungen über die Beeinflussung des Menschen durch konventionell und im Mikrowellenofen aufbereitete Nahrung* ("Comparative study of the effects on human beings of food prepared by conventional means and in microwave ovens"), and it concluded as follows (translation of an extract from the summary in French that was appended to it):

"...

... a significant relation was established between the absorption of microwave energy by the food and its transfer to the volunteers' blood. Thus this energy could be inductively transmitted to human beings by means of the food, a phenomenon governed by the laws of physics and confirmed in the literature [references to: Alfred

Only recently, the European Commission made public a brief report containing the anxieties of certain researchers, confirming the main points of the findings made by Dr Hans Ulrich **Hertel**, an independent researcher, findings which we published in detail in our April 1989 issue. The claim that microwave ovens were harmful came as a bombshell to technologists and industrialists and provoked wide discussion, which we reported on in the July 1990 issue of the *Journal Franz Weber*.

Giving a scientific reply

The claim was taken seriously, however, by a number of scientists, including Mr H. Blanc, Professor of Biochemical Engineering at the Lausanne Federal Institute of Technology, who undertook some research in collaboration with Hans Ulrich **Hertel**. It is the damning findings of that work that we are summarising here, in its broad outlines, and are publishing for the first time.

Sealing is sufficient...

... [The] effects [of artificial microwaves] have been known since the last world war thanks to one of their applications, radar. ...

And food?

On the other hand, hardly any questions were asked about the quality of food irradiated in this way. It was accepted that such food was neither better nor worse than food cooked by conventional means. But, to our knowledge, no research attempted to answer the question 'harmful/not harmful?'

Harmfulness demonstrated

Today the answer is unequivocal: the use of microwaves for preparing food is harmful. The microwaves impair the organic substances and cause alarming changes in the blood of those who consume them, notably anaemia and precancerous conditions. Those are the findings of the study carried out by Professor Bernard H Blanc and Dr Hans U. **Hertel**.

Clinical research

...

Living beings in danger!

Not a single atom, molecule or cell can, while remaining whole, resist destructive forces of such power, even if that power is no greater than 1 milliwatt. When one considers that four-fifths of the weight of plants, animals and human beings is accounted for by water, the biological dangers represented by such microwaves can easily be imagined.

A prey to viruses

In addition to the thermic effects of microwaves, there is an athermic effect, although official science pays little attention to it, no doubt because it is not measurable. But under the influence of these two factors molecules are shattered, their structures deformed and their natural functions perverted. ... A cell weakened in this way rapidly becomes an easy prey for viruses and fungi.

Like a cancer cell

If the stress is maintained under the influence of the microwaves, the repair mechanism breaks down and the cell, for want of energy, switches to anaerobic respiration (without oxygen). In place of H_2O and CO_2 (aerobic respiration) there appears, *inter alia*, the cell poison H_2O_2 and CO, as can be observed in a cancer cell.

As can be seen, Professor Blanc and Dr **Hertel**'s findings are sufficiently alarming for the use of microwave ovens to be rapidly banned, their manufacture and sale to cease and all ovens currently in service to be scrapped. Public health is at stake."

13. Pages 5–10 contain the following account of the study in question:

"**The complete research paper**

Comparative study of the effects on human beings of food prepared by conventional means and food prepared with microwaves

Bernard H. Blanc ... Hans U. Hertel...

1. Introduction

...

Tolerance thresholds

... The harmfulness of microwaves, and above all their thermic effect on biological systems, was discovered very early on (1944). Tolerance thresholds were accordingly established, for microwave ovens as for other applications, in order to avoid the undesirable effects of any leaking radiation.

Easy prey for viruses

In addition to the thermic effects of microwaves there is also an athermic effect ..., of which little official notice has been taken until now. It is not measurable like the thermic effect. But under the influence of these two effects, molecules are shattered, their structure deformed and their natural functions perverted. Such effects are probably qualitative. This pernicious effect at the qualitative level and the weakening of organic systems, such as cell membranes, are used in genetic engineering to gain access to genes. In this way the genes can be artificially altered by radiation. The cells are thus broken into and the energy tension between the outside and the inside of the cell is removed. A cell weakened in this way becomes an easy prey for viruses and fungi.

Danger! Cell poison

If the stress were to be maintained, *inter alia* by microwaves, the repair mechanism would break down and the cell, for want of energy, would be obliged to switch to anaerobic respiration. In place of H_2O and CO_2 (aerobic respiration) there appears, among other things, the cell poison H_2O_2 and CO as in a cancer cell. This is why leaked radiation from microwave ovens is so dangerous. Yet safety standards vary from country to country. This shows only too well that the problem is far from being resolved, especially as microwave ovens, as we know very well, are not always reliably sealed and become less leakproof with use, as experience has shown.

Danger to the eyes, lungs and endocrine system

The microwaves, which in the light of our scientific knowledge can be identified as the main cause, together with artificial radioactivity, of 'electrosmog', impair the functions of all living organisms, functions which depend on natural fields. ... It can be expected that these effects will be detectable in the blood count.

As powerful as a television transmitter

Basically, microwaves can produce the same changes in form and structure in food prepared in microwave ovens as they can in living organisms. ...

Microwave transmitters on the loose in the organism

Through this irradiation of food the structure of the molecules is likewise broken down and deformed and new substances with lasting effects are created about which science knows very little. Furthermore, this powerful, artificially produced radiation will be induced in the food, which in its turn, by a well-known electromagnetic process, will become a source and carrier of the radiation. The actual process of induction in organic matter is not entirely understood.

A phenomenon unknown in nature

...

Differences in food transit

In unpasteurised milk (variant 1) haemoglobin levels tend to fall, in vegetables cooked with microwaves (variant 8) they drop significantly. Haemoglobin deficits are to be regarded as stress indicators. The three foodstuffs in question cause stress in the human organism. The digestion of unpasteurised milk is radically different from that of heated milk. The transit of unpasteurised milk through the stomach, because of its coagulation and breakdown, is lengthy and is associated with some stress for the organism. This process, however, is natural, normal and not toxic.

Aggressiveness of milk heated with microwaves

The transit of heat-treated milk through the stomach and intestines is generally more rapid than that of unpasteurised milk. The proteins are transformed to such an extent that they coagulate into magma more quickly. But in this accelerated transit they are not fully broken down. The heated milk thus has a less stressful effect on the organism but its nutritional value is also less. Milk heated with microwaves, on the other hand, unlike conventionally heated milk, clearly creates a situation of stress which is in no way comparable to that caused by unpasteurised milk.

Rheumatism, fever and pituitary insufficiency

Haemoglobin concentration and corpuscular content react like haemoglobin. There is a significant drop in the levels above all in foodstuffs prepared with microwaves (variants 4, 7 and 8). These losses also indicate anaemia. In the reference literature they are associated with microcytosis (haemoglobin content), poisoning (chemical, radiation) and their consequences: rheumatism, fever, pituitary insufficiency, etc.

The haematocrit increases partly significantly in vegetables prepared with microwaves (variants 7 and 8). While the low haematocrit values may indicate anaemia – as a result of repeated pernicious influences – increasing values are more a sign of acute poisoning.

Beware, leucocytes on the increase!

The increase in leucocytes, which exceed the normal daily variations – after consuming food, for example – is taken very seriously by haematologists. Leucocytes are particularly sensitive to external challenges. They are often a sign of pathogenic action on the organic system by poisoning and non-infectious damage to the (cell) tissues. The increase in leucocytes in food prepared with microwaves (variants 4, 7 and 8) is greater than with the other variants. The consequences of such a challenge can easily be imagined.

Decreasing lymphocytes

Lymphocytes in principle react to external challenges (poisons, for example) in the opposite way to leucocytes. They tend to decrease. They react similarly to haemoglobin. The effect of a challenge is above all observable in unpasteurised milk (variant 1) and in vegetables prepared with microwaves (variants 7 and 8). In these

The results obtained do not in any circumstances justify drawing any conclusions as to the harmful effects of food treated with microwaves or a predisposition to the appearance of a given pathological condition. As the objective publication of the study in a forthcoming issue of the periodical *Alimenta* (spring 1992) will show, only one conclusion is unavoidable, namely that it is necessary to undertake, as a matter of urgency, multidisciplinary and multifactorial basic research on the effects on (certain parameters of) health of the consumption of food treated with microwaves in comparison with food prepared using other food technologies or culinary techniques.

The major unknown factor is the source of the funds needed to finance such a study."

B. The proceedings brought against Mr Weber and Mr Hertel by the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances

1. The proceedings against Mr Weber

16. On 18 March 1992 the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances ("the MHEA") applied to the President of the Vevey District Court under the Federal Unfair Competition Act ("the UCA") for an interim order prohibiting Mr Franz Weber, on pain of the penalties provided in Article 292 of the Criminal Code, "from using ... the image of a man's skeleton or any other image suggesting the idea of death ... associated with the graphic, photographic, oral or written representation of a microwave oven", "from stating ... that microwave ovens must be abolished and their use banned", "from stating ... that

thorough, rigorously methodical survey on a larger number of people. It is clearly unreasonable to affirm, as was done in issue no. 19 of the *Journal Franz Weber* that it has been scientifically proved that microwave ovens are harmful and that they must be immediately destroyed and their use banned. It nonetheless remains the case that some scientists still have doubts about the safety of microwave ovens. The fact that they are in a minority does not of itself enable one to exclude the possibility that they might be partly right, as this is an area in which no certainty exists. Indeed, when the *OFSP*'s report is read in full it can be seen that there remain a number of unresolved problems.

In these circumstances, and even if it seems highly likely that Franz Weber's statements are wholly unfounded, I cannot find that it is absolutely clear that that is the case. ...

... Lastly, the interim orders sought would appear disproportionate at all events. They would in fact lead to a kind of judicial censorship of scientific research and the conclusions that may be drawn from it, and this is scarcely compatible with the living traditions in this country, in which it is generally considered that it is for one's peers and not for the courts to assess the worth and significance of a scientist's work."

The judge nevertheless took formal note of Mr Weber's undertaking

"... not to use in forthcoming publications of his newspaper or in any other publications or at press conferences, public events or presentations to the media images of a skeleton or a cross or tomb in association with the presentation of a microwave oven".

18. On 14 April 1992 Mr Weber made the following statement (translated from German):

"We refer to the summary which appeared in issue no. 19 ... of the *Journal Franz Weber* under the title "Microwave ovens: a health hazard" and certify that Mr **Hertel** and Mr Blanc cannot be held responsible for either its form or its content, for which sole responsibility lies with the editor. The same applies to the cover page. Furthermore, we should like to point out that the title and sub-title of the research report which followed it were likewise the editor's responsibility.

competitive relationship, for instance, has been removed from the Act. Its personal scope, as apparent from section 2, does not cover only the acts of competitors, suppliers and customers; third parties not involved in such relations may be (independently) liable if their conduct affects relations in the context of economic competition and if, through their statements, they adversely affect the competitive position of the person targeted (see Troller and Troller, *Kurzlehrbuch des Immaterialgüterrechts*, p. 189). Competition is particularly affected by consumer-protection organisations, but also, for example, by reviewers, art critics and media personalities. Also caught by the Act are the authors of financial analyses, company reports and – what is of importance here – scientific studies, provided that the essential elements of the offence of unfair competition are present (Ernst Zeller, *SZW* 1/93, p. 23). In the event of inaccurate, misleading or unnecessarily derogatory statements concerning the subject of study, these people will be guilty of unfair competition. The new wording of section 2 UCA has thus put an end to the old controversy as to whether the application of the Act requires the existence of a competitive relationship. Persons unconnected with a sector who interfere in the competition between third parties are likewise caught by the Unfair Competition Act (David, *Unlauterer Wettbewerb*, p. 169; cf. *BGE* 117 IV 193: Bernina). In each case, however, it must be ascertained whether the behaviour of the person concerned affects the relations between competitors or between suppliers and customers. The Act is directed at all those whose behaviour or commercial management may have an effect on economic competition. The decisive factor is whether the activity complained of has direct or indirect effects on the competitive position of the person making it or of a third party (Pedrazzini, *Unlauterer Wettbewerb*, Berne 1992, pp. 32 and 47). Both according to legal writers and in practice, economic relevance in the sense of a potential aptitude to affect competition is taken into account (see H.P. Walter, *Das Wettbewerbsverhältnis im neuen UWG*, *SMI* 1992, pp. 169 et seq.). Capability of affecting competition must be determined objectively; it is of no importance whether given behaviour is associated with a subjective intention to affect the market; the decisive factor is whether the action in question is objectively apt to affect competition (Walter, ibid., p. 176; cf. *BGE* 117 IV, pp. 195 et seq.: Bernina). This was so in the instant case, as was set out above in relation to the question of the plaintiff's *locus standi*. Even if there is no certain proof of a connection between the drop in turnover in respect of microwave ovens and the [defendant's] behaviour, it is clear that the statements and publications complained of in the instant case are apt to diminish sales of microwave ovens and, consequently, to harm the businesses associated with the plaintiff. The objective aptitude to affect competition is therefore established.

2. Section 2 UCA defines as unfair and illegal 'any conduct or commercial practice ... if it is deceptive or in any other way offends the principle of good faith and if it affects relations between competitors or between suppliers and customers'. The general provision of section 2 is given concrete expression by the provisions of sections 3 to 8, which describe the special factual ingredients (*Sondertatbestände*) of the offence. Section 3(a) provides that a person acts unfairly if, in particular, he denigrates others or the goods, work, services, prices or business of others by making inaccurate, misleading or unnecessarily wounding statements. Unfair competition does not necessarily presuppose either bad faith or fault, but merely an objective breach of

concerned, fair, undistorted competition (see section 1 UCA); those concerned are thus competitors, customers and the general public ('tripartite nature' of competition law and 'equivalence' of the three interested groups, Botschaft, pp. 35 and 50). There is consequently nothing in the Act to support that opinion. An amendment to the Act would be necessary for that (cf. Roger Zäch, *ZSR* 111 I, 1992, pp. 173 et seq., with reference to the Federal Council's reply to the motion of a national councillor, Peter Vollmer, concerning a revision of the UCA, *NZZ* of 15.1.1992). ... The principle of good faith mentioned in the general provision of section 2 UCA, which is decisive of the issue of fairness and therefore of legality, must be construed in the light of the Act's purpose and the special factual ingredients of section 3(a) UCA. These define in greater detail the unlawful conduct, for which no fault is required, constituting the tort of 'unfair competition'. No competitive relationship between the 'tortfeasor' and the 'victim' is required under the Act (see above). All that is needed is behaviour apt to affect competition; a very weak link with an economic activity will thus suffice (Pedrazzini, *Unlauterer Wettbewerb*, p. 33; cf. also *BGE* 117 IV, pp. 193 et seq.: Bernina); that is a consequence of the functional conception that governed the revision of the Act. The new UCA was intended to enlarge the sphere of protection afforded by the Act. Thus, in the light of the provision setting out the aim pursued by the Act and of the general provision of the Act, the requirement of an intention to affect competition is incompatible with the definition of the tort of unfair competition within the meaning of the general provision of section 2 UCA, as it is not contained in that definition (cf. Zeller, loc. cit., p. 23). Anyone who in his media work seeks to cause a scandal or a sensation is also caught by the Act. Freedom of the press does not relieve those concerned from the obligation to comply with professional ethical standards – on the contrary, it takes such an obligation for granted (Pedrazzini, loc. cit. p. 239, cf. Zeller, loc. cit., p. 25).

Even if the Court were to accept Nobel's opinion, it would not in the instant case be led to a different conclusion. Intention (*Absicht*) is a particular form of knowledge that one is acting wrongly (*Vorsatz*). For such intention to exist, it suffices that the person concerned is aware of the possibility that the act will be carried out and that he accepts that possibility (recklessness; cf. Stark, *Ausservertragliches Haftpflichtrecht, Skriptum*, notes 448 et seq., pp. 101 et seq.). As a subscriber to the *Journal Franz Weber* the defendant knew to whom he was sending the research paper for publication. He thus accepted the simplistic and exaggerated interpretation of the published article, and he also endorsed the publication in its entirety since at no stage did he dissociate himself from even part of it in writing but, while not considering it to be 100% accurate, nevertheless approved it with the representation of the Reaper.

4. Since the scope of the UCA is determined by the mere potential aptitude to affect competition, acts performed in the exercise of fundamental rights in the field of ideas are covered by it, even when they have only a remote link with economic activity; only acts that are no more than ideas fall outside the scope of the statute, provided that they are confined to a strictly personal sphere of activity (Pedrazzini, loc. cit., pp. 33 et seq., Urs Saxer, *AJP* 1993, p. 606). In that respect, whether or not the activity concerned is remunerated is irrelevant. However, an act will not be caught by the UCA merely because it is performed outside the private sphere. It is necessary that there be a link, however weak, with an economic activity. Acts that are performed for purely disinterested ends are not covered by the UCA. Such would be the case, for example, with associations whose activity is wholly disinterested. An association will be disinterested if it pursues altruistic aims and does not deal in the (economic)

Reaper, for which he is liable as he knew the style of the review and accepted and approved that exaggerated representation, the defendant has, irrespective of whether the substance was true, overstepped the acceptable limits and has thus acted '*unnecessarily woundingly*' within the meaning of section 3(a) UCA. By combining a tabloid-style report with scientific comment he has also misled the intended readership. In particular, the image of the Reaper and statements such as 'microwave ovens are more harmful than the Dachau gas chambers', '... you are exposing yourself to a slow death...', or '... it is certain that you will die from cancer...' ... amount to unacceptable playing on the fear of death. The defendant himself had to admit that the journalist from the *Journal Franz Weber* had gone a bit too far and that his article was a little tendentious. He said that he had not liked that very much as a scientist, but the reporter had nonetheless been right. It was sometimes necessary to use a journalistic style to wake people up...

...

5. Among other forms of protection, the civil law affords the possibility of applying for an injunction (*Unterlassungsklage*). The purpose of such an application is to obtain from the court an order prohibiting the defendant from interfering in the plaintiff's sphere of interest. Such an order may concern existing or continuing interference and threatened interference. The court may allow such an application irrespective of whether damage has been caused (Troller and Troller, p. 105, *BGE* 104 II 134). Applications may be lodged and injunctions issued only in respect of precisely defined acts which the defendant has committed and is likely to continue to commit or is about to commit (*BGE* 93 II 51). That is clearly true in the instant case, especially as the defendant has expressly stated that he will continue to follow that route scientifically ... and has not distanced himself from the publications in issue. To the application for an injunction there may be joined an application for an order that, if he breaches the injunction, the defendant shall be punished with imprisonment under Article 292 of the Criminal Code or a fine (*BGE* 79 II 420). That penalty must be supplemented by the one provided for in Article 403 of the Code of Civil Procedure.

..."

(b) In the Federal Court

23. On an application by the applicant, the Federal Court (First Civil Division) delivered the following judgment on 25 February 1994 (translation from German):

"...

3. The appellant submitted that the UCA was not applicable in the instant case since the statements complained of were made disinterestedly with a view to protecting public health and not in a context of competition.

(a) The UCA is intended to guarantee, in the interests of all the parties concerned, fair, undistorted competition (section 1). Consequently, any conduct or commercial practice is unfair if it offends the principle of good faith and affects relations between competitors or between suppliers and customers (section 2 UCA) or is apt to affect them (Cherpillod, '*L'application de la loi contre la concurrence déloyale aux journalistes*', résumé of a lecture of 28 January 1992, given to the Swiss Copyright and Media Association, p. 7). When the UCA is applied with a view to preventing distortions in competition in the private sector, however, the conduct of persons who are not in competition with the supplier or customer affected may also be classified as unfair. That is indisputably the position according to current legal theory and the case-law (*BGE* 117 IV 193 E. 1, pp. 195 et seq. and references, 116 II 463 E. 4a, p. 470; Nobel, *Zu den Schranken des UWG für die Presse*, in *SJZ* 88/1992, pp. 245 et seq.; Schluep, *Die Europaverträglichkeit des schweizerischen Lauterkeitsrechts*, in *Un droit européen de la concurrence déloyale en formation*, pp. 67 et seq. and p. 81). Notwithstanding that no competitive relationship is required, only conduct that can be described as an act of competition is prohibited, that is to say acts which are objectively aimed at affecting competitive relationships and not those which take place in a wholly different context. For the purposes of the UCA the conduct of the tortfeasor must therefore be related to the market or competition ('*marktrelevant, marktgeneigt oder wettbewerbsgerichtet*' – Schluep, loc.cit.).

The statements held against the applicant are, in both content and presentation, regard being had in particular to the readership of the periodical concerned, clearly intended to influence the market since, at least objectively, they are unmistakably aimed at deterring consumers from buying and using microwave ovens. They are thus apt to affect competition. That is why the Commercial Court rightly considered that they came within the scope of the UCA and therefore examined whether they should be described as unfair within the meaning of that Act.

4. (a) The appellant considers that the order prohibiting his using symbols evoking death is contrary to federal law as it was not he who was responsible for the use of the image of the Reaper in the *Journal Franz Weber* in respect of which the injunction was imposed and so no recurrence is likely. The Commercial Court emphasised that it remained unproved that the appellant had taken part in the design and editing of the periodical or that his approval had been sought before the article in question appeared. The appellant had, however, become aware of the tenor of the article because he was a subscriber to the review but had not distanced himself from it in any way and had even said, at the trial, that he liked the image of the Reaper. The court concluded that the appellant had knowingly accepted his research paper being used in a simplified and exaggerated manner and had approved the publication in its entirety.

...

5. The Berne Court prohibited the appellant 'from stating that food prepared in microwave ovens is a danger to health and leads to changes in the blood of those who consume it that indicate a pathological disorder and present a pattern that could be seen as the beginning of a carcinogenic process'. The appellant says that that prohibition is contrary to federal law since the prohibited statement is not unfair within the meaning of the UCA and enjoyed the protection afforded to fundamental rights.

...

(b) As already indicated, given the readership to which his statements were addressed and the scientifically unsophisticated content of those statements, the appellant has left the purely academic sphere and entered the realm of competition. He is therefore subject to the fairness requirement laid down by the UCA.

Section 3(a) UCA provides that a person acts unfairly if he denigrates others or the goods, work, services, prices or business of others by making inaccurate, misleading or unnecessarily wounding statements. In the appellant's defence, it must admittedly be acknowledged that it is not always easy to establish the degree of scientific truth of an assertion, since in this sphere of knowledge, what is held to be true today will often be superseded tomorrow and true again the day after (Baumbach and Hefermehl, loc. cit., ...). That does not, however, mean to say that ostensibly scientific views on one's own work or the work of others in the competition field must always unconditionally be considered fair. When an opinion relating to the market refers to a question that is professionally controversial and is presented as being objectively accurate or scientifically confirmed, that means that the party concerned has opted in favour of a particular opinion and is ready to answer for its accuracy also in the context of competition (*BGH*, 23.10.1971, in *GRUR* 1971, pp. 153 et seq., E. IV/2, p. 155).

(a) denigrates others or the goods, work, activity or business of others by making inaccurate, misleading or unnecessarily wounding statements;

..."

25. The Act of 30 September 1943 was repealed by the Federal Unfair Competition Act of 19 December 1986, the relevant provisions of which are as follow:

Section 1

"This Act is intended to guarantee, in the interests of all the parties concerned, fair, undistorted competition."

Section 2

"Any conduct [*Verhalten*] or commercial practice [*Geschäftsgebaren*] shall be unfair and illegal if it is deceptive or in any other way offends the principle of good faith and if it affects relations between competitors or between suppliers and customers."

Section 3

"A person acts unfairly if, in particular,

(a) he denigrates others or the goods, work, services, prices or business of others by making inaccurate, misleading or unnecessarily wounding statements;

..."

Section 9

"1. Anyone who through an act of unfair competition sustains or is threatened with damage to his goodwill, credit, professional reputation, business or economic interests in general, may apply to a court:

(a) to prohibit the act if it is imminent;

(b) to order that it cease, if it is still continuing;

(c) to declare it unlawful, if the interference it has caused persists.

2. He may, in particular, seek an order that a rectification or the judgment be communicated to third parties or published.

3. He may also, in accordance with the Code of Obligations, bring an action in damages and for reparation of non-pecuniary damage and require that any gain be handed over in accordance with the provisions on intermeddling."

Section 10

"...

2. The actions provided for by section 9, sub-paragraphs 1 and 2, may also be brought by:

(a) professional associations and economic associations whose memoranda and articles of association authorise them to defend the economic interests of their members;

..."

PROCEEDINGS BEFORE THE COMMISSION

"interference by public authority" in the exercise of the right guaranteed by Article 10; indeed, that was not disputed.

Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It is therefore necessary to determine whether it was "prescribed by law", motivated by one or more of the legitimate aims set out in that paragraph and "necessary in a democratic society" to achieve them.

A. "Prescribed by law"

32. The applicant disputed that the interference in issue was "prescribed by law". In his submission, as he was not in the household electrical appliances market he could not reasonably have foreseen that by sending his research paper to the *Journal Franz Weber* he might be committing unfair competition within the meaning of the Act of 19 December 1986. Indeed, the scope of that Act was a matter of debate.

33. The Government replied that the prohibition on the applicant was based on sections 2, 3 and 9 of the Act of 19 December 1986 and on the Federal Court's interpretation of those provisions. It was clear therefrom that even a person who was not a "competitor of the suppliers or buyers" of such goods could act "unfairly" within the meaning of that statute if he committed an "act of competition", that is one likely to affect the market; whether or not there was a "subjective intention" to do so was irrelevant. As the dissemination of the statements in issue was liable to have an "objective impact" on the market in microwave ovens, Mr **Hertel** could not maintain that it had been unforeseeable that an injunction would be imposed on him under section 9.

34. The Commission came to the same conclusion.

35. The Court reiterates that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Again, whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, for example, the *Sunday Times* **v.** the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 31, § 49).

36. In the instant case section 2 of the Federal Unfair Competition Act of 19 December 1986 ("UCA") contains a general provision in which are defined as "unfair and illegal" not only any commercial practice but also any conduct that is "deceptive or in any other way offends the principle of good faith and ... affects relations between competitors or between suppliers and customers". Furthermore, section 3, which lists certain unfair acts, provides in particular that "a person acts unfairly if ... he denigrates others or the goods, work, services, prices or business of others by making inaccurate, misleading or unnecessarily wounding statements" (see paragraph 25 above).

whether the inaccurate, misleading or unnecessarily wounding statements hinder in an unacceptable manner competitive relations or the commercial position of the person or body against whom they are made."

37. Furthermore, the Federal Court had already indicated before the occurrence of the events that gave rise to the present case that the applicability of the Act of 19 December 1986 was not conditional on the tortfeasor and the injured party being "competitors"; it had held that a journalist may, through his own articles or by reproducing articles written by others, be guilty of contravening some of the provisions of the Act (see judgment of 18 March 1991, *Arrêts du Tribunal fédéral suisse* (*ATF*) 117 IV 193).

38. The Court consequently accepts that it was "foreseeable" that the communication to the *Journal Franz Weber* of the research paper and its subsequent publication were liable to amount to an act of "competition" within the meaning of the UCA. That being so, in order to conclude that the interference was "prescribed by law", the Court need only note that section 3 UCA provides "a person acts unfairly if, in particular, ... he denigrates others or the goods, work, services, prices or business of others by making inaccurate, misleading or unnecessarily wounding statements" and that section 9 provides "Anyone who through an act of unfair competition sustains or is threatened with damage to his goodwill, credit, professional reputation, business or economic interests in general, may apply to a court ... to prohibit the act if it is imminent" (see paragraph 25 above).

B. Legitimate aim

39. The applicant submitted that the aim pursued in the instant case – guaranteeing "fair" competition and therefore the protection of mere commercial interests – was not among those exhaustively set out in paragraph 2 of Article 10.

40. The Government argued that the prohibition imposed on the applicant was intended to protect consumers and suppliers from the dissemination of misleading and false information about the characteristics of services and goods on offer on the market. It was thus aimed not only at the protection of the "rights of others" but also the "prevention of [economic] disorder".

41. The Commission expressed the view that the interference in question was aimed at "the protection of the reputation [and] rights of others".

42. The Court observes that the Federal Unfair Competition Act of 19 December 1986 "is intended to guarantee, in the interests of all the parties concerned, fair, undistorted competition" (section 1 – see paragraph 25 above) and that a person who sustains or is "threatened with damage to his goodwill, credit, professional reputation, business or economic interests in general" through an "act of unfair competition" may apply to a court for an order prohibiting such act (section 9, ibid.). It was under those provisions that the domestic courts granted the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances' application alleging unfair competition on the part of Mr **Hertel** likely to be prejudicial to the interests of its members. There is no doubt, therefore, that the aim of the measure was the "protection of the ... rights of others".

C. "Necessary in a democratic society"

43. Mr **Hertel** considered that the measure imposed on him had been disproportionate. It amounted to inordinate protection of the economic interests of the members of the complainant association, at the cost of his research papers being censored

appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see the *Sunday Times* **v.** the United Kingdom (no. 2) judgment of 26 November 1991, Series A no. 217, p. 29, § 50). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see the Jersild judgment cited above, p. 26, § 31).

47. The Swiss authorities thus had some margin of appreciation to decide whether there was a "pressing social need" to impose the injunction in question on the applicant.

Such a margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of unfair competition (see the markt intern Verlag GmbH and Klaus Beermann **v.** Germany judgment of 20 November 1989, Series A no. 165, p. 20, § 33, and the Jacubowski **v.** Germany judgment of 23 June 1994, Series A no. 291-A, p. 14, § 26). It is however necessary to reduce the extent of the 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. It concerned the effects of microwaves on human health (indeed, the only issue was over the conclusions reached by Mr **Hertel** in his research as set out in issue no. 19 of the *Journal Franz Weber* and not the subject matter of that research). In that respect, the present case is substantially different from the markt intern and Jacubowski cases cited above.

The Court will consequently carefully examine whether the measures in issue were proportionate to the aim pursued. In that regard, it must balance the need to protect the rights of the members of the MHEA against Mr **Hertel**'s freedom of expression.

48. The Court observes that the applicant did no more than send a copy of his research paper to the *Journal Franz Weber*. He had nothing to do with the editing of issue no. 19 of that periodical or in the choice of its illustration, of which he became aware only after its publication. That is clear from Mr Weber's statement of 14 April 1992 (see paragraph 18 above) and was not called into question by either the Commercial Court of the Canton of Berne or by the Federal Court. Both courts held that the applicant's liability derived from the fact that in sending his paper to the *Journal Franz Weber* he had accepted its being used in a simplified and exaggerated manner – as, given the periodical concerned, it had been foreseeable that it would be – and that, consequently, he had identified himself with the article in issue (see paragraphs 22–23 above).

microwave ovens was a danger to health and led to changes in the blood of those consuming it that indicated a pathological disorder and presented a pattern that could be seen as the beginning of a carcinogenic process, and from using the image of death in association with microwave ovens.

The Court cannot help but note a disparity between that measure and the behaviour it was intended to rectify. That disparity creates an impression of imbalance that is materialised by the scope of the injunction in question. In that regard, although it is true that the injunction applies only to specific statements, it nonetheless remains the case that those statements related to the very substance of the applicant's views. The effect of the injunction was thus partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.

The fact that the Swiss courts expressly reserved Mr **Hertel**'s freedom to pursue his research does not in any way alter that finding. As to presenting the results outside the "economic sphere", it is not transparently obvious from the courts' decisions that he was given such a possibility; it may be that the wide scope of the UCA would prevent those reservations being seen as providing a significant reduction in the extent of the interference in question.

Furthermore, if the applicant fails to comply with the injunction he runs the risk of a penalty, which could include imprisonment.

51. In the light of the foregoing, the measure in issue cannot be considered as "necessary" "in a democratic society". Consequently, there has been a violation of Article 10.

II. alleged violations of article 6 § 1 and article 8 of the convention

52. The applicant submitted that the measure imposed on him prevented him from communicating to others the result of his scientific work and damaged his "personality as a scientist"; he argued that that amounted to a violation of Article 8. He added that by ordering him not to associate symbols of death with microwave ovens, the Swiss courts had prohibited an act which he had not committed – since he had merely communicated his

62. The Delegate of the Commission did not express a view.

63. If the Court finds that there has been a violation of the Convention, it may award the applicant not only the costs and expenses incurred before the Strasbourg institutions, but also those incurred before the national courts for the prevention or redress of the violation (see, in particular, the Zimmermann and Steiner **v. Switzerland** judgment of 13 July 1983, Series A no. 66, p. 14, § 36). In the instant case, having regard to the subject matter of the proceedings before the Commercial Court of the Canton of Berne and what was at stake in them, Mr **Hertel** is entitled to request payment of the costs and expenses incurred in them in addition to the costs and expenses of the proceedings before the Federal Court, the Commission and the Court. That being so, the Court considers it reasonable to award the applicant CHF 40,000.

C. Default interest

64. According to the information available to the Court, the statutory rate of interest applicable in **Switzerland** at the date of adoption of the present judgment is 5% per annum.

for these reasons, the court

1. *Holds* by six votes to three that there has been a violation of Article 10 of the Convention;

2. *Holds* unanimously that it is unnecessary to consider the complaints under Article 6 § 1 and Article 8 of the Convention;

3. *Holds* by eight votes to one

(a) that the respondent State is to pay the applicant, within three months, 40,000 (forty thousand) Swiss francs for costs and expenses;

(b) that simple interest at an annual rate of 5% shall be payable on that sum from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

DISSENTING OPINION OF JUDGE BERNHARDT

I am unable to follow the majority of my colleagues in the present case. I cannot subscribe either to the result in the concrete case, or to the general approach on which it is based. In the final analysis, the present decision of the Court reviews the decisions taken by the national courts like a court of last instance and does so in the context of economic and competition matters.

The earlier decisions of the Court quoted in paragraph 46 of the present judgment concern the freedom of expression in a political context. In paragraph 47, the judgment accepts that it is indispensable for national authorities to enjoy a considerable margin of appreciation in determining what restrictions on the freedom of expression may be necessary in economic matters and especially in the field of unfair competition. But this correct statement is not respected thereafter. The Court tries itself to strike a fair balance between the interests of the economic producers concerned and Mr **Hertel**'s freedom of expression. In giving a detailed description and evaluation of the publication as well as of the surrounding factors, the Court comes to a different conclusion from that of the national courts.

In the present case, it is beyond doubt that the applicant's central assertion and the alleged scientific results do not stand up to close scrutiny, and this was obviously decisive for the national courts. There might be good reasons to allow such statements irrespective of their correctness, but the European Court of Human Rights should not substitute its own evaluation for that of the national courts, where those courts considered, on reasonable grounds, the restrictions to be necessary.

DISSENTING OPINION OF JUDGE TOUMANOV

(*TRANSLATION*)

I agree with Mr Bernhardt's dissenting opinion.

Furthermore, I voted against awarding a sum under Article 50 of the Convention as, in my view, there is no justification for reimbursing the applicant for the costs and expenses he incurred before the national courts.

1. This summary by the registry does not bind the Court.

Notes by the Registrar

2. The case is numbered 59/1997/843/1049. 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.

3. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

4. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

HERTEL JUDGMENT OF 25 AUGUST 1998

HERTEL JUDGMENT

Forsker kneblet og ryddet unna

De har mistet hodet i Helsedepartementet og Statens Strålevern. Man gir ganske enkelt ikke topp kvalifiserte fagfolk sparken fordi de sier tydelig i fra om at de er dønn uenige med ledelsen. Dette er lojalitetstenkning på villspor, skriver redaktør Magne Lerø.

Kirsten Laake er forsker og ekspert på faren for kreft om man utsettes for ulike typer stråling. Statens strålevern, hvor hun arbeider, hevder at 300 nordmenn dør av radongass i året. Kreftregisteret hevdet tallet ligger mellom 30 og 100. Laake sier til Dagens Næringsliv at Strålevernet lyver og sprer ubegrunnet frykt.

Striden står også om grenseverdiene for radioaktige avfallsstrømmer. Laake hevder de lave grenseverdiene som Statens Strålevern opererer med, ikke har forskningsmessig dekning. Det har hun informert Olje- og energidepartementet (OED) om. De satte selvsagt pris på opplysninger de ikke hadde fått fra Statens Strålevern. Opplysningene fra Laake førte til at grenseverdiene ble satt høyere enn det lå an til ut fra de offisielle vurderingene fra Statens Strålevern. Hun fikk en mail fra underdirektør Egil Meisingset i OED der hun takkes for bidraget, for «de hadde mistet tilliten til både faktaformidlingen og vurderingene fra Strålevernet i denne saken».

Fikk sparken

Laake derimot **fikk sparken** fordi hun hadde gått direkte til OED. Laake anket imidlertid avgjørelsen til Helse- og omsorgsdepartementet (HOD). HOD mener hun har brutt lojalitetsplikten og skriver at det er et stort behov for at offentlige instanser som skal gi råd til allmennheten, framstår samlet og at det skal «relativt mye til for at en arbeidstaker skal gå aktivt ut mot sin egen arbeidsgiver». Ledelsen i Strålevernet vil ikke si noe. Dette er en personalsak.

Laake har bestemt seg for å bringe saken inn for retten. Hun godtar ikke lydighet som innebærer at hun skal sette til side fagkunnskapene sine bare fordi noen sier hun skal gjøre det.

Jusprofessor Henning Jakhelln, ekspert i arbeidsrett, synes det lukter sovjetstat av hele greia. Han er rystet og sier til DN at man ikke kan nekte faglig uenighet å komme fram. Det kan være en fordel for allmennheten at man blir kjent med at fagfolk vurderer spørsmål ulikt.

Er det noen som bør kalles inn på teppet i denne saken, er det Ole Harbitz som er direktør i Statens Strålevern. Han bør gjøre nøye rede for hvilke faglige belegg avdelingsdirektør Per Strand har for å hevde at 300 nordmenn dør hvert år på grunn av radon. Statens Strålevern skal ikke drive med synsing. De skal ikke være apostler for en forsiktighetstenkning som ikke har rot i forskningen og en skråsikkerhet det ikke er grunnlag for. Er det uenighet mellom fagfolk, skal dette reflekteres.

Vi så hvor galt det gikk under svineinfluensaepidemien. Da skulle alle si det samme. Frykten ble overdrevet. Det kostet samfunnet dyrt. Det vil koste samfunnet fem milliarder dersom det syn Per Strand formidler, vinner fram. Laake sier det ikke er verd pengene.

Meningsmonopolet

Kirsten Laake fortjener honnør for at hun sier fra og våger å ta opp kampen mot meningsmonopolet. Hvis det ender med at hun får sparken, må reglene endres. Er det noe vi trenger mer av, er det forskere med avvikende meninger.

Den disiplineringen av fagfolk som skjer i det offentlige for tiden, bærer galt av sted. Den fremmer en lydighetskultur vi ikke er tjent med. Topp kvalifiserte fagfolk skal ikke strømlinjeformes. Deres jobb er noen ganger å være hår i suppa. De skal skape tvil og usikkerhet og gjøre det vanskeligere for beslutningstakerne.

Det er bare noen måneder siden Aftenposten avdekket at man i offentlig sektor var godt i gang med å **gjøre forskere til konsulenter**. De listet opp en rekke eksempler på at ledere i det offentlige ville styre de resultater av forskningen som skulle formidles. Det var så ille at forskningsminister **Tora Aasland måtte presisere reglene**.

Departementet gir ikke Kirsten Laake medhold fordi hun ikke har fulgt reglene for varsling. En ekspert med doktorgrad skal da ikke måtte ta på seg en varslerhatt for å få sagt fra om at ledelsen etter hennes mening ikke har forskningmessige belegg for det de sier.

Hvordan skal det gå om alle mulige slags fagfolk skal begynne å melde sin uenighet med ledelsen? Det vil gå utmerket. Det er nødvendig å endre reglene slik at forskere ikke tvinges til å påføre seg munnkurv. Det kommer til å bli vanskeligere for de som har lederansvar. Det er bra. Det skal være vanskelig å formidle råd som skal være forskningmessig basert. Rådene må faktisk avveies i forhold til den kunnskap ulike eksperter har. Det er den beste måten å hindre synsing i den gode saks tjeneste.

- Statens strålevern lyver

Jusprofessor mener begrunnelsen for å sparke Kirsten Laake fra Statens strålevern gir assosiasjoner til en siste sovjetstat.

DN.no

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I et varslingsbrev til Anne-Grete Strøm-Erichsen ber Kirsten Laake helseministeren granske Statens strålevern for alvorlige tjenesteforsømmelser og lovstridig informasjonshåndtering, skriver Dagens Næringsliv.

DN fortalte igår om den tidligere seniorrådgiveren i Statens strålevern som fikk sparken etter at hun gikk direkte til Olje- og energidepartementet med råd.

Strålevernet og flere departementer jobbet på det tidspunktet med en ny forskrift om radioaktivt avfall, og Laakes nye informasjon gikk på tvers av ledelsen i Strålevernet.

- Fullstendig galt
Jusprofessor Henning Jakhelln, med tjenestemannsrett som spesialfelt, er rystet over begrunnelsen for avskjedigelsen der Helse- og omsorgsdepartementet skriver følgende til Laakes klage på avskjedigelsen; ".. det skal relativt mye til for at en arbeidstager skal kunne gå aktivt ut mot sin egen arbeidsgiver, en faglig uenighet hjelper ikke".

- Det er fullstendig galt etter min mening. Jeg må innrømme at man i gamle dager, hos vår store nabo i øst, praktiserte dette synspunktet. Men jeg tror ikke det er noe godt standpunkt. Sverige kommer av og til med bemerkninger om at Norge er en siste sovjetstat, og man er kanskje nærmere sannheten enn man skulle tro, sier Jakhelln til Dagens Næringsliv.

«Tilsidesatt sunn fornuft»
Men det er ikke bare om radioaktivt avfall Laake mener Strålevernet gir feilinformasjon.

I brevet til helseministeren viser hun til at avdelingsdirektør Per Strand i Statens strålevern har overdrevet dødstall og kreftrisikoen fra radon, og dermed feilinformert både norske myndigheter og publikum.

Siden 2005 har Strand formidlet inntrykket av at flere hundre tusen nordmenn er truet av livsfarlig radongass egne hjem, og at gassen tar livet av nærmere 300 nordmenn hvert år.

Kreftregisterets egne tall viser imidlertid at 30-100 nordmenn dør av radon årlig.

-Tilsidesatt sunn fornuft
- Per Strand og Statens strålevern lyver og har tilsidesatt både innvendinger fra fagekspertise og sunn fornuft. Er det i publikums interesse at en fagetat under Helse- og omsorgsdepartementet

sprer ubegrunnet helsefrykt om det å leve og bo hjemme hos seg selv? sier Laake.

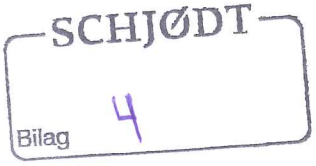
Strand avviser at han bevisst har ført det norske folk bak lyset, og sier han bare bruker kunnskapen fra Verdens helseorganisasjon (WHO).

Les også: – Norge tar atomsituasjonen meget alvorlig

- Mobilbruk er et globalt eksperiment

Henrik Bonge / Schjødt

Til: Halvor Manshaus / Schjødt
Emne: SV: Stralevern.no



-----Opprinnelig melding-----
Fra: Halvor Manshaus / Schjødt
Sendt: 1. juni 2012 16:43
Til: Martin.hoiby@nrta.no
Emne: Stralevern.no

Hei,

Viser til konstruktiv samtale nå nettopp.

Grunnen til at jeg tok kontakt er altså at jeg vil høre litt rundt mulighetene for å komme frem til en foreløpig avklaring i diskusjonen rundt "stralevern.no". Undertegnede er altså blitt bedt om å bistå Folkets Strålevern i denne saken.

Folkets Strålevern har bedt meg se på mulighetene som foreligger i saken. Det eneste alternativet vil være å bringe saken inn for domstolene. I saker om domenenavn vil det også nødvendigvis høre med en begjæring om midlertidig forføyning, ettersom en etterfølgende dom vil ha liten verdi dersom man har sittet uten domenet i perioden frem til endelig dom foreligger.

Påstanden i en begjæring om midlertidig forføyning vil være at Folkets Strålevern får rå over domenet i sin helhet frem til endelig rettskraftig dom i saken foreligger.

Saken om midlertidig forføyning vil medføre en del omkostninger og ressursbruk på begge sider, og vil etter min vurdering kunne medføre en del oppmerksomhet i media. Samtidig opplever vi ofte at dommeren i slike saker legger en del press på partene til å finne frem til en minnelig løsning.

Jeg må innrømme at jeg ennå ikke har rukket å sette meg inn i saken noe særlig, men det slår meg at denne saken ligger slik an at en midlertidig løsning mellom partene kan være mulig å få til uten å gå til domstolene.

Her er mitt forslag:

- domenet stralevern.no forblir hos Folkets Strålevern ut året (altså inntil 31.12.2012) - dersom søksmål om domenet er tatt ut før utløpet av 2012, vil domenet ligge hos Folkets Strålevern inntil rettskraftig dom foreligger - Folkets Strålevern påtar seg å legge inn en "disclaimer" (ser for meg en liten tekstboks) på forsiden av stralevern.no der det opplyses om at nettsstedet ikke har noen tilknytning til Statens Stråleven

Kort kommentar til forslaget: Jeg ønsker ikke en for kort tidsfrist her, både fordi Folkets Strålevern trenger såpass med tid hvis de skal flytte over brukere og formidle ny informasjon om overgangsdomenet i markedsmateriale osv, samt at jeg ønsker å unngå en kort frist som tvinger dem til å gå til sak. Dersom de først går til sak antar at jeg det er greit at domenet ligger der inntil dom foreligger. Jeg antar at klient ikke vil ha noen motforestillinger til disclaimer på bakgrunn av info jeg fikk i møtet med klient i dag. Det heter fra klient at man ikke har noe ønske om å forveksles med Statens Strålevern, og da legger jeg til grunn at noe slikt kan presiseres på nettsiden.

Dette er ikke ment som et forpliktende tilbud fra klient. La oss først ta en prat på mandag og se om dette er noe å gå videre med, så kan vi se på formuleringer osv og kanskje øke presisjonsnivået noe.

Ha en god helg,

Halvor Manshaus Advokat/Partner (H)

SCHJØDT

Uninett Norid AS
7465 TRONDHEIM

Oslo, 5. juni 2012
Dok.ref: 34512-501-2243719.1
Saksansvarlig advokat:
Halvor Manshaus

VEDRØRENDE DOMENENAVNENE "STRALEVERN.NO" OG "STRAALEVERN.NO"

Det vises til Domeneklagenemndas vedtak i sak 2012031601 om overføring av domenenavnene stralevern.no og straalevern.no fra Folkets Strålevern til Statens Strålevern, av 23. mai 2012.

Det gjøres oppmerksom på at det i dag på vegne av Folkets Strålevern er sendt begjæring om midlertidig forføyning til Oslo byfogdembete i anledning domenetvisten mellom partene. Det heter i oversendelsesbrev av 24. mai angående Domeneklagenemndas vedtak at Norid først vil "*iverksette overføringen den 6. juni 2012, dvs etter at 7 virkedager har passert*". I henhold til Regelverk for .no, vedlegg H, punkt 2.11, innebærer dette at iverksettelsen av overføringen skal utsettes inntil rettskraftig avgjørelse foreligger i saken.

Med vennlig hilsen
ADVOKATFIRMAET SCHJØDT AS

Henrik Bang

for Halvor Manshaus
Advokat

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